

INTRA-GROUP PREFERENCING: PROVING SKIN COLOR AND IDENTITY PERFORMANCE DISCRIMINATION

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I.

INTRODUCTION

[Senator Reid] was wowed by Obama’s oratorical gifts and believed that the country was ready to embrace a black presidential candidate, especially one such as Obama—a “light-skinned” African American “with no Negro dialect, unless he wanted to have one,” as he later put it privately.¹

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1. JOHN HEILEMANN & MARK HALPERIN, *GAME CHANGE: OBAMA AND THE*

The above statement, which journalists Mark Halperin and John Heilemann attribute to Senator Harry Reid,² offers anecdotal proof that Americans make consequential distinctions among same-race individuals.³ Legal scholars have been studying this phenomenon, known as intra-group preferencing, for years.⁴ Indeed, in 2000, I contributed to the scholarly literature by publishing an article that directly examines one of the issues raised by Reid's observation. *Shades of Brown: The Law of Skin Color*⁵ analyzes the ways in which people, of all races, make distinctions within racial categories on the basis of skin color.

This issue arises often in the employment setting. For example, an employer may prefer one African-American employee over another because of the employees' respective skin tones (assume that one employee is milk chocolate brown and the other is dark chocolate brown).⁶

CLINTONS, MCCAIN AND PALIN, AND THE RACE OF A LIFETIME 36 (2010).

2. *Id.*

3. Senator Reid was not the only public official in recent years to allude to the significance of skin color in electoral politics. In January 2007, when commenting on Obama's candidacy for the presidency, then-Senator Joseph Biden stated, "I mean, you got the first mainstream African-American who is articulate and bright and clean and a nice-looking guy . . . I mean, that's a storybook, man." Jason Horowitz, *Biden Unbound: Lays Into Clinton, Obama, Edwards*, N.Y. OBSERVER, Feb. 4, 2007, available at <http://www.observer.com/2007/politics/biden-unbound-lays-clinton-obama-edwards#>. To be sure, "bright" may reference intelligence and "clean" may reference a certain freshness of appearance. One, however, cannot help but wonder if Biden's perceptions were also influenced by Obama's lighter skin tone. Indeed, it was arguably his intra-group preferencing (of African-American candidates like Barack Obama, as opposed perhaps to previous African-American candidates like Jesse Jackson and Al Sharpton) that rendered Biden's comments so inflammatory and controversial at the time. See Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895, 1913 (2007) (discussing the significance of racial performances to mainstream acceptability); Catherine Smith, *Queer As Black Folk?*, 2007 WIS. L. REV. 379, 398 (2007) (discussing the implicit racial criticism in supposed "compliments" like that rendered by Biden); Terry Smith, *Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace*, 67 AM. U. L. REV. 523, 525 (2008) (noting that Biden's comments exposed the ways in which previous Black candidates may have been deemed unacceptable).

4. See *infra* notes 8 and 9.

5. 49 DUKE L.J. 1487 (2000). See also Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000); Leonard M. Baynes, *If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow Than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. 131 (1997).

6. See, e.g., *Brack v. Shoney's, Inc.*, 249 F. Supp. 2d 938 (W.D. Tenn. 2003) (darker-toned African-American employee alleged that supervisor preferred lighter-toned African Americans). Importantly, color preferences are highly contextual and do not always operate in favor of lighter skin tones. See, e.g., *Walker v. Internal Revenue Serv.*, 713 F. Supp. 403 (N.D. Ga. 1989) (plaintiff alleged that her supervisor preferred darker-skinned African Americans). For more detailed discussion of this issue, see Jones, *Shades of Brown*, *supra* note 5, at 1515–21. For the Equal Employment Opportunity Commission's (EEOC)

My purpose in *Shades of Brown* was to demonstrate the sophisticated and nuanced nature of modern discrimination and to argue for legal recognition of skin color discrimination, which is also referred to as colorism.⁷ In recent years, the literature on colorism has grown, with scholars across disciplines tackling this phenomenon from both domestic and international perspectives.⁸

Over the past decade, scholars have also paid increasing attention to intra-group discrimination that occurs as a result of certain, usually nonconformist, identity performances.⁹ For example, an employer may

definition of color discrimination, *see Facts About Race/Color Discrimination*, EQUAL OPPORTUNITY COMM'N, <http://www.eeoc.gov/facts/fs-race.html> (last visited Dec. 10, 2010). The EEOC is one of the primary governmental agencies charged with enforcing federal antidiscrimination laws.

7. *See also* Trina Jones, *The Case for Legal Recognition of Colorism Claims*, in *SHADES OF DIFFERENCE: WHY SKIN COLOR MATTERS* 233 (Evelyn Nakano Glenn ed., 2009).

8. *See generally* PETER FROST, *FAIR WOMEN, DARK MEN: THE FORGOTTEN ROOT* (2005); *SHADES OF DIFFERENCE*, *supra* note 7 (collecting cross-disciplinary essays examining relevance of skin tone domestically and internationally); MARGARET L. HUNTER, *RACE, GENDER, AND THE POLITICS OF SKIN TONE* (2005) (providing a historical account and contemporary analysis of colorism in both African-American and Mexican communities); RONALD E. HALL ED., *RACISM IN THE 21ST CENTURY: AN EMPIRICAL ANALYSIS OF SKIN COLOR* (2008) (collecting works and arguing that, as racial categorization has become more difficult in the twenty-first century, skin color as a mechanism for distinguishing individuals has become increasingly important); JOANNE L. RONDILLA & PAUL SPICKARD, *IS LIGHTER BETTER? SKIN-TONE DISCRIMINATION AMONG ASIAN AMERICANS* (2007) (exploring colorism in Asian-American cultures); SKIN DEEP: *HOW RACE AND COMPLEXION MATTER IN THE "COLOR-BLIND" ERA* (Cedric Herring, Verna Keith & Hayward Derrick Horton eds., 2004) (collecting articles on both inter- and intra-group colorism); RODOLFO ESPINO & MICHAEL F. FRANZ, *Latino Phenotypic Discrimination Revisited: The Impact of Skin Color on Occupational Status*, 83 *SOC. SCI. Q.* 612 (2002) (finding that darker Mexicans and Cubans received lower occupational prestige scores than their lighter-toned counterparts); ARTHUR GOLDSMITH, DARRICK HAMILTON & WILLIAM DARITY, JR., *Shades of Discrimination: Skin Tone and Wages*, 96 *AMER. ECON. REV.* 242 (2006) (finding that "among Black males there was a substantial wage advantage (on the order of 7%) for having light skin"); CHRISTINA GOMEZ, *The Continual Significance of Color: An Exploratory Study of Latinos in the Northeast*, 22 *HISP. J. BEHAV. SCI.* 94 (2000) (studying the effects of colorism on Latinos in the Northeast and finding that darker skin negatively affects wages for men but such effects were not demonstrated for women); AARON GULLICKSON, *The Significance of Color Declines: A Re-Analysis of Skin Tone Differentials in Post-Civil Rights America*, 84 *SOC. FORCES* 157 (2005) (arguing that disparities resulting from skin tone differences are on the decline among persons born in the 1940s and later in education, employment, and occupational attainment; no such decline found for spousal attainment); JONI HERSCH, *Profiling the New Immigrant Worker: The Effects of Skin Color and Height*, 26 *J. LAB. ECON.* 345 (Apr. 2008) (finding that recent immigrant workers who are taller and with lighter skin tones earn higher wages than those who are not); CYNTHIA E. NANCE, *Colorable Claims: The Continuing Significance of Color Under Title VII Forty Years After Its Passage*, 26 *BERKELEY J. EMP. & LAB. L.* 435 (2005) (arguing that personal and economic effects of colorism remain a contemporary issue among all racial groups).

9. *See generally* KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL*

distinguish between women who wear makeup and women who do not,¹⁰ or a woman of color who wears dreadlocks or braids and one who perms (or chemically straightens) her hair.¹¹ Like the literature on colorism, identity performance scholarship underscores that modern discrimination is not only about the wholesale exclusion of particular groups (e.g., *all* Latinos or *all* women), but also about intra-group distinctions.¹²

Educating the public and policymakers about the complex and constantly changing nature of discrimination is no doubt critically important, and scholars in recent years have done an excellent job both explaining intra-group preferencing and making persuasive arguments for legal recognition of intra-group claims.¹³ One question, however, has received scant attention in the literature. It is this: assuming a legal basis for intra-group claims, can plaintiffs actually win these cases?¹⁴ In other

RIGHTS (2006); John O. Calmore, *Whiteness as Audition and Blackness as Performance: Status Protest from the Margin*, 18 WASH. U. J.L. & POL'Y 99 (2005); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004); Emily M.S. Houh, *Toward Praxis*, 39 U.C. DAVIS L. REV. 905 (2005); Angela Onwuachi-Willig, *supra* note 3. See also the excellent collection of essays in *Symposium Issue: Makeup, Identity Performance & Discrimination*, 14 DUKE J. GENDER L. & POL'Y (2007).

10. See, e.g., *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1111 (9th Cir. 2006) (upholding company policy requiring female employees to wear makeup). For additional analysis, see the collected essays in *Symposium Issue: Makeup, Identity Performance & Discrimination*, *supra* note 9.

11. See, e.g., *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 259–60, 269 (S.D.N.Y. 2002) (upholding company policy prohibiting “unconventional” hairstyles); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231, 233 (S.D.N.Y. 1981) (upholding American Airlines’ policy of prohibiting braided hairstyles in certain job classifications). For an insightful critique of *Rogers*, see Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991).

12. See Devon Carbado, Mitu Gulati & Gowri Ramachandran, *The Story of Jespersen v. Harrah's: Makeup and Women at Work*, in *EMPLOYMENT DISCRIMINATION STORIES* 117 (Joel Friedman ed., 2006) (asserting that “sex discrimination today is not usually going to take the form of total exclusion. Companies will employ a number of gendered technologies to screen in some women and screen out others.”).

13. See *supra* notes 5, 8–9.

14. Failure to analyze this question is due in part to the fact that scholars have been busy attempting to explain what intra-group preferencing is and how very serious a problem it is. In addition, the number of intra-group lawsuits has been relatively small, making it difficult to assess impediments to proof in a wide range of cases. This is changing as colorism filings with the EEOC have increased, from 374 in fiscal year 1992 to 1241 in fiscal year 2006. Press Release, U.S. Equal Employment Opportunity Comm’n, EEOC Takes New Approach to Fighting Racism and Colorism in the 21st Century Workplace (Feb. 28, 2007), available at <http://www.ee.oc.gov/press/2-28-07.html> [hereinafter EEOC, New Approach]. The majority of EEOC charges in 2002 were in the Northeast (44%), followed by the West (21%), South (15%), Midwest (12.5%), and Southwest (7.5%). Press

words, it is one thing to be able *to assert* a right to relief. It is another *to convince* a fact-finder to grant that relief.

To be sure, it is difficult as a general matter for plaintiffs to win discrimination cases.¹⁵ As several scholars have observed, this difficulty may stem in part from judicial bias against these claims.¹⁶ Contrary to available evidence, some judges appear to believe that discrimination claims are “generally unmeritorious, brought by whining plaintiffs who have been given too many, not too few, breaks along the way.”¹⁷ The

Release, U.S. Equal Employment Opportunity Comm'n, EEOC Settles Color Harassment Lawsuit with Applebee's Neighborhood Bar and Grill (Aug. 7, 2003), *available at* <http://www.eeoc.gov/press/8-07-03.html> [hereinafter EEOC Settles Color Harassment Lawsuit].

15. A voluminous literature exists that both documents plaintiffs' low success rates and explores possible reasons for these outcomes. *See, e.g.*, Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004) (finding that employment discrimination cases settle less often than other types of cases and that plaintiffs in employment discrimination cases are less likely to win than other plaintiffs); Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 54, 98–99 (2006) (detailing results of empirical study showing that plaintiffs in racial harassment cases are more likely than plaintiffs in sexual harassment cases to fare poorly); Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMPL. RTS. & EMPLOY. POL'Y J. 547, 566 (2003) (showing that employment discrimination plaintiffs fare poorly on appeal, with a 7% reversal rate when defendants win at trial compared to a 42% reversal rate when plaintiffs win at trial); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889 (2006) (showing that plaintiffs have most difficulty winning in race and national origin discrimination cases); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560–61 (2001) (showing that plaintiffs in employment cases win only 18.7% of the time in bench trials, compared with success rates of 43.5% and 41.8% for insurance and personal injury cases, respectively); Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Hon. Michael Baylson, *Estimates of Summary Judgment Activity in Fiscal Year 2006* (June 15, 2007) (showing that, in 2006, the national average for summary judgment grants resulting in termination of cases was 70% in civil rights cases and 73% in employment discrimination cases—the highest for federal civil cases). Compare Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.–C.L. L. REV. 99, 100 (1999) (finding that defendants prevail in more than 93% of reported ADA employment cases decided on the merits at the trial court level and in 84% of cases that are appealed and available on Westlaw).

16. Clermont, Eisenberg & Schwab, *supra* note 15, at 567 (arguing that “[t]he anti-plaintiff effect on appeal raises the specter that appellate courts have a double standard for employment discrimination cases, harshly scrutinizing employees' victories below while gazing benignly at employers' victories”); Parker, *supra* note 15, at 931–41 (discussing the extensive empirical research in support of the existence of a “judicial bias” against plaintiffs in antidiscrimination cases and examining its impact on claims of racial discrimination); Selmi, *supra* note 15, at 556 (noting “general misperception” among federal judges that “the volume of employment discrimination cases . . . reflect[s] an excessive amount of costly nuisance suits”).

17. Selmi, *supra* note 15, at 556. *See also* Parker, *supra* note 15, at 931–41 (explaining why race neutral factors are inadequate to explain judicial decision-making and noting anti-

hurdles are particularly high in race discrimination cases, where some judges analyze the claims from “an anti-affirmative action mindset, one that views both the persistence of discrimination and the merits of the underlying claims with deep skepticism.”¹⁸

Although the bar is already high for plaintiffs in discrimination cases, there are additional challenges that arise in the context of intra-group claims. Indeed, when one examines the principal colorism and identity performance cases, plaintiffs overwhelmingly tend to lose.¹⁹ This Article

plaintiff bias in race cases). Two neutral justifications for plaintiff losses are frequently offered: (1) all the good cases settle, leaving only the weakest for judicial decision; and (2) defendants have better lawyers given their resources. The data, however, do not support these explanations. As Wendy Parker points out, if the strongest cases settle, then “one could expect high settlement rates for cases in which the plaintiff won on a summary judgment motion, which signals some merit to the plaintiff’s claim. But the empirical studies . . . indicate that cases in which plaintiffs won a summary judgment motion had a lower settlement rate. . . .” *Id.* at 894. In addition, given the rarity of plaintiff victories at trial, it is doubtful that defendants have a strong incentive to settle. *Id.* at 922. As for the second explanation, while plaintiffs’ lawyers may be less highly resourced than defendants’, this theory is not sufficiently satisfactory. As Pat Chew and Robert Kelley point out:

[A]n alternative theory could predict that plaintiffs and their lawyers, given their limited resources, are particularly careful to determine the quality of their cases and only proceed with what they believe are high quality cases. . . . It is unlikely . . . that plaintiffs and their lawyers would consistently be four times more likely to misjudge the quality of their cases over a ten year period. A more plausible explanation is that some systematic factor is at play, such as judges as a group being biased in favor of defendants (or biased against plaintiffs). When faced with the defendant’s motion for summary judgment, for instance, the judge must decide which party’s position is the most convincing. As products of their socialization, judges may be consciously and deliberately, or as likely, unconsciously and unintentionally biased.

Chew & Kelley, *supra* note 15, at 99.

18. Selmi, *supra* note 15, at 562. Selmi further notes that “courts appear hesitant to draw inferences of racial discrimination based on circumstantial evidence, even though courts have long recognized that race discrimination is generally more subtle in form and dependent upon circumstantial evidence.” *Id.* at 563. See also Parker, *supra* note 15, at 931–41 (noting that “although all discrimination cases are hard to win, that difficulty is especially pronounced for race and national origin claims”).

19. Other than four claims handled by the EEOC and one case litigated under the Fair Housing Act (FHA), I have yet to find cases where a plaintiff who brought an intra-group discrimination claim won after a trial on the merits. For a description of colorism cases pursued by the EEOC, see *Significant EEOC Race/Color Cases*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/initiatives/erace/caselist.cfm> (last visited Nov. 2, 2010). For the FHA case, see *Rodriguez v. Gattuso*, 795 F. Supp. 860, 866 (N.D. Ill. 1992) (finding for plaintiffs in case involving housing discrimination against darker-toned Latinos in favor of lighter-toned Latinos).

For colorism cases resolved in favor of the defendant, usually on a motion to dismiss or by summary judgment, see *Lindsay v. Pizza Hut of Am.*, 57 F. App’x. 648 (6th Cir. 2003); *Brack v. Shoney’s, Inc.*, 249 F. Supp. 2d 938 (W.D. Tenn. 2003); *Sidique v. Univ. of Pittsburg*, No. 02-365, 2003 U.S. Dist. LEXIS 20473 (W.D. Pa. Oct. 3, 2003); *Karim v. Staples, Inc.*, 210 F. Supp. 2d 737 (D. Md. 2002); *Hill v. Textron Auto. Interiors, Inc.*, 160 F.

identifies and examines four challenges these plaintiffs face.²⁰ Importantly, the goal here is not to make a case for legal recognition of intra-group claims as that work has been undertaken elsewhere.²¹ Instead, by pointing to some of the more common, and more serious, difficulties plaintiffs encounter when litigating intra-group cases, this Article aims to make such claims not only theoretically plausible but also winnable.

