genealogy

MDPI

Article

Genealogy in Law as a Technology for Categorizing, Contesting and Deconstructing Monoracialism

András L. Pap [1,2]

[1] Department of Constitutional and Administrative Law, Center for Social Sciences Institute for Legal Studies, Tóth Kálmán u. 4, 1097 Budapest, Hungary; pap.andras.laszlo@tk.hu
[2] Department of Management and Business Law, Faculty of Business Economics, Eötvös Loránd University, Rákóczi út 7, 1088 Budapest, Hungary

Abstract: Contextualized by contestation and deconstruction of monoracialism, this article provides an assessment of how law, as a distinct tool and technology, conceptualizes and operationalizes race and ethnicity. The focus of the comparative project, by bringing examples from various countries and jurisdictions, is specifically on the morphology and dynamics of legal categorization. A separate discussion concentrates on conceptualizing groupness and membership, with distinguished attention on self-identification and "objective" criteria. The paper shows that although identity politics has dominated the past decades, ethno-racial self-identification is not the only operationalizing model legal regimes apply, especially with the recent boost in artificial intelligence, and bio-genetic research. Examples for the "re-biologization" of ethno-racial conceptualization are brought from a wide range of legal regimes, including citizenship, anti-discrimination, asylum, and indigenous law.

Keywords: ethnicity; fraud; genetic reinscription; passing; proxy; race

1. Introduction

Contextualized by contestation and deconstruction of monoracialism, the article provides an assessment of how law, as a distinct tool and technology, conceptualizes and operationalizes race and ethnicity. The focus is specifically on the morphology and dynamics of legal categorization, leaving aside social science discourses. The project is comparative in the sense that examples are brought from various countries and jurisdictions, but the analysis does not aim at providing a full-pledged global screening of legal instruments and practice.

Legally constructed protective measures for racial, ethnic, or national communities can target a variety of conditions: ensuring social equality or freedom of religion, protecting victims of hate crimes, mitigating cultural conflicts, combating racial segregation or apartheid, setting forth affirmative measures for compensatory, remedial, or transitional justice, etc. Laws may be placed under the clusters of anti-discrimination, identity politics, affirmative action, indigenous/aboriginal law, Diaspora law, or (national) minority rights. Surprisingly, although domestic and international law commonly uses the terminology of race, ethnicity, and nationality when conceptualizing and operationalizing collective rights, discrimination, and genocide, the criteria for asylum, it actually does not provide definitions for either the groups or affiliation requirements (see Pap 2020); thus, conceptualization needs to be deciphered meticulously from technical and operationalizing measures and procedures.

In technical terms, questions of recognition surface for example in debates on census categories; anti-discrimination (and affirmative action) eligibility (Farkas 2017), as well as hate crime statutes (Kirs 2021); the enumeration of recognized national minorities in the European context (Molnár and Schaft 2003); being recognized or listed as members of Indian (Native American) tribes or aboriginal groups under indigenous law (Walajahi et al. 2019); or even in asylum law (where refugee status can be granted based on a well-founded fear of persecution due to race, ethnicity, or membership in a "particular social

check for updates

Citation: Pap, András L. 2023. Genealogy in Law as a Technology for Categorizing, Contesting and Deconstructing Monoracialism. *Genealogy* 7: 1. https://doi.org/10.3390/genealogy7010001

Received: 21 October 2022
Revised: 9 December 2022
Accepted: 15 December 2022
Published: 21 December 2022

group") (Zagor 2014), preferential naturalization schemes (Pogonyi 2022), or genocide trials (Ambrus 2012).

Conceptualization and operationalization appears in two domains: (i) classifications pertaining to ethnic, racial, and national groups; and (ii) how affiliation criteria are established in the given communities. The operationalization of ethnic/racial/national group affiliation can follow several options: self-identification; authority provided to elected or appointed members of the group; classification by outsiders' perception; or via "objective," externally set forth criteria, such as name, residence, or other forms of (often biologized) benchmarks. Through separate examples, this paper discusses these models in detail. The legal, political, and policy context of the analysis is that the lack of appropriate operationalizing schemes make legal regimes designed to provide protection from discrimination, hate crime victimization, systematic marginalization, etc., vulnerable to abuse by fraud.

The analysis is structured as follows: it begins with an overview of how law functions as a technology of categorization of race and ethnicity, with separate discussions on conceptualizing groupness and membership. Case studies accentuate the peculiar dynamics of group recognition and underline that administrative categorization is often arbitrary and random, rooting in the temporary administrative givens, which are then cemented in to conceptual and operationalizing schemes (Simonsen 1999; Salenko 2012).

The scrutiny of group affiliation is carried out with particular attention to self-identification and "objective" criteria, and especially on how bio-genetic technology changed the conceptualization and operationalization of race and ethnicity in a multitude of areas in law enforcement, forensics, immigration, biomedicine, or how ethno-national ancestry and geology is understood. Examples are brought to demonstrate how, for example "direct to consumer" ancestry services, archaeogenetic research, or the practices of assisted reproductive technology industries serve as gatekeepers to reproducing race, ethnicity, nationality, and kinship (Williams 2010; Skinner 2018; Kilpatrick and Jones 2022; Moll 2019; Rich 2020; Ray 2022).

Following this, the focus turns to the contestation of the aforementioned legal constructions and categorizations. Here, after an overview of the various relevant concepts of "fabrication", "concealment", "covering", "discretion", and "transracialism", the analysis identifies two crucial concepts: "passing" (and "reverse passing") and "fraud" (Kennedy 2001b; Yoshino 2006; Gullickson and Morning 2011). Finally, two short assessments are presented on misrepresentation (Rich 2014b) and the contestation of ethno-racial proxies (Rich 2004).

The core argument pertaining to the focus of the Special Issue is as follows: First, law is one technology for conceptualization and operationalization of race and ethnicity. Political and policy decisions involving race or ethnicity (for example preferential naturalization schemes, anti-discrimination or affirmative action regimes, etc.) materialize as legal regimes and constructions, as law is the endpoint of political and policy discussions.

Second, it is an extralegal issue whether political or policy regimes apply monolithic conceptualization or include complex mixed-race, multiracial, or transracial categories, as legal hermeneutics operate under a binary logic, where the sole question is whether a certain specific case meets the abstract legal criteria. However, the lack of appropriate operationalizing schemes jeopardize the functioning of legal regimes and make legal instruments vulnerable to abuse.

Third, while identity politics (Heyes 2016) has arguably been the dominant trend in the second half of the latter 20th century and throughout the 21st century, ethno-racial self-identification is not the only operationalizing model legal regimes apply, especially with recent trends in the "re-biologization", "molecularisation" or "genetic reinscription" of ethno-racial conceptualization. Thus, law offers and relies on various operationalizing (and conceptualizing) methods for membership beyond subjective, personal identification. Genealogy, biological heritage, is omnipresent in citizenship, anti-discrimination, etc., regimes and law can even incorporate blood quantum rules (for example in deferring to tribal norms in indigenous law.) Furthermore, through the new "biotechnological

imaginary" new entrepreneurs and gatekeepers and new languages have emerged in defining and operationalizing race and ethnicity (and of course membership).

Fourth, the contestation of various legal constructions and categorizations of race and ethnicity adds an important dimension when deconstructing monolithic conceptualizations. This paper differentiates between two types of contestation: one initiated by individuals wishing to "pass" by redefining the boundaries of legal categorization, and second the state or other stakeholders contesting "reverse passing" conceptualizing such initiatives as fraudulent attempts to bend the rules.

2. Race, Ethnicity, and Law as a Technology of Categorization

As explained above, the starting point of this assessment is that law is one of the available technologies for categorization, conceptualization, and operationalization of race and ethnicity.

