

January 2008

From Color Line to Color Chart: Racism and Colorism in the New Century

Angela P. Harris

Follow this and additional works at: <http://scholarship.law.berkeley.edu/bjalp>

Recommended Citation

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 (2008).

Available at: <http://scholarship.law.berkeley.edu/bjalp/vol10/iss1/3>

Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z380C9X>

This Article is brought to you for free and open access by the Berkeley Journal of African-American Law & Policy at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of African-American Law & Policy by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

From Color Line to Color Chart?: Racism and Colorism in the New Century

Angela P. Harris*

INTRODUCTION

When my sister graduated from college in the mid-1980s with a degree in musical theater she moved to Chicago with her new husband in search of work in television commercials and the performing arts. To her frustration and dismay, however, despite her good looks, acting ability, and musical talent, she was rejected in audition after audition. Getting rejected for arbitrary reasons or for no reason, of course, is just life in the entertainment industry. After a while, though, my sister began to hear some repetition in the rejections she received. “You don’t look black enough,” is the apology she would get.

My sister is very fair-skinned, with hair that streaks blonde in the summer. Yet, at least to discerning eyes, she can’t “pass” for white: her features, her creamy skin, and her “African booty” distinguish her from the Scandinavian-descent blondes that populate beer commercials and musical revues. For casting directors, then, she fell into a limbo: too white to play black, but too black to play white.

Today, my sister has a recurring role on a children’s television show (she’s Prudence the Musical Genie on “Jack’s Big Show,” produced by Nickelodeon, if you want to see her), and fortunes are changing not just for her but for many women and men in the performing arts who “read” as racially ambiguous, or racially “mixed.” To put it bluntly, the ambiguous/mixed look is now “hot.” Celebrities such as Tiger Woods, Mariah Carey, and The Rock discuss their mixed background with pride;¹ television, catalog, magazine, and

* Professor of Law, University of California – Berkeley (Berkeley Law). My thanks to Trina Jones for her comments on a previous draft.

1. As a recent discussion on NPR’s “Talk of the Nation” indicated, these public figures now proudly call attention to their mixed-race heritage, although a generation ago they would probably have identified themselves solely as black. See *Talk of the Nation: Multi-Racial Identity In America Today* (National Public Radio broadcast Apr. 26, 2007); see also Mireya Navarro, *When You Contain Multitudes*, N.Y. TIMES, Apr. 24, 2005, §9, at 1. (“The so-called ambiguous look is hip”). Tiger Woods has probably gone the furthest in the direction of calling attention to his multicultural background, by coining the term “Cablanasian” to describe himself. See “*Multi-Racial Identity in America Today*” *supra*.

newspaper advertising is full of adorable light-brown children with flowing locks that are not quite nappy, not quite straight; and mixed-race.

Politician Barack Obama finds himself able to appeal to both white and African-American audiences. A recent essay predicts that in the future the most desirable aesthetic both in the United States and in Latin America will not be to look “white,” but to look *café con crema*.²

Not only the aesthetics but the ideologies of race are undergoing a shift. Tanya Hernandez, who writes in the field of comparative race and racism, argues that the United States is poised to adopt the “multiracial matrix” that characterizes state and civil society in Cuba, Brazil, and Puerto Rico. Hernandez describes this matrix as composed of four beliefs:

- (1) [R]acial mixture and diverse racial demography will resolve racial problems by transcending race; (2) fluid racial identity is an indicator of a form of racial progress that deconstructs the stability of racial categories and thereby brings society closer to a colorblind utopia; (3) racism is solely a phenomenon of aberrant racist individuals who inappropriately express their prejudice; and (4) discussing race or focusing on race is itself racist because it disrupts the harmony of race neutrality.³

Judging from these indicators, perhaps the dream of finally achieving racial harmony through racial intermixing is about to become real.⁴ Hernandez and some other scholars, however, are worried rather than pleased about the emergence of the multiracial matrix. Some worry that despite the emergence of an anti-race public discourse, racism has not disappeared, but instead has retreated into individual cognitive processing systems, where it is inaccessible to legal intent tests (and, often, the individual’s own conscious mind), yet continues to shape the life chances of persons according to race.⁵ In this view, what is disappearing is not racism but rather our ability to talk about it.⁶ Others argue that in the new millennium traditional racism is indeed disappearing, but

2. SHADES OF DIFFERENCE (Evelyn Nakano Glenn ed., forthcoming 2008).

3. Tanya Hernandez, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, a United States-Latin America Comparison*, 87 CORNELL L. REV. 1093, 1098 (2002).

4. For a statement of this aspiration see Jim Chen, *Unloving*, 80 IOWA L. REV. 145 (1994) (arguing that the United States is, and should be, a “Creole Republic” in which racism is defeated by widespread interracial marriage).

5. See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006) (summarizing recent social science work on unconscious cognitive bias); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (discussing the relationship between implicit bias against racial minorities and media regulation). The classic work introducing this area of psychological research to the law is Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

6. See, e.g., Hernandez, *supra* note 3, 1157 (“Should the United States continue its trajectory towards a Latin American-style race ideology, the failure of courts to attend to the nuances of inter-minority racism and properly adjudicate colorism claims will impede contemporary efforts to eliminate discrimination.”).

only to be slowly supplanted by colorism, in which the color of a person's skin will take on more importance in determining how she is treated by others than her ancestry.⁷ In this Article, I speculate about the implications of this second possibility.

In Part I, I survey the critical race theory literature addressing colorism. This literature has examined how colorism fits (or doesn't fit) into the existing apparatus of anti-discrimination law in the United States, and – as in Hernandez's work – the relationship between colorism in the United States and in other countries. In Part II, I draw on a different strand of critical race theory literature to argue that the work of the performativity school offers a way to conceptually link colorism to more familiar forms of racism. In Part III, I speculate about the possible effects on society and anti-discrimination law of a drift away from ancestry as an important component of assigned race and towards a greater focus on color.

I.