The analysis proceeds as follows. Part II provides a more detailed analysis of colorism and identity performance claims, summarizing their similarities and differences and their relationship to other intra-group claims. Part III examines the broader legal landscape within which these claims are asserted and summarizes the judicial response to them. Part IV explores obstacles to relief encountered by plaintiffs in intra-group discrimination cases. Importantly, these obstacles may help to explain why some lawyers are reluctant to accept colorism and identity performance cases and why, when they do, lawyers frequently attempt to fit these claims

Supp. 2d 179 (D.N.H. 2001); *Rios v. Aramark Corp.*, 139 F. Supp. 2d 210 (D.P.R. 2001); *Ofudu v. Barr Lab., Inc.*, 98 F. Supp. 2d 510 (S.D.N.Y. 2000); *Hines v. F.J.C. Sec. Co.*, No. 96 Civ. 2632 (JFK), 1998 U.S. Dist. LEXIS 1537 (S.D.N.Y. Feb. 11, 1998); *Santiago v. Stryker Corp.*, 10 F. Supp. 2d 93 (D.P.R. 1998); *Franceschi v. Hyatt Corp.*, 782 F. Supp. 712 (D.P.R. 1992); *Walker v. Internal Revenue Serv.*, 742 F. Supp. 670 (N.D. Ga. 1990) (finding for defendant on the merits after bench trial); *Felix v. Marquez*, 1981 WL 275 (D.D.C. Mar. 26, 1981); *Ali v. Nat'l Bank of Pak.*, 508 F. Supp. 611 (S.D.N.Y. 1981). See also *Bryant v. Bell Atlantic Maryland, Inc.*, 288 F.3d 124, 132–33 (4th Cir. Apr. 29, 2002) (acknowledging that color discrimination is a claim under Title VII, but barring plaintiff's claim for color discrimination because plaintiff did not raise it in EEOC charge); *Moore v. Dolgencorp, Inc.*, No. 1:05-CV-107, 2006 U.S. Dist. LEXIS 66973, at *8–*12 (W.D. Mich. Sept. 19, 2006) (same); *Sere v. Board of Tr.*, 628 F. Supp. 1543, 1546 (N.D. Ill. 1986) (holding color claims not cognizable under Section 1981); *Waller v. Int'l Harvester Co.*, 578 F. Supp. 309, 314 (N.D. Ill. 1984) (same).

In several cases, the plaintiffs survived motions to dismiss or motions for summary judgment. It is, however, unclear whether they eventually won their cases. See, e.g., *Salas v. Wisconsin Dep't of Corr.*, No. 05-C-399-C, 2006 U.S. Dist. LEXIS 21140 (W.D. Wis. Apr. 17, 2006) (surviving motion to dismiss); *Arrocha v. City Univ. of N.Y.*, No. CV-02-1868 (SJM)(LB), 2004 U.S. Dist. LEXIS 4486 (E.D.N.Y. Feb. 9, 2004) (same); *Singletary v. District of Columbia*, 351 F.3d 519 (D.C. Cir. 2003) (same); *Munshi v. Alliant Techsystems, Inc.*, 2001 U.S. Dist. LEXIS 9639 (June 26, 2001) (same); *Roy v. Austin Co.*, 1996 WL 599435 (N.D. Ill. Oct. 16, 1996) (same); *Abdulrahim v. Glick Co.*, 612 F. Supp. 256 (N.D. Ind. 1985) (dismissing claims under Title VII, but allowing claims under Section 1981 to proceed). Importantly, studies suggest that prevailing on a motion to dismiss or a motion for summary judgment does not increase the rate of settlement or plaintiffs' ultimate success rates when appearing before a judge. *Parker*, *supra* note 15, at 920.

Finally, it is worth noting that there are numerous cases where it is difficult to discern from the written opinion whether the allegations were of race or color discrimination. I have chosen to omit these cases for purposes of this analysis.

20. For more specific analysis of jurisprudential problems faced by Latino/as in colorism cases, see Tanya Kateri Hernández, *Latinos at Work: When Color Discrimination Involves More Than Color*, in *SHADES OF DIFFERENCE*, *supra* note 7, at 236–44.

21. See, e.g., *Banks*, *supra* note 5; *Jones*, *Shades of Brown*, *supra* note 5.

into more traditional and more familiar analytical frameworks (e.g., by presenting them as race or national origin claims).²² Part V offers an alternative approach to intra-group claims that may ameliorate some of these difficulties. In short, I argue that instead of focusing inordinately on whether the plaintiff and defendant are of the same class and on whether the plaintiff was treated differently from someone in her class, in assessing liability courts should try to uncover the employer's conception of the ideal employee and the extent to which the plaintiff deviates from this ideal.²³

II.

A CLOSER LOOK AT SKIN COLOR AND IDENTITY PERFORMANCE DISCRIMINATION

In 1986, Tracy Walker, a light-skinned African-American typist for the IRS alleged that her supervisor, a dark-skinned African American, fired Walker because of Walker's lighter skin tone.²⁴ In March 2001, Dwight Burch, an African-American server at an Applebee's restaurant, brought suit against his employer, alleging that he was verbally harassed, and ultimately fired, because of his darker skin tone.²⁵ Burch claimed that,

22. There may be a compelling strategic reason for lawyers and antidiscrimination advocates to characterize colorism claims as simply race claims. Before proceeding in court with a race discrimination claim under Title VII, aggrieved persons must file a charge with the EEOC. Importantly, the scope of any subsequent legal claim is limited by the factual information included on the EEOC charge form. Because lay persons often do not distinguish between color and race, they tend to describe color claims as race claims on their EEOC charge forms. This makes prosecuting the suit as a colorism claim difficult. Indeed, some courts have dismissed colorism claims on this ground. *See, e.g.*, Bryant, 288 F.3d at 132-33 (dismissing color claim because of failure to include theory in EEOC charge); Moore, 2006 U.S. Dist. LEXIS 66973, at *8-*12 (same); Sullivan, 1997 U.S. Dist. LEXIS 8402, at *5-*7 (same). Not all courts have taken this approach. For example, in *Ofudu v. Barr Labs, Inc.*, the court declined to dismiss the plaintiff's claims after the plaintiff failed to include color in the EEOC charge, observing "[f]rankly, to the uninitiated (which most charging parties are), the difference between race discrimination and color discrimination is imperceptible." 98 F. Supp 2d at 515. The court nonetheless granted defendant's motion for summary judgment due to the plaintiff's absence of evidentiary proof. *Id.* at 517. *See also Arrocha*, 2004 U.S. Dist. LEXIS 4486, at *18 n.2 ("Since a claim for discrimination based on color is 'reasonably related' to plaintiff's race discrimination claim, his failure to check the 'color' box in his EEOC complaint does not bar such a claim for failure to exhaust administrative remedies.").

23. Before proceeding, two caveats are in order. First, the analysis herein focuses primarily on employment discrimination cases because that is the area in which one sees most colorism and identity performances cases. This focus, however, should not obscure the fact that identity performance discrimination and colorism occur in other contexts. Second, I have primarily focused on intra-racial screening for ease of analysis. Again, it bears remembering that intra-group preferencing occurs frequently within other classifications (e.g., gender, national origin, etc.).

24. *Walker v. Internal Revenue Serv.*, 713 F. Supp. 403, 404 (N.D. Ga. 1989).

25. *See EEOC Settles Color Harassment Lawsuit*, *supra* note 14.

during his three months of employment at Applebee's, the manager repeatedly referred to him as a "tar baby," "black monkey," "jig-a-boo," and "blackie," and advised Burch to "bleach his skin."²⁶

Both the Walker and Burch cases were brought as color, not race, claims.²⁷ The problem in each case was not necessarily that the plaintiffs were African American; Walker and Burch's employers did not appear to be generally opposed to employing African Americans.²⁸ The problem was that Walker and Burch were the wrong shades of brown (i.e., too light and too dark, respectively). Thus, instead of excluding all African Americans, the employers were engaging in intra-group screening or preferencing on the basis of skin color. Walker and Burch presumably would not have been subject to discriminatory treatment if their skin tones had been different.

I have argued elsewhere that it is important to isolate the distinguishing variable in intra-group cases in order to expose this more nuanced form of discrimination.²⁹ For example, if one were to focus only on broad categories like race, then colorism would be obscured due to an assumption that a Black³⁰ employer will not discriminate against Black employees or that any employer, regardless of race, who hires people of color will not distinguish among them. In addition to isolating the distinguishing variable, it is also important to understand why color may lead to differential treatment. As I have demonstrated elsewhere, skin color implicates a number of concerns. At times, it may serve as an indicator of socio-economic class.³¹ The meaning attributed to skin color

26. Dana Hedgpeth, *Settlement Reached in Color-Bias Suit; Black Worker at Applebee's Said Lighter-Skinned Black Supervisor Harassed Him*, WASH. POST, Aug. 8, 2003, at E4; Marjorie Valbrun, *EEOC Sees Rise in Intra-race Complaints of Color Bias*, WALL ST. J., Aug. 7, 2003, at B1.

27. *Walker*, 713 F. Supp. at 403, 405, 407; Hedgpeth, *supra* note 26.

28. Walker's discrimination came, after all, at the hands of another African American. To be sure, some employers may prefer to have no African Americans in the workplace. However, because all-White workplaces are normatively suspicious, these employers may concede to employ African Americans whom they find more palatable or acceptable. Thus, intra-group screening and preferencing should not be read to signal an absence of racism.

29. Jones, *Shades of Brown*, *supra* note 5, at 1541-44.

30. I use the words "Black" and "African American" deliberately in this article. I use Black in a global sense to reference Black people regardless of their national origin. Thus, the word Black would encompass Black citizens of the United States, Ghana, Mexico, Cuba, etc. I use African American to reference Black persons who are citizens of the United States and whose ethnic and cultural identity is historically based in this country. Thus, African American is a subset of the larger category Black. I capitalize "Black" and "White" when these words are used to reference races because these references often function as proper names for their respective groups.

31. *Id.* at 1528 (noting that historically, lighter-skinned Blacks have enjoyed a higher socio-economic status than darker-skinned blacks). See also Espino & Franz, *supra* note 8, at 612 (finding that darker Mexicans and Cubans received lower occupational prestige

may draw upon the symbolism associated with the colors white and black and concepts of good and evil related thereto.³² Skin color may be used to indicate race,³³ and in intra-group comparisons it may produce a more subtle form of racism.³⁴ Lawyers litigating colorism claims must be aware

scores than their lighter-skinned counterparts); Goldsmith, Hamilton & Darity, *supra* note 8, at 245 (finding a 7% wage advantage for black males with light skin).

32. Jones, *Shades of Brown*, *supra* note 5, at 1528 (describing ways in which “whiteness” or ‘fairness’ is associated with purity and innocence, and ‘blackness’ is associated with dirt, evil, and death”). Frantz Fanon captures this symbolism effectively in *BLACK SKIN, WHITE MASKS*, when he notes:

In Europe, the black man is the symbol of Evil. One must move softly, I know, but it is not easy. The torturer is the black man, Satan is black, one talks of shadows, when one is dirty one is black—whether one is thinking of physical dirtiness or of moral dirtiness. It would be astonishing, if the trouble were taken to bring them all together, to see the vast number of expressions that make the black man the equivalent of sin. . . . Blackness, darkness, shadow, shades, night, the labyrinths of the earth, abysmal depth, blacken someone’s reputation; and, on the other side, the bright look of innocence, the white dove of peace, magical, heavenly light. A magnificent blond child—how much peace there is in that phrase, how much joy, and above all how much hope! There is no comparison with a magnificent black child: literally, such a thing is unwonted.

FRANTZ FANON, *BLACK SKIN, WHITE MASKS: THE EXPERIENCES OF A BLACK MAN IN A WHITE WORLD* 188–89 (1967). For additional insight on the symbolism of the colors black and white, and how this symbolism becomes culturally entrenched see Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 34–39 (1990); Harold R. Isaacs, *Blackness and Whiteness*, 21 ENCOUNTER 12 (1963).

33. Importantly, in the United States, colorism was promoted by the racist ideology created to justify slavery and the imperial conquest of indigenous peoples. But there is reason to believe that color has significance outside of this racialized context. As Professor Angela Harris notes:

Although many United States writers treat Atlantic chattel slavery as the original point of colorism, colorism is in fact global, and it is not clear that it is always and everywhere purely an ideological or material product of the African slave trade. There is ample evidence, for example, that light skins are also preferred to dark ones in East and South Asia, regions where African slavery had little or no presence and where the valuation of light skin predates the slave trade. And in some regions, “whiteness” as an aesthetic ideal is not represented by a European body, but a Japanese or Chinese one.

Angela P. Harris, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 52, 55–56 (2008).

34. By this I mean that the racism evident in intra-group cases is to some extent different from the racially exclusionary practices of the past. While colorism is often informed by the same racist ideologies and stereotypes that fueled past discriminatory acts, exposing racism in intra-group claims is more complex because not all Blacks are harmed by it. In addition, the traditional methods courts have used to smoke out racism do not necessarily work in colorism cases. Comparing the treatment of Blacks and Whites as general groups (as has been the baseline method in race discrimination cases) will not necessarily pick up discrimination on the basis of color. For more discussion of this point, see Jones, *Shades of Brown*, *supra* note 5, at 1529–30 (explaining that colorism may draw upon racism and nineteenth-century ideologies of race); Harris, *supra* note 33, at 54–58

of the long and complex history surrounding skin color in order to educate sometimes uninformed decision makers about the various meanings ascribed to it. That is to say, lawyers must be prepared to explain that color is a loaded marker, signifying social and economic desirability, and that discrimination based on skin color is not simply a reflection of aesthetic preferences the way in which distinctions based on eye color or hair color may be.

Like colorism, identity performance claims also frequently result from intra-group preferencing. A typical example might involve two African-American female associates at a law firm: Lakesha Johnson and Shymeka Smith. Lakesha Johnson, who prefers to be called L.K. Johnson, has permed hair, wears understated jewelry and dresses conservatively à la Jackie O. She socializes with her coworkers, avoids committee work involving racial or gender issues, and never interacts with the firm's primarily African-American and Latino/a secretarial and cleaning staff. L.K. lives in a predominantly White suburban neighborhood and is very careful to always use standard, crisply enunciated, English. In contrast, Shymeka Smith has long, flowing dreadlocks and wears African-inspired attire and bold, colorful jewelry. Shymeka tends not to socialize with her coworkers, has been vocal and actively involved in the firm's diversity committee, lives in the inner city, is openly friendly with the office secretaries and cleaning staff, and laughs loudly.³⁵

L.K. is promoted to partner and Shymeka is denied promotion. Assuming roughly the same talent level (i.e., they each have the same technical skills required to do the job), one could argue that Shymeka was passed over because she chose to embrace her racial identity rather than to

(summarizing differing views about relationship between colorism and racism).

35. This hypothetical was inspired by the work of Devon W. Carbado and Mitu Gulati. See Carbado & Gulati, *The Fifth Black Woman*, *supra* note 9. Real world examples, however, are plentiful. For example, one need only consider the differing outcomes for women who choose to wear makeup and those who refuse to be made up. See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1106, 1113 (9th Cir. 2006) (rejecting claim of bartender who was discharged for refusing to wear makeup). See also *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231, 234 (S.D.N.Y. 1981) (rejecting claim of woman who wanted to wear a braided hairstyle). One might also consider the difference between Michael Jordan, the clean-shaven, pristine former NBA megastar known for playing by the rules and never challenging "the system," and Allen Iverson, the rebel who embraced hip-hop culture and who has been an outspoken critic of racism in the NBA. On a different playing field, one could compare the public reception of Marvin Harrison, the quiet and steady former receiver for the Indianapolis Colts, with the reception given the more brash and outspoken Terrell Owens of the Cincinnati Bengals. Or, one might compare the public's reaction to Barack Obama with the reaction to Al Sharpton or Jesse Jackson. This is not to suggest that Barack Obama, Michael Jordan, or Marvin Harrison have circumvented the issue of racism. Rather, I am suggesting that racial performances matter in the way in which these individuals are perceived. See *supra* notes 3 and 9 and accompanying text.

downplay or distance herself from that identity. That is, Shymeka was harmed because her identity performance did not conform to mainstream norms. According to Professor Kenji Yoshino, Shymeka failed to “cover;” that is, she failed to “mute[] the difference between [her]self and the mainstream.”³⁶ Instead of reflecting racial differences, what Shymeka should have done was to minimize those differences by adopting a racial performance closer to L.K.’s.

The problem in identity performance cases, as in colorism cases, is not racial discrimination the way in which it has historically been understood (i.e., as the wholesale exclusion or denigration of all persons within a particular racial category). Rather, the problem is intra-group screening: a more subtle, sophisticated, and at times subconsciously motivated form of discrimination which is revealed by unveiling the ways in which different racial performances challenge existing norms and consequently provoke different responses.

