RECOGNIZING RACE

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Judges habitually decide whether to identify individuals racially within the context of judicial opinions. Yet this practice, which this Essay labels “recognizing race,” has thus far gone virtually unexplored by legal scholars. The dearth of scholarly attention to this practice is lamentable, as judges often appear to make poor decisions in this arena—not only recognizing race when they should avoid doing so, but failing to recognize race when they should. This Essay represents the first sustained effort to offer a broad examination of the judiciary’s racial recognition in an attempt to articulate broadly applicable normative principles. After observing that the number of cases requiring judges to recognize race is dramatically smaller than is commonly appreciated, this Essay identifies and critiques two common pitfalls that judges should seek to avoid: asymmetric racial recognition and gratuitous racial recognition. The Essay then provides four reforms regarding how judges might affirmatively harness the potential of racial recognition. First, judges should explain in writing why opinions recognize race. Second, judges should contemplate how racial equality may be served by “unrecognizing” race, even if a particular legal question contains a racial element. Third, courts should practice racial inversion, a technique that assists judges in thinking through precisely what work—if any—racial considerations play in a particular case. Finally, and perhaps most importantly, judicial decisionmakers should bear in mind that opinions can adhere to the anticlassification principle while avoiding the colorblindness

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principle—two distinct concepts that legal scholars have incorrectly conflated. By defamiliarizing racial recognition, this Essay aims to make the legal community more conscious of its often confounding race-consciousness.

**INTRODUCTION**

Few legal disputes have garnered more attention in recent years than *Ricci v. DeStefano*. Even before the Supreme Court heard oral argument, the *New York Times* featured the case and lead plaintiff Frank Ricci on its front page. The potential for a landmark decision coupled with the messy underlying facts—involving firefighters who claimed that New Haven, Connecticut racially discriminated by refusing to certify examination results that would have promoted only nonblack firefighters—made *Ricci* a natural candidate for widespread coverage. The media focus only intensified after President Obama nominated a member of the Second Circuit panel that resolved *Ricci*, then-Judge Sotomayor, to replace Justice Souter on the Court. Although Justice Kennedy’s 5-4 decision ultimately declined to tackle the broad question of whether Title VII and the Equal Protection Clause could be reconciled, his relatively narrow decision vindicating the firefighters’ claim hardly signaled the end of *Ricci*’s moment in the spotlight. Indeed, both *Ricci* and Ricci played starring roles in Sotomayor’s confirmation hearings. Even weeks after the Court’s decision, moreover, prominent media outlets continued to run critiques of *Ricci*. Legal scholarship—as is its wont—arrived late to the party. But what it lacked in promptness it has more than compensated for in volume.

3. See David D. Kirkpatrick, A Judge’s Focus on Race Issues May Be Hurdle, N.Y. Times, May 30, 2009, at A1 (reporting one judicial observer’s opinion that “[Sotomayor’s] nomination and the *Ricci* case have brought racial quotas back as a national issue” (quoting Gary Marx, Executive Director, Judicial Confirmation Network)).
7. See, e.g., Michelle Adams, Is Integration a Discriminatory Purpose?, 96 Iowa L. Rev. 837, 842–43 (2011) (contending *Ricci* prohibits government from inflicting racial harm but does
Despite the torrent of journalistic and academic work parsing the decision, perhaps *Ricci*’s most notable—and certainly its most jarring—line has thus far utterly escaped analysis. That line appeared when Justice Kennedy described one of the many meetings held by the New Haven Civil Service Board (CSB) to consider whether to certify the firefighter examination results.\(^8\) At that meeting, the CSB heard three witnesses testify about standardized testing and New Haven’s method for determining promotions.\(^9\) *Ricci* identified two of the three witnesses by citing only their relevant professional credentials. “The first witness, Christopher Hornick, spoke to the CSB by telephone,” Justice Kennedy wrote.\(^10\) “Hornick is an industrial/organizational psychologist from Texas who operates a consulting business that ‘direct[ly]’ competes with” the company that designed New Haven’s test.\(^11\) Similarly, Justice Kennedy explained: “The final witness was Janet Helms, a professor at Boston College whose ‘primary area of expertise’ is ‘not with firefighters per se’ but in ‘race and culture as they influence performance on tests and other assessment procedures.’”\(^12\) Justice Kennedy’s description of the second witness also started with professional qualifications. “The second witness was Vincent Lewis, a fire program specialist for the Department of Homeland Security and a retired fire captain from Michigan,” Justice Kennedy began.\(^13\) But from that innocuous beginning, Justice Kennedy deviated sharply, introducing a conspicuous factor that he omitted from the other descriptions: “Lewis, *who is black*, had looked ‘extensively’ at the lieutenant exam and ‘a little less

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9. Id. at 2668.
10. Id.
11. Id. (quoting joint appendix).
12. Id. at 2669 (quoting joint appendix).
13. Id.
extensively’ at the captain exam.”