Colorism and traditional U.S. racism are inextricably intertwined, yet distinct. Racism involves discrimination against persons based on their racial identity, which in turn is traditionally designated through a complex mix of self-identification and other-identification through appearance (including color) and ancestry. Colorism involves discrimination against persons based on their physiognomy, regardless of their perceived racial identity. The hierarchy employed in colorism, however, is usually the same one that governs racism: light skin is prized over dark skin, and European facial features and body shapes are prized over African features and body shapes.⁸

Colorism has been empirically verified in several different contexts. Pizzi, Blair, and Judd, for example, found a bias in criminal sentencing against

7. See, e.g., Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000).

8. Of course, this sentence itself is only intelligible because we have all been taught to recognize the combination of generous lips, a broad nose, and large hips and derriere as "African" and skinny lips, a narrow nose and hips, and a flat posterior as "European." In fact skin color and body shapes vary across the African continent and in Europe as well. The association of a very particular physiognomy with "the African," and the conflation of "African" with "Negro" or "black," is the product of modern race science, which began in the seventeenth century, reached its pinnacle (or nadir) in the nineteenth century, and still lingers in contemporary folk understandings of "race." See AUDREY SMEDLEY, *RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW* 162-70 (1993) (discussing the seventeenth and eighteenth century human classifications that formed the basis of later race science); compare NANCY STEPAN, *THE IDEA OF RACE IN SCIENCE: GREAT BRITAIN 1800-1960* 6 (1982) ("By the 1850s, the notion that the races formed a graded series, with the European on the top and the Negro invariably at the bottom, had become one of the cornerstones of racial science.") The physical stereotype of the "Negro" or "African" emerged from the efforts of these early writers to suggest a physical similarity between Negroes and the great apes, making blacks the "missing link" between animals and humans. See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 34 (1981).

persons who had facial features culturally marked as Afrocentric, regardless of whether they were racially identified as white or black.⁹ Irene Blair and her colleagues found that men with Afrocentric features drew both more negative and more positive stereotypes from people looking at their photographs.¹⁰ Verna Keith, using data about African-American women collected in 1979-1980, identified a positive relationship between lighter skin color and educational attainment, occupational standing, and family income.¹¹ Taunya Banks notes that “a more recent study of 2000 men in Los Angeles found that race, skin tone, and the existence of a criminal record are major factors in determining whether men with similar educational backgrounds are employed. According to the study, being black and dark-skinned reduced a man’s odds of working by 52 percent.”¹² As Trina Jones has explained, these phenomena do not fit the standard paradigm of racial discrimination, in which all persons recognized as African-American face similar discrimination and all persons recognized as white enjoy privilege regardless of their individual features.¹³ Rather, colorism reveals hierarchies of privilege and disadvantage within racialized groups.

Although many United States writers treat Atlantic chattel slavery as the origin point of colorism,¹⁴ colorism is in fact global, and it is not clear that it is

9. William T. Pizzi, Irene V. Blair & Charles M. Judd, *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327 (2005).

10. Irene Blair, *The Role of Afrocentric Features in Person Perception: Judging by Features and Categories*, 83 J. PERSONALITY & SOC. PSYCHOL. 5 (2005).

11. Verna Keith, *A Color-Struck World: Colorism, Achievement, and Self-Esteem Among African American Women*, in SHADES OF DIFFERENCE, *supra* note 2; see also Verna M. Keith & Cedric Herring, *Skin Tone and Stratification in the Black Community*, 97 AM. J. SOC. 760, 761 (1991).

12. Taunya Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1721 (2000).

13. See Trina Jones, *The Case for Legal Recognition of Colorism Claims*, in SHADES OF DIFFERENCE, *supra* note 2; see also Jones, *Shades of Brown*, *supra* note 7, at 1497 (2000) (arguing that colorism and racism are distinct).

14. In part, this is because colorism within African-American communities has received so much scholarly attention. In the United States, African chattel slavery, which relied heavily on white sexual violence against blacks, led to at least two American practices said to be important for the evolution of colorism: the house slave/field slave dichotomy, and the emergence in some regions of a “mulatto” buffer class between whites and blacks. The house slave/field slave theory is that because house slaves were subject to rape and forced procreation, their children were often of mixed heritage, and thus preferred by slaveholders. See the explanation given by Gunnar Myrdal in his famous report on American Apartheid, *An American Dilemma*:

Mixed bloods have always been preferred by the whites in practically all respects. They made a better appearance to the whites and were assumed to be mentally more capable. They had a higher sales value on the slave market.... Many white fathers freed their illegitimate mulatto offspring..., or gave them the opportunity to work out their freedom on easy terms. Some were helped to education and sent to the free states in the North. Some were given a start in business or helped to acquire land....[While] [e]mancipation broadened the basis for a Negro upper class....[b]lackness of skin remained undesirable and even took on an association of badness.

See GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 696-97 (1944).

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.¹⁵ And in some regions, “whiteness” as an aesthetic ideal is not represented by a European body, but a Japanese or Chinese one.¹⁶

In the Americas, however, there is no question that colorism is inextricably intertwined with the histories of slavery and indigenous conquest that gave birth to race thinking. Sometimes dark skin is linked to African heritage and sometimes to indigenous heritage, but in either case it is undesirable. Light skin and European features are the gold standard for beauty and desirability, and individual and collective action has proceeded accordingly. For example, several Latin American nations embarked on self-conscious “whitening” campaigns in the late nineteenth and early twentieth century, as a form of nation-building.¹⁷ In many countries, romantic and marriage partners continue to be evaluated in part on the basis of their skin color, and in many families children who are “dark” are pitied, or teased.¹⁸ Finally, from at least the nineteenth century to the present (and most likely earlier in Asia), people have made money selling skin lightening creams and lotions to women in search of beauty.¹⁹

Despite the evidence that colorism is not a new phenomenon, the United States legal system has not addressed it in a consistent fashion. Today, claims of discrimination on the basis of color frequently arise in the employment context. The relevant federal statutes frequently invoked in these claims are Title VII of the 1964 Civil Rights Act, which prohibits discrimination on the basis of color as well as race,²⁰ and 42 U.S.C. section 1981, which guarantees

Jones also notes that in the antebellum Lower South, “mulattoes” were recognized as a distinct social class, and that these persons of mixed white and African ancestry often had lighter skin than people of purely African descent. Jones, *Shades of Brown*, *supra* note 7, at 1506-10.