Importantly, there has been forward progress with some intra-group claims in recent decades. Due in part to the influential work of scholars like Angela Harris³⁷ and Kimberlé Crenshaw,³⁸ courts are increasingly willing to recognize what are known as intersectionality claims.³⁹ Intersectionality theory posits that individuals may be subject to adverse treatment as a result of the convergence, or intersection, of two or more protected classifications. Thus, an Asian woman may allege that she was discriminated against not because she is a woman, or Asian, but because

36. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 500 (1998). Yoshino distinguishes between passing and covering. The former involves hiding one’s identity or keeping a trait invisible. The latter involves downplaying that identity or keeping a trait unobtrusive. *Id.* at 500–01. He notes: “Passing is at issue, for example, when gays are permitted to serve in the military as long as they do not disclose their orientation. . . . Covering is at issue . . . when an employer retains ‘out’ gays, but not a lesbian who ‘flaunts’ her homosexuality by entering into a public commitment ceremony with her same-sex lover.” *Id.* at 500.

37. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

38. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

39. See *Lam v. University of Hawaii*, 40 F.3d 1551, 1561–62 (9th Cir. 1994) (recognizing intersection between race and gender in a Title VII discrimination claim); *Jefferies v. Harris County Cmty. Action Ass’n*, 615 F.2d 1025, 1032–34 (5th Cir. 1980) (same); *Graham v. Bendix Corp.*, 585 F. Supp. 1036, 1047 (N.D. Ind. 1984) (same). *But see Degraffenreid v. Gen. Motors Assembly Div.*, 413 F. Supp. 142, 145 (E.D. Mo. 1976) (early intersectionality case in which court declined to create a new class of “protected minorities [black women], governed only by mathematical principles of permutation and combination”).

she is an Asian woman.⁴⁰ This is a form of intra-group preferencing because employers may be willing to hire Asians or women, but not a subgroup within either of those two categories—namely Asian women.⁴¹ For example, in *Lam v. University of Hawaii*, an Asian woman sued the University of Hawaii alleging that it discriminated against her when it rejected, without serious consideration, her application for the directorship of a program at the University's law school.⁴² The district court granted summary judgment to the defendant on the grounds that the University had favorably considered the application of an Asian man (supposedly negating racial bias) and had ultimately offered the position to a White woman (supposedly negating gender bias).⁴³ The Ninth Circuit reversed, noting:

As other courts have recognized, where two bases for discrimination exist, they cannot be neatly reduced to distinct components. Rather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences. . . . Like other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women. In consequence, they may be targeted for discrimination "even in the absence of

40. See *Lam*, 40 F.3d at 1554. See also Virginia W. Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 B.C. L. REV. 771 (1996).

41. It is important to keep in mind that Asian women are subject to stereotypes that may not apply to Asians in general. For example, Asian Americans are often stereotyped as "hardworking, industrious, thrifty, and family oriented." See Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 296 (1997) (noting that positive attributes associated with "the model minority" can easily turn into elements of the "yellow peril" when "hardworking and industrious becomes unfairly competitive; family-oriented becomes clannish; mysterious becomes dangerously inscrutable"). Asian women, however, are additionally stereotyped as, among other things: passive, repressed, naive lotus blossoms; sexually exotic or seductively mysterious geisha; or devious and wicked dragon ladies. See Wei, *supra* note 40, at 801-04 (examining stereotypes of Asian women); Peter Kwan, *Invention, Inversion and Intervention: The Oriental Woman in the World of Suzie Wong, M. Butterfly, and the Adventures of Priscilla, Queen of the Desert*, 5 ASIAN L.J. 99, 100 (1998) (examining construction of the "Oriental Woman" in films, noting that she is "meek, shy, passive, childlike, innocent, and naive" and that this "fictive creation" is "an invention of the western imagination deployed to justify sexual exploitation, dominance and not infrequently, violence to Asian women"); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 182-95 (1997) (analyzing stereotypes of Asian Pacific American women).

42. 40 F.3d at 1554.

43. *Id.* at 1561.

discrimination against [Asian] men or white women.” Accordingly . . . when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that combination of factors, not just whether it discriminates against people of the same race or of the same sex.⁴⁴

Though logically similar, intersectionality claims differ from colorism and identity performance cases. With intersectionality claims, the basis for distinction is usually a defined and established marker like race, gender, or national origin.⁴⁵ As I demonstrate in Part IV(C), difficulties arise when the markers are less clear and less well established as is often the case in colorism and identity performance cases. In addition, in intersectionality cases, the markers are usually based upon a fundamental right or an immutable characteristic.⁴⁶ Again, as I demonstrate in Part IV(C), when these attributes are missing, problems of proof arise.

III.

JUDICIAL RESPONSES TO COLORISM AND IDENTITY PERFORMANCE CLAIMS

Although there was initial uncertainty over whether courts would recognize colorism as a legal claim,⁴⁷ that uncertainty appears to have disappeared. Over the past twenty-three years, no court has held that colorism claims lack a legal basis,⁴⁸ and the number of claims has skyrocketed.⁴⁹ Colorism claims, however, have been incredibly difficult to

44. *Id.* at 1561–62 (citations omitted).

45. Courts have also recognized discrimination against a subgroup within a class in what are known as sex-plus cases. Generally, these cases involve discrimination against women on the basis of gender and an additional characteristic related to gender. *See, e.g.*, *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (sex and reproductive capacity); *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734 (7th Cir. 1994) (gender and pregnancy); *Phillips v. Martin Marietta Corp.*, 411 F.2d 1 (5th Cir. 1969) (sex and having pre-school age children); *Chambers v. Omaha Girls Club*, 629 F. Supp. 925, 944 (D. Neb. 1986) (sex and pregnancy).

46. The former is absent in colorism cases. Both variables are generally lacking in identity performance cases.

47. In two early cases, courts refused to recognize color discrimination claims as cognizable under Section 1981 of the Civil Rights Act of 1866. *See Sere v. Bd. of Trs. of the Univ. of Ill.*, 628 F. Supp. 1543 (N.D. Ill. 1986); *Waller v. Int’l Harvester Co.*, 578 F. Supp. 309, 309–10 (N.D. Ill. 1984). Since that time, most courts have recognized colorism as a legitimate cause of action. *See supra* note 19.

48. *See cases cited supra* note 19.

49. Since the mid-1990s, color discrimination filings with the EEOC have increased significantly, from 374 in fiscal year 1992 to 1,241 in fiscal year 2006. EEOC, *New Approach*, *supra* note 14. Notwithstanding this sharp increase in EEOC filings, colorism complaints still constitute only about 3% of the 85,000 charges received annually by the EEOC. Few of these complaints have resulted in court cases. From 1994 to 2002, only

prove.⁵⁰ Indeed, plaintiffs have prevailed in only a handful of cases.⁵¹ This low success rate could merely reflect that discrimination cases are hard to win in general.⁵² But, even with a small sample size, plaintiff success rates in colorism cases appear to be lower than plaintiff success rates in other discrimination cases.⁵³ The important question is why is there such a sharp disconnect between theoretical acceptance of colorism as a legal claim and plaintiff success rates?

Identity performance claims have also received a mixed reception in the courts. The high point for plaintiffs came in 1989 when the U.S. Supreme Court decided *Price Waterhouse v. Hopkins*.⁵⁴ In that case, Ann Hopkins sued Price Waterhouse alleging that the accounting firm's failure to promote her to partner resulted from sex discrimination. Hopkins had an excellent record regarding client relations and was praised for her technical acumen, her strong intellect, and her rain-making abilities.⁵⁵ Her interpersonal skills, however, were less desirable. Hopkins was criticized for having an aggressively demanding personality and abrasive interactions with office staff and was told that, in order to improve her chances for partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry."⁵⁶ She was also advised to consider enrolling in charm school.⁵⁷ In finding that Hopkins had stated a claim of sex discrimination, the U.S. Supreme Court observed:

[A]n employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave

about twenty complaints led to lawsuits. The remaining complaints were settled out of court. See *EEOC Settles Color Harassment Lawsuit*, *supra* note 14. To be sure, it is difficult to get a firm grip on the number of colorism claims, as laypersons often treat color and race synonymously, alleging both race and color discrimination. Historically, these cases were automatically treated as race cases.

50. The landmark colorism case of *Walker v. Internal Revenue Service* effectively demonstrates this point. While the case is widely cited to support the legal validity of colorism claims, the plaintiff ultimately lost. See *Walker v. Internal Revenue Serv.*, 713 F. Supp. 403, 404 (N.D. Ga. 1989) (allowing colorism claim by light-skinned Black person against dark-skinned Black person); *Walker v. Internal Revenue Serv.*, 742 F. Supp. 670, 676 (N.D. Ga. 1990) (finding against plaintiff on the merits).

51. See *supra* note 19.

52. See *supra* notes 15–19 and accompanying text.

53. See *supra* note 19.

54. 490 U.S. 228 (1989).

55. *Id.* at 233–34.

56. *Id.* at 234–35.

57. *Id.* at 235.

aggressively and out of a job if they do not. Title VII lifts women out of this bind.⁵⁸

Price Waterhouse is significant to the present analysis for three reasons. First, the Court extended Title VII of the Civil Rights Act of 1964⁵⁹ to cover gender stereotyping,⁶⁰ which can of course lead to intra-group screening as employers may, depending upon context, prefer women who perform their identity consistently with traditional gender roles (e.g., by being accommodating, charming, and wearing makeup).⁶¹ Second, the Court placed reduced reliance upon immutability, a quality the Court has used often to justify protection for certain classifications, including gender. Although the attributes for which Ann Hopkins was penalized were arguably mutable, the Court nonetheless recognized sex stereotyping as a form of sex discrimination.⁶² While immutability is not an issue in colorism cases (as color is largely immutable), it is critically important in identity performance cases where the differences leading to adverse treatment are often seen as within the individual's control and are frequently dismissed as matters of personal choice. Finally, *Price Waterhouse* is significant because the Court did not mandate use of a cross-group comparative analytical framework. Rather than ask if Ann Hopkins was treated the same as a man with similar attributes, the Court instead asked whether Price Waterhouse required Ann Hopkins to behave or, in other words, to perform her identity, the way in which the accounting firm thought women "should" act.⁶³ As Professors Devon Carbado, Mitu Gulati, and Gowri Ramachandran observe, instead of making cross-gender comparisons (by forcing Hopkins to show that men were treated differently),⁶⁴ the Court

58. *Id.* at 250–51.

59. 42 U.S.C. § 2000e (2006).

60. Gender stereotyping falls into two categories: normative and descriptive. Normative stereotyping occurs when an employer has an idea of how women *ought* to act, or what women *should* be like, and screens women to ascertain whether they fit this understanding. *See* Carbado, Gulati & Ramachandran, *supra* note 12, at 140–44. Thus, if an employer thinks women should be feminine, the employer will screen out women whose gender performances are insufficiently feminine and screen in women who perform according to the stereotype (e.g., women who speak softly and giggle, and who wear dresses, high heels, and make up). *Id.* Descriptive stereotyping occurs when an employer has a belief as to what women *are* like, as opposed to what they should be like. *Id.* For example, an employer may conclude that women are more caring, less aggressive, and more family-oriented than men, and may screen employees accordingly.

61. 490 U.S. at 250–51.

62. 490 U.S. at 250.

63. 490 U.S. at 256. Here, the accounting firm was engaging in normative as opposed to descriptive gender stereotyping. *See supra* note 60.

64. Carbado, Gulati & Ramachandran, *supra* note 12, at 105. To be sure, men possessing similar characteristics to Ann Hopkins may well have received different treatment since men are rarely penalized for being ambitious, assertive and aggressive. Similarly, Price Waterhouse very well may have rejected a man who exhibited the

asked whether Price Waterhouse was imposing a stereotypically gendered identity upon Hopkins.⁶⁵ As I explain in Part V, this move away from strict adherence to a cross-group comparative framework opens the door to a more fluid understanding of discrimination and a more expansive examination of what happens to individuals within groups.

In 1998, in *Oncale v. Sundowner Offshore Services*,⁶⁶ the Supreme Court again recognized that employers differentiate among employees of the same sex on the basis of gender nonconformity. *Oncale* involved a single-sex workplace—an oil platform in the Gulf of Mexico—where the plaintiff was subject to egregious acts of abuse apparently because he did not fit a gendered, macho ideal of masculinity.⁶⁷ In other words, he was not perceived as being “tough enough.” In holding that Title VII covers same-sex harassment claims, the Supreme Court recognized that individuals can and do discriminate against members of their own sex and that they draw intra-group distinctions.⁶⁸

Price Waterhouse and *Oncale* set the stage for a more probing and realistic examination of intra-group preferencing. These cases, however, have been limited in application. Although some lower courts have granted relief when plaintiffs allege harm due to nonconformity with traditional gender roles, courts have only been willing to go so far. In the

characteristics the firm urged Ann Hopkins to acquire. That is to say, it is doubtful Price Waterhouse would have desired male employees who walked femininely, talked femininely, and wore makeup. It is thus likely that the firm did treat men and women differently. Nonetheless, while “but for” comparisons are helpful in highlighting the fact of differential treatment, they beg the question of *why* men and women are treated differently. Answering this question requires examining whether Price Waterhouse was demanding, as a prerequisite to success, that women fit into a preconceived gender role (i.e., were men and women being required to perform their identities in accordance with a certain conception of femininity and masculinity).

65. 490 U.S. at 250 (noting that “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender”).

66. 523 U.S. 75 (1998).

67. The court declined to describe the facts in detail for the sake of “brevity and dignity.” *Id.* at 77. For a description of the horrors *Oncale* allegedly experienced, see Brief for Petitioner at 5, *Oncale v. Sundowner Offshore Serv., Inc.*, No. 96-568, 1997 WL 458826, at *3-*7 (1997); Catharine A. MacKinnon, *Oncale v. Sundowner Offshore Services, Inc., 96-568, Amici Curiae Brief in Support of Petitioner*, 8 UCLA WOMEN’S L.J. 9, 13–14 (1997).

68. 523 U.S. at 79 (“If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.”). See also *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 609–10 (1987) (holding that an Iraqi professor who is technically Caucasian qualifies for protection against race-based discrimination perpetrated by other Caucasian people if that discrimination is based on membership in “an ethnically and physiognomically distinctive subgrouping of *homo sapiens*”).

Price Waterhouse line of cases, plaintiffs win when they have direct evidence⁶⁹ of gender stereotyping and when the very quality for which they are penalized is essential to successful job performance (thereby placing the plaintiff in the catch 22 referenced earlier).⁷⁰ However, plaintiffs encounter difficulty when direct evidence is absent or when the quality at issue is viewed as tangential to job performance.⁷¹ In addition, plaintiffs in gender stereotyping cases encounter difficulty when their gender performances are seen as inconsistent with traditional values and norms (e.g., a woman who refuses to wear makeup or a man who desires another man).⁷² When plaintiffs are seen as pushing the envelope too far, backlash results and their claims are dismissed as trivial or as matters of choice.

Perhaps most damaging for identity performance claims is the fact that *Price Waterhouse* did nothing to upset established precedent in what are referred to as dress and grooming cases. Since the Fifth Circuit's 1975 decision in *Willingham v. Macon Telegraph*,⁷³ courts have consistently allowed employers to require different grooming requirements for men and women.⁷⁴ The *Willingham* case involved an employer rule that

69. Direct evidence establishes discrimination without reliance upon inference, presumption, or other evidence. See *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999) (“[D]irect evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor” in the decision at issue.). In employment discrimination cases, when a plaintiff provides direct evidence of discriminatory animus, the burden of persuasion shifts to the defendant to establish by a preponderance of the evidence that it would have taken the same action even had it not been motivated by discrimination. Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B), 2000e(m) (2006).

70. In *Price Waterhouse*, Ann Hopkins was penalized for being assertive and aggressive, which are stereotypically masculine traits. Presumably, if Hopkins had behaved in a more submissive or “feminine” fashion, she would have been penalized for being too weak. Indeed, she likely would not have been a successful accountant in the competitive world of mega-accounting firms had she not been tough and assertive. It is in these catch 22 type situations that *Price Waterhouse* seems to have most traction. For an insightful critique of the Court's catch 22 analysis, see Carbado, Gulati & Ramachandran, *supra* note 12, at 144–48.

71. See, e.g., *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1112 (9th Cir. 2006) (distinguishing *Price Waterhouse* from a case in which a female employee was terminated for refusing to wear makeup, and noting that “[t]he record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job”); *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766, at *29 (6th Cir. 1992), *aff'd*, 952 F.2d 403 (6th Cir. 1992) (distinguishing *Price Waterhouse* from case in which man suffered gross workplace discrimination on the basis of his assumed sexual orientation on the grounds that in this case, “[the plaintiff's] supposed activities or characteristics simply had no relevance to the workplace, and did not place him in a ‘Catch-22’”).

72. See *Jespersen*, 444 F.3d at 1112.

73. *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975).