2.1. Race, Ethnicity, National Minorities: Group Recognition and the Law

The conceptualization of communities by legal regimes takes place in a climate of ambiguity, sensitivity, and suspicion. Depending on the social and geographic context, the very terms are used in vastly differing ways in legal and administrative documents, in common parlance, in the commercial sector, and within academic literature, and quite differently by the humanities, social sciences, or natural sciences. Furthermore, the word "race" has different meanings in the US and the UK than in continental Europe; even within the Anglo-American world, signifiers are rarely rigid, for example the common understanding term of the term "Asian" would likely refer to having origins in the Far East or Southeast Asia in the US, and the Indian subcontinent in the UK. In the social sciences, race is considered controversial and analytically problematic and understood to be a social construct rather than a biological trait (as in the biological sense, the entirety of humanity is held to constitute one single race) and lacking a theoretically or politically uniform definition.[1]

Race is often conflated with ethnicity: even by jurists. For example, under Article 1. Of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, "*the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin . . .*"

One of the most widely cited legal definitions comes from the opinion of Lord Frazer of the UK House of Lords in the Mandla v Dowell Lee ruling, which concerned whether Sikhs were a distinct racial group under the Race Relations Act: "*For a group to constitute an ethnic [sic!] group* [. . .] *it must*, [. . .] *regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics* [such as . . .] *(1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.* [. . .] *(3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group;* [. . .] *being a minority or being an oppressed or a dominant group within a larger community* [. . .]" Using these criteria, it was held that Sikhs "*are a group defined by a reference to ethnic origins for the purpose of the* [Race relations!] *Act of 1976, although they are not biologically distinguishable from the other peoples living in the Punjab*."

The common element in provisions pertaining to race and ethnicity is that they usually focus on protection from maltreatment: discrimination, victimization in hate crimes, and alike.

"Ethnicity", nevertheless implies a more complex set of claims. As well as being grounded in the anti-discrimination discourse, some "ethnically defined" groups also set forth cultural claims similar to national minorities.

One of the ways international legal terminology differentiates between "national" and "ethnic" minorities is that the latter have nation states as national homelands, whereas "ethnic minorities" would not (Hannum 2000). Thus, ethnic minorities have hybrid claims, blending those made by racial and national communities.

Likely the most important international document on national minorities, the 1995 Council of Europe (CoE 1995) Framework Convention for the Protection of National Minorities, also fails to provide a definition for its targets. Article 1. of Recommendation 1201 (1993) of the CoE Parliamentary Assembly on an additional protocol on the rights of national minorities to the European Convention on Human Rights[2] provides some guidance: "'*national minority' refers to a group of persons in a state who: reside on the territory of that state and are citizens thereof; maintain longstanding, firm and lasting ties with that state; display distinctive ethnic, cultural, religious or linguistic characteristics; are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state; are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language*."

The corollary feature is, thus, that the claims these groups make go beyond the anti-discrimination framework, and include collective cultural and political rights, such as exceptions pertaining to cultural practices, or even territorial or personal autonomy.

Group recognition by law, whether as ethnic, racial, or "national", is always an outcome of a political decision, and the success of endeavors for recognition is shaped by the nature of the claims as well as the ethno-political environment. The length of historic coexistence, and the basis and origin for group-formation shapes and determines political and legislative processes. For example, rooted in and specific to the European ideological and political framework of nationalism, national minorities (distinguished from others, such as ethno-racial minorities or recently arriving migrants) are conceptualized as communities that have a national homeland somewhere nearby, usually in the approximate neighborhood, and the cluster of minority rights (for national minorities) centers around the concept of sustaining the cultural essence and belonging to this national community. Thus, the right to use (national minority) languages, to maintain cultural and educational institutions (at the expense of the majority state) or the right to participation in public and political life (as a national minority), i.e., to have street signs or use their language in public administration, is reserved for these communities. These measures are compensatory for historical hardships brought about by changing borders, population transfer, or the initial inability to take part in the nation building project of the national homeland. A similar logic applies to the broad set of preferences and privileges (sometimes involving immunities from a wide range of generally applicable laws in diverse areas ranging from taxation to criminal law) aboriginal/indigenous people may have, but the primary focus of indigenous rights is connected to pre-colonial way of life: land rights, and adjacently, cultural practices. Here the source of exemptions comes from compensation for the historical wrongs performed by colonization.

Group recognition is a dynamic process. Community representatives seeking recognition invest in political persuasion: proving continuous oppression, establishing empirical credibility for targeted violence, embeddedness in the human rights discourse, etc. All dimensions of group-recognition: which groups are recognized, and whether monolithic, or complex (mixed-race, multiracial or transracial) categories are adopted are entirely political questions, and legislative constructs can equally accommodate both constructions. Law, legal hermeneutics, operate under a binary logic where the sole question is whether a certain specific case meets the abstract legal criteria. On the other hand, the operationalization of legislation involving race or ethnicity raises a number of issues and challenges pertaining to group membership or affiliation.

2.2. Operationalizing Group Membership: Self-ID, Choice, and Beyond

As noted above, ethno-national identity can be defined in five ways: through self-identification; by members or either elected or appointed representatives of the community (which raises questions regarding the legitimacy and authenticity of these actors); via external perception; through "objective" criteria; or by proxies. for the following are some examples.

Endorsements by community organizations are widely used for Central–East European Roma scholarship programs. Farkas (2017, p. 28) documented how Roma leaders engage in designing proxies for ethnicity by identifying typical Roma names and streets in the segregated Roma neighborhoods for the purposes of strategic litigation (for more Pap JEMIE). Community acceptance was also recognized by the Supreme Court of India, in the Arumugam v S. Rajgopal (AIR 1976 SC 939) case, where a member of the Adi Dravida Hindu Caste and a Hindu converted to Christianity, but later wished to reconvert and return. The Court held that if accepted and recognized by other cast members as a fully reintegrated member, the Court would follow suit.

As for proxies, anti-discrimination law and practice recognizes a number of markers as proxies for ethnicity or race: skin color, name, citizenship, place of birth, country of origin, parents' origin, language (mother tongue and language used), customs (such as diet or clothing), religion, etc.

As for the perception of outsiders: ethno-racial census data are often registered following the census taker's classification, and medical or educational surveys often rely on the doctors' or teachers' categorization (see for example (Germaine et al. 2014; Farkas 2017)). Third-party identification (TPI) is used in adoption in Central–East Europe, wherein children's services make an informal determination of the children's ethnicity and prospective parents can formally refuse to adopt Roma children.

Legal regimes thus differ in which of the five operationalizing strategies is applied, and often we see a combination of these techniques. A landmark European Roma strategic desegregation case, for example, combined perception-based third-party identification (TPI) with local minority representatives (Germaine et al. 2014, pp. 61–62).

What follows here are two separate discussions of the remaining and most common operationalizing strategies: self-identification and "objective" criteria. Two preliminary points need to be made: First, as noted above, paradoxically, despite the often broad set of preferences and privileges, many legal regimes do not set forth definitions for membership in the relevant and respective ethno-racial groups. This can imperil policy goals and increase discrimination and marginalization. Thus, operationalizing schemes are crucial for effective legal protection. For efficient operation, each policy goal and legal instrument requires a specific operationalization scheme. For example, protecting victims of discrimination or hate crimes, the perception of the perpetrators should be in focus (and the self-identification of victims is less relevant). For affirmative action (remedial preferences), self-identification combined with community identification or endorsement is the optimal strategy.

Second, rather ironically, it can be observed that states are more at ease to conceptualize and operationalize membership in the titular majority population for example in ethnically preferential naturalization schemes or status law-like provisions targeting the diaspora,[3] than setting forth classifications or definitions for minorities.

2.2.1. Self-Identification

Several factors contributed to the current dominance of self-identification. The horrors of Nazism delegitimized biologically rooted objective approaches to race and ethnicity. In addition, identity politics, political activity, and "*theorizing founded in the shared experiences of injustice of members of certain social groups*" (Heyes 2016) became arguably the most powerful, multifaceted, diverse, and robust social movement in the second half of the twentieth century.[4]

Currently, most legal instruments rely on ethno-racial self-identification. For example, in the US, objective, even judicially formulated and validated racial classification schemes were replaced. For instance, in 2007 the US Equal Employment Opportunity Commission, requiring companies with more than 100 employees to report racial data, abandoned classification based on visual survey and the employers' perception for self-identification.

As Rich argues, ethno-racial identification has three dimensions: documentary race concerns decisions one makes by checking boxes in response to administrative data collec-

tion efforts; private race refers to personal views about one's racial identity; public race pertains to racial identification where an individual is prepared to be recognized as having by others in social life; and finally, social race concerns involuntarily affiliation assigned by third parties on perceived appearance or social practice (see Rich 2014a).

Legal analysis (Pap 2015) investigating whether international law recognizes the right (freedom) to the free choice of ethno-racial identity concludes that neither hard, nor soft international law actually sets forth a standalone, sui generis such a right. If such a right existed, it would logically entail both its negative and positive aspect, that is, the right to opt out and in into any ethno-national or racial group. Some elements of free choice enjoy legal protections. "(Pap 2017, p. 975) In Europe, this right to opt out is also supported by stringent privacy/data protection regulations. Article 9 of the European Data Protection Regulation[5] creates a special category of sensitive data, and apart from a very narrow set of exceptions, prohibits the processing of data revealing racial or ethnic origin (using such data needs to be set forth by law, be based on the explicit consent of the data subject, or be anonymized).