15. See Jyotsna Vaid, *Fair Enough? Color and the Commodification of Self in Indian Matrimonials*, in SHADES OF DIFFERENCE, *supra* note 2.

16. See Joanne Rondilla, *Asians and the Color Complex: Skin Lightening Advertisements in the Philippines and the United States*, in SHADES OF DIFFERENCE, *supra* note 2 (observing that Filipinas often take Japanese women, not European women, as their paleness ideal).

17. The Spanish word is *blanqueamiento*. See Robert J. Cottrol, *Normative Nominalism: The Paradox of Egalitarian Law in Inegalitarian Cultures*, 81 TUL. L. REV. 889, 909-11 (2007); Hernandez, *supra* note 3, at 1108; Robert J. Cottrol, *The Long Lingering Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas*, 76 TUL. L. REV. 11, 57 (2001).

18. See Imani Perry, *Buying White Beauty*, 12 CARDOZO J. L. & GENDER 579 (2006). For various first-person accounts, see, e.g., Cherrie Moraga, *La Güera*, in LOVING IN THE WAR YEARS: LO QUE NUNCA PASÓ POR SUS LABIOS 50 (1983); Kristal Brent Zook, *Light Skinned-ded Naps*, in Gloria Anzaldúa MAKING FACE, MAKING SOUL/HACIENDO CARAS 85 (1990); GLORIA ANZALDÚA & CHERRIE MORAGA, THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 198 (2d ed. Kitchen Table, Women of Color Press 1983).

19. See Perry, *supra* note 18.

20. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.

to all the same rights to make and enforce contracts as white citizens.²¹ Taunya Banks has found that courts are willing to consider a plaintiff's skin color in racial discrimination cases under these statutes when her racial identification is ambiguous, but that when a plaintiff's racial designation is clear (as is often the case with African-American litigants), courts often do not see skin color as relevant.²² Both Banks and Trina Jones argue that courts are confused about the relationship of race discrimination to color discrimination claims: sometimes race and color theories of the case are treated as separate and independent, and sometimes color claims are subsumed under race claims.²³

Conceptually, color discrimination claims may violate expectations about what racial discrimination looks like. Thus, in the oft-cited case of *Walker v. IRS*, a light-skinned African-American employee argued that her supervisor, a darker-skinned African-American woman, had treated her poorly because of her color.²⁴ The defendant's response was that no claim had been stated because "although Title VII includes 'color' as one of the bases for prohibited discrimination, that term has generally been interpreted to mean the same thing as race," and because "there simply is no cause of action pursuant to Title VII available to a light-skinned black person against a dark-skinned black person."²⁵ Tanya Hernandez, examining recent cases brought by Latino/a employees, has found that these claims often succeed when the supervisor or employer is a white Anglo.²⁶ However, when the racial-ethnic environment is more complicated, claims tended to fail. Hernandez describes the case of *Felix v. Marquez*,²⁷ in which both the terminated employee and the supervisor who fired her were Puerto Rican.²⁸ Felix offered to prove that out of twenty-eight fellow employees only two were as dark or darker than she. The court rejected this offer of proof on the ground that by the plaintiff's own admission there was no "rigid line between white and non-white employees."²⁹ However, Hernandez argues, this misses the point, since the claim was not based on race (i.e. white versus non-white) but on color.³⁰ Hernandez concludes that U.S. judges are not equipped to comprehend the complexity of Latino/a racial-ethnic

21. Civil Rights Act of 1866, 42 U.S.C. § 1981 ("All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.").

22. Banks, *supra* note 12, at 1727. Banks, Jones, and Hernandez agree that the most sophisticated court opinions have involved Latino/a plaintiffs. In such cases courts are willing to recognize the possibility of color discrimination. See, e.g., Banks, *supra* note 12, at 1733-34; Tanya Hernández, *Latinos At Work: When Color Discrimination Involves More Than Color, in SHADES OF DIFFERENCE*, *supra* note 2.

23. See Banks, *supra* note 12, at 1730-31 (describing inconsistencies in the case law); Jones, *Shades of Brown*, *supra* note 7, at 1538 (noting inconsistency and lack of analysis).

24. 713 F.Supp. 403 (N.D. Ga. 1989).

25. *Walker*, 713 F.Supp. at 405.

26. Hernandez, *Latinos at Work*, *supra* note 22.

27. No. 78-2314, 1981 WL 275 (D.D.C. Mar. 26, 1981).

28. Hernandez, *Latinos at Work*, *supra* note 22.

29. *Id.* (citing *Felix v. Marquez*, 1981 WL 275 at 8).

30. *Id.*

identifications, in which color, blood, hair type, and class all intertwine.³¹

This is troubling, given the rapid growth of Latino/a populations in the United States. Indeed, as Hernandez recognizes, as immigration rates from Latin America and Asia remain high and the entire United States moves toward majority-minority demographics, racial-ethnic relations will soon completely escape the tidy black-white box that judges are accustomed to.³² In addition to an increase in citizens who are neither black nor white, other factors have already begun to complicate the United States racial landscape. The increasing number of people who identify as multiracial, and the increased social recognition of multiracial as a valid identity, undermines the old “one-drop rule,” which in turn makes it difficult to easily categorize people who, a generation ago, would simply be identified as black.³³ Finally, marriages understood as interracial are increasing, and interracial relationships produce more mixed race children – children whose parents, increasingly, demand to have the complexity of their racial heritage acknowledged.³⁴

How should the law respond to these changes? Hernandez, Jones, and Banks all agree that colorism claims should be incorporated into existing anti-discrimination law, although Jones and Banks disagree about whether color discrimination should be understood as analytically distinct from race discrimination or as a subset of race discrimination. In the next section, I want to suggest that the existence, and likely increase, of colorism claims should prompt scholars and judges to conceptualize race discrimination itself in more complex – and realistic – ways.