74. Although employers can legally impose different grooming requirements on males and females, the requirements cannot demean one sex more than the other or impose unequal burdens (though one could query whether separate (or different) can ever be

prohibited male, but not female, employees from having hair longer than shoulder length. In rejecting a challenge by a male employee, the court noted:

A line must be drawn between distinctions grounded on such fundamental rights as the right to have children or to marry and those interfering with the manner in which an employer exercises his judgment as to the way to operate a business. Hair length is not immutable and in the situation of employer vis-à-vis employee enjoys no constitutional protection. If the employee objects to the grooming code, he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job. . . . From all that appears, equal job opportunities are available to both sexes. It does not appear that defendant fails to impose grooming standards for female employees; thus in this respect each sex is treated equally.⁷⁵

The court went on to uphold rules that require “grooming in accordance with accepted community standards of dress and appearance.”⁷⁶

The reasoning employed by the *Willingham* court is troubling in several respects. First, the fact that an employer sets grooming standards for both sexes does not automatically render these standards gender neutral. Indeed, this reasoning is eerily reminiscent of the type of analysis the Supreme Court rejected in *Loving v. Virginia* where, in attempting to uphold its anti-miscegenation statutes, Virginia argued that its laws were race neutral because they applied to both Blacks and Whites.⁷⁷ Second, community standards may very well incorporate and perpetuate the type of stereotyped thinking that antidiscrimination law seeks to eliminate. Why are women expected to wear makeup? Why are men subject to the opposite expectation? And why can't professional men have longer hair or wear dresses? The *Willingham* reasoning obstructs in-depth exploration of the very questions that would expose the gendered nature of community standards and how they are applied both across and within groups.⁷⁸

equal). See, e.g., *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi.*, 604 F.2d 1028, 1033 (7th Cir. 1979) (striking down policy allowing men to wear “customary business attire” but requiring women to wear uniforms). For thoughtful critiques of the grooming cases, see Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541 (1994); Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW. ENG. L. REV. 1395 (1992); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 30–34 (2000).

75. *Willingham*, 507 F.2d at 1091–92.

76. *Id.* at 1092.

77. 388 U.S. 1, 8 (1967).

78. The court also seems to suggest that some infringements—those that restrict only

The *Oncale* precedent has proven similarly unhelpful to plaintiffs who bring intra-group, performance-based claims of discrimination. Here, it has not been the subsequent narrowing of the decision but the demanding standard of proof established by *Oncale* itself that creates difficulties for plaintiffs. In the *Oncale* opinion, the Supreme Court insisted that the plaintiff demonstrate “but for” causation. In other words, it required the plaintiff to show that he would not have been subject to discrimination if he had been of a different sex.⁷⁹ The Court noted that “but for” causation was fairly easy to establish in male-female sexual harassment cases because the allegedly discriminatory activity usually involved explicit or implicit proposals of sexual activity and “it is reasonable to assume those proposals would not have been made to someone of the same sex.”⁸⁰ The court went on to find that the same chain of inference would exist in same-sex harassment cases if (1) “there were credible evidence that the harasser was homosexual,” (2) a female victim was harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser was motivated by a general hostility to the presence of women in the workplace, or (3) there was “comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”⁸¹

The Court’s insistence on a cross-group comparison (i.e., a showing that someone outside of the protected group would have been treated differently than the plaintiff) limits the utility of *Oncale* for purposes of

personal “preferences”—are too trivial or too minimal to warrant legal intervention especially if prohibiting these infringements will further limit employer autonomy. That is to say, whatever Congress’ goal in enacting Title VII, it did not intend for the statute to be used to mandate that employers adopt unisex dress codes. Yet, the mere fact that behavior was not within the contemplation of the enacting legislators does not preclude extension of the statute to comparable evils. *See, e.g.*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (extending Title VII to cover claims of sexual harassment). In addition, the argument that workplace requirements can easily be met begs the question of whether these requirements are fair.

79. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (“The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring))).

80. *Id.* at 80. The heterosexism implicit in the Court’s analysis is worth noting.

81. *Id.* at 80–81. Given this analytical framework (and uncertainty about whether it is illustrative or exhaustive), it is hard to see how *Oncale* could have prevailed on remand. In the case, there was no evidence that the harassers were gay; in an all-male work environment, it would be impossible to show that the defendants were hostile to the presence of men; and the workplace was not mixed-sex. The Court’s insistence on “but for” causation raises additional problems. For example, if a woman had worked on the oil platform and had been subjected to taunts, threats, and violence similar to what *Oncale* received, would both she and *Oncale* have been precluded from bringing claims because of the fact that the harassers had targeted members of both sexes? Or, if one of the harassers had been bisexual and had treated both men and women equally poorly (the equal opportunity harasser), would there be no claim based on the harasser’s acts?

intra-group claims. In intra-group cases the critical issue is not whether someone outside the class was treated better, but instead whether the employer's expectations of individuals falling within the plaintiff's class are raced or gendered. Thus, cross-group analysis, if done superficially, may thwart examination of the critical issue in these cases: namely, the imposition of gendered or racialized stereotypes on nonconformist members of gender or racial groups.

Much like colorism cases, *Oncala* and the *Price Waterhouse* line of cases demonstrate how difficult it can be for plaintiffs to succeed with identity performance claims. This is not to say that colorism and performance claims are identical. Because skin color is largely immutable, claims of colorism are less easily characterized as matters of choice. This difference may explain, in part, why courts are more inclined to recognize a legal basis for colorism claims. The fact, however, that plaintiffs overwhelmingly lose colorism cases suggests that this difference may lack meaningful significance. In other words, when one scratches beneath the surface, plaintiffs in identity performance and colorism cases face many of the same hurdles. It is to these challenges that I now turn.

IV.

CHALLENGES FOR INTRA-GROUP CLAIMANTS

Plaintiffs raising intra-group discrimination claims push against a bias in U.S. anti-discrimination law towards thinking of discrimination in Black and White and cross-racial (as opposed to intra-racial) terms. Due in part to the history of chattel slavery and to the fact that African Americans were until recently the largest minority in this country,⁸² the struggle against discrimination in the United States has been closely identified with the African-American struggle against White domination and oppression. This is buttressed by the fact that it was the African-American struggle for civil rights⁸³ that produced *Brown v. Board of Education*,⁸⁴ *Loving v. Virginia*,⁸⁵ and the landmark anti-discrimination statutes of the 1960s.⁸⁶ To be sure, the United States has always been populated by numerous

82. See Lynette Clemetson, *Hispanics Now Largest Minority, Census Shows*, N.Y. TIMES, Jan. 22, 2003, available at <http://www.nytimes.com/2003/01/22/us/hispanics-now-largest-minority-census-shows.html>.

83. Of course African Americans were not alone in fighting against racial oppression in this country. People of all races joined in this effort. See JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 536-38 (8th ed. 2004).

84. 347 U.S. 483 (1954).

85. 388 U.S. 1 (1967).

86. See, e.g., Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

minority groups—all with histories of struggle and resistance that should not be ignored. However, centuries of pervasive White on Black violence, abuse, and subordination have left an indelible mark on the way Americans conceptualize discrimination and utilize legal frameworks developed to address it.

This can be seen most readily in employment discrimination law where plaintiffs can seek to prove their cases with either direct or circumstantial evidence. Direct evidence establishes harmful action motivated by discriminatory animus without the need for inference. In the absence of direct evidence, plaintiffs can employ circumstantial proof.⁸⁷ To make a race claim based upon circumstantial proof, individual plaintiffs need to show that they applied for a job for which they were qualified and that notwithstanding their qualifications, they were rejected and the employer hired someone of a different race.⁸⁸ A defendant can rebut this prima facie case by offering a legitimate, nondiscriminatory reason for her action.⁸⁹ The plaintiff then has an opportunity to show that the defendant's proffered reason was a pretext and that discriminatory animus more likely than not led to the action in question.⁹⁰ Plaintiffs can also bring cases based on systemic proof by showing a statistically significant disparity between the employer's workforce and the appropriate labor pool⁹¹ or by showing that the employer utilized a facially neutral criterion that produced a disparate impact on a protected class.⁹² In both individual and systemic cases, the default assumption has been that hiring a White instead of a Black applicant or the existence of a significant disparity between Whites and Blacks in the workplace, when unexplained, is the basis for an inference of discrimination.⁹³

87. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

88. *Id.* at 802 (describing final element of prima facie case as “the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications”). In subsequent cases, the evidence most commonly employed to establish the final element of the prima facie case was that someone outside of the plaintiff’s class was hired. See, e.g., *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 n.6 (1981); *Walker v. Boys & Girls Club of Am.*, 38 F. Supp. 2d 1326, 1336 (M.D. Ala. 1999).

89. In failure to hire cases, defendants commonly assert that the plaintiff was not the most qualified person for the position, or in discharge cases, that the plaintiff was not performing adequately. See, e.g., *Brack v. Shoney’s Inc.*, 249 F. Supp. 2d 938, 943–44 (W.D. Tenn. 2003) (asserting that plaintiff needed better understanding of operational processes); *Arrocha v. City Univ. of N.Y.*, No. CV-02-1868, 2004 U.S. Dist. LEXIS 4486, at *13–*14 (E.D.N.Y. Feb. 9, 2004) (citing deficiencies in plaintiff’s performance as causal factor).

90. The plaintiff always bears the burden of persuasion in establishing discriminatory animus. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000).

91. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

92. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

93. See, e.g., *Burdine*, 450 U.S. at 254 (stating that the prima facie case “raises an inference of discrimination only because we presume these acts, if otherwise unexplained,

The assumption that an unexplained disparity in the individual or statistical treatment of certain racial categories was a sufficient basis for an inference of discrimination was plausible in the 1960s and 1970s. At that time, Jim Crow segregation was not viewed as a distant practice created and perpetuated by prior generations. It was an active part of many American's lived experiences. In addition, racial lines and racial barriers were sharply defined. People were deemed Black, White, Latino/a, or Asian and where one stood in the socio-economic hierarchy was largely determined by one's racial classification. Moreover, the meanings attributed to Blackness and Whiteness were not veiled by political correctness, but rather were thrust openly into public discourse and public spaces.

However, times changed. As the United States progressed beyond an era defined by images of fire hoses, police dogs, stridently racist public officials, and de jure segregation, some African Americans slowly began to gain access to institutions from which they had previously been excluded and began to occupy different places in the socio-economic hierarchy.⁹⁴ Racial lines and barriers became more permeable and status as a result of race became less fixed. In addition, the visibility and lived experiences of other racialized groups increased. As times changed, so too did the nature of discrimination. What was once blatant became more subtle. Discussions that were once dominated by a Black-White paradigm were challenged by peoples of varying shades of brown.⁹⁵ Gender,⁹⁶ class,⁹⁷

are more likely than not based on the consideration of impermissible factors" (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978))). See also *Teamsters*, 431 U.S. at 339 n.20 ("Absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.").

94. While there has been measurable progress for some African Americans, in most categories, African Americans still lag behind Whites. See SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION LAW* 4-5 (2004) (describing "two black Americas"—one on the path to economic prosperity and one continuing to face significant barriers to economic opportunity). See generally MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 1-33, 93-97 (10th anniversary ed. 2006) (detailing advances by African Americans while pointing to substantial racial gaps in wealth and the fragility and marginality of the Black middle class). In addition, a recent study funded by the Brookings Institute and the Pew Charitable Trusts found that while income inequality in the United States has been increasing across the board, the situation is particularly grave for African Americans, whose children are likely to be less economically mobile than the children of Whites and are likely to have less family income than their parents. JULIA B. ISAACS, ISABEL V. SAWHILL & RON HASKINS, *THE BROOKINGS INST., GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA* 5, 27-32, 71-79 (2008), available at http://economicmobility.org/reports_and_research/mobility_in_america.

95. See generally Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997) (arguing that the traditional Black/White racial paradigm overlooks historical struggles experienced by

language,⁹⁸ accent,⁹⁹ color,¹⁰⁰ and national origin¹⁰¹ began to complicate the analysis and served to differentially situate racialized groups and individuals within those groups. Unfortunately, legal analysis and doctrinal frameworks failed to keep up with the times. Today, these frameworks and outmoded ways of thinking about discrimination present considerable challenges for plaintiffs.¹⁰²

This Part examines four obstacles that plaintiffs face in colorism and identity performance cases. Although I will examine them separately, these obstacles frequently work in tandem and are mutually reinforcing, thus creating more difficulties than their separate treatment might suggest. As explained in Sections A and B below, the first set of problems relate to the fact that intra-group claims often do not fit the usual analytical framework for discrimination cases. Consider, for example, a typical Black-White race discrimination case. There, the decision maker is generally White, the person denied the position is of color, and the person who receives the position is White.¹⁰³ If one were to apply this profile to the Burch case discussed earlier in Part II, the manager would be White,

other people of color).

96. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (exploring intersectionality of race and gender in violence against women of color); Harris, *supra* note 37 (challenging essentialization of unified female voice as neglecting distinct voices of black women).

97. See, e.g., Trina Jones, *Race, Economic Class and Employment Opportunity*, 72 LAW & CONTEMP. PROBS. 57 (2009); Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799 (2003); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996); John A. Powell [sic], *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355 (2007).

98. See, e.g., Edward M. Chen, *Labor Law & Language Discrimination*, 6 ASIAN L. J. 223 (1999); Mark Colón, *Line Drawing, Code Switching, and Spanish as Second-Hand Smoke: English-Only Workplace Rules and Bilingual Employees*, 20 YALE L. & POL'Y REV. 227 (2002).

99. See Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

100. See *supra* notes 5 and 8.

101. See Saito, *supra* note 41.

102. In a study of employment discrimination cases, Ruth Colker notes that in the years immediately following passage of Title VII, appellate court interpretations of the statute were more pro-plaintiff than they are today, suggesting that resistance to discrimination claims increases as time passes and as decision makers assume that the nation has moved beyond its racist past. See Colker, *supra* note 15, at 259–61.

103. See, e.g., *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006) (White males selected for promotion over Black males); *Cobbins v. Tenn. Dep't of Transp.*, No. 07–6491, 2009 U.S. App. LEXIS 8365 (6th Cir. Apr. 2, 2009) (White male selected over Black male); *Snooks v. Duquesne Light Co.*, No. 08–1689, 2009 U.S. App. LEXIS 3781 (3rd Cir. Feb. 24, 2009) (White female promoted over Black male); *White v. Baxter Healthcare Corp.*, 533 F.3d 381 (6th Cir. 2008) (White female promoted over Black male).

Burch would be of color, and Burch would be adversely treated in comparison to a White employee. Historically, in U.S. anti-discrimination law, it is the negative treatment of Burch by someone of a different race (vertical discrimination) and in comparison to someone of a different race (horizontal discrimination) that creates an inference of racial discrimination. Inherent in this framework is an assumption that decision makers prefer individuals of their own race. Complications arise, however, when this assumption does not hold.

The other set of challenges relates to the nature of intra-group claims. As I explain in Sections C and D below, unlike traditional markers like race and gender, intra-group skin tone differences and various types of identity performances are not viewed by many Americans as bases for discriminatory conduct. In addition, because there are so many different skin shades and ways in which people may perform their identity, it may be hard to determine (indeed to prove) what shades and what performances fall on the acceptable side of the equation.

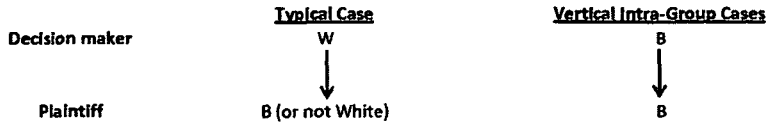
A. Vertical Intra-Group Discrimination

As noted above, the typical cross-racial framework does not fit skin color and identity performance claims because, in many of these cases,¹⁰⁴ the decision maker and the plaintiff are members of the same group.¹⁰⁵ For

104. I am not suggesting that *all* intra-group cases involve a decision maker and a plaintiff of the same class. Certainly a White employer may differentiate among people of color on the basis of skin color and racial performances. See Jones, *Shades of Brown*, *supra* note 5, at 1511–15, for additional analysis of this point. However, many intra-group cases involve same-race defendants and plaintiffs and when this configuration is present, additional proof problems arise.

105. Technically, nothing prevents a claim by a plaintiff against a decision maker in her own class. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78–79 (1998) (“[W]e have rejected any conclusive presumption that an employer will not discriminate against members of his own race”); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 609 (1987) (rejecting argument that claims of discrimination by one Caucasian against another are not cognizable under Section 1981); *Bryant v. Begin Manage Program*, 281 F. Supp. 2d 561, 570 (E.D.N.Y. 2003) (finding that the fact that plaintiff’s supervisor was the same race as plaintiff did not put race claim beyond the scope of Title VII). Historically, however, courts have been reluctant to allow claims to proceed in these cases. See, e.g., *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1001–02 (5th Cir. 1996) (invoking the fact that plaintiff, decision makers and replacement employee were all within protected age group to support conclusion that plaintiff had not successfully made out prima facie case of age discrimination); *Rooks v. Girl Scouts of Chicago*, No. 95-3516, 1996 U.S. App. LEXIS 20389, at *14 (7th Cir. Aug. 9, 1996) (finding “no compelling inference of age discrimination” given fact that decision maker was “herself . . . in the protected age group”); *Marlow v. Office of Court Admin.*, 820 F. Supp. 753, 757 (S.D.N.Y. 1993) (requiring plaintiff to show that applicants “outside the protected group were hired in his stead”), *aff’d*, 22 F.3d 1091 (2d Cir. 1993); *Walker v. Boys & Girls Club of Am.*, 38 F. Supp. 2d 1326, 1327 (M.D. Ala. 1999) (noting that while “an organization cannot shield itself from liability simply by placing members of a protected class in decision making positions[, it] is

example, in the Burch case, both the manager and Burch were Black.¹⁰⁶ Graphically, this can be depicted as follows:



The nontraditional lineup in vertical intra-group discrimination cases presents three sets of issues, which I shall characterize as skepticism, indifference, and acceptance.