International law also recognizes the right to retain ethno-national identity in the sense that no one should be forced to assimilate into the majority.[6] The core of what international law sets forth pertaining to the free choice of identity is the following: the positive aspect of the free choice of identity encompasses the individual's right to join a group or community. Although, this not a separate dimension within the logic of law, a distinct difference in situations needs to be mentioned: the "right to stay", the prohibition of forced assimilation concerns a specific form of opting in. The status and position of members of national minorities who wish to assert their right recognition and acceptance as such marks this as an example. In such an explicit form, the freedom to choose one's identity is rarely declared in legally binding documents. According to the Explanatory Report to the CoE (1995) Framework Convention for the Protection of National Minorities: "Paragraph 1 firstly guarantees to every person belonging to a national minority the freedom to choose to be treated or not to be treated as such. This provision leaves it to every such person to decide whether or not he or she wishes to come under the protection flowing from the principles of the Framework Convention. This paragraph does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity."

According to these interpretations, the limitless right to associate with a (minority or majority) community thus remains outside the scope of protections afforded to the "free choice of identity," mostly limiting it to freedom to opt-out. On the other hand, under international law, states are authorized to set up "objective" criteria for minority community membership (or adopt ones set forth by non-state agents). For example, in the 2010 Ciubotaru v Moldova case the European Court of Human Rights held that the state may deny a request to change ethnicity in official records when it is based purely on unsubstantiated subjective grounds, and can even require objective evidence of a claimed ethnicity (App. No. 27138/04).[7]

2.2.2. Objective Ethno-Racial Membership Criteria

Even in the era of subjective ethno-racial classifications, we see numerous examples of "objective", externally defined criteria. It should be reiterated that the lack of appropriate operationalizing regimes, ethnicity- and race-based protection regimes (from discrimination, hate crime victimization, systematic marginalization, etc.) make the instruments vulnerable to abuse by fraud. We have seen that there is a variety of operationalizing mechanisms available, and when there is a political/legislative dedication, procedural solutions can easily be crafted. Although this practice is scattered and inconsistent, we can now consider some concrete examples.

When preferential naturalization schemes are introduced for (descendants of) ethnic kins, proven ancestry and language tests may be used.[8] Strictly speaking, the knowledge of the national vernacular is arguably more a proxy than an actual ethnic criterion. The most

robust example for "objectively" defined group membership is indigenous/aboriginal law, which often sets forth rigid and explicit blood quantum-based membership requirements, either established by the state, or coopting tribal rules.[9]

We see a similar externally set objective operationalization in refugee procedures, where (see for example, Sternberg 2011) authorities carry out a two-stage validation procedure: first establishing whether the group which the asylum-seeker claims to be a member of is actually in danger of persecution, and second, whether the claimant's declaration for affiliation is credible (see for example Zagor 2014).

Conceptualizing and operationalizing group-membership even comes up in genocide cases. Ambrus showed the debates surrounding who can be considered as justiciable victims and how judicial bodies examine racial and religious identities (Ambrus 2012, p. 942; for more, see Pap 2015).

The arbitrariness of ethno-racial categorization (accentuating the socially constructed nature of the concepts) is demonstrated by the fact that sometimes the affiliation criteria precede the very administrative legal conceptualization of the group. In Rwanda, ethnic "identity" was an outcome of administrative categorization distinguishing between Hutu and Tutsi (and Twa) by Belgian colonizers in 1933 (Prevent Genocide International). Initially people having 10 or more cows were classified as Tutsi; those with fewer as Hutu. After the initial determination, classification went by patrilineal parentage. Comparing Galician Jacquerie with the Rwandan ethnicization process, Kamusella (2022, pp. 695–98) showed how porous the boundary between social and ethnic categorization is, as a successful farmer could "climb" from Hutu to Tutsi (similar to a serf and a noble).

Ethnicization then works via what we can call "bureaucratic path dependence." Similarly to Rwanda, in the Soviet Union, starting in 1932 internal passports contained data on ethnicity. At first, one could choose (Simonsen 1999, p. 1071), but thereafter it became hereditary (for mixed parents a choice was to be made (Salenko 2012, p. 2). Administrative categorization is, thus, often arbitrary and random, rooting in the temporary administrative givens, but leads to subsequent cementing of conceptualization and operationalization of ethnicity. For example, the Nürenbergian definition of "a Jew" as an ethno-racial category (lacking any halachic, theological background) was institutionalized as having at least one grandparent whose documents indicated Judaism as religion: a standard data entry at the time (and in fact, often churches and religions entities were tasked with population registry). Thus, religion was racialized (operationalized and conceptualized) based on the administrative reality and bureaucratic feasibility to rely on official records that contained data on religion going back two generations. This definition still serves as a point of reference for (one of) the conceptualization of "who is Jewish" in Israel, when consciously applying this definition for offering inclusion (to all potentially persecuted Jews of the Diaspora) under the Law of Return (Kimmerling 2002, p. 190). It has also been used to identify Jewish refugees fleeing from Ukraine in 2022 to Israel (see for example Sales 2022) and Germany, where they are afforded preferential asylum and immigration regimes (see Axelrod 2022).

The boost in artificial intelligence (AI), machine learning, and most of all bio-genetic research brought a re-biologization of ethno-racial conceptualization in the 21st century. With the development of biotechnology, new entrepreneurs and gatekeepers appeared in defining and operationalizing race and ethnicity, new languages and conceptual tools have emerged to define race and ethnicity (and of course membership). Responding to policy, and commercial or political need and will, the "scientific" language to describe and encapsulate ethnicity has been revisited. The development of cheap and fast genetic analysis brought a sweeping change in how the understanding of race and ethnicity is perceived, lived, and operationalized, affecting a multitude of areas in law enforcement, immigration, (personalized and race-conscious) medicine, nationalism (in terms of how ethno-national ancestry and geology is understood), and how public and private imagination relates to ethno-racial identification.

As Skinner explains, these new forms of "datafication and visualization" once again conflate race, ethnicity, and biology in forensics, biomedicine, population genetics, and ancestry testing. This process has been referred to as "the molecularisation of race" or the "genetic reinscription of race". The new regime of racial signification is also described as "informationalization", as racial meaning is inferred from information (Skinner 2018, p. 334). For example, innovations in forensics support criminal investigations by making inferences about the racial or ethnic appearance of unidentified suspects using genetic markers of phenotype or ancestry. The process was termed as creating "biological witnesses" within a new "forensic imaginary" (Williams 2010).

Returning to refugee procedures: while the traditional use of voice recognition in law enforcement was used in criminal proceedings matching a recording with an identified suspect, AI-enabled "language biometrics" has been used recently in asylum procedures analyzing dialects in verifying applicants regarding their (geographic and ethnic) origin (see Kilpatrick and Jones 2022, pp. 15–17).

A significant contributor to the "new regime of racial signification" and "informationalization" is the highly lucrative commercial enterprise of direct to consumer (DTC) ancestry services, conceptualizing molecularized heritage based on geography and advertising to determine someone's identity through a broader web of genetic relationships and mapping and measuring of how relatives share DNA. For example, the probably most popular representative of this industry, the company Myheritage has 96 million users, its site is available in 42 languages and produces 82 million family trees with 16.1 billion historical records, and 5.6 million DNA kits in its DNA database (MyHeritage 2021). Its model applies 2114 geographic regions (MyHeritage n.d.) and breaks down to "countries" and "ethnicity" with categories such as Maasai, Nigerian, etc. (MyHeritage n.d.). These ethno-national (racial) categories are established and assigned by the company.

Ancestry and genetic tests made way to intricate legal and administrative procedures. For example, in Israel, where ethno-religious designation has crucial ramifications for naturalization and civil rights (McGonigle and Herman 2015), a rabbi issued a marriage license as a "bona fide Jew" based on DNA test. Likewise, eligibility-tests for birthright trips had also relied on DNA-tests (see Kohler 2021, p. 37; Staff 2013).