31. Even if the conceptual distinction between race and color claims can be worked out, moreover, there remains an evidentiary problem. Jones quotes from an early 1990s court opinion:

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.

Hansborough v. City of Elkhart Parks and Recreation, 802 F.Supp. 199, 207 (N.D. Ind.1992) (quoted in Jones, *The Case for Legal Recognition of Colorism Claims*, in SHADES OF DIFFERENCE, *supra* note 13). In response to this difficulty Jones considers, but ultimately rejects, the idea of a presumption of non-discrimination in intraracial color cases.

32. Hernandez, *Multiracial Matrix*, *supra* note 3, at 1156.

33. See Tanya Hernandez on the social movement that successfully established changes on the U.S. decennial census so that people could choose more than one race with which to identify.

34. For an examination of the “multiracial movement,” see Tanya Kateri Hernandez, “*Multiracial*” Discourse: *Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97 (1998). On interracial marriages and recent demographic changes, see generally RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* (2003).

II.

As the previous section suggested, judges faced with colorism claims are likely to try to squeeze them into the familiar race paradigm in which a white person discriminates against a non-white person. This effort brings with it problems of racial categorization – what makes a person white or non-white? – and problems of conceptualization – can people with the same racial designation discriminate against one another? Colorism claims in this way seem to escape the racism box. In this section, I suggest that despite these disjunctions, the critical race theory literature offers a way to grapple with these questions that brings color and race claims into a single analytical framework.

Critical race theory has recently seen the emergence of what I will call the performativity school, in which I mean to include scholars such as Devon Carbado and Mitu Gulati,³⁵ Emily Houh,³⁶ Angela Onwuachi-Willig,³⁷ Camille Gear Rich,³⁸ John Calmore,³⁹ Regina Austin,⁴⁰ and Kenji Yoshino.⁴¹ These writers have all called attention to how people perceived as belonging to disfavored identity categories must work to disabuse strangers and acquaintances (such as co-workers) of negative stereotypes and expectations. Carbado and Gulati, concerned with such performances in the workplace, call this “working identity”; Yoshino calls it “covering.” The idea is that if people see me as an X, and if being an X in this society has negative connotations, then I have to convince people on a daily, interpersonal basis that I am either not an X at all, or else that I am “the good kind” who does not fit the negative stereotypes associated with being an X. One of the descriptive points to come from this literature is that people think strategically about how they are perceived by others, and undertake various kinds of long-term and short-term action projects to influence others’ perception of them. One of the normative points is that anti-discrimination law and institutional cultures not regulated by the state should acknowledge and attempt to ease this affirmative burden of

35. See, e.g., Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Devon Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003).

36. See, e.g., Emily M.S. Houh, *Toward Praxis*, 39 U.C. DAVIS L. REV. 905 (2006).

37. See, e.g., Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895 (2006).

38. See, e.g., Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1166-71, 1194-99 (2004).

39. John O. Calmore, *Whiteness as Audition and Blackness as Performance: Status Protest from the Margin*, 18 WASH. U. J.L. & POL’Y 99 (2005).

40. Regina Austin, *“The Black Community,” Its Lawbreakers, and a Politics of Identification*, 65 S. CALIF. L. REV. 1769 (1992). Although Austin is not strictly a member of this school, as she does not use the concept of “performativity,” her description of the search for “respectability” among the black middle class is closely related to the phenomenon the other writers describe as “working identity” or “covering.”

41. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

having to respond to other people's culturally-shaped stereotypes. And one of the conceptual points has been that racial identities are not simply given at birth as immutable traits, but rather are partly performed, and hence are a complex integration of the given and the contingent.

This last point connects the performativity school with the phenomenon of colorism. The performativity school has focused on strategic actions that people take to work their racial identities. For example, when non-whites seek to succeed in white-dominated environments, they may disclaim interest in leisure activities associated with minority racialized groups, avow interest in leisure activities coded "white," distance themselves from non-whites perceived as angry or political, and so forth.⁴² Colorism scholars suggest that skin color and other aspects of physiognomy constitute a form of social capital that individuals may use in the pursuit of economic and political success and social status.⁴³ We might, therefore, think of skin color as a resource, along with other resources that Yoshino would file under "appearance," for performing one's identity. From this perspective, color is just one aspect of racial identity. And identity itself is a complex matrix of interactions, constrained to some extent by physical appearance and bodily predilections, but constantly being shaped by conscious and unconscious actions taken by the self and by others.

Indeed, if we look more closely at colorism, it becomes apparent that color is itself shorthand for a complex interplay of perceived physiognomy, behavior, and culturally-transmitted expectations and assumptions. Psychologists studying colorism find that skin tone is not the sole index of color identifications. Facial features, such as shape of one's nose, eyes, and lips, also contribute to perceptions of a person's color, as does the texture and style of one's hair.⁴⁴ Christina Sue, investigating colorism in Veracruz, Mexico,

42. See, e.g., Carbado & Gulati, *supra* note 35 at 1301-04 (describing "comforting strategies"). Yoshino asserts that people perform their identities along four main axes: (1) appearance, or how an individual physically presents herself to the world; (2) affiliation, or cultural identifications; (3) activism, or the extent to which she politicizes her identity; and (4) association, or her choice of lovers, friends, and colleagues. Yoshino, *Covering*,

43. See, e.g., Evelyn Nakano Glenn, *The Quest for Lighter Skin: Transnational Circuits of Colorism and Color Hierarchy*, in *SHADES OF DIFFERENCE*, *supra* note 2; see also Verna Keith, *A Color-Struck World: Colorism, Achievement, and Self-Esteem Among African American Women*, in *SHADES OF DIFFERENCE*, *supra* note 2.