1. *Skepticism*

Like White-on-White discrimination, Black-on-Black or vertical intra-group discrimination is assumed to be so rare, so seemingly against the norm and illogical, that jurors may deny it or be skeptical about whether it occurs. Of course there is considerable evidence that members of racial groups treat one another in sometimes discriminatory and unequal ways; individuals are not immune to larger socialization processes and frequently internalize and act upon prejudiced and stereotyped beliefs against members of their own race.¹⁰⁷ Yet such behavior is usually not perceived

however, extremely difficult for a plaintiff to establish discrimination where the allegedly discriminatory decision-makers are within the same protected class as the plaintiff"); *Dungee v. Northeast Foods, Inc.*, 940 F. Supp. 682, 688 n.3 (D.N.J. 1996) (finding that the fact that "the final decision maker and both interviewers are members of the plaintiff's protected class (women) weakens any possible inference of discrimination"); *Hansborough v. City of Elkhart Parks & Rec. Dep't*, 802 F. Supp. 199, 207 (N.D. Ind. 1992) (requiring "substantial preliminary showing when one black person alleges discrimination by another black person"). Professors Pat Chew and Robert Kelley offer some support for these outcomes in their study of racial harassment cases. They found that:

Plaintiffs (who are most likely to be Black) win a slightly higher percentage of cases if the alleged harassers are White rather than Black. In fact, in the 9 cases in which both the plaintiffs and the harassers are minority (minority-on-minority harassment), the plaintiffs lost 8 of the cases. Based on this small sub-sample, there is some indication that courts find minority-on-minority harassment even less plausible than White-on-minority harassment. It could be that mostly White judges are not familiar with intra-minority groups "racial" tensions and harassment. Judges may not be aware of African Americans harassing each other because of variations of skin color, Hispanics harassing each other because of differences in immigration status, or Asians harassing each other because of historical animosities based on countries of origin.

Chew and Kelly, *supra* note 15, at 105.

106. EEOC Settles Color Harassment Lawsuit, *supra* note 14.

107. See Jones, *Shades of Brown*, *supra* note 5, at 1515-21 (discussing internalized racism in people of color). See also Lisa V. Blitz & Linda C. Illidge, *Not So Black & White: Shades of Grey and Brown in Antiracist Multicultural Team Building in a Domestic*

as discrimination because of the absence of some sort of cross-group activity. This absence has led some fact-finders to search for other reasons or motivations for the decision maker's actions. This was the case in *Hansborough v. City of Elkhart Parks and Recreation*, where the court noted:

Despite the conclusion that as a purely conceptual matter it is possible for one black person to discriminate against another black person on the basis of race, the problem of proof remains. For the plaintiff . . . it is a relatively unique and difficult burden of proof. One has to be very careful to be sure that what in other interpersonal relationships might be described as discrimination is not just plain, ordinary, personal antagonism unrelated to the color of skin. . . . This concern causes the court to require a substantial preliminary showing when one black person alleges discrimination by another black person.¹⁰⁸

Other courts deciding colorism or identity performance cases have also invoked alternative explanations (like cronyism, personality clashes, economic class differences, etc.) in denying plaintiffs their requested relief.¹⁰⁹

Vertical intra-group discrimination thus only seems to emerge as a visible phenomenon when it is motivated by an already established categorical distinction, like gender, race, religion, age, sexuality, or national origin.¹¹⁰ Americans on the whole are far more likely to recognize the possibility that a Black male supervisor may discriminate against a Black woman on the basis of gender than they are to recognize the possibility that a Black male supervisor may discriminate against a Black woman on the basis of color. I shall return to perceived differences between color, identity performance, and more traditional markers like gender and religion—what I call the Murky Marker Problem—in Part IV(C). For the moment, the key point is that people are generally skeptical of vertical intra-group discrimination claims because these claims are less familiar and because the starting and entrenched assumption is that individuals are less likely to discriminate against persons falling within their same class.¹¹¹

Violence Shelter, 6 J. EMOTIONAL ABUSE 113, 118–19 (2006).

108. *Hansborough*, 802 F. Supp. at 206–07.

109. See *infra* notes 166–68 and accompanying text.

110. See *supra* note 105 for cases in which courts found same-race discrimination actionable, but nonetheless noted that membership of the complainant and decision maker in the same protected class weakened the inference of discrimination.

111. Of course, history is filled with instances that challenge this assumption. For centuries, White men have discriminated against White women (e.g., on the basis of gender). White men have also discriminated against Black men (e.g., on the basis of race).

2. Indifference

Skepticism poses a significant barrier to relief, but it is not the only obstacle when both the decision maker and the plaintiff are of the same class. Sometimes the problem is indifference. This is especially likely when the plaintiff and the decision maker are both from a disfavored class—for example, if both are people of color. In these cases, intra-group claims may be dismissed by White judges and jurors in the way that Black-on-Black crime sometimes is. Although these fact-finders may recognize that intra-group discrimination occurs, they may simply not care (or they may care less) when the decision maker and the plaintiff are Black.

The indifference theory is supported by studies establishing that victim race and offender race play a significant role in sentencing in criminal cases.¹¹² For example, in capital cases, when the victim is White, defendants (regardless of their race) are four times more likely to receive a death sentence than when the victim is Black.¹¹³ Moreover, Blacks who kill Whites (B → W) have the greatest likelihood of receiving the death penalty.¹¹⁴ Beyond the capital context, other studies have shown that in murder and sexual assault cases, when the defendant is Black and the victim is White (B → W), defendants are treated more harshly than when

Women have discriminated against women (e.g., on the basis of race). And people of color have discriminated against each other (e.g., on the basis of national origin). Notwithstanding this history, a presumption of in-group camaraderie or intra-group alliance still exists.

112. One must of course exercise care when discussing the influence of race in criminal sentencing as researchers have not reached uniform conclusions. As political scientist and criminologist Cassia Spohn notes:

[T]he relationship between race and sentencing is nonlinear and nonadditive. The effect of race may be mediated by the race composition of the offender-victim dyad and by the type of conviction charge; for some types of crimes, it also may be mediated by the relationship between the offender and the victim. Researchers who simply test for the direct effect of defendant race may incorrectly conclude that race does not affect sentence severity. They may miss the subtle and potentially more interesting interactive effects

Cassia Spohn, *Crime and the Social Control of Blacks: Offender/Victim Race and the Sentencing of Violent Offenders*, in *INEQUALITY, CRIME, & SOCIAL CONTROL* 249, 265 (George S. Bridges & Martha A. Myers eds., 1994) (reviewing studies). For additional discussion of the literature in this area, see *id.* at 249–51.

113. David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 708–10 (1983).

114. *Id.* See also *Race and the Death Penalty*, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/capital-punishment/race-and-death-penalty> (last visited Dec. 10, 2010) (summarizing studies showing Blacks who kill Whites are much more likely to be sentenced to death); *Race of Death Row Inmates Executed Since 1976*, DEATH PENALTY INFO. CTR. <http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976> (last visited Dec. 10, 2010) (showing execution rates in interracial homicide cases); Spohn, *supra* note 112, at 250–51 (citing studies).

the defendant and victim are both Black (B → B) or when the defendant and victim are both White (W → W).¹¹⁵ In short, sentences in Black on White (B → W) criminal cases are harsher than in White on White (W → W) or Black on Black (B → B) criminal cases.

Scholars have advanced several theories to explain these results. One theory is that “law exists to maintain the power of the dominant group and to control the behavior of those who threaten that power.”¹¹⁶ Consequently, “crimes involving black offenders and white victims are punished more harshly because they pose the greatest threat ‘to the system of racially stratified state authority.’”¹¹⁷ A second theory posits that because the lives of Black victims are valued less than the lives of White victims, “crimes involving black victims are not taken seriously and/or crimes involving white victims are taken very seriously.”¹¹⁸ Consequently, “crimes against Whites will be punished more severely than crimes against Blacks regardless of the race of the offender.”¹¹⁹ A related theory is that predominantly White jurors are simply unable to identify with Black victims.¹²⁰ According to this theory, “[i]n a society that remains segregated socially if not legally, and in which the great majority of jurors are White,

115. See Spohn, *supra* note 112, at 264 (citing studies showing Blacks who sexually assaulted or murdered Whites faced greater risk of incarceration and longer sentences than either Blacks or Whites committing those offenses against members of their same race). These results hold in cases involving serious crimes. When Spohn tested all felony defendants, she found that

[the] incarceration rate for the black offender/white victim category was nearly identical to the rate for the black offender/black victim category. And the rate for the white offender/white victim category was significantly *lower* than the rate for the other two categories. These results signal discrimination in sentencing based on the race of the *offender* rather than the race of the victim.

Id. at 262.

116. *Id.* at 252. A similar theory has been offered to explain the higher sentences imposed on Black men who sexually assault White women. *Id.* Interestingly, researchers have found that defendants (regardless of race) in vehicular homicide cases receive sentences that are 56% *longer* if the victim was female rather than male and 53% *shorter* if the victim was Black rather than White. Edward L. Glaeser & Bruce Sacerdote, *The Determinants of Punishment: Deterrence, Incapacitation and Vengeance* 1 (Harvard Institute of Economic Research Discussion Paper No. 1894, April 2000), available at <http://www.economics.harvard.edu/pub/hier/2000/HIER1894.pdf>. Glaeser and Sacerdote suggest that these outcomes may have to do with “vengeance,” which may produce outrage over the death of an innocent woman and lead to disproportionately long sentences. But when the victim is Black, overt or unconscious racism may produce a significant devaluing of the victim’s life and cause a judge to go lighter on the defendant. See *id.* at 14–15.

117. Spohn, *supra* note 112, at 252 (citing Darnell F. Hawkins, *Beyond Anomalies: Rethinking the Conflict Perspective on Race and Criminal Punishment*, 65 SOC. FORCES 719 (1987)).

118. *Id.*

119. *Id.*

120. *Id.*

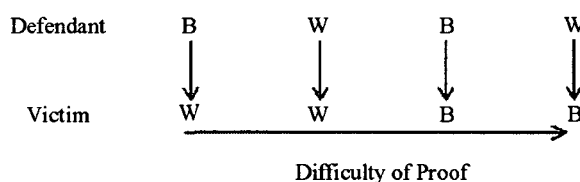
jurors are not likely to identify with Black victims or to see them as family or friends. Thus jurors are more likely to be horrified by the killing of a White than of a Black, and more likely to act against the killer of a White than against the killer of a Black.”¹²¹

Although the procedures employed and the liberty interests at stake in the civil context differ from the criminal context, it is reasonable to assume that some of the above considerations apply in civil cases. It may well be that vertical intra-group discrimination cases involving disfavored classes are more difficult to prove due to an inability to identify and to empathize with plaintiffs of a different race.¹²² Or, it may be that judges and jurors are loath to “do anything” about vertical intra-group claims because, unlike discrimination perpetuated by members of a disfavored group against the majority (B → W), discrimination between members of a disfavored group (B → B) is less threatening and does not undermine notions of White hegemony and dominance.¹²³ Either way, whether under

121. *Id.* at 252–53 (quoting SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989)).

122. To be sure, this would apply in any case where the victim is of a disfavored class and not just in vertical intra-group situations. However, a lack of empathy towards persons from disfavored classes may increase the likelihood that vertical intra-group claims will be dismissed because the fact-finder may lack interest in both the plaintiff and the defendant.

123. The above theories suggest that plaintiffs will encounter the most difficulty proving White on Black cases due to the inability of jurors to empathize with Black plaintiffs and their higher regard for White defendants. In addition, the pattern in White on Black cases would be consistent with, if not reinforcing of, existing power relations and therefore arguably less alarming to these jurors. According to this analysis, the cases would be sorted as follows (in increasing difficulty of proof for plaintiffs):

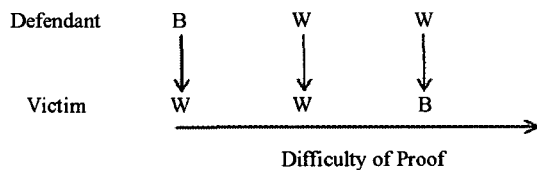


The above reasoning may explain why White defendants are less likely to receive the death penalty than Black defendants in cases with Black victims. It may also explain why racial discrimination cases, which typically involve a White defendant and a Black plaintiff, are generally difficult to prove. However, as I explained in the text accompanying notes 82–93, this reasoning is not wholly convincing given the unique focus and historical origin of anti-discrimination law. Unlike in criminal cases, where laws are designed to deter and to punish criminal activity regardless of race (at least in theory), anti-discrimination law was originally directed at a particular type of interaction, i.e., discrimination by the majority against a minority. Because White-on-Black discrimination is what anti-discrimination law was initially designed to address, that law tends to be more suspicious of this pattern than of the reverse. As a result, White-on-Black cases may actually be easier to establish than Black-on-Black cases. Under this reasoning, the cases would be sorted as follows (in increasing difficulty of proof):

a victim-centered approach or a power theory, plaintiffs in vertical intra-group cases involving disfavored classes will encounter difficulty convincing White judges and jurors to take these cases seriously.

3. Acceptance

Even if they are neither skeptical nor indifferent, judges and jurors may be more accepting of vertical intra-group discrimination, especially when a lawsuit involves litigants from a disfavored group and the fact-finders are from that group (e.g., Black jurors examining allegations of Black-on-Black discrimination). These jurors may be reluctant to award relief and to give too much credence to intra-group claims because doing so would “air dirty laundry”¹²⁴ and could potentially deflect attention from



124. “Airing dirty laundry” refers to a desire to avoid highlighting or exposing dysfunctional behavior within a particular community or social group. This desire may stem from simple embarrassment, or it may arise from a perceived need to prevent further reduction in the stature of an already oppressed and maligned group (the argument being that there is nothing to be gained from providing another basis for criticism of the group). In addition, the desire not to air dirty laundry may be driven by a fear that to reveal reprehensible conduct within a community (especially within a historically oppressed group) will undermine that community’s criticism of similar conduct when perpetuated against the group by outsiders. In other words, it is hard to criticize another group for the same type of behavior in which one’s own group participates.

Discussions of a need to avoid airing dirty laundry often arise when one member of a community levels a charge against another member of that community. Thus, when Anita Hill, an African-American woman, accused then-Judge Clarence Thomas, an African-American man, of sexual harassment during Senate hearings to consider Judge Thomas’ appointment to the Supreme Court, some commentators within the Black community argued that even if Judge Thomas was guilty of misconduct, it would be better not to expose this fact. See *Frontline: Clarence Thomas and Anita Hill: Public Hearing, Private Pain* (PBS television broadcast Oct. 13, 1992) (on file with author). Similarly, when Desiree Washington, an African-American woman, accused boxer Mike Tyson, an African-American man, of rape (a crime for which he was subsequently convicted), some African Americans thought that perhaps she should have refrained from exposing his behavior and bringing charges against such a high profile African-American athlete. See Ellen Goodman, *Only Now Do They Begin To Wonder What’s Eating Mike Tyson*, TAMPA TRIB., July 7, 1997, at 7; Wayne Lockwood, *Suit By Tyson’s Victim Is Justified After What He Has Put Her Through*, SAN DIEGO UNION-TRIB., June 27, 1992, at C1. Certainly one can find other explanations for these views (e.g., a tendency to minimize the pernicious consequences of sexism and sexual assault within the African-American community or a tendency to subordinate gender concerns to race concerns). But a desire not to air dirty laundry seems also to have been present.

the problem of White on Black discrimination, which may be perceived as more pressing.

This ranking of discrimination (e.g., the belief or perception that some discriminatory acts are worse than others) not only afflicts members of disfavored groups, but extends as well to Whites. I have already explored why some Whites may view Black-on-Black discrimination with skepticism and indifference. They may also be more accepting of this behavior. As I explained in Part IV(A)(1), cross-group action (e.g., Whites harming Blacks or Blacks harming Whites) shapes and defines understandings of discrimination in the United States.¹²⁵ The absence of such action may suggest that a plaintiff's injury did not result from discrimination, or that it resulted from a "less egregious" form of discrimination. Thus, if a Black man were to discriminate against another Black man (e.g., for being insufficiently masculine), some may view this with less urgency than White-on-Black discrimination because the former does not raise the specter of White supremacy (at least not as directly or as obviously) and does not carry the same historical baggage as cross-group discrimination. In short, given this country's horrible history of White-on-Black racial subordination, Black-on-Black discrimination simply may not raise the same red flags that White-on-Black discrimination does. Importantly, in vertical intra-group discrimination cases, White acceptance, unlike Black acceptance, would not be driven by a desire to suppress dirty laundry, but rather by the absence, or a reduced sense, of moral obligation as an impetus for action.¹²⁶

The problem of White acceptance is aggravated by what I call the Imus Syndrome.¹²⁷ When persons within marginalized or disfavored groups engage in the same egregious behavior for which the majority is criticized, the majority's conduct somehow gets excused and the severity of the underlying behavior is minimized because, "well, it can't be all that bad if *they* (people of color) are doing it too!"¹²⁸ Historical examples of this

125. See *supra* notes 82–93 and accompanying text.

126. See Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 119 (2000) (citing studies establishing that "[b]oth moral outrage, in which society and social institutions are blamed for the disadvantaged, and existential guilt, in which people feel personal blame for the disadvantaged, lead to a readiness to perform prosocial actions").