This identification is striking because, in a decision that cautions against the dangers of racially disparate treatment, it treats Lewis disparately by race. Ricci’s disclosure that Lewis is black suggests that his race carries unusual significance, and that it is germane to the case in a way that the other two witnesses’ racial identities are not. Were it otherwise, Ricci presumably would have approached the three witnesses’ racial identities in the same fashion—either revealing them all or concealing them all. Ricci’s racial identification of Lewis is all the more arresting because it comes from the pen of Justice Kennedy, who has long insisted that the government should resist racially classifying individuals.

What message, then, does the Court attempt to communicate by mentioning Lewis’s race? It is impossible to answer that question with certainty because Ricci, like most cases that identify the race of individuals, offers no explanation for its racial approach. The most compelling interpretation, however, understands Lewis’s blackness to support the notion that New Haven’s exam was nondiscriminatory. Of the three witnesses, it bears emphasizing, Lewis endorsed the test with the greatest force. While Hornick and Helms both noted that heavily weighting written tests typically results in racial minorities receiving disproportionately fewer promotions, Lewis praised the exam’s legitimacy.

“He stated that the candidates ‘should know that material,’” Justice Kennedy wrote. “In Lewis’s view, the ‘questions were relevant for both exams,’ and the New Haven candidates had an advantage because the study materials identified the particular book chapters from which the questions were taken. In other departments, by contrast, ‘you had to know basically the . . . entire book.’” That an expert who is black gave the test a passing mark, Justice Kennedy seemed to suggest, should alleviate concern about the exam’s racially disparate impact.

Support for this understanding may be located in the petitioners’ Supreme Court brief filed on behalf of Frank Ricci and his fellow firefighters. That brief, it strongly appears, inspired the Court’s racial (and nonracial) descriptions of the three witnesses. After noting that “Vincent Lewis [was] a highly credentialed expert in fire and homeland security services,” the brief

14. Id. (emphasis added) (quoting joint appendix).
15. See, e.g., Rice v. Cayetano, 528 U.S. 495, 517 (2000) (Kennedy, J.) (“One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”).
16. See Ricci, 129 S. Ct. at 2668–69 (discussing Lewis’s belief that test was relevant).
17. Id. at 2669 (quoting joint appendix).
18. Id. (quoting joint appendix).
19. After racially describing Lewis initially in the facts section, the Court returned to Lewis in the analysis and elevated his testimony. See id. at 2678 (“Of the outside witnesses who appeared before the CSB, only one, Vincent Lewis, had reviewed the examinations in any detail, and he was the only one with any firefighting experience. Lewis stated that the ‘questions were relevant for both exams.’” (quoting joint appendix)).
made the following observation in a construction that anticipated the Court’s: “Lewis, who is African-American, thought well of the exams and believed they measured the [knowledge, skills, and abilities that promoted firefighters] must possess.” Like the Court’s opinion in Ricci, the brief also declined to identify Hornick and Helms by race. Given that whiteness is often naturalized, it seems plausible that the Court’s racial silence regarding Hornick and Helms indicates that both are white. Intriguingly, though, this is not the case. Although Hornick does in fact identify as white, Helms identifies herself as black. Thus, Justice Kennedy’s opinion—perhaps unwittingly—highlighted an expert’s blackness who supported the examination, but rendered raceless a black expert who cast doubt on it.

Justice Kennedy’s unsettled and unsettling approach to identifying witnesses at a New Haven meeting—an approach embodied by a simple adjectival phrase that amounts to a grand total of three words (“who is black”)—provides an occasion to step back and cast a critical eye over the judiciary’s mottled practice of racial recognition. Judicial recognitions of race have thus far generally been viewed as preordained. Indeed, it is tempting to believe that courts simply recognize race whenever doing so is pertinent and avoid recognizing race whenever doing so is not pertinent. It quickly becomes apparent, however, that these categories are far from self-sorting. Judges often make seemingly small decisions about whose race to recognize within their larger judicial decisions. But it would be deeply mistaken to dismiss these race-based decisions as trivial. Rather, examining the manner in which judges recognize race elucidates how courts (and the broader legal culture of which they are part) both assess and simultaneously create racial significance.