44. See Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991). Caldwell's piece discusses the case of *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981), in which an African-American employee of American Airlines who wore her hair in a braided style claimed that American's prohibition of braided hairstyles in certain job classifications discriminated against her as a woman in general, and as a black woman in particular. In dismissing the claim, the court referred to braided hairstyles as having been popularized by Bo Derek, a white actress, in the Hollywood film "Ten." Caldwell remarks:

The court's reference to Bo Derek presents us with two conflicting images, both of which subordinate black women and black culture. On the one hand, braids are

found that the color term *blanco* was often used to refer to foreigners, such as Spanish immigrants.⁴⁵ Thus, national origin is also, in some times and places, an element of color. Finally, in Latin America it is common to observe that “money whitens” - that is, people with high economic and social status - are able to claim lighter color identities than people with the same skin tone but fewer material resources.⁴⁶ Social psychologist Keith Maddox concludes that a more precise term for colorism is “phenotypic bias.”⁴⁷

Conceptually, then, although it may in some circumstances make sense to analytically distinguish colorism from racism, race and color are not two different things. Rather, what we know as traditional racism and what we now recognize as colorism represent related ways to assign status and stigma. Traditional racism places a higher value on ancestry than colorism; traditional racism assigns people to discrete racial categories, while colorism assigns people to places along a spectrum from dark to light, indigenous or African to European.

Bringing the work of the performativity school to bear on colorism suggests that rather than isolating skin color discrimination as a distinctive

separated from black culture, and, by implication are said to arise from whites. Not only do blacks contribute nothing to the nation's or the world's culture, they copy the fads of whites. On the other hand, whites make fads of black culture, which, by virtue of their popularization, become-like all “pop”-disposable, vulgar, and without lasting value. Braided hairstyles are thus trivialized and protests over them made ludicrous.

Caldwell at 379. See also INDIA ARIE, *I Am Not My Hair*, on TESTIMONY VOL. 1: LIFE & RELATIONSHIP (Motown Records 2006).

45. Christina Sue, *The Dynamics of Color: Mestizaje, Racism, and Blackness in Veracruz, Mexico*, in SHADES OF DIFFERENCE, *supra* note 2.

46. *Id.*

As Mark Tushnet explains:

A classic study by Marvin Harris demonstrated how perceived social class could make ambiguous perceived skin color. A simplified description of the study is this: Harris assembled a number of drawings of people with different skin colors, hair forms, lip, nose, and sex types as measured by an objective scale. The respondents were asked to describe the person in each drawing in order to elicit a response that included the drawing subject's race. The language of race in Brazil contains a rather finely differentiated scale of terms describing a person's perceived skin color. The Harris study respondents provided 492 categorizations and each of the drawings “was identified by at least twenty different lexical combinations.” The result of the study was that there existed a correlation between class and race--the darker the skin, the lower the imputed class.

Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, With Reference to Affirmative Action*, 36 CONN. L. REV. 649, 659-60 (2004) (citing Marvin Harris, *Referential Ambiguity in the Calculus of Brazilian Racial Identity*, in AFRO-AMERICAN ANTHROPOLOGY: CONTEMPORARY PERSPECTIVES 75-86 (Norman E. Whitten, Jr. & John F. Szwed eds., 1970)).

For a careful investigation of the complexity of contemporary Brazilian racial designations, see Seth Racusen, *Making the “Impossible” Determination: Flexible Identity and Targeted Opportunity in Contemporary Brazil*, 36 CONN. L. REV. 787 (2004).

47. See, e.g., Keith B. Maddox, *Perspectives on Phenotypicality Bias*, 8 PERSONALITY & SOC. PSYCH. REV. 383 (2004).

form of discrimination from racism, we should be alive to the many different triggers for racial stereotyping, from skin color to epicanthic folds to accented English⁴⁸ to speaking in Spanish.⁴⁹ Color is a long-standing trigger for discrimination along the black-white colorline. But it is not unique in its ability to produce and maintain racial hierarchy. The shift from categorical racism to colorism, if that is what the United States is currently experiencing, signals a more complex racial environment, but not a necessarily less racist one.

Finally, bringing the work of the performativity school to bear on the issue of colorism suggests that at a higher level of abstraction, culturally stigmatized identities all function in the same way. This possibility is explored in the next section.

III.

What are the possible social consequences of a shift from what we might call categorical racism – discrimination based on one’s designated racial identity, as determined by ancestry combined with appearance – toward the more fine-grained, differentialist racism that colorism exemplifies? And how should anti-racist scholars, litigators, and activists respond?

Tanya Hernandez identifies one worry: that we will lose a language in which to talk about structural privilege and disadvantage. Hernandez argues that in several Latin American countries, including Brazil, Cuba, and Mexico, there is a distinct color hierarchy, but it is not seen as having anything to do with “race” and, therefore, there is little or no public debate about questions of group justice and equality.⁵⁰ Hernandez sees the contemporary United States as fertile soil for the growth of the multiracial matrix given the growing popularity of colorblindness – refusing to talk about or classify in terms of race – as the preferred ethical and legal approach to racism.⁵¹

One danger of the multiracial matrix is an increasing difficulty in formulating anti-discrimination claims. As the colorism cases illustrate, the more complex racial identity is acknowledged to be, the more fugitive and difficult to identify will be acts of racial discrimination.⁵² Ian Haney Lopez argues that in “a nation of minorities,” everyone is assumed to be equally

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

49. See Juan F. Perea, *Buscando America: Why Integration and Equal Protection Fail To Protect Latinos*, 117 HARV. L. REV. 1420 (2004).

50. See Hernandez, *Multiracial Matrix*, *supra* note 3; see also Cottrol, *supra* note 17.

51. See Hernandez, *Multiracial Matrix*, *supra* note 3, at 1162 (“[T]he United States remains enraptured with the sheen of humanitarianism that multiracial discourse uses to veil and maintain racial hierarchy.”).

52. See *supra* note 31 (under a “colorism” regime, it may be hard to distinguish animus based on color from simple personality clash).