Entrepreneurs in the Assisted Reproductive Technology (ART) industry are also examples for new global arrived agents for substantiating ethno-racial meaning (see Moll 2019), as race is the crucial criterion for buyers of human eggs and sperm for donor insemination and IVF (Fogg-Davis 2001, p. 15). Thus, as Moll (2019) points out, reproductive technologies and services have become agents of racialization, enacting race and kinship, and producing not only children and parents, but also to reproducing race, ethnicity, nationality, and kinship by managing, highlighting, moderating, and sorting "*fragments of donor information with recipients' desires to craft whole narratives of racialized kinship, folding elements of social life within a notion of inheritable and biologized race, and mollifying anxieties of unknowable genealogies*." (Moll 2019, p. 589) The "language ", the technology to the everyday epistemology of race (ibid. p. 598) here is unique and not less arbitrary than that of the DTC genealogy industry. As Rich points out, for example "*some gamete providers regard Jewish donors as White, while other gamete providers treat Jewish persons, a religious category, as a separate racial category. Some providers appear to have made up racial and ethnic categories that don't exist anywhere else, such as Aztec or Mayan. To be clear, there are no consistent standards for racial and ethnic definitions in the ART industry*." (Rich 2020, p. 2408)

Curiously, re-biologization is not only a successful commercial enterprise (which fulfills a market niche and a social desire to create novel aids in the process of developing and nurturing social identities) and a technical tool for governmentality for technology savvy technocrats (with algorithm-based imaginary of predictive policing and forensic scientism seeing "genetics as the "gold standard" of evidence" (Ray 2022), but it is also a tool for agents of social progress, equality, and dignity. Take for example the class-action lawsuit launched in 2002 (and ultimately dismissed) by reparations lawyer Deadria Farmer-Paellmanna, along with descendants of slaves, seeking reparations from industries with a

history of benefitting from slavery. Here DNA ancestry tests were used to prove that the plaintiffs could trace their ancestry back to African slaves (Walajahi et al. 2019).

It needs to be noted that new technologies are also being used to identify (the genealogy of) various groups, and not individuals, be them the nation-constituting majority or minorities. A telling example of the former is the archaeogenetic research involving ancient genomes to support linguistic theories and folk traditions to unravel the origin of Hungarian tribes and prove genetic relationship between nomadic Hungarians, Sarmatians, and Huns (Xiongnus) before the 9th century (Maróti et al. 2022).[10] For the latter, Ray documented how genetic research has been used to supplement folklorists', ethnographers', linguists' and demographers' endeavors to place Roma within an imagined Indian-hood (and India embraced this (Ray 2022).

3. Legal Contestation of Categorization: Litigating Passing and Fraud

This section considers the contestation of the aforementioned legal constructions and categorizations of race and ethnicity. The assessment is limited to dynamics that surface as administrative legal procedures, leaving aside conflict resolution in the political and cultural terrain, even if the overwhelming majority ethno-racial contestation is extralegal. This assessment thus only includes the tip of the iceberg. For example, if a "racial trespasser" bends to social sanctioning by resigning from office, or accepts the termination of employment without litigation, it remains outside the scope of analysis here. Despite the limited nature of scrutiny, the study of legal contestation is relevant and valuable not only because it highlights how through law the state officially speaks, but when passing judgments the state not only speaks about what race and ethnicity is, but (to a certain degree at least) also about why it is so.

There is a very large stock of literature on bending and expanding the boundaries of ethno-racial legal classification (see for example Harris 1993; Hobbs 2014; Kennedy 2001b; Rich 2013; Gross 1998; Enriquez 2013; Clarke 2015a; Rich 2004, pp. 1166–71, 1194–99; Yoshino 2006; Sharfstein 2007, p. 631; Hernández 1998, pp. 109–11; Brunsma 2006, p. 573; Gullickson and Morning 2011). There are also numerous projects on distinguishing and sorting these phenomena. For example, Dobai and Hopkins (2022) explained how psychological accounts differentiate between identity "fabrication", "concealment", and "discretion": seeing "fabrication" to involve the "purposeful presentation of false information about oneself", "concealment" entailing the "active control of what information about one's identity is revealed", and "discretion" referring to "managing the flow of information about one's identity in a subtle manner". They discussed both "passing" and "covering" under (proactive or reactive) identity "concealment," the motivation for which may include the desire to: secure material benefits; avoid conflict; take pleasure from seeing others' assumptions blinding them to the reality before them; test (and expose) majority group members' attitudes; or allow themselves opportunities to experience the world in new ways (Dobai and Hopkins 2022).

Passing is a concept and practice widely discussed in American literature, as throughout history many have concealed their "true" racial identities and assumed a White one in order to reap the economic, political, and social benefits associated with Whiteness (Yang 2006, pp. 367–69, 373).[11] For example, during the period of Chinese Exclusion, likely the only way to enter the United States via Mexico or Canada for Chinese was to disguise themselves as American Indian or Mexican. During World War II, some Japanese Americans also claimed to be Chinese in order to avoid war-time internment (ibid., p. 373). "*Given this racial hierarchy, 'passing' has traditionally been a process by which nonwhites have sought to perform and present themselves as White in order to escape slavery, circumvent racism, access new worlds of economic and employment opportunity, shop and dine*." (Beydoun and Wilson 2017, p. 288) In the legal literature we see a diverse set of definitions. According to Khanna and Johnson, it is "*a phenomenon in which a person of one race identifies and presents himself or herself as another (usually White)*." (Khanna and Johnson 2010, p. 380). Yoshino distinguishes passing from "assimilation" and "covering", defining assimilation as an "*attempt to change*

or hide identity" and covering as "strategic concealment of stigmatized aspects of identity", while the concept of passing assumes that "the passer fails to convert the underlying identity, secretly retaining it even as she presents a separate face to the outside world." (Yoshino 2002, p. 772).

According to Randall Kennedy, racial passing is fundamentally a "deception" of the broader public in the sense that an individual does not reject social norms pertaining to racial identification, but knowingly attempts to adhere to these social standards (Kennedy 2001b). Instead of requiring an active effort at misrepresentation, Yang (2006, p. 374) offers a definition under which an individual simply fails to correct others' misperception of his or her racial identity.

As for the related "reverse passing", Beydoun and Wilson identify "legal reverse passing", as the process by which Whites present themselves as non-White on legal and administrative documents in order to benefit from affirmative action or other benefits. They may also do so in cultural spheres, which they term as "cultural reverse passing".[12] Non-Whites are also capable of reverse passing as specific racial minority.[13]

We offer a theory according to which legal contestation should be discussed through two clusters: passing (including reverse passing) and fraud. Passing in this understanding involves both a process of self-identification performed by individuals, and debates concerning the categorization of the ethno-racial groups (where the individual's affiliation is not questioned), and "fraud" is the contestation of "passing" or "reverse passing" by the state or other stakeholders, who conceptualize such initiatives as wrongful misrepresentation of fraudulent attempts to bend the rules, and this often necessitates referencing or establishing "objective" boundaries for ethno-racial classifications. We argue that fraud or ethnocorruption can also be committed by the state by establishing abusive legislative regimes or practices. A special case between passing and fraud refers to cases when applicants seek to invalidate certain contractual legal obligations, mostly marriages on the basis of (intentional or even unintentional) misrepresentation pertaining to the ethno-racial status of the partners, the knowledge of which would have prevented them from entering the contract. In addition to contesting preexisting (and mostly objectively defined) criteria via "passing" and subjective assertions via claims of "fraud", we also point to initiatives contesting proxy race and ethnicity.

3.1. Passing and Excluding "Passers"

There are two types of litigation for passing. The first concerns individuals seeking judicial confirmation of their "elective race". These also have two types. The first is counterclaims made in fraud allegations (to be discussed in the next section), and the second when petitioners seek to change their "official ethno-racial" categorization. Yang (2006, p. 376) reported for example efforts in lawsuits filed by slaves seeking judicial affirmation that they were White. Naomi Drake, supervisor and deputy registrar of the Louisiana Bureau of Vital Statistics, initiated a series (of mostly unsuccessful) of cases from the 1950s and up until the 1980s challenging racial identity designations on birth certificates (also see Gross 1998).

The other type of passing litigation concerns the categorization of the ethno-racial group the litigants are members of (and affiliation qualifications are not rebutted). Thus, here the classification of the group is in question. The US prerequisite naturalization cases are illustrative for this type. As of a 1790 Act of Congress, citizenship was reserved for "White persons" only. Thus, litigating naturalization denials on the grounds of questioning the authorities' classifications of the petitioners as "not White" brought dozens of judgments (many reaching the Supreme Court) until 1952 (See López 1996), when racial restrictions were removed. Prerequisite litigation brought to a case-to-case development of the judicial conceptualization and operationalization of "Whiteness", for example deciding whether applicants from Armenia, Burma, China, Hawaii, Japan, Mexico, etc., were "White" or not. The judicial practice was quite inconsistent. In 1878,[14] the Ninth Circuit Court ruled that Chinese could not be White (Okizaki 2000, p. 478). A few decades later, in Ozawa v US (Ozawa v US, 260 US 178 (1922)), a light-skinned Japanese was also denied citizenship

when the Supreme Court held that it is not only the skin color and popular perception that matter, but scientific categorization too, and according to that, Japanese are members of the "Mongolian" race, and hence, cannot be Caucasian.