127. In April 2007, radio talk show host Don Imus called the Rutgers University women's basketball team a bunch of "nappy-headed ho's." See David Carr, *Networks Condemn Remarks by Imus*, N.Y. TIMES, Apr. 7, 2007, at B7. The remark caused a hailstorm of controversy during which Imus lost his MSNBC cable show as well as his radio broadcast. The comment also led to debate about its appropriateness given that similarly racist and misogynistic language is often used by Black rap artists in their lyrics. See Jeff Leeds, *Hearing Focuses on Language and Violence in Rap Music*, N.Y. TIMES, Sept. 26, 2007, at A24; Kelefa Sanneh, *Don't Blame Hip-Hop*, N.Y. TIMES, Apr. 25, 2007, at E1.

128. For analysis of a related phenomenon, see Onwuachi-Willig, *supra* note 3 (using

phenomenon abound. The Imus Syndrome surfaces when Whites attempt to excuse the horrors of slavery in the Americas by pointing to the participation of Africans in the slave trade; when Whites attempt to justify their use of the “n” word by pointing to its use among some people of color; when observers attempt to minimize White-on-Black police brutality by pointing to the presence of Black officers at the scene of the crime; or when employers seek to justify certain restrictions on “ethnic” attire because some historically black colleges and universities have adopted similar requirements. During the 2008 democratic presidential primaries, former President Clinton even sought to refute allegations that his criticism of Barack Obama was racist by arguing that he had expressed more optimism about Obama’s chances of prevailing in the general election than some African-American observers.¹²⁹ Ironically, in all of these cases, various social actors use intra-group acts to excuse their own behavior. Inherent in this analysis is the suggestion that there is nothing wrong with the intra-group activity—or that no one should be punished because all are engaging in the same bad acts. In other words, instead of being viewed as problematic across the board, the pervasiveness of the conduct at issue across groups (by both the majority and the minority) seems somehow to render it more acceptable. This does not bode well for persons challenging either White-on-Black or Black-on-Black discriminatory conduct.

In sum, if the above is true (e.g., *skepticism* because vertical intra-group discrimination does not conform to established understandings of discrimination; *indifference* because the offender and the plaintiff are of color; and *acceptance* because same-group participation seemingly ameliorates the severity of the harm and the absence of a White perpetrator eliminates White moral obligation as a possible catalyst for action), then plaintiffs will have a tough row to hoe when both the plaintiff and the decision maker are members of the same group. Direct evidence may overcome some of these hurdles. But circumstantial evidence leaves too much room for doubt to flourish.

B. Horizontal Intra-Group Discrimination

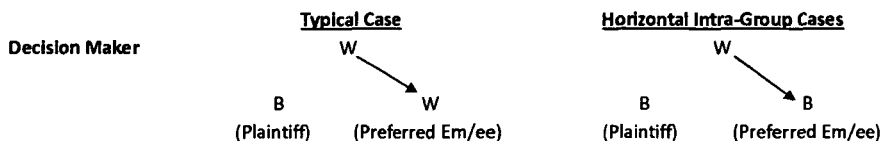
Thus far, I have examined difficulties that arise when the decision maker and the plaintiff are of the same group. Even when one alters this configuration, challenges remain.¹³⁰ Assume, for example, in the Burch

the controversy surrounding the NBA’s dress code to demonstrate the ways in which supportive testimony by some African Americans has been used to refute allegations of racism by other African Americans).

129. *Nightline: Interview with Kate Snow* (ABC News television broadcast, Aug. 5, 2008).

130. In many colorism and identity performance cases, vertical and horizontal claims

case that the manager was White and a lighter-toned African American was preferred to Burch (who you will recall has dark skin). Again, this scenario is atypical because in the usual discrimination case, the decision maker displays a preference for someone of one race over someone of a different race (e.g., the manager would prefer a White employee to one who was African American).¹³¹ The above may be depicted as follows:



overlap (i.e., the decision maker, the plaintiff, and the preferred employee are all of the same class), thereby adding additional layers of complexity. See, e.g., *Brack v. Shoney's Inc.*, 249 F. Supp. 2d 938, 947–49 (W.D. Tenn. 2003) (darker-toned Black plaintiff alleging that Black supervisor favored lighter-toned Blacks); *Walker v. Internal Revenue Serv.*, 742 F. Supp. 670, 670 (N.D. Ga. 1990) (lighter-toned Black plaintiff alleging that Black supervisor favored darker-toned Blacks).

131. To be sure, the selection of someone in the same protected class as the plaintiff does not necessarily preclude a claim, especially following the Supreme Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996) (holding, in an age discrimination case, that replacement of plaintiff with someone who was also within the protected class under Age Discrimination in Employment Act did not void the plaintiff's claim). Since *O'Connor*, some courts have held that employers are not entitled to judgment as a matter of law just because the plaintiff and her replacement are in the same protected class. See *Stella v. Mineta*, 284 F.3d 135, 145–46 (D.C. Cir. 2002) (collecting cases). See also *Perry v. Woodward*, 199 F.3d 1126, 1138 (10th Cir. 1999) (finding that non-White employee can establish a prima facie case of discrimination without proving that her job was filled by White person). However, other courts have taken a different view. See, e.g., *Brown v. McLean*, 159 F.3d 898, 905–06 (4th Cir. 1998) (allowing claim only when there has been significant period of time between the adverse action and decision to hire replacement or when the hiring of another person within the protected class was calculated to hide unlawful discrimination against the plaintiff); *Sidique v. Univ. of Pittsburg*, No. 02-365, 2003 U.S. Dist. LEXIS 20473, at *28 n.10 (W.D. Pa. Oct. 3, 2003) (noting that plaintiff's claims were "undermined by the remarkable degree of ethnic diversity reflected" in department to which plaintiff sought admittance and observing that while this evidence "cannot conclusively demonstrate the employer's actions were not discriminatorily motivated, it is not wholly irrelevant and serves to further emphasize the weaknesses otherwise reflected in the plaintiff's case"); *Walker v. Boys & Girls Club of Am.*, 38 F. Supp. 2d 1326, 1336–37 (M.D. Ala. 1999) (holding that replacing plaintiff with someone of the same protected class, without additional evidence of racial bias, negated the inference of discrimination); *Ferdinand v. Borden Chem. & Plastics*, 1998 U.S. Dist. LEXIS 13921, at *17 n.5 (E.D. La. Sept. 1, 1998) (noting that while replacement of plaintiff with someone of her class does not "automatically entitle defendant to a summary judgment[, i]n such a situation, the Court must examine all the evidence for other indicia of discrimination relating to the discharge").

Although one can explain why decision makers may make intra-group distinctions among people of the same race, one problem in horizontal intra-group discrimination cases is proving that the discriminator is a bad actor. As noted in Part I, U.S. anti-discrimination law has been historically concerned with the total exclusion of people of color from the workplace or from particular job categories within the workplace.¹³² Laws were directed at this across-the-board intolerance, what I call first-generation discrimination. Applying this paradigm to the Burch case, the manager would hire *no* African Americans, at least not as servers. Of course this is not the sole or arguably the primary way in which discrimination operates in the United States today.¹³³ White-only institutions and job categories are for the most part now suspect, and presumably the market will no longer tolerate such places.¹³⁴ Instead of wholesale exclusion, we are more likely to see intra-group “screening” or “preferencing,” or second-generation discrimination, to determine who will be included and excluded. With second-generation discrimination, employers prefer a subset of people of color, those who dress, talk, and act a certain way, or who have a certain lightness or darkness to their skin tones.

The problem is that employers who engage in this type of subtly nuanced discrimination are not likely to be viewed as “evil” because unlike the bigots of the past, these employers are welcoming towards *some* people of color. To accuse them of unlawful discrimination when they are hiring people of color, and therefore making *some* progress, may strike fact-finders as simply wrong or petty. In this scenario, a plaintiff’s claims may be viewed as unreasonable whining. Indeed, one can easily envision a defendant’s closing arguments in such a case, which might proceed as follows:

132. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Hazelwood Sch. Dist. v. United States*, 422 U.S. 299 (1977); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

133. Although women and people of color have access to most employment arenas, glass ceilings remain in place in many professions (especially in the executive and managerial ranks) as well as unspoken numerical limits on the desired number of people of color and women. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY* (2007), available at <http://www.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/2007/index.html> (demonstrating that women and minorities hold fewer managerial and executive positions than men and Whites). See also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *JOB PATTERNS FOR MINORITIES AND WOMEN IN STATE AND LOCAL GOVERNMENTS* (2005) available at <http://www.eeoc.gov/eeoc/statistics/employment/jobpat-eeo4/2005/index.html> (demonstrating that women and minorities have fewer high salaried positions than men and Whites).

134. The only time such institutions would pass muster is when there are no or very few people of color in the qualified labor pool. One suspects, however, that as time passes, these instances will be increasingly rare. See Carbado, Gulati & Ramachandran, *supra* note 12, at 117 (making a similar observation about male-only workplaces).

Come on, you have got to be kidding me. My client hires people of color, but that isn't good enough. Now the plaintiff is complaining because my client doesn't hire the right kind of people of color. His employees are not dark enough or they don't have braided hairstyles?!?! Can my client do anything right? Give me a break (as counsel scratches his head in a perplexed fashion and walks slowly, tragically to his chair). Is this type of petty whining really what anti-discrimination law was designed to redress (as counsel takes his seat)?

In short, the presence of members of plaintiff's race in the workplace will generate the same sort of skepticism and indifference (if not hostility) that one sees in vertical intra-group discrimination cases.¹³⁵

In addition to the above, plaintiffs in horizontal intra-group discrimination cases likely will encounter difficulty establishing an inference of discrimination unless they can show (1) that someone of a different class (e.g., a different race) was treated better than the plaintiff; or (2) that no one in the plaintiff's class was treated better than the plaintiff. The first proposition is problematic because horizontal claims have not historically involved cross-group (e.g., Black/White) comparisons. Although the Supreme Court has held that the replacement of a plaintiff with someone of the same class does not preclude a claim of discrimination,¹³⁶ replacement of the plaintiff with someone of a different class remains the paradigmatic means of establishing an inference of discrimination.¹³⁷ Yet, this inference is not readily available in intra-group cases because the comparison is generally between individuals of the same class. The second proposition is problematic because intra-group claims by definition involve a preferencing of someone in the plaintiff's group over the plaintiff.¹³⁸

135. Indeed, employers in intersectionality cases often make this argument, asserting that Black women or Asian women could not be subject to discrimination if other women and other people of their race were in the workplace. *See supra* notes 39–44 and accompanying text. Although courts have rejected these arguments, plaintiffs in intersectionality cases still have very low success rates.

136. *O'Connor*, 517 U.S. at 312. *See also* *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 n.10 (1999) (citing precedent in which Supreme Court included disparate treatment among members of same protected class in its definition of “discrimination”).

137. *See supra* note 131. *See also* *Moore v. Dolgencorp, Inc.*, No. 1:05-CV-107 2006 U.S. Dist. LEXIS 66973, at *13, *15, *22 (W.D. Mich. Sept. 19, 2006) (holding that Black plaintiff would have failed to state a prima facie case if her only evidence was that she was replaced by someone within her class, but finding prima facie case established because plaintiff was treated differently than similarly situated White individuals); *Ferdinand v. Borden Chem. & Plastics*, 1998 U.S. Dist. LEXIS 13921, at *17 n.5 (E.D. La. Sept. 1, 1998) (same).

138. Courts routinely rule against plaintiffs who are unable to show that their employers gave preferential treatment to other employees who were similarly situated to

*Brack v. Shoney's, Inc.*¹³⁹ effectively demonstrates these complexities. Brack, who was African American, alleged that his manager, who was also African American, discriminated against Brack because of his dark skin tone. The court quickly rejected several of Brack's colorism contentions because someone lighter than Brack was also treated poorly¹⁴⁰ and someone darker than Brack was treated well.¹⁴¹

At first blush, the Court's reasoning in *Brack* seems persuasive. Intra-group claims are strongest when there is some basis for distinguishing the plaintiff from others in his class. Thus, if a decision maker distinguishes between a Latino applicant from Puerto Rico and a Latino applicant from Cuba based upon national origin, then an intra-group claim based upon national origin discrimination seems plausible. But, in an intra-group case based on a Latino plaintiff's dark skin tone, if the defendant treats another dark-skinned Latino better than the plaintiff and a lighter-toned Latino worse than the plaintiff, then a claim of colorism seems improbable. Unless the defendant is attempting to cover up discrimination after the fact,¹⁴² then one could reasonably conclude that the defendant was motivated by something other than color.

The problem with the above analysis is that it overlooks that discrimination often is driven by not just one causal factor, but by several. That is to say, discrimination is rarely just about one variable, like skin color. Indeed, in many colorism cases, lurking in the background are issues of language, class, national origin, age, and sometimes sexuality.¹⁴³ The same holds true for identity performance claims, where it may not be

the plaintiff and who were not members of plaintiff's protected class. *See, e.g.,* Antonetti v. Abbott Labs, 563 F.3d 587, 592 (7th Cir. 2009); Merritt v. United Parcel Serv., Inc., 321 F. App'x 410, 413 (5th Cir. 2009); Oliver v. Nat'l Beef Packing Co., 294 F. App'x. 455, 458 (11th Cir. 2008); Fuelling v. New Vision Med. Labs., 284 F. App'x. 247, 255-56 (6th Cir. 2008).

139. *Brack v. Shoney's, Inc.*, 249 F. Supp. 2d 938, 941-46 (W.D. Tenn. 2003).

140. *See id.* at 949-50.

141. *See id.*

142. *See* Lam v. Univ. of Haw., 40 F.3d 1551, 1561 n.17 (9th Cir. 1994) (noting that law school's subsequent offer of employment to female did not preclude plaintiff's claim of race and gender discrimination because offer was made after plaintiff had complained of discrimination and had filed her lawsuit and "[b]y that time, the Law School was on notice that its employment actions would be subject to scrutiny").

143. Sometimes these issues do not merely lurk, but are part of the plaintiff's claim. *See, e.g.,* Lindsay v. Pizza Hut of Am., 57 F. App'x 648 (6th Cir. 2003) (alleging discrimination based on race, color, and gender); Salas v. Wis. Dep't of Corr., 429 F. Supp. 2d 1056 (W.D. Wis. 2006) (alleging discrimination based on age, race, and national origin); Arrocha v. City Univ. of N.Y., No. CV-02-1868 (SJF)(LB), 2004 U.S. Dist. LEXIS 4486 (E.D.N.Y. Feb. 9, 2004) (alleging discrimination based on color and national origin); Sidique v. Univ. of Pittsburg, No. 02-365, 2003 U.S. Dist. LEXIS 20473 (W.D. Pa. Oct. 3, 2003) (alleging discrimination based on race, color and/or national origin); Rios v. Aramark Corp., 139 F. Supp. 2d 210 (D.P.R. 2001) (alleging age and color discrimination).

just the plaintiff's hair, but hair, color, and dress in combination that lead to the plaintiff's adverse treatment. Intra-group claims are thus layered, and a plaintiff could plausibly argue that a defendant was motivated not just by her dark skin, but by the fact that she was a dark brown African American who wore locks and was poor.

Again, the *Brack* case is useful in demonstrating these points. In the case, there were several employees of plaintiff's skin tone. As suggested above, some were treated better and some were treated worse, or at least as bad as, the plaintiff. What is interesting about the case is that the plaintiff was not only dark-skinned, but he had presumably tightly curled hair¹⁴⁴ and was gay.¹⁴⁵ His manager repeatedly referred to him as her "little black sheep,"¹⁴⁶ a name that was picked up by others in the workplace. Interestingly, this moniker could have referred to the dark color of the plaintiff's skin, the "wooly" texture of his hair, or to his being the black sheep of the workplace because of his sexuality. It therefore reflected the complexity of the plaintiff's identity as well as the complexity of others' responses to it. While sexuality or skin tone alone may have been insufficient to lead to discriminatory conduct, the combination of these two "undesirable" characteristics may well have placed the plaintiff over the line of acceptability.¹⁴⁷ In light of these complexities, the fact that a darker-skinned employee was treated better than the plaintiff and that a lighter-toned employee was treated worse should not preclude the plaintiff's claim

144. 249 F. Supp. 2d at 943.

145. *Id.* at 942-43.

146. *Id.*

147. This may also explain why skin color does not in all cases lead to the same outcome. The combination of an undesirable marker and a valued characteristic may ameliorate the stigma associated with the undesirable marker. For example, Justice Clarence Thomas appears to have done quite well notwithstanding his darker skin tone. One could argue that for some people his conservative politics and reserved demeanor may ameliorate negative stereotypes associated with darkness. The same holds for Barack Obama. President Obama identifies as African American. But, he is arguably more palatable to a wider audience than say Jesse Jackson or Al Sharpton because of the way in which he performs his identity. (Note that racial performances are not necessarily strategic or conscious. They may be unconscious choices made in environments where different performances carry significant weight.) Notwithstanding his liberal politics and his race, Obama is highly educated. He speaks in moderate tones. He rarely talks of race directly unless circumstances force him to do so (e.g., his response to the issue of Reverend Jeremiah Wright) or he makes a rare political "mistake" (e.g., his comments on the arrest of Professor Skip Gates). His dress and grooming are conservative. Because he is the antithesis of the stereotype of the Black radical of the 1960s, or the more passionately outspoken racial justice advocates of the 1980s and 1990s, he presumably has broader appeal. See *supra* notes 3 and 35 for additional analysis. The same holds true for women and gender performances. A woman may not be desired in certain occupations, but she may do okay if she plays the game, does not shake things up too much, and performs according to expectations (e.g., by not being too aggressive if the desired role is femininity, or by being one of the boys if the desired role is toughness).

if the discriminatory act was based on a combination of hair, color, and sexuality.