“minoritized,” and thus discrimination is assumed not to exist.⁵³ Yet the data on colorism make clear that certain hierarchies persist.⁵⁴ The danger is that even if having identifiable African ancestry stops being an automatic social stigma, and even if the nation comes to fully embrace the ideal of colorblindness, “the nigger” may continue to be a stereotype that influences our behavior. If this is the case, the darkest-skinned, most African-looking people will continue to receive worse treatment than others, as will those whose actions trigger negative stereotypes in others’ eyes.⁵⁵ At the same time, this discrimination will be harder and harder to demonstrate; it will be visible statistically but not provable case by case.⁵⁶

The result may be that we in the United States will talk about race in the same way that we talk about class. Americans usually describe themselves as “middle class” regardless of their actual income or wealth, assume perfect social mobility regardless of the situation of one’s birth, and do not think in terms of structural economic inequality.⁵⁷ Similarly, in the future most Americans may come to describe themselves as of mixed background, assume that race is no barrier to social mobility, and will insist, like our American cousins to the south, that there is no racism. Absorbed by the (multiracial) matrix, we will all cry together, “We are all Americans!”⁵⁸

A second possible effect of a shift away from categorical racism toward differentialist racism is the lessening or loss of a sense of “linked fate” among the members of racialized groups. Political scientists use the concept of “linked fate” to explain how African-Americans, for example, feel a sense of responsibility to and for other African-Americans based on a sense of shared history and common treatment.⁵⁹ The easier it is to escape racial discrimination,

53. Ian Haney Lopez, *“A Nation of Minorities:” Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007).

54. See text accompanying notes 9-13, *supra*.

55. Compare Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006) (arguing that a stereotype of the “Bad Black Man” exists which influences African-American male identity performances) with N. Jeremi Duru, *The Central Park Five, The Scottboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315 (2004) (arguing that a stereotype of the “Bestial Black Man” influences public discussion of high-profile crimes involving African-American men).

56. Tanya Hernandez argues that this is what has happened in Cuba:

Perhaps most perniciously, the government’s formal position, which asserts that race (and class) distinctions have been renounced--when, in fact, they continue to virulently operate through both public and private sectors of the society--impairs the ability of Afro-Cubans to recognize, name, and address systemic racism through legal or other means.

Hernandez, *Multiracial Matrix*, 87 CORNELL L. REV., *supra* note 3, at 1143.

57. See Martha Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CALIF. L. REV. 799, 829-30 (2003).

58. Eduardo Bonilla-Silva and David Dietrich, *The Latin-Americanization of Race Relations: A New Pigmentocracy*, in SHADES OF DIFFERENCE, *supra* note 2.

59. For a discussion of the literature of “linked fate” and its application to African-

however, the more defectors there will be from the disfavored races.⁶⁰ The result may be both increased competition and tension among people within a single racialized group, and harsher treatment of those who cannot mobilize sufficient resources to escape the box of racial stereotyping. An analogy here is the effect of the loosening of housing discrimination on the basis of race on black communities: as the black middle class moved out of former ghettos, they left behind the poorest and most disenfranchised to live in neighborhoods that were now both racially “hyper-segregated” and intensely impoverished in terms of social networks and cultural resources.⁶¹ When everyone knows that no matter how much he earns, a black man cannot get a taxi to stop on a rainy evening, a sense of linked fate is preserved; but as racial identity becomes more mutable and finely grained – if, for example, money comes to “whiten” as it is said to do in Brazil – those on the top can easily escape a sense of responsibility to and for those on the bottom.⁶²

A third possible effect of a shift toward differentialist racism is a greater sense of personal responsibility for deflecting racism. Here the culture of personal responsibility for one’s fate and the culture of consumer capitalism happily join hands. Imani Perry, Evelyn Glenn, and others have called attention to the multimillion-dollar industry in skin lightening and brightening creams and lotions.⁶³ In a fascinating essay, Charis Thompson notes how skin color also plays a role in decisions about alternative reproductive technologies.⁶⁴ As plastic surgery, reproductive technology, and other forms of physical modification become technically easier and cheaper, we can expect people to feel pressure to use them to aid their personal and familial projects of social mobility. The result may be a strengthening rather than undermining of the stigmas attached to certain identities: if no one *has* to look “African,” then increased suspicion will fall on those who nevertheless do.⁶⁵

American communities, see Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998).

60. Tanya Hernandez has made a similar argument with respect to the struggle to permit people to identify as “multiracial” on the U.S. census. See Hernandez, “*Multiracial*” Discourse, *supra* note 34. Prior to the 2000 census, which included a “multiracial” box for the first time, Hernandez argued that such a category would permit people to “opt out” of being identified as a racial minority, thus undermining minority group solidarity. See *Id.* at 137-38.

61. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (2d ed. 1990) (arguing that the black middle class engaged in spatial and social flight from the black urban poor in the 1970s, and 1980s, leaving a black “underclass” in inner cities which was increasingly spatially and culturally isolated).

62. See Hernandez, *Multiracial Matrix*, *supra* note 3, at 1106-07 (2002) (discussing the idea that “money whitens” the skin in the context of self-classification of race by Brazilians).

63. See Perry, *Buying White Beauty*, *supra* note 18; Glenn, *supra* note 30; Rondilla, *Asians and the Color Complex*, *supra* note 16.

64. Charis Thompson, *Skin Tone and the Persistence of Biological Race in Egg Donation for Assisted Reproduction*, in *SHADES OF DIFFERENCE*, *supra* note 2.

65. Jerome Culp explored the ethics of this problem in a thought experiment. See Jerome McCristal Culp, Jr., *The Michael Jackson Pill: Equality, Race, and Culture*, 92 MICH. L. REV. 2613 (1994).

How should scholars, activists, and litigators respond to a shift to differentialist over categorical racism? The lesson of the performativity school is that although the ratio of immutable to mutable traits involved in the work of the identity in question may vary, all identities are performed.⁶⁶ The most potentially stigmatizing social identities are those with some physiognomic expression, because these currently provide the least room to maneuver (future developments in biotechnology, of course, may change this, as we have seen). But there is no clear line between the *given* and the *chosen* identity, or between biological substrate and cultural superstructure.