The more contemporary versions of this type of litigations are initiated by employers or the state, and not the individuals. For example, in 1987, an Iraqi-born American professor sued his college for racial discrimination after being denied tenure. Here, in *Saint Francis College v Al-Khazraji* (481 U.S. 604 (1987)) the Supreme Court rejected the employer's claim that since Arabs are "Caucasians," racial discrimination cannot take place. A few years later, in *Sandhu v Lockheed Missiles & Space Co*. (26 Cal. App. 4th 846, 850, 1994), a company also lost the claim that as the plaintiff is an Indian, and hence, Caucasian, he should not be eligible for antidiscrimination protections.[15] In another case, reversing lower Court decisions, the Supreme Court held that Jews constituted a racial group (in the desecration of the congregation's synagogue) (Shaare Tefila Congregation v Cobb, 481 US 615 (1987)). On the other hand, in *United Jewish Organizations v Carey* (430 U.S. 144 (1977)), in the context of gerrymandering, it held that Hasidic Jews enjoy no constitutional right to separate community recognition for the purposes of redistricting. We see similar contestation in Israel, where the "who is Jewish? what is Jewish?" question is a recurring theme in constitutional law and a subject of several Supreme Court decisions. The aforementioned Law of Return (1950) grants "every Jew, the right to come to Israel as an *oleh* (a Jew immigrating to Israel) and become an Israeli citizen (and be eligible to settlement benefits.)" Official documents contain an entry on membership in one of the "ethnic communities" (Jewish, Moslem, Christian, or Druze,) with different legal regimes applying to each. The applicant of the most famous (and one of the numerous) Supreme Court case was Brother Daniel.[16] Born in Poland in 1922 to and raised by Jewish parents, he was imprisoned by the Gestapo. Having escaped, he fought as a partisan and saved many lives from deportations. After converting to the Christian faith and joining the Carmelite order, he moved to Israel, requesting immigration. Referring to "public opinion" that a Jew cannot belong to another faith, his claim was rejected at all fora, including the Supreme Court, (despite even the Chief Rabbi of Israel argued that he should be considered Jewish.) (See Pap 2015).

3.2. Reverse Passing, Racial Fraud, Ethnocorruption, and Ethnic Cheating

The concept of fraud is difficult to define as an analytic category. It can be conceptualized as building on the loopholes of legal classification, identity-based policies are intentionally used, or rather: abused by persons who are not "authentic" members of the target group. Intentionality means that the abusers are aware of the inadequacy of their actions. Ethno-racial fraud roots in cynicism and/or opportunism (Pap 2017, p. 973). Let us consider some examples of "racial fraud" in relation of "elective race" in the US (Rich 2014a), or the experience of "ethnocorruption" in relation to minority rights in continental Europe.

As for the former, in the American literature, the aforementioned "reverse passing" is the most widely used term. Beydoun and Wilson explains how the "*racial self-identification regime combined with the benefits available through affirmative action programming altered the once mono-directional incentives of passing from nonwhite to White. . . as a means to acquire the benefits of affirmative action.*" (Beydoun and Wilson 2017, p. 308). They identify "legal reverse passing," as the process by which Whites disavow their White identity and present themselves as per se non-White on legal and administrative documents such as birth certificates, the census form, college and graduate school applications, employment applications and statistics, demographic data, and more. The 1989 Malone case (Malone v Haley, No. 88-339, slip op. at 3 (Sup. Jud. Ct. for Suffolk County, 25 July 1989), Malone v Civil Service Commission, 646 N.E.2d 150, 151 (1995)) is probably the most widely discussed example. Here, two Irish American firefighters were dismissed from the Boston Fire Department after finding out that they had been hired as black applicants. As Yang (2006, pp. 384, 391) explains, the highly cited Malone Court established a limit to self-identification: sincerity. "*At the administrative hearing, the Malones were given the opportunity to rebut their allegedly false race designation either by (1) showing that they had "acted in good faith", or (2) demonstrating*

that they were in fact "Black". The criteria . . . were: (i) visual observation of physical features; (ii) documentary evidence establishing black ancestry, such as birth certificates; and (iii) evidence that the Malones or their families held themselves out to be black and are considered black in the community." In a similar 1990 case, the San Francisco Civil Service Commission ruled that one firefighter was an Italian American posing as Mexican American and thus, ineligible for an affirmative action program.

For European ethnocorruption, consider the case of Hungary, a jurisdiction where the exercise of minority rights is not dependent on minimal affiliation requirements. Deets documented how "*[A]ccording to Hungarian government statistics, in 1998, almost 45,000 primary school students were enrolled in German-minority programs (providing extra classes of a useful language-education), which, by the census, was about 8000 more than the number of ethnic Germans who are even in Hungary.*" (Deets 2002) Hungary set up a unique autonomous minority institution, the "minority self-government" structure (bodies that exist parallel with local municipal administration and have a budget for this) (see for example Molnár and Schaft 2003; Ram 2014), and besides self-declaration, no restrictions apply for running and voting at these. For example, in order to express their enthusiasm for German football, a small village's entire football team registered as German minority-candidates (see Pap 2015). In 2010, the mayor of a marginalized village at the edge of bankruptcy, unable to finance its public school, asked all students to declare themselves Roma and request minority education, which would qualify the school for extra funds. According to census data, no Roma lived in the village (see Pap 2015). Several petitions have been filed with the Constitutional Court, arguing that the ambiguity of the legal regime is unconstitutional, but all were rejected (see for example CC decision 45/2005 (XII. 14.); and Pap and Szentgáli-Tóth 2022). There are reports of similar cases throughout Central Europe: Carstocea, for example, reports how MPs ran on minority tickets without any link to the community in Romania (see Carstocea 2011, p. 20).

A special form of misconduct committed by the state is what we call the Murphy's law of discrimination. It refers to the following: perpetrators of discrimination or hate crimes never have difficulties identifying (and conceptualizing) their victims; yet when it comes to legal remedies, state authorities are often unable (or unwilling) to distinguish between scenarios when self-proclaimed or perceived ethnicity should be applied, or see data protection regimes as obstacles to take action. For example, racially motivated hate crimes are registered as simple assault. The European Court of Human Rights repeatedly found inadequate state practices to prosecute hate crimes to be a violation of the European Convention on Human Rights.[17] Farkas pointed to (Farkas 2004) how a restrictive approach to privacy can severely impede the prospect of litigating indirect discrimination and institutional racism.

3.3. Misrepresentation (or Mistake) as a Cause for Annulling Legal Obligations and Status

A peculiar case of disputing categorization pertains to litigating misrepresentation of ethno-racial status. As Yang (2006, p. 398) explained, "*Misrepresentations as to race, when made with respect to a person or organization that had a policy of doing business with Whites only, allowed the voiding of contracts . . . for interment in a Whites-only cemetery, for life-insurance provided by an all-White benevolent association, for conveyance of property subject to a racially restrictive covenant. . . . Fraudulent concealment of non-White racial ancestry could also serve as a defense to lawsuits seeking to enforce promises to marry and probate claims.*" The most well-known example for the latter is the 1927 Rhinelander v Rhinelander (219 N.Y.S. 548 (App. Div.), aff'd, 157 N.E. 838 (N.Y. 1927)), annulment case that centered around whether the mixed-race wife and former chambermaid Alice Jones, had engaged in "racial fraud" when she married Leonard "Kip" Rhinelander, a member of the White social elite. The husband claimed that the marriage should be annulled as his then-fiancé misrepresented her race, by hiding her colored blood and affirmatively representing to that she was White (see Onwuachi-Willig 2007, 2013; see Rich 2014b; Kennedy 2001a) (An annulment, as opposed to a divorce, severs ties completely between the spouses, returning them to their original, unmarried status,

and denying the fraudulent party of all claims to alimony or property (Onwuachi-Willig 2007, pp. 2410–11). The case became infamous because (besides explaining at length facial features, nostrils, lips) (ibid. pp. 2437–38), in providing evidence for Kip's knowledge of his wife's race (with whom he admitted to have had sexual escapades prior to the wedding), the defense put Alice on display for the jury in the Justice's chambers. As Onwuachi-Willig (ibid. p. 2449)[18] reported, "*after seeing Alice's bare shoulders, arms, legs, and breasts at trial*," the all-White jury determined that Alice was to be considered as "colored" and dismissed the husband's claims.