This Essay represents the first sustained effort to offer a broad examination of the judiciary’s racial recognition in an attempt to articulate broadly applicable normative principles for when and how courts should

22. E-mail from Janet Helms, Professor, Bos. Coll., to author (Feb. 18, 2011, 1:47 PM) (on file with the Columbia Law Review); E-mail from Christopher Hornick, President, CWH Research, Inc., to author (Feb. 20, 2011, 10:50 AM) (on file with the Columbia Law Review).
23. At least one distinguished scholar has suggested that race enters the legal equation in only a narrow band of cases. See Stephen L. Carter, When Victims Happen to Be Black, 97 Yale L.J. 420, 439 (1988) (“The law in its majestic neutrality takes no official note of the race of the victim unless the victim places race in issue, as for example in a claim of racial discrimination.”). The history of racial recognition, however, contradicts this assessment, as courts have repeatedly recognized race in contexts where race appears to be either tangential or irrelevant to the underlying legal issue. See infra text accompanying notes 68–71 (discussing judges’ superfluous recognition of race).
recognize race. Thus far, legal scholars have not subjected the judiciary’s racial recognition to much in the way of scrutiny. The paucity of scholarly attention to this common practice is disconcerting not least because judges often appear to make poor decisions regarding racial recognition: Courts not only recognize race when they should avoid doing so, but courts also fail to recognize race when they should. The few scholars who have addressed racial recognition, moreover, have done so only within the narrow confines of a discrete doctrinal area.25 Perhaps in part because of their constrained doctrinal examinations, previous scholarly inquiries of this phenomenon have typically asserted that courts pay what many scholars regard as insufficient attention to race.26 More racial justice, these scholars urge, requires more judicial recognition of race.

This Essay departs from that tradition by insisting that, when it comes to recognizing race, less is sometimes more. Courts should, in other words, sometimes contemplate omitting race from opinions rather than injecting it. But writing about race, for whatever reason, often leads to scholarship that tends toward absolutes. This Essay attempts to carve out a middle path, where


26. See Carbado, supra note 25, at 968–69 (contending Supreme Court’s Fourth Amendment jurisprudence is insufficiently sensitive to race of criminal suspects and defendants); Maclin, Black and Blue, supra note 25, at 265 (“Whatever the motivation, ignoring the impact of race does a disservice to blacks and the country as a whole. The problem of race-based excessive force by the police will not go away simply because the Court sticks its collective head in the sand.”); Maclin, Race, supra note 25, at 340 (“Although the casual reader of the Court’s Fourth Amendment opinions would never know it, race matters when measuring the dynamics and legitimacy of certain police-citizen encounters.”) (citation omitted)); see also T. Alexander Aleinikoff, The Constitution in Context: The Continuing Significance of Racism, 63 U. Colo. L. Rev. 325, 328 (1992) [hereinafter Aleinikoff, Context] (“[T]he persistence and power of racism ought to be seen as an important part of the social ‘context’ with which constitutional norms regarding equal protection and racial justice interact.”); Regina Austin, “Bad for Business”: Contextual Analysis, Race Discrimination, and Fast Food, 34 J. Marshall L. Rev. 207, 207 (2000) (“If race truly mattered, legal argument, writing, and scholarship would pay much more attention to context than it does today.”). Professor Brooks does not, admittedly, encourage courts to increase their racial recognition of corporations. See Brooks, supra note 25, at 2092 (“The courts’ recognition of the presence or absence of race in corporations should be avoided . . . .”). But his analysis elevates the bar for permitting courts to recognize race to an exceedingly high level. See id. (arguing “[l]egal judgments about race should recognize race as minimally as possible”).
always and never are replaced by often and sometimes. Against scholars writing in the critical race theory tradition, this Essay insists that the path to racial equality often requires judges to avoid recognizing race. Against advocates of a purely colorblind approach, this Essay insists that the path to racial equality sometimes requires racial recognition.