The work of the performativity school suggests that anti-discrimination law, instead of enshrining “suspect classifications” and seeking to protect certain categories of people, should work to disestablish caste-linked stereotypes more generally. The goal would be to avoid forced assimilation to norms of behavior or appearance that are linked to caste. From this perspective, the goals of the anti-racist civil rights agenda converge with the goals of some transgender civil rights and some disability rights activists and scholars. All are moving away from the traditional “protected class” approach to anti-discrimination law and policy. Instead of seeking to have their groups treated the same as non-discriminated-against groups, these advocates and scholars are trying to articulate a mandate for full social inclusion. The obligation of the state, in this view, is to do whatever is necessary to make full inclusion possible – including protecting individuals from the effects of harmful social norms and stereotypes, and even taking positive steps to create new rights.

Consider, first, the example of transgender legal activism. Transgender activists are quick to note that the term does not describe a single social identity, but rather is an umbrella term designed to bring together in solidarity a variety of identifications, all of which involve variance between the person’s gender identity and/or expression and the social expectations for that person based on his or her assigned sex at birth.⁶⁷ Because of the wide variety of social identities that have in common some kind of gender transgression, Paisley Currah argues that transgender legal activism has not been directed toward adding discrete social identities to existing laundry lists of suspect categories in anti-discrimination statutes.⁶⁸ Rather, Currah argues, transgender activists’ goal in statutory reform has been to “effectively eliminate, for the purposes of nondiscrimination law, any legally prescribed relationship between biological sex, gender identity, and gender expression – a normatively structured series of

66. As Devon Carbado and Mitu Gulati put it, “Everyone works identity.” Carbado & Gulati, *supra* note 35, at 1263.

67. See editors’ introduction to *TRANSGENDER RIGHTS* xiv (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006).

68. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANSGENDER RIGHTS*, *supra* note 67.

relations that governs everyone, not just self-identified transgender people.”⁶⁹ Therefore, the goal is to uncouple gender performance from material consequences in the public sphere, so that how you perform your gender identity no longer has any impact on your ability to marry, hold a job, get an education, use the bathroom, have children, get a driver’s license, and so on.⁷⁰ This approach to thinking about anti-discrimination has much in common with the teachings of the performativity school.

The disability rights movement provides a second example of this move away from the “protected class” approach. Disability advocates Michael Stein and Penelope J.S. Stein argue that the traditional civil rights paradigm of equal treatment for those who are similarly situated – even the paradigm of “reasonable accommodation” – is inadequate to provide all disabled people with the opportunity to live the fullest lives possible.⁷¹ Instead, the Steins argue, state policy should seek to maximize each person’s opportunity for social inclusion, which may necessitate positive material support as well as non-discrimination.⁷² If the goal is to ensure that all people, including disabled people, have the freedom to work and contribute to society, then in some cases the state will have the obligation to go beyond mere equal *treatment*, and create programs and policies that provide for equal *opportunity*.⁷³

The performativity school similarly seeks to disrupt the enforcement of racialized norms, whether by the state or by non-state institutions. Like transgender activists, the performativity school wants racial performances to be costless, so that one’s racial identity has no impact on his or her ability to function in the world. Emily Houh’s proposed “good faith antidiscrimination claim,” for example, would permit a plaintiff to establish an anti-discrimination claim under contract law if she could demonstrate “the existence of relevant stereotype(s) that have attached to the plaintiff; how those attached stereotypes negatively impact work performance; and that the employer took some negative employment action against the plaintiff; and causation.”⁷⁴ Houh argues that this

69. *Id.*

70. *Id.* at 24.

71. See Michael Ashley Stein, *Disability Human Rights*, 95 CALIF. L. REV. 75 (2007); see also Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203 (2007).

72. See Stein, *supra* note 71; see also Michael Ashley Stein & Penelope J.S. Stein, *supra* note 71.

73. Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, *supra* note 71, at 1223. The Steins argue that their framework for disability rights, which is based on international human rights theory, would encompass fuller rights for “other socially excluded groups, such as ethnic minorities, women, and the poor.” *Id.* at 1240. See also Stein, *Disability Human Rights*, *supra* note 71, at 115 (arguing that this human rights framework would also bring about fuller rights for sexual minorities).

74. Emily M.S. Houh, *Toward Praxis*, 39 U.C. DAVIS L.REV. 905, 920 (2006); see also Emily M.S. Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455 (2005).

application of equality norms to private as well as public law is a necessary step in disrupting “an overly narrow view of equality and an understanding of discrimination as discrete sets of de-contextualized acts that are inflicted on a victim by an individually motivated perpetrator who must intend to do harm.”⁷⁵ In public law, the existing template of “sex-plus discrimination” could be elaborated to encompass discrimination based not solely on one’s membership in a protected category, but rather on one’s triggering racialized stereotypes whether attached to appearance, behavior, activism, or association.⁷⁶ Sex-plus discrimination has been used successfully in court to challenge the stereotyping of mothers, for instance, as persons who are unable to function as successful employees.⁷⁷ A “race-plus” discrimination theory might be invoked to challenge the stereotype, for example, of the Bestial Black Man if an employment situation triggered that stereotype to an employee’s detriment. Similarly, the theory of “intersectional discrimination,” which is occasionally recognized by courts when plaintiffs belong to more than one stigmatized group, points toward an understanding of discrimination not as based on a person’s fixed categorical identity, but rather on how and whether that person’s behavior or appearance has triggered a stereotyped response.⁷⁸ The EEOC is

75. Houh, *Toward Praxis*, *supra* note 74, at 909. See also Houh, *Critical Race Realism*, *supra* note 74, at 458-63 (adopting Iris Marion Young’s theory of oppression and arguing that “civil rights laws [should] aim to integrate American social and working life by altering our notions about ‘who does what for whom,’ and ‘how work is compensated.’”).

76. As a recent practice manual explains:

“Sex plus” discrimination refers to policies or practices through which an employer classifies employees on the basis of sex plus another characteristic, such as parenthood, race, marital status or child-bearing ability. The employer is alleged to have discriminated against a specific subclass of one sex. In *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), the Supreme Court held that the employer, which refused to hire women with pre-school-age children but hired men with pre-school-age children, violated Title VII, because Title VII prohibited using one hiring policy for women and another for men. The reasoning of *Phillips* has been extended to other subclasses. To state a “sex plus” claim, most (but not all) courts have required a plaintiff to show that the defendant discriminated against a sub-class of one sex by treating a similarly situated sub-class of the other sex with those same characteristics more favorably. “Sex plus” claims are often related to claims of sex stereotyping, for example, when based on discrimination grounded on the belief that a female employee with young children cannot be or will not be committed to her job.