In short, the *Brack* case underscores the fallacy of one-dimensional conceptions of identity and discrimination based thereon. The problem of course is that when a plaintiff's allegations become very specific and textured—in other words, reflective of our messy realities—the plaintiff risks backlash, ridicule, and criticism for engaging in over victimization. In this context, instead of the defendant's actions being treated with skepticism, the plaintiff's allegations will be. The bottom line is this: if it is already hard to prove that a defendant was motivated by race, something that is supposedly fixed and known, then plaintiffs face a Herculean task proving discrimination based upon a combination of factors when, as I discuss in the next section, these factors are murky and when defendants will offer many alternative justifications for their behavior.

C. Indeterminate or Murky Markers

Even if a judge or jury could be persuaded to take intra-group screening seriously, proof problems remain because intra-group markers are less defined than those with which U.S. anti-discrimination law historically has been concerned. For better or worse, that law has relied upon fairly rigid classification systems which drew sharp lines between different races, genders, and religions, among other things. In these systems, people were deemed to be either Black, White, Yellow, or Red;¹⁴⁸ male or female;¹⁴⁹ Christian, Jewish, or Muslim. For the most part, Americans knew (or assumed they knew) where the lines were and in a comparative, cross-group framework, it was *at least possible* to establish when a defendant crossed them.¹⁵⁰

148. For historical analysis of racial classification systems in the United States, see Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans and the U.S. Census*, 95 MICH. L. REV. 1161, 1171–87 (1997); Carrie Lynn H. Okizaki, *What Are You?: Hapa-Girl and Multiracial Identity*, 71 U. COLO. L. REV. 463, 469–84 (2000); Luther Wright, Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classification*, 48 VAND. L. REV. 513, 522–42 (1995).

149. For discussion of gender classification systems, see Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 269–78 (1999); Leslie Pearlman, *Transsexualism as Metaphor: the Collision of Sex and Gender*, 43 BUFF. L. REV. 835, 842–44 (1995).

150. Of course, there were always individuals who challenged these rigid and artificial classification schemes and who were not easily categorized. See generally IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (10th anniversary ed., 2006) (examining various methods employed by U.S. courts to determine the racial status of individuals in the early 20th century and the contradictory results these courts produced); Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-*

This is not true in colorism and identity performance cases. There are many shades of brown, many accents, and many ways to perform one's race or gender. Thus, convincing a jury that a defendant thought the plaintiff's hair was "too ethnic," her accent "too pronounced," or her skin a little "too dark" can present a formidable challenge. Plaintiffs are in essence required to prove a defendant's subjective intent without any "objectively clear" markers to back up their assertions. Absent direct evidence, and in the face of defendant's denial, query whether this can be done.

At least one court anticipated the Murky Marker Problem early in the evolution of colorism claims and expressed reservations about engaging in line drawing, noting that it refused "to create a cause of action that would place it in the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties was sufficiently different to form the basis of a lawsuit."¹⁵¹ The line-drawing problem is complicated by the fact that in many intra-group cases, the statistical sample is small and thus of limited probative value.¹⁵² This is particularly true in promotion and discharge cases where there are sometimes too few employees of color in the workplace to establish color bias with any degree of certainty.¹⁵³ Even in failure to hire cases, plaintiffs are hindered due to the frequent absence of information regarding the skin color of applicants.¹⁵⁴ If plaintiffs cannot establish that persons with darker skin tones applied, then the absence of such persons in the employer's workforce will have little probative weight.¹⁵⁵

A similar murkiness problem arises in identity performance cases,

Century South, 108 YALE L.J. 109 (1998) (examining ways in which law and legal trials shaped various meanings of race).

151. *Sere v. Bd. of Trs. of the Univ. of Ill.*, 628 F. Supp. 1543, 1546 (N.D. Ill. 1986).

152. *See Rios v. Aramark Corp.*, 139 F. Supp. 2d 210, 224–25 (D.P.R. 2001) (finding plaintiffs' statistical support flawed because it "fails to provide important information regarding the pool of applicants" and because plaintiffs' discharge data "pertain[ed] only to two positions and 'such a small statistical sample carries little or no probative force.'" (quoting *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 848–49 (1st Cir. 1993))).

153. *See id.*

154. *See id.*

155. To be sure, even if an employer has never hired a woman or person of color, plaintiffs can bring still systemic discrimination claims based upon the difference between the racial and gender composition of the defendant's workplace and the relevant labor pool. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977) (stating that "the company's inability to rebut the inference of discrimination came not from a misuse of statistics [concerning the appropriate labor market] but from 'the inexorable zero,'" i.e. the complete absence of people of color in the position at issue). The problem in colorism and identity performance cases is that, unlike race and gender, demographic information concerning the relative skin tone of individuals or their identity performances is not readily available. Thus, systemic claims on the basis of colorism and identity performance may be particularly difficult to prove.

where the inferences to be drawn from the evidence are not always clear. For example, are prohibitions against all-braided hairstyles, low-lying prison-culture jeans, or rap music race-based, class-based, both race- and class-based, or neither?¹⁵⁶ Is a dashiki an expression of racial identity? What about a FUBU sweatshirt? How should courts decide what is a reflection of racial identity and what is merely sloppy, rebellious, or otherwise nonconformist behavior?¹⁵⁷

The Murky Marker Problem is more complicated than the above analysis suggests for it may be that even if one could devise effective ways of determining where the lines are, some might question whether anti-discrimination law should extend this far.¹⁵⁸ There seems to exist an established hierarchy of markers, meaning that some markers carry more weight and are received with greater legitimacy (e.g., gender, race,

156. This characterization is important because racial classifications are subject to more suspicion and legal regulation than socio-economic distinctions. *Compare* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 235–40 (1995) (applying strict scrutiny to racial classifications) *with* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (subjecting class-based distinctions to only rational basis review). For examination of the growing problem of class inequality in the United States, see *LAW AND CLASS IN AMERICA: TRENDS SINCE THE COLD WAR* (Paul D. Carrington & Trina Jones eds., 2006). See also the collected essays in *Symposium Issue: Race and Socioeconomic Class: Examining an Increasingly Complex Tapestry*, 72 *LAW & CONTEMP. PROBS.* i (Trina Jones special ed., 2009).

157. Some might question whether identity performance claims assume a homogeneity within races—that each race has a finite style of dress or racial expression unique to that race—that does not exist. This concern, however, misses the mark. The issue is not whether identity performances are solely and exclusively engaged in by one racial group, but whether those performances are generally associated with a particular race. Thus, when White suburban youth wear low-lying jeans and drive cars vibrating to the rhythm of rap music, the question is not whether this activity is limited to one racial group, but whether White parents object to the music because it is associated with Black (perhaps lower-class Black) culture. For analysis of the relationship between racial and class identity, see Trina Jones, *Foreword: Race and Socioeconomic Class: Examining an Increasingly Complex Tapestry*, 72 *LAW & CONTEMP. PROBS.* i, iii–viii (2009).

158. This concern is particularly pressing in identity performance cases where some may question whether the imposition of uniform standards upon employees is the sort of harm the law should redress. *See infra* note 163–64 and accompanying text. The argument is, as one sees in dress and grooming cases, that these workplace restrictions are “minor infringements” because the employee is free to perform her identity any way she chooses outside of the workplace. And if workplace limitations are too great, the argument goes, then the employee can elect to secure employment elsewhere. *See supra* notes 73–76 and accompanying text.

The problem with this argument is that only some people will be required to modify their behavior in order to fit into the workplace. Moreover, if the employer’s rules require conformity with a particular type of racial or gender performance (or nonperformance), these rules may squelch the type of diversity this country has celebrated in recent years. Such practices thus thwart anti-discrimination law’s goals of promoting equality of employment opportunities and removing barriers that favor one class of employees over another. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).

religion, national/geographic origin)¹⁵⁹ than others (e.g., skin color, hair, accent, dress). The markers at the top of the hierarchy may have earned their place because of historical pedigree (e.g., their extensive use in the past as a basis for subordination),¹⁶⁰ because they implicate fundamental rights, or because they are seen as beyond the control of the individual (which makes it particularly unfair to rely upon them in contexts where they are irrelevant).¹⁶¹ In a society that views claims based on established markers with suspicion and hostility,¹⁶² one must question whether the will exists to expand anti-discrimination law to include less well-known, less understood, and indeed, murky markers.¹⁶³

159. This is readily seen in equal protection doctrine where race, religion, national origin, and gender are treated as suspect and semi-suspect classifications. Even within the equal protection hierarchy, sub-tiers exist where governmental classifications based on race are subject to strict scrutiny (the highest level of judicial review) while gender classifications appear to be subject to intermediate scrutiny (or mid-level review). See *Adarand*, 515 U.S. at 227, 235–40 (regarding race); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (regarding gender).

160. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (Brennan, White, Marshall & Blackmun, JJ., dissenting) (commenting on the significance of America's history of race discrimination for purposes of constitutional analysis); *McLaughlin v. Florida*, 379 U.S. 184, 190–92 (1964) (same).

161. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 685–86 (1973) (“[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility.’” (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972))); *Watkins v. U.S. Army*, 837 F.2d 1428, 1446 (9th Cir. 1988) (discussing immutability analysis and whether it should apply to sexuality classifications, *superseded by* 847 F.2d 1329 (9th Cir. 1988), *vacated en banc and aff’d on other grounds*, 875 F.2d 699 (9th Cir. 1989). For a thoughtful critique of the Supreme Court’s reliance upon immutability, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 150–60 (1980) (asserting that the test should be relevance to legislative purpose instead of immutability); J.M. Balkin, *The Constitution of Status*, 106 *YALE L.J.* 2313, 2323–24 (1997) (arguing that the social meaning of a trait is more important than immutability).

162. See *supra* notes 15–18 and accompanying text.

163. Even if the will exists, one might question whether such expansion is advisable. As one commentator on this paper noted, “perhaps intra-racial discrimination is less frequent than other forms of discrimination, and perhaps the more commonplace forms of discrimination should be addressed first?” Another commentator worried that putting identity performance claims on the same footing as traditional gender and racial discrimination claims would open the floodgates to frivolous litigation. For example, should individuals employed in certain professions be allowed to bring identity performance claims because their employers prefer that they wear professional attire (e.g., white lab coats for doctors and suits for lawyers appearing in court)? Should a Greek person be able to sue if he cannot wear a toga and sandals to work? Should a Black employee be able to sue if he is terminated for refusing to turn his rap music down to a reasonable level (and his argument is not that rap music is being treated differently from other music in the office, but that Black employees prefer to hear music played louder than their office counterparts and thus the music volume rule has an adverse impact on Blacks)?

This concern is particularly pressing given the tension between equality and autonomy that lies at the heart of anti-discrimination law. To be sure, this tension has always existed¹⁶⁴ and surfaces whenever courts are asked to expand anti-discrimination law in a meaningful way. Although

To be sure, any expansion of grounds for recovery risks meritless claims and will raise the usual slippery-slope counterarguments. Yet, without changing existing analytical frameworks, the legal system can readily handle most of the above concerns. As with all discrimination cases, in identity performance cases, courts must first determine whether an employer's requirements are race-related or perpetuate racial stereotypes. As the Supreme Court has noted, discerning the latter will involve consideration of "context, local custom, and historical usage." *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006). If requirements are not racially motivated or do not have a disparate effect on a racial group, then there would be no legal basis on which to proceed and the case would be over. If, however, a neutral policy has a disparate impact on a protected group, then the court must ask whether there is a legitimate business reason for the requirement. If the answer to that question is yes, then the requirement would survive. If it is no, the requirement would be struck down.

Applying this analysis to the claims mentioned earlier, the regulation of music levels would be upheld, as it would be hard to see racial animus in the adoption of such a rule. Even if the rule has a racially disparate impact, in just about any workplace the employer would be able to argue persuasively that loud music interferes with productivity (e.g., the ability of all workers in the workplace to concentrate and to perform their jobs adequately). Similarly, the lab coat and suit requirements would be upheld as it is difficult to discern racial animus in their adoption and implementation. The impact analysis is a bit trickier, however, as the rule would limit the hajib-wearing doctor or the dashiki-wearing litigator. The essential question there would be whether a conventional business suit is in fact required for professional legitimacy and decorum—or whether generally accepted professional norms are themselves discriminatory. As for the toga-wearing Greek, the court might require some showing that the performance at issue is not reflective of an idiosyncratic personal preference, but that it is deeply tied to the socio-political history of a particular group and is a significant component of that group's identity. This would be similar to the type of analysis courts engage in when determining if a belief is religious or simply a matter of personal preference. *See, e.g., Brown v. Pena*, 441 F. Supp. 1382, 1384–85 (S.D. Fla. 1977) (rejecting employee's claim that his need to ingest Kozy Kitten Cat Food was a religious practice covered by Title VII). To be sure, this sort of line-drawing risks taking courts into the swamps of subjectivity and relativism. Some observers will surely argue, however, that the difficulty of the challenge should not deter the tackling of it and that conversation is needed to expose invisible, unstated, and potentially discriminatory norms. Others will argue that it is better to not open Pandora's box at all and to bar all of these claims.

164. *See, e.g., Robert H. Bork, Civil Rights—A Challenge*, THE NEW REPUBLIC, Aug. 31, 1963, at 21 (arguing against public accommodation laws on freedom of association grounds); Robert H. Bork, *Response, Civil Rights—A Rejoinder*, THE NEW REPUBLIC, Sept. 21, 1963, at 36; Editors, *Civil Rights—A Reply*, THE NEW REPUBLIC, Aug. 31, 1963, at 24. Although I have focused primarily on anti-discrimination legislation from the 1960s, it is important to keep in mind that U.S. anti-discrimination law dates back at least as far as the Reconstruction era. *See, e.g., U.S. CONST. amend XV* (prohibiting race-based infringements on right to vote); *U.S. CONST. amend XIV* (providing for equal protection); *U.S. CONST. amend. XIII* (outlawing slavery); 42 U.S.C. § 1981 (2006) (prohibiting, among other things, restrictions on the right to contract); 42 U.S.C. §. 1983 (2006) (prohibiting deprivation of rights by those acting under color of state law); 42 U.S.C. § 1985 (2006) (prohibiting conspiracies to interfere with exercise of civil rights).

courts have been inclined to restrict autonomy in favor of equality when dealing with the categorical exclusion of people from certain jobs or institutions because of their race, sex, religion and other group-based characteristics, it is not clear that this same balance will be struck in intra-group cases. The issue is most pressing in identity performance cases where certain performances (e.g., wearing makeup, braided hair, or ethnic attire) are not only ambiguous, but are modifiable. Thus, any infringement on opportunity will be characterized as a matter of individual choice and not as a consequence of discrimination as Americans are accustomed to conceptualizing it (i.e., many will assert that there would be no obstruction if the plaintiff simply *chose* to put on makeup or to get rid of the braids). In these cases, courts and commentators may question the extent to which employees have a right to express all aspects of their identity in the workplace and how much employer autonomy should be compromised in pursuit of this objective.

D. *Alternative Explanations*

Finally, problems of proof arise in colorism and identity performance cases because people differ along a variety of dimensions (e.g., on the basis of race, color, hair, accent, class, gender, age, height, weight, educational and family background, geographical origin, work experience, etc.).¹⁶⁵ No two individuals are identical and there are countless ways to differentiate among persons within a particular group. Thus, in colorism cases, defendants can easily argue that it was not skin color, but rather something else that led to the plaintiff's harm. For example, a defendant may assert that any problems were due to a personality conflict or the plaintiff's bad attitude, as was claimed in the landmark case of *Walker v. Internal Revenue Service*.¹⁶⁶ Or, a defendant may subtly suggest that the issue was

165. Indeed, often in discrimination cases, plaintiffs will allege multiple bases for the defendant's allegedly discriminatory conduct. *See supra* note 143.

166. *Walker v. Internal Revenue Serv.*, 742 F. Supp. 670, 672 (N.D. Ga. 1990); *Hansborough v. City of Elkhart Parks & Rec. Dep't*, 802 F. Supp. 199, 207 (N.D. Ind. 1992) (alluding to personality clashes between plaintiff and other employees as potential justification for employer's action). *See also* *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 508 (1993) (finding that personal, rather than racial, animus may have caused adverse action against plaintiff). For critique of the personal animus argument, see Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary's Honor Center v. Hicks, Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 186, 215-30 (1997) (arguing that the Supreme Court's acceptance of "personality clashes as a nondiscriminatory justification ignores the effects of unconscious bias and stereotyping and opens a gaping loophole in the law"); Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177 (2003) (criticizing judicial move from a presumption of unlawful discrimination to a nondiscriminatory personal animus presumption).

not the plaintiff's skin color, but the plaintiff's sexuality, as appeared to be the case in *Brack v. Shoney's, Inc.*¹⁶⁷ Or, a defendant may argue that the problem was not due to skin color or identity performance, but to the plaintiff's lack of qualifications or poor job performance.¹⁶⁸

To be sure, the problem of alternative explanations also arises in traditional cross-group cases. For example, imagine that Burch alleged that he was poorly treated not because he was too dark, but because he was not White. As with intra-group cases, the defendant would likely deny this allegation and assert some other lawful reason for the action in question (e.g., Burch's poor job performance or weak qualifications). The difference in cross-racial cases is that in the United States the racial difference (e.g., the fact that a White person was preferred over a Black person) is itself suspicious and, when unexplained, creates an inference of discrimination.¹⁶⁹ Even with this inference, cross-group cases are difficult to prove.¹⁷⁰

If cross-group cases are hard to prove, then plaintiffs face additional hurdles with intra-group claims when dealing with markers like skin color or hair—markers that are less defined and less widely understood bases for discrimination. Because reliance upon these markers does not produce the same degree of suspicion as does reliance upon traditional markers, the burden on the defendant of coming forth with an alternative explanation is lower.