Similar claims based on ethno-racial representation were brought to Court during the Holocaust in Hungary. Schweitzer (2005) documented how children, often jointly with their parents, would ask to have their illegitimacy declared (especially if only their father was legally Jewish) to in order to escape persecution and deportation.

3.4. Contesting Proxies

Besides contesting preexisting (and mostly objectively defined) criteria via "passing" and subjective assertions via claims of "fraud," we also see initiatives contesting proxies. Rich (2004) provided a detailed account of how litigants, mostly African American women wearing braided hair and being sanctioned for it argued for this to be a proxy-based racial discrimination. For most, these challenges are rejected by courts, failing to recognize discrimination based on "non-immutable", "voluntary", or "performed" aspects of racial or ethnic identity.[19]

It needs to be added that, as Yang (2006, p. 400) pointed out, "Choice and fraud have different strengths and weaknesses in their ability to address the role that race and identity play in our society. However, there is one significant short-coming of both: they are premised on the idea that racial identity can be fixed-that it is static and singular. Both assume that there is one "true" identity that an individual has, an identity that can be ascertained just like most type of facts."

Fraud and passing also raise numerous complex ethical and epistemological questions. For example, what are the ethics of passing, if it is one of the scarce resources to cope with structural injustices and inequalities in an ethno-racially oppressive society?

4. Conclusions

The aim of this article was to demonstrate how law operates as a technology for conceptualizing race and ethnicity. We established the limitations of such inquiry caused by the specificity of legal logic, and explained how much of the public and social science discussion on monoraciality remains in an extralegal terrain. We identified the legal, political and policy context of our project in that the lack of appropriate operationalizing schemes, ethnicity- and race-based protection regimes (from discrimination, hate crime victimization, systematic marginalization, etc.) are jeopardized and make the instruments vulnerable to abuse by fraud. It has nevertheless been shown that although identity politics has been arguably the dominant trend since the second half of the 20th century and during the 21st century, ethno-racial self-identification is not the only operationalizing model legal regimes apply, especially with the recent boost in artificial intelligence, machine learning, and most of all bio-genetic research, bringing the "re-biologization", "molecularisation" or "genetic reinscription" of ethno-racial conceptualization. We showed how law offers and relies on various operationalizing (and conceptualizing) methods for membership, and that biological heritage is present in numerous citizenship, anti-discrimination, indigenous law etc., regimes. A comparative screening of legislative engineering thus showed that there is a variety of operationalizing mechanisms available, and when there is a political/legislative dedication, procedural solutions can easily be crafted, although practice is scattered and inconsistent.

We also demonstrated how contestation of various legal constructions and categorizations of race and ethnicity add an important dimension for understanding (and deconstructing) conceptualization, especially since in legal disputes courts not only say what

race and ethnicity is, but often also explain why. We distinguished between contestation initiated by individuals wishing to "pass" by redefining the boundaries of legal categorization, and by action initiated by the state or other stakeholders, who contest passing (or "reverse passing") and conceptualize such initiatives as fraudulent attempts to bend the rules. We also identified cases of ethnocorruption or racial fraud where the state is the perpetrator, as well as and when contestation targets ethno-racial proxies. The paper discussed governmental classifications of people based on race or ethnicity in the context of giving or denying benefits. The broader context of the project is that history teaches caution: the new biogenetic languages and technologies can also be used for campaigns of hatred, or to enforce social arrangements subordinating classes of people.

Funding: This research was funded by the 134962 and 138965 Hungarian National Research and Innovation Grants and the Artificial Intelligence National Laboratory Program.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: Not applicable.

Conflicts of Interest: The author declares no conflict of interest.

Notes

1 In 18 July 1950, the United Nations Educational, Scientific and Cultural Organization (UNESCO) issued a 54 page long document on "The Race Question", arguing that race is not a biological phenomenon but rather largely socially constructed." See also (Tajfel 1981).

2 https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15235 (accessed on 16 December 2022).The document was also endorsed by the European Parliament's 2005 resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe.

3 For numerous European examples see (Venice Commission 2001).

4 Consider second wave feminism, the US Black Civil Rights movement, indigenous, or LGBT movements.

5 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

6 See for example, Article 1 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the June 1990 Copenhagen Concluding Document on the Human Dimension of the CSCE, paras 32–33, the 2012 Ljubljana Guidelines on Integration of Diverse Societies by the Organization on Security and Co-operation in Europe (OSCE part II, para 6, the UN Principles and Recommendations for Population and Housing Censuses, or Article 8(1) of the 2007 United Nations Declaration on the Rights of Indigenous Peoples 2007.

7 In the case the Court found the State to be in violation of the Convention by not providing the applicant to have his claim examined and objectively verified.

8 "In some cases, restoration of citizenship is available for very distant descendants of nationals who were nonvoluntarily deprived of their membership status. One of the most recent (and probably also the most peculiar) example is the Spanish government's decision to open up fast-track naturalization for descendants of Sephardic Jews who were expelled from Spain in 1492." Pogonyi (2022, p. 9). Portugal followed suit, here applicants must be able to show "Sephardic names". See https://cilisboa.org/portuguese-nationality-concession/ (accessed on 16 December 2022). In Croatia, Bulgaria, and Hungary expedited naturalization is available upon documented ancestry. Ibid.

9 In the leading 1978 case Santa Clara Pueblo v Martinez case, the US Supreme Court confirmed "a tribe's right to define its own membership for tribal purposes . . . as central to its existence as an independent political community", 436 U.S. 49, 72 n.32 (1978).

10 For other, similar research on different groups see for example Antonio et al. (2019); Raghavan et al. (2014).

11 Most American strategic litigation (and landmark) cases involved litigants who were passing as White. Consider for example the light-skinned Plessy Homer (contesting segregated transport in Plessy v Ferguson, 163 U.S. 537 (1896), the Japanese-American Fred Korematsu (resisting internment under World War II) obtaining rudimentary plastic surgery and claiming to be Clyde Sarah of Spanish–Hawaiian origin (Korematsu v United States, 323 U.S. 214 (1944)), or NAACP's Walter White, a "fair-skinned, blue-eyed, and blond-haired.. son of light-complexioned Negroes . . . Using his ability to pass as White, investigat(ing) lynchings for the NAACP during Jim Crow times." Yang (2006, p. 373).

12 Beydoun and Wilson (2017, p. 328) showed how "Today, some people have flipped the "one-drop rule" to claim minority status to try to gain perceived advantages in scholarships, college admission and in the workplace." Clarke observes how the American

Bar Association pointed to the disparity between the number of self-identified Native American lawyers on the census (228) and the number reportedly graduated by ABA-accredited law schools over that same time period (approximately 2610). Clarke (2015b, p. 805).

[13] See Chokal-Ingam (2015), reporting how a Southeast Asian medical school applicant represented himself as Black in order to obtain admission to medical school through a race-conscious affirmative action program. See also Harpalani (2013, p. 183). A related term is "transracialism", which, prior to the Rachel Dolezal outing and the debate that it generated, was used to describe the lived experiences of children who were adopted into homes and raised by parents whose racial identification was phenotypically and culturally different from that of the child's. Beydoun and Wilson (2017, pp. 348–49).

[14] Re Ah Yup. (United States Circuit Court for the District of California 1 F. Cas. 223 (1878)).

[15] The rationale was echoed in Baruah v Young (D.Md. 1982, 536 F.Supp. 356), and Defendants in Ortiz v Bank of America ((E.D.Cal. 1982) 547 F.Supp. 550).

[16] His life was the basis of Lyudmila Ulitskaya's 2006 novel, Daniel Stein, Interpreter.

[17] For example, Nachova and Others v Bulgaria, No. 43577/98 and 43579/98, judgment of 6 July 2005, Balázs v Hungary, No. 15529/12, 20 October 2015, R.B. v Hungary, No. 64602/12, 12 April 2016. See also Kirs (2021), Balogh (2011), EU Agency for Fundamental Rights (2018) https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-unmasking-bias-motives-paper_en.pdf (accessed on 16 December 2022).

[18] In addition to using Alice's bare body as proof of race, the defense emphasized proxies, non-physical markers that he also viewed as telling of race, such as language, grammar, tone, and the use of colored doctors for illnesses.