Practicing Law Institute, *Evolving Theories of Sex, Race, and Color Discrimination Under Title VII*, 763 PLI/Lit 153, 177 (October 2007).

77. *Id.* at 177-85 (describing cases).

78. See, e.g., *Berndt v. California Dep't of Corrections*, No. C03-3174, 2005 WL 2596452 (N.D. Cal. Oct. 13, 2005) (holding that a claim is stated under Title VII when the plaintiff claims a combination of race and sex bias, such that only African-American female correctional officers were required to work alone without backup); *Lam v. Univ. of Hawai'i*, 40 F.3d 1551, 1562 (9th Cir. 1994) (holding that when plaintiff claims race and sex bias, it is necessary to determine whether employer discriminated on basis of combination of factors, and not just on whether it discriminated against persons of same race or of same sex); *Jeffries v. Harris County Cmty. Action Ass'n*, 615 F.2d 1025, 1034 (5th Cir. 1980) (holding that non-discriminatory treatment of black males and white females is irrelevant to question of discrimination against black female

moving in this direction in a recent compliance manual.⁷⁹ As a team of lawyers describe the guidance in this manual:

In its Compliance Manual, the EEOC defines race broadly to encompass ancestry, physical characteristics associated with a race (such as a person's color, hair, facial features, height and weight), race-related illness (such as sickle cell anemia), and cultural characteristics related to race (such as a person's name, cultural dress, grooming practices, or accent or manner of speech). According to the EEOC, Title VII is also violated when an employer discriminates against an individual based on the perception that the individual belongs to a particular racial group, whether or not that individual actually identifies himself or herself with that racial group, and when an employee discriminates against an individual because he or she associates with someone of a particular race. The Compliance Manual also recognizes as race discrimination reverse discrimination and bias against a subgroup of a race, such as black women with pre-school age discrimination. The Compliance Manual notes that Title VII also prohibits discrimination on the basis of "color", which is generally understood by courts and the EEOC to mean "pigmentation, complexion, or skin shade or tone." The EEOC states that color discrimination can occur between members of different races or ethnicities or between members of the same race or ethnicity.⁸⁰

A focus on stereotyping rather than on identity would be consonant with critical race theory's aim to de-naturalize identities generally. The aim might be to bring into law what one of the parents of critical race theory, Charles Lawrence, advocated twenty years ago: understanding discrimination not as a phenomenon of individual conscious intent, but of shared cultural norms, which are enforced through social interactions and often nonconscious behavior.⁸¹ Colorism, from this perspective, is a reminder of the need to think beyond identity as a thing a person has, and to conceptualize it as the effect of relationship.⁸² The work of the performativity school suggests another connotation for the slogan that "race is a social construction." The emphasis in that phrase is usually on *construction*: race does not exist in the body but rather is the product of socially-produced understanding. Perhaps we need also to stress that race is a *social* construction. Rather than investigating a plaintiff's ancestry or color to discover a preexisting and protected identity, courts should

claiming bias on both racial and gender grounds).

79. EEOC Compliance Manual, No. 915.003, §15-II (April 19, 2006), available at <http://www.eeoc.gov/policy/docs/race-color.pdf>.

80. Practising Law Institute, *supra* note 76, at 192.

81. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

82. See Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 34-36 (1987) (describing discrimination as "relational," not based on a trait possessed by the person considered "different").

seek to discover whether and how caste is being produced in the interaction between the plaintiff and the defendant.⁸³ Thus, the question should be, not whether the plaintiff *is* a particular race, but whether and how he or she has been *racialized* by others.⁸⁴

IV.

When my daughter was six, she asked me, “Why do all the good lions in ‘The Lion King’ have light fur and blue eyes, and all the bad lions have dark fur and brown eyes?” My answer was, “Because white people drew the lions.” Of course there is a longer answer. As Winthrop Jordan has demonstrated, an elaborate iconography of color in which light is good and dark is bad goes back a long time in European history, and it is unlikely that colorism and other kinds of discrimination based on racialized appearances or behaviors can be extinguished by an act of will.⁸⁵ Indeed, my continued worry is the persistence of certain kinds of fantasy images that lie deep in American society, despite our efforts to denature and neutralize them. Margaret Baldwin has written powerfully about how the fantasy image of the whore pressures all women to prove that, whoever they are, they are not that.⁸⁶ Similar fantasy figures, like the ungovernable “nigger” or the unassimilable “Oriental,” may be difficult to eradicate from the culture because of their centrality to the political project of liberalism.⁸⁷ Despite public and private efforts to reduce their disciplinary pressure, they may persist as necessary shadows of what we imagine America to be. But we need not embrace the liberal hope that someday all racial discrimination will go away to move to challenge discrimination in the here and now. We should remain mindful of Reva Siegel’s admonition that systems of caste do not stand still.⁸⁸ Faced in the twenty-first century with not one but potentially many color lines, law and public policy should respond with rules that reflect the complexity of discrimination in a multiethnic world.

83. Vicki Schultz identifies this model of discrimination as the “Disruption Model.” Vicki Schultz, *Antidiscrimination Law as Disruption: The Emergence of a New Paradigm for Understanding and Addressing Discrimination*, presentation at Boalt Hall School of Law (Nov. 19, 2007).

84. See Ken Nakasu Davison, *The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals Under Title VII*, 12 ASIAN L.J. 161, 176 (2005) (“Under Title VII, courts can only fully afford protection to all employees against racial discrimination by looking at the intent of the discriminator, rather than whether the characteristic of the employee is mutable or not.”).

85. See WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812* (1968).

86. Margaret Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47 (1992).

87. See Angela P. Harris, *Ghosts of Liberalism* (unpublished manuscript on file with the author) for a further exploration of these fantasy images and their importance to theories of governance.

88. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).