V.

REASSESSING INTRA-GROUP CLAIMS

As stated at the outset, this Article's primary purpose is not to solve the problems examined in Part IV, but rather to expose them. To the extent, however, that intra-group preferencing reflects a key aspect of contemporary discrimination, it is worthwhile to at least briefly consider ways in which plaintiffs and those interested in combating discrimination might respond to the problems identified herein. I offer two suggestions. First, lawyers representing plaintiffs in intra-group cases must ensure (1) that they understand the nature of these claims, (2) that they make appropriate inquiries during discovery (e.g., by asking the right questions in interviews, interrogatories, and depositions) to elicit the kind of information required to persuade skeptical juries, (3) that they utilize experts to explain the historical and contemporary meaning of color and

167. 249 F. Supp. 2d 938, 954 (W.D. Tenn. 2003) (finding that “[p]laintiff cannot rely on statements related to his sexual preference to support a claim of hostile work environment based on race, because such statements are not related to plaintiff's color”).

168. This is the most commonly asserted defense. See *supra* note 89.

169. See *supra* notes 87–93 and accompanying text.

170. See *supra* notes 15–18 and accompanying text.

certain identity performances, and (4) that they anticipate and directly engage objections to intra-group claims in response to motions to dismiss and motions for summary judgment. In other words, these lawyers must assume hostility to their clients' claims and must prepare to respond to it.

In order to do this work, lawyers must have ready access to psychological and sociological studies, empirical data, and historical records establishing that colorism and identity performance claims are not made up, fictitious, or trivial. They must be able to show that the discrimination on which these claims are based is deeply woven into the social fabric of the United States, and as such, that it requires serious reflection and attention. To the extent that scholars across disciplines can assist in this effort by continuing to illuminate the very subtle and nuanced ways in which discrimination happens both across and within groups, plaintiffs stand a better chance.

These educational efforts must not only occur in the courtroom, they must take place in lecture halls, newspapers, magazines, and on blogs, etc. In the same way that social conservatives launched a deliberate media campaign against anti-discrimination law,¹⁷¹ progressives must launch a campaign to inform the public of the continued existence and dynamic nature of discrimination.

This is easier said than done. One cannot underscore how vital and difficult educational efforts are in a context where many people appear exhausted thinking about inequality or seem convinced that discrimination no longer exists—at least not on a widespread or pervasive basis.¹⁷² In

171. See Selmi, *supra* note 15, at 556.

172. Claims that the United States has entered a post-racial era, where race has lost much of its salience, have been made with seemingly increasing frequency since the election of Barack Obama as President. See, e.g., Mark Z. Barabak, *IT'S OBAMA; Decisive Victory Makes History*, L.A. TIMES, Nov. 5, 2008, at 1, available at <http://www.latimes.com/news/politics/la-na-ledeall5-2008nov05,0,2076534.story>; Robert Barnes & Michael D. Shear, *Obama Makes History*, WASH. POST, Nov. 5, 2008, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/04/AR2008110404246.html>; Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES, Nov. 5, 2008, at A1, available at <http://www.nytimes.com/2008/11/05/us/politics/05elect.html>; Shelby Steele, *Obama's Post-Racial Promise*, L.A. TIMES, Nov. 5, 2008, at 31, available at <http://www.latimes.com/news/printedition/opinion/la-oe-steele5-2008nov05,0,1642069.story>; Juan Williams, *Obama's Color Line*, N.Y. TIMES, Nov. 30, 2007, at A23, available at <http://www.nytimes.com/2007/11/30/opinion/30williams.html>. As evidence that the United States has largely moved beyond race, observers point to the presence of successful people of color in politics, business, education, entertainment, and sports, among other areas—suggesting that previous barriers to opportunity have fallen. Oddly, when highlighting these success stories, advocates of a post-racial America seem implicitly to suggest that racism was largely absent from the lives of these successful people of color and consequently that it is absent from the lives of all people of color. In other words, because Oprah, Barack, Condi, LeBron, Cornel, and Skip “made it,” racism no longer exists, or is a rare occurrence perpetuated by fringe elements of U.S. society. These

short, it is hard to educate a disinterested and sometimes hostile public. The problems are magnified by the fact that while most Americans profess agreement with an anti-discrimination norm, at least in principle, both individual and systemic biases continue to exist.¹⁷³ The complication in a world heavily influenced by political correctness and post-racial ideologies is that Americans find it challenging to talk about these biases in a forthright and honest fashion.¹⁷⁴ (Thus, not only are people disinterested, they are also in denial.)¹⁷⁵ Unlike fifty years ago, when Americans would

advocates do not seem to be suggesting that these extraordinary people achieved despite America's racism. This distinction is important. The critical difference is the hidden assumption about whether racism exists and the extent to which it remains a barrier to opportunity. On the flawed assumption of a post-racial America, see generally Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-race Equal Protection?*, 98 GEO. L.J. 967 (2010); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009); John A. Powell [sic], *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785 (2009); Reginald T. Shuford, *Why Affirmative Action Remains Essential in the Age of Obama*, 31 CAMPBELL L. REV. 503 (2009). The fact that many Americans believe discrimination no longer exists (or is rarely practiced) is, of course, not new. On Americans' skepticism about the continued prevalence of discrimination, see JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* 123–24 (2000) (citing various surveys); HOWARD SCHUMAN, CHARLOTTE STEEH, LAWRENCE BOBO & MARIA KRYSAN, *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 166–67 (1997) (three-fourths of Whites surveyed did not believe that Blacks face workplace discrimination); Deborah A. Calloway, *St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption*, 26 CONN. L. REV. 997 (1994) (noting that judges, academics, and many lay Americans disbelieve the basic assumption behind anti-discrimination law—that absent explanation, different treatment of protected group members is the result of discrimination); Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917 (2009) (analyzing historical arguments against governmental measures to decrease racial inequality); Adam Goodheart, *The New America: A Change of Heart*, AARP MAG., May/June 2004, at 43, 43–49, 82 (citing survey results showing majority of Whites deny persistent discrimination against people of color).

173. People of color are more likely to be impoverished, to have lower incomes, to be incarcerated, and to be uninsured and unemployed, among other things, than Whites. For an examination of the statistical data, see Barnes, Chemerinsky & Jones, *supra* note 172, at 982–92. To be sure, other factors no doubt contribute to these statistical disparities, but given the history of this country, it would be illogical to assume that structural racism is not a critical contributing factor. For analysis of the various causes of racial inequality in the workplace, see Note, “*Trading Action for Access*”: *The Myth of Meritocracy and the Failure to Remedy Structural Discrimination*, 121 HARV. L. REV. 2156 (2008); Kingsley R. Browne, *Statistical Proof of Discrimination: Beyond “Damned Lies”*, 68 WASH. L. REV. 477, 505–13 (1993) (arguing that racial and gender inequality result from lack of motivation and skill).

174. I offer a sort of anecdotal support. I have taught a seminar on Race and the Law at Duke Law School for over ten years. Even in an educational context, where students feel comfortable and know each other, it is at times tremendously difficult to generate a forthright discussion of race because students are (quite understandably) very concerned about being labeled racist or bigoted by their peers.

175. See CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 67–87 (1997) (asserting that anti-affirmative

quite openly air their views of race, gender, national and regional origin, sexuality, skin color, hair, etc., today, to a large extent, prejudiced beliefs have gone underground. With few exceptions, open expression of discriminatory views is no longer an acceptable part of public discourse in the United States.¹⁷⁶ While no one (well, very few people) would suggest that the United States returns to the offensive and oppressive practices of the Jim Crow era, social justice advocates must acknowledge that denial and suppression make discriminatory views much more difficult to excavate and to engage.

Addressing the issues raised in this Article, however, requires more than sustained educational efforts. It seems that part of the problem with proving intra-group claims lies in the comparative analytical framework upon which U.S. anti-discrimination law rests. This framework has been useful in providing redress for cross-group discrimination (e.g., cases where an employer prefers one racial group and seeks totally to exclude other groups, or where an employer hires people of color, but pays and promotes them at a lower rate than Whites).¹⁷⁷ Because a comparative framework is helpful in ferreting out inequality in these circumstances, it makes sense to keep it.

Yet, for the reasons I have been explaining, strict adherence to this framework creates difficulties for plaintiffs litigating intra-group claims because in these cases there is seemingly no cross-group comparison. Or is there? Perhaps a partial solution in intra-group cases would be to *not* compare the plaintiff to someone within her own racial group (or at least not to end with that comparison). Thus, a darker African American would not be compared to a lighter African American. A Latina woman with an accent would not be compared to a Latina woman without an accent. The African-American woman with dreads would not be compared to the African-American woman with chemically processed hair. This sort of intra-group comparison merely cloaks the real problem, which in the context of racial discrimination is the imposition of racially normative criteria.¹⁷⁸ What is needed is an analytical framework that will expose what

action discourse denies existence of past and continuing racism); Hutchinson, *supra* note 172, at 918–19; Bill Maxwell, *White America, Denial Won't Erase Racism*, ST. PETERSBURG TIMES, Dec. 6, 2000, at 15A.

176. Unfortunately, in some quarters, some people believe that it is still acceptable to openly discriminate on the basis of age and sexuality.

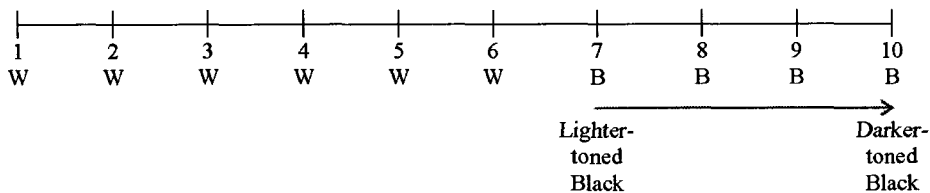
177. *See, e.g.*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Equal Employment Opportunity Comm'n v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988) (gender claim); Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981) (gender claim).

178. In other words, the problem is not the total exclusion of Black people because they are all undesirable, but rather employers preferring a particular type of Black person, or a particular type of woman. Thus, if employers do not want people who are too dark,

these criteria are.

I suggest the benchmark for comparison should not be the other person of color in the workplace (to whom the plaintiff is compared in most intra-group cases), but rather the employer's normative conception of what constitutes the ideal employee. That employee is likely gendered and raced in the sense that the employee has a preferred gender and certain racial characteristics that are deemed desirable.¹⁷⁹ For ease of analysis, assume that the employee is White and male (though that will not always be the case).¹⁸⁰ Importantly, it is the plaintiff's distance from this idealized norm that leads to discrimination.

The critical mistake in intra-group cases is a failure to realize that employees fall on a spectrum of acceptability with employers making nuanced and subtle distinctions at various points along the way. This may be graphically depicted as follows with one representing the ideal employee and each subsequent number representing some deviation from that ideal:



W = White
B = Black

Importantly, some points along the continuum are more sharply defined than others (e.g., point seven where a racial line is crossed). This should not, however, obscure that critical distinctions are made elsewhere on the spectrum. If one compares points that are close on the spectrum (like the distance between seven and ten), then these distinctions will appear minimal, almost trivial. Yet, if one takes a broader view, and

too ethnic looking or sounding, or too *different*, then the critical question becomes *different* from what, or more precisely, from whom?

179. Depending upon context, the ideal employee may also have a preferred religion and national origin, among other things.

180. For example, in a case where a defendant prefers a darker-toned Black to a lighter-toned Black person, the ideal employee may be the person who is the antithesis of a White male. This would also be true in an identity performance case where the defendant prefers Shymeka to L.K. because L.K. does not act "black enough." *See, e.g., Bryant v. Begin Manage Program*, 281 F. Supp. 2d 561, 574 (E.D.N.Y. 2003) (refusing to grant summary judgment for defendant where plaintiff alleged that her Black supervisor discriminated because of plaintiff's lighter skin tone and because she failed to be sufficiently Afrocentric).

compares the distance between one and ten, then the deviation from the norm is greater and the distinction being made is more readily seen.

To be sure, an employer will argue that the correct comparison is between seven and ten. That is, if seven is acceptable, then there is no reason why ten would not be similarly acceptable given the small difference between them. Or, the assumption may be that the race line is so significant that once employers cross it (e.g., by hiring at least one person of color), they cannot possibly be discriminatory. Indeed, this is in essence the standard argument offered in intra-group cases (i.e., there is no meaningful difference in terms of desirability between two Black employees and therefore an employer would not discriminate between them). Again, this argument only has traction if one takes a narrow view of the employee pool.¹⁸¹ But if one views the pool through a wider lens, one sees that both seven and eight are so far removed from the ideal that both are in a precarious position. And the farther an employee or applicant is from one, the more likely she is to be rejected. The situation may be analogized to a Law School Admissions officer's assessment of LSAT scores. If the perfect score is 180, the officer may admit persons who score between 160 and 180, but may determine that anything below a 160 is simply unacceptable. Thus, people with a 159 will be rejected notwithstanding the marginal difference between a 159 and a 160. If the baseline is 180, a 159 may be just one step too far removed from it.

One can apply this analysis to the hypotheticals with which I began this Article. Recall the law firm associates L.K. and Shymeka. The tendency in intra-group cases is to minimize what happens to Shymeka by comparing her to L.K. and by arguing that the employer exhibited no racial animus if it promoted a person of color to partner. But L.K. and Shymeka are not the critical comparison. Rather one needs to determine the characteristics of the ideal soon-to-be-partner associate in the employer's workforce and measure Shymeka against this norm. If the ideal associate is a White male who plays golf, wears suits, lives in the suburbs, and is perfectly content with the status quo, then (though the distance between L.K. and Shymeka may seem small) the distance between Shymeka and this person will be vast. The same holds with the Burch case. Burch was fired because he was too dark. If he is compared with another Black employee, then that seems to be a marginal difference. If an employer is willing to cross the racial line, then the argument goes, it is less likely to discriminate over a "little thing" like skin shade. Yet, if one takes the broader view, then one will see that there are various valuations of brown. White is preferred. Lighter brown is okay. But, at some point,

181. Limiting the comparison to persons within a particular racial category artificially minimizes the significance of an employer's actions.

being too dark is simply too much.¹⁸²

Importantly, this proposal does more than just widen the lens; it shifts the framework of analysis. It does not ask how an employer has treated someone outside of the plaintiff's class vis-à-vis the plaintiff (the question that is typically posed under traditional cross-group analysis). Rather, this new approach asks how the employer defines the ideal employee and whether the factors upon which this determination rests are raced or gendered, and if so, then to what extent should the law prevent their use?¹⁸³

I am not oblivious to the fact that identifying the ideal employee presents a considerable challenge,¹⁸⁴ especially given that what is ideal varies across time and place. Nor am I so naive as to believe that the above proposal will solve all of the proof problems in intra-group cases. But rethinking conventional understandings of discrimination *is* a step in the right direction. This reassessment requires reexamination of the idea of discreet and clear cut categories upon which anti-discrimination law was built and subsequently developed. This approach made sense when lines between groups were sharper, when groups were treated as monoliths, and when discrimination was largely a matter of the total exclusion or marginalization of one group vis-a-vis another group. But times have changed. As discrimination has become more sophisticated, subtle, and nuanced, so too must conceptual frameworks lest the promise of anti-discrimination law be rendered more illusory than real.

182. This, of course, brings to mind the familiar adage from the 1950s, "if you're white you're all right; if you're brown, stick around; if you're black, stand back." Interview with Hattie Jones (Mar. 2, 2000 and Mar. 22, 2000); Interview with Loris Ray (Mar. 2, 2000).

183. As in all discrimination cases, the question is not merely whether a person of color is treated differently from a White employee. Although differential treatment may raise an inference of discrimination, employers are given an opportunity to offer a nondiscriminatory justification for their actions (e.g., the plaintiff was not qualified or was not the most qualified person for the job). An additional hurdle arises in identity performance cases because the question is not whether there is a neutral justification for the employer's action (e.g., a desire to have all employees dress alike), but rather whether the law ought to protect performances that are race or gender related. In addition, in identity performance cases there is often no cross-group comparison. Thus, with the rap-music loving employee, *see supra* note 163, the question is not merely whether the Black employee is treated differently from the employer's ideal employee, but whether playing rap music loudly is something the law should allow. Or, in a case involving a woman who shuns makeup, the question is not simply whether she is treated differently from men, but whether anti-discrimination law should prohibit rules requiring the wearing of makeup.

184. This obstacle, however, is not insurmountable. It can be met, in part, by examining the characteristics of those persons who are most frequently hired or who are most highly rewarded and successful in a particular workplace or setting.