[19] See for example McBride v Lawstaf, Civil Action No. A.1:96-CV-0196C, 1996 U.S. Dist. LEXIS 16190, N.D. Ga. 19 Sept. 1996, Rogers v Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981), Carswell v Peachford Hosp., No. C80-222A, 1981 U.S. Dist. LEXIS 14562, at 6 (N.D. Ga. 26 May 1981), McGlothin v Jackson Mun. Separate Sch. Dist., 829 F. Supp. 853, (Rich 2004), 1136-37, 1207-08).

References

Ambrus, Monika. 2012. Genocide and Discrimination: Lessons to Be Learnt from Discrimination Law. *Leiden Journal of International Law* 25: 935–54. [CrossRef]

Antonio, Margaret L., Ziyue Gao, Hannah M. Moots, Michaela Lucci, Francesca Candilio, Susanna Sawyer, Victoria Oberreiter, Diego Calderon, Katharina Devitofranceschi, Rachael C. Aikens, and et al. 2019. Ancient Rome: A genetic crossroads of Europe and the Mediterranean. *Science* 366: 708–14. [CrossRef] [PubMed]

Axelrod, Toby. 2022. Germany eases asylum requirements for Ukrainian Jews fleeing invasion. *The Times of Israel*. March 11. Available online: https://www.timesofisrael.com/germany-loosens-asylum-requirements-for-ukrainian-jews-fleeing-invasion/ (accessed on 31 August 2022).

Balogh, Lídia. 2011. Racist and related hate crimes in Hungary—Recent empirical findings. *Acta Iuridica Hungarica* 52: 296–315. [CrossRef]

Beydoun, Khaled, and Erika K. Wilson. 2017. Reverse Passing. *UCLA Law Review* 64: 282–354.

Brunsma, David L. 2006. Public Categories, Private Identities: Exploring Regional Differences in the Biracial Experience. *Social Science Research* 35: 555–76. [CrossRef]

Carstocea, Andreea. 2011. Ethno-business—The Manipulation of Minority Rights in Romania and Hungary. In *Perpetual Motion? Transformation and Transition in Central and Eastern Europe & Russia*. Edited by Tul'si Bhambry, Clare Griffin, Titus Hjelm, Christopher Nicholson and Olga G. Voronina. London: UCL, School of Slavonic and East European Studies, pp. 16–28.

Chokal-Ingam, Vijay. 2015. Why I Faked Being Black for Med School. *N.Y. Post*. April 12. Available online: http://nypost.com/2015/04/12/mindy-kalings-brother-explains-why-hepretended-to-be-black (accessed on 31 August 2022).

Clarke, Jessica A. 2015a. Against Immutability. *Yale Law Journal* 125: 2–102.

Clarke, Jessica A. 2015b. Identity and Form. *California Law Review* 103: 747–840. [CrossRef]

CoE. 1995. Council of Europe's Framework Convention for the Protection of National Minorities. *International Legal Materials* 34: 351–59. [CrossRef]

Deets, Stephen. 2002. Reconsidering East European Minority Policy: Liberal Theory and European Norms. *East European Politics and Society* 16: 30–53. [CrossRef]

Dobai, Anna, and Nick Hopkins. 2022. Ethnic identity concealment and disclosure: Contexts and strategies. *British Journal of Social Psychology* 61: 790–807. [CrossRef]

Enriquez, Anthony R. 2013. Assuming Responsibility for Who You Are: The Right to Choose "Immutable" Identity Characteristics. *NYU Law Review* 88: 373–400.

EU Agency for Fundamental Rights. 2018. Unmasking Bias Motives in Crimes: Selected Cases of the European Court of Human Rights. Available online: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-unmasking-bias-motives-paper_en.pdf (accessed on 31 August 2022).

Farkas, Lilla. 2004. The Monkey that does not See. *Roma Rights Quarterly* 2: 19–23.

Farkas, Lilla. 2017. Analysis and Comparative Review of Equality Data Collection Practices in the European Union: Data Collection in the Field of Ethnicity. *European Commission*. Available online: https://op.europa.eu/en/publication-detail/-/publication/1dcc2e44-4370-11ea-b81b-01aa75ed71a1/language-en (accessed on 9 December 2022).
Fogg-Davis, Hawley. 2001. Navigating Race in the Market for Human Gametes. *The Hastings Center Report* 31: 13–21. [CrossRef] [PubMed]
Germaine, Catharina, Isabelle Chopin, and Lilla Farkas. 2014. Ethnic Origin and Disability Data Collection in Europe: Measuring Inequality-Combating Discrimination. *Migration Policy Group for Open Society Foundations*. Available online: https://www.opensocietyfoundations.org/publications/ethnic-origin-and-disability-data-collection-europe-measuring-inequality-combating (accessed on 9 December 2022).
Gross, Ariela J. 1998. Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South. *Yale Law Journal* 108: 109–88. [CrossRef]
Gullickson, Aaron, and Ann Morning. 2011. Choosing Race: Multiracial Ancestry and Identification. *Social Science Research* 40: 498–512. [CrossRef]
Hannum, Hurst. 2000. International Law. In *Encyclopedia of Nationalism*. Edited by Alexander Motyl. Cambridge: Academic Press, pp. 405–19.
Harpalani, Vinay. 2013. DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans. *NYU Annual Survey of American Law* 69: 77–184.
Harris, Cheryl I. 1993. Whiteness as Property. *Harvard Law Review* 106: 1707–91. [CrossRef]
Hernández, Tanya Katerí. 1998. "Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence. *Maryland Law Review* 57: 97–173.
Heyes, Cressida. 2016. Identity Politics. In *The Stanford Encyclopedia of Philosophy*, Summer 2016 ed. Edited by Edward N. Zalta. Available online: http://plato.stanford.edu/archives/sum2016/entries/identity-politics/ (accessed on 31 August 2022).
Hobbs, Allyson. 2014. *A Chosen Exile: A History of Racial Passing in American Life*. Cambridge: Harvard University Press.
Kamusella, Tomasz. 2022. Ethnicity and Estate: The Galician Jacquerie and the Rwandan Genocide Compared. *Nationalities Papers* 50: 684–703. [CrossRef]
Kennedy, Randall. 2001a. Interracial Intimacies: Sex, Marriage, Identity, Adoption. *Harvard BlackLetter Law Journal* 17: 66–70.
Kennedy, Randall. 2001b. Racial Passing. *OSLJ Ohio State Law Journal* 62: 1145–93.
Khanna, Nikki, and Cathryn Johnson. 2010. Passing as Black: Racial Identity Work Among Biracial Americans. *Social Psychology Quarterly* 73: 380–97. [CrossRef]
Kilpatrick, Jane, and Chris Jones. 2022. A Clear and Present Danger Missing Safeguards on Migration and Asylum in the EU's AI Act. *Statewtch*. Available online: https://www.statewatch.org/media/3285/sw-a-clear-and-present-danger-ai-act-migration-11-5-22.pdf (accessed on 31 August 2022).
Kimmerling, Baruch. 2002. Nationalism, Identity, and Citizenship. An Epilogue to the Yehoshua-Shammas Debate. In *Challenging Ethnic Citizenship. German and Israeli Perspectives on Immigration*. Edited by Daniel Levy and Yfaat Weiss. New York: Berghahn, pp. 181–95.
Kirs, Eszter. 2021. Hate crimes and international institutions: A literature review. *Hungarian Journal of Legal Studies* 61: 285–95.
Kohler, Noa Sophie. 2021. Negotiating Jewishness through genetic testing in the State of Israel. *TATuP-Zeitschrift für Technikfolgenabschätzung in Theorie und Praxis/Journal for Technology Assessment in Theory and Practice* 30: 36–40. [CrossRef]
López, Ian F. 1996. *White by Law, The Legal construction of Race*. New York: New York University Press.
Maróti, Zoltán, Endre Neparáczki, Oszkár Schütz, Kitti Maár, Gergely I. B. Varga, Bence Kovács, Tibor Kalmár, Emil Nyerki, István Nagy, Dóra Latinovics, and et al. 2022. The genetic origin of Huns, Avars, and conquering Hungarians. *Current Biology* 32: 1–13. [CrossRef]
McGonigle, Ian V., and Lauren W. Herman. 2015. Genetic Citizenship: DNA Testing and the Israeli Law of Return. *Journal of Law and the Biosciences* 2: 469–78. [CrossRef]
Moll, Tessa. 2019. Making a Match: Curating Race in South African Gamete Donation. *Medical Anthropology* 38: 588–602. [CrossRef]
Molnár, Emilia, and Kai A. Schaft. 2003. Preserving "Cultural Authonomy" or Confronting Social Crisis? The Activities and Aims of Roma Local Minority Self-governments 2000–2001. *Review of Sociology of the Hungarian Sociological Association* 9: 27–42.
MyHeritage. 2021. MyHeritage Surpasses 1 Million Annual Subscribers! December 19. Available online: https://blog.myheritage.com/2021/12/myheritage-surpasses-1-million-annual-subscribers/ (accessed on 31 August 2022).
MyHeritage. n.d.a. Available online: https://www.myheritage.hu/dna?utm_source=ppc_google&utm_medium=cpc&utm_campaign=mh_search_hu_hu_des_mhdna_exact_myheritage&utm_content=432972135000&utm_term=myheritage%20dna&tr_camp_id=9950694872&tr_ad_group=myheritage_dna&tr_ag_id=104395085167&tr_placement=&tr_device=c&tr_account=945-052-3745&keyword=&tr_size=&gclid=EAIaIQobChMI0POc2bOl-AIVUeJ3Ch1TWwWIEAAYASAAEgJDSfD_BwE (accessed on 31 August 2022).
MyHeritage. n.d.b. Available online: https://www.myheritage.hu/ethnicities/europe/continent-country-list (accessed on 31 August 2022).
Okizaki, Carrie Lynn. 2000. "What are you?:" Hapa-girl and multicultural identity. *University of Colorado Law Review* 71: 463–96.
Onwuachi-Willig, Angela. 2007. A Beautiful Lie: Exploring Rhinelander v Rhinelander as a Formative Lesson on Race, Identity, Marriage, and Family. *California Law Review* 95: 2393–458.