The balance of this Essay evaluates the descriptive and prescriptive aspects of how judges recognize race. Part I canvases the judicial practice of racial recognition in order to make two primary points. First, the number of cases doctrinally requiring judges to recognize race is dramatically smaller than is commonly appreciated. Second, when courts recognize race for a discernible reason, they have tended to do so either to highlight a broad need for judicial intervention or to demonstrate that judicial intervention is unnecessary. Placing the courts’ historical practices and varied purposes squarely in view sets the parameters of the debate, thus permitting assessment of the warrants for racial recognition.

With that analytical foundation established, the Essay examines the normative considerations involved when courts recognize race. Part II identifies and critiques two types of racial recognition that judges should attempt to avoid when they write opinions. The first pitfall—racial asymmetry—occurs when a judicial opinion acknowledges the race of some actors, but not the race of similarly situated actors. Judges should not limit their focus to avoiding racial asymmetries within the confines of a particular opinion; rather, judges should attempt to develop a generally symmetrical


28. See Lino A. Graglia, Special Admission of the “Culturally Deprived” to Law School, 119 U. Pa. L. Rev. 351, 354 (1970) (contending that “the democratic ideal” requires “people not be classified—and neither taught nor expected to classify others—on the grounds of race”); see also William Van Alstyne, Rites of Passage: Race, the Supreme Court, and the Constitution, 46 U. Chi. L. Rev. 775, 790 (1979) (“The state may neither use race in its own business nor may it encourage others to take it into account. Both are equally divisive and equally wrong.”).

Colorblindness also has adherents in high places. See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 772 (2007) (Thomas, J., concurring) (“My view of the Constitution is Justice Harlan’s view in Plessy: ‘Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.’” (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))). Some scholars who appear sympathetic to the colorblindness ideal realize that forbidding the government from ever taking account of race is not only unworkable, but would also be unwise. See Charles Fried, Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality, 104 Harv. L. Rev. 107, 111 (1990) (“It is impossible to ignore racial differences entirely—pure color-blindness is too extreme a principle.”); id. at 111 n.19 (“If a disease . . . overwhelmingly afflicts a particular ethnic group, it would be unreasonable to ignore that fact. If a criminal gang has an exclusive racial composition, it would be fanatical to require the government to ignore this fact in recruiting agents to infiltrate that gang.”).
approach across doctrinal areas. The second pitfall—gratuitous disclosures of race—arises when judges reveal race for no apparent reason. Courts should be particularly leery of such racial gratuitousness in cases that have the potential to confirm damaging stereotypes.

After analyzing how judges should not recognize race, Part III shifts the focus to exploring how judges might affirmatively harness the potential of racial recognition. The first step in that process involves judges acknowledging the choice associated with racial recognition by offering an explanation of why, precisely, the opinion identifies someone by race. In addition, judges should contemplate whether justice may be more readily achieved when race is “unrecognized”—even if there is a racial component to the legal issue at hand. Relatedly, courts should utilize the technique of “racial inversion,” which assists judges in thinking through precisely what work, if any, racial considerations are playing in cases by inverting the races of the key players. Finally, judges should bear in mind that, contrary to the conventional wisdom among legal scholars, the anticlassification principle is conceptually distinct from the colorblindness principle. Because these two concepts are not coextensive, judges may take account of racial realities that exist in society without racially identifying particular individuals. Given the current Justices’ views regarding race, this strategic insight could prove vitally important for legal advocates who wish to have the Supreme Court recognize the continuing role that race plays in society.

The thread unifying these three Parts is the aim of making the legal community—lawyers and judges, students and scholars—more conscious of judicial race-consciousness. Although this Essay aims to identify some previously underappreciated common ground, not everyone will agree with every recommendation contained in this Essay regarding when courts should recognize race and when they should refrain from doing so. But this Essay does not seek universal agreement. Instead, it seeks to generate a nuanced discussion of racial recognition in our legal culture—a discussion that has thus far been sorely lacking in this essential arena.

I. PRACTICES

A. When

In certain cases, courts possess virtually no discretion regarding whether to recognize a particular person’s racial identity. This set of cases involving required racial determinations, however, accounts for an infinitesimal percentage of the standard judicial practices of recognizing race. Because judges must recognize race in a very limited number of cases (and many of those cases stretch back to a much earlier era), this means that in the overwhelming number of instances judges make an elective choice to recognize race. Legitimate prudential reasons may well motivate the decision to identify individuals by race. Judges delude themselves, however, if they