Onwuachi-Willig, Angela. 2013. *According to Our Hearts: Rhinelander v Rhinelander and the Law of the Multiracial Family*. New Haven: Yale University Press.
Pap, András László. 2015. Is There a Legal Right to Free Choice of Ethno-Racial Identity? Legal and Political Difficulties in Defining Minority Communities and Membership Boundaries. *Columbia Human Rights Law Review* 46: 153–232.
Pap, Andras L. 2017. Ethno-racial identity (politics) by law:"Fraud" and "choice". *Nationalities Papers* 45: 968–87. [CrossRef]
Pap, Andras László. 2020. Conceptualizing and Operationalizing Identity, Race, Ethnicity, and Nationality by Law: An Introduction. *Nationalities Papers* 49: 1–8. [CrossRef]
Pap, Andras László, and Boldizsár Szentgáli-Tóth. 2022. CC Decision 1/2013. (I. 5.) on registration as a prerequisite for the right to vote. In *The Main Lines of the Jurisprudence of the Hungarian Constitutional Court: 30 Case Studies from the 30 Years of the Constitutional Court (1990–2020)*. Edited by Fruzsina Gárdos-Orosz and Kinga Zakariás. Baden-Baden: Nomos, pp. 234–45.
Pogonyi, Szabolcs. 2022. The right of blood: 'Ethnically' selective citizenship policies in Europe. *National Identities* 24: 523–38. [CrossRef]
Prevent Genocide International. n.d. Available online: http://www.preventgenocide.org/edu/pastgenocides/rwanda/indangamuntu.htm (accessed on 31 August 2022).
Raghavan, Maanasa, Pontus Skoglund, Kelly E. Graf, Mait Metspalu, Anders Albrechtsen, Ida Moltke, Simon Rasmussen, Thomas W. Stafford Jr., Ludovic Orlando, and Ene Metspalu. 2014. Upper palaeolithic Siberian genome reveals dual ancestry of Native Americans. *Nature* 505: 87–91. [CrossRef]
Ram, Melanie H. 2014. Europeanized Hypocrisy: Roma Inclusion and Exclusion in Central and Eastern Europe. *Journal on Ethnopolitics and Minority Issues in Europe* 13: 15–44.
Ray, Avishek. 2022. The episteme(s) around Roma historiography: Genealogical fantasy reexamined. *Ethnicities*. [CrossRef]
Rich, Camille Gear. 2004. Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII. *NYU Law Review* 79: 1134–270.
Rich, Camille Gear. 2013. Affirmative Action in the Era of Elective Race: Racial Commodification and the Promise of the New Functionalism. *Georgetown Law Journal* 102: 179–218.
Rich, Camille Gear. 2014a. Elective Race: Identifying Race Discrimination in the Era of Racial Self Definition. *Georgetown Law Journal* 102: 1502–72.
Rich, Camille Gear. 2014b. Making the Modern Family: Interracial Intimacy and the Social Production of Whiteness. *Harvard Law Review* 127: 1341–94.
Rich, Camille Gear. 2020. Contracting Our Way to Inequality: Race, Reproductive Freedom, and the Quest for the Perfect Child. *Minnesota Law Review* 104: 2375–469.
Salenko, Alexander. 2012. Country Report: Russia. 2012/01, EUDO Citizenship Observatory. Available online: https://cadmus.eui.eu/bitstream/handle/1814/60230/RSCAS_EUDO_CIT_2012_1.pdf?sequence=1&isAllowed=y (accessed on 31 August 2022).
Sales, Ben. 2022. How Jewish groups determine if Ukrainian refugees can move to Israel—One person or planeload at a time. *eJewish Philanthropy*. March 23. Available online: https://ejewishphilanthropy.com/how-jewish-groups-determine-if-ukrainian-refugees-can-move-to-israel-one-person-or-planeload-at-a-time/ (accessed on 31 August 2022).
Schweitzer, Gábor. 2005. Anti-Jewish laws in judicature Practice of the Administrative Court. In *The Holocaust in Hungary a European Perspective*. Edited by Judit Molnár. Budapest: Balassi Kiadó, pp. 167–79.
Sharfstein, Daniel J. 2007. Crossing the Color Line: Racial Migration and the OneDrop Rule, 1600–1860. *Minnesota Law Review* 91: 592–656.
Simonsen, Sven Gunnar. 1999. Inheriting the Soviet Policy Toolbox: Russia's Dilemma over Ascriptive Nationality. *Europe-Asia Studies* 51: 1069–87. [CrossRef] [PubMed]
Skinner, David L. 2018. Forensic genetics and the prediction of race: What is the problem? *BioSocieties* 15: 329–49. [CrossRef]
Staff, Toi. 2013. Teen told she can't join Birthright without DNA test. *The Times of Israel*. July 28. Available online: https://www.timesofisrael.com/teen-told-she-cant-join-birthright-without-dna-test/ (accessed on 31 August 2022).
Sternberg, Nitzan. 2011. Do I Need to Pin a Target to My Back? The Definition of "Particular Social Group" in U.S. Asylum Law. *Fordham Urban Law Journal* 39: 246. [CrossRef]
Tajfel, Henri. 1981. *Human Groups and Social Categories: Studies in Social Psychology*. Cambridge: CUP Archive. Available online: http://eudo-citizenship.eu/news/citizenship-news/844-portugal-follows-spain-extending-citizenship-to-sephardic-jews (accessed on 31 June 2022).
Venice Commission. 2001. Report on the Preferential Treatment of National Minorities by their Kin-State. Presented at 48th Plenary Meeting, Venice, Italy, October 19–20. CDL-INF(2001)019.
Walajahi, Hina, David R. Wilson, and Sara Chandros Hull. 2019. Constructing identities: The implications of DTC ancestry testing for tribal communities. *Genetics in Medicine* 21: 1744–50. [CrossRef]
Williams, Robin. 2010. DNA Databases and the Forensic Imaginary. In *Genetic Suspects: Global Governance of Forensic DNA Profiling and Databasing*. Edited by Richard Hindmarsh and Barbara Prainsack. Cambridge: Cambridge University Press, pp. 131–52.
Yang, Tseming. 2006. Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and a Color- Blind Society. *Michigan Journal of Race and Law* 311: 67–417. [CrossRef]
Yoshino, Kenji. 2002. Covering. *Yale Law Journal* 111: 769–939. [CrossRef]

Yoshino, Kenji. 2006. *Covering: The Hidden Assault On Our Civil Rights*. New York: Random House.
Zagor, Matthew. 2014. Recognition and narrative identities: Is refugee law redeemable? In *Allegiance and Identity in a Globalised World*. Edited by Fiona Jenkins, Mark Nolan and Kim Rubenstein. Cambridge: Cambridge University Press, pp. 311–53.