

# 12 Multilayered Racism

Courts' Continued Resistance to Colorism Claims

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IN 1993, LAW PROFESSOR CHERYL HARRIS RECOUNTED how her light-skinned grandmother used her “white” skin to secure a better paying job to support her family.<sup>1</sup> Harris acknowledged that her grandmother would not have gotten a job reserved for white women had her black racial ancestry been known. Thus, her grandmother’s light skin tone served as a surrogate for whiteness.

Today, antidiscrimination laws make it illegal for Harris’ grandmother to be denied a job for which she was qualified based only on her race. The law is less clear about whether the hiring of Harris’ grandmother over another similarly qualified black person because of her light skin tone—colorism—is illegal. Courts have been reluctant to acknowledge the increasing complexity of race because legal race theories do not provide sufficient guidelines for courts to apply. Additionally, proof of intent to discrimination is required to prevail even though empirical studies suggest that increasingly race-based discrimination in America is unintentional—that is, unconscious and automatic, but nonetheless harmful.

## Empirical Evidence of Skin Tone Bias

Literature on colorism tends to treat skin tone bias as an internal phenomenon within nonwhite communities, but skin tone discrimination can be either interracial or intraracial. There is a body of literature dating from the late nineteenth century about the American “mulatto” that reflected and fostered color bias within the white community.<sup>2</sup> Many early-twentieth-century eugenicists argued that possession of partial white ancestry accounted for the success of some black people.<sup>3</sup>

Colorphobia also infected nonwhite communities, especially black communities in America. Bias against dark-skinned people created a color hierarchy within the group labeled as *black*. In other words, colorphobia, colorism, or skin tone bias creates different levels of status and power within a racial group. Thus, scholars recognize that members of the same racial group can be differentially racialized.<sup>4</sup>

The famous Swedish economist Gunnar Myrdal wrote in the 1944 that “without a doubt a Negro with light skin and other European features has in the North an advantage with white people when competing for jobs available to Negroes.”<sup>5</sup> In the 1950s, E. Franklin Frazier, a controversial black social scientist, agreed, cautioning that although light skin tone conferred an advantage, it did not overcome the stigma of being black.<sup>6</sup> Several later empirical studies support Myrdal’s and Frazier’s claims. These studies found that light-skinned blacks were more likely to be better educated, better employed, and have better (socio-economic) marital outcomes than dark-skinned blacks.<sup>7</sup>

One scholar qualifies these findings, arguing that although skin tone-based differences exist among black Americans, they are less pronounced for blacks born after World War II; and employment differences between light- and dark-skinned persons has decreased significantly since the 1980s.<sup>8</sup> This study, however, has been questioned by other researchers who conclude that during the late twentieth century, skin tone still had a significant impact on the wages of black males. Black male workers with medium and dark skin lost at least 10 percent in wages compared with white male workers. Whereas the wage differences between light-skinned black male and white male workers was insignificant. These researchers conclude that there is “a line of separation in labor market experiences for light-complexioned black males and all others” (p. 245).<sup>9</sup>

Skin tone bias is not limited to black Americans. Empirical studies also suggest a correlation between skin tone and education or income for Mexican Americans. Mexican Americans with dark skin tones and indigenous features fair poorly compared with Mexican Americans with light skin tones and more European features.<sup>10</sup> Another study using the New Immigrant Survey 2003 found that light-skinned legal immigrants earned between 8 to 15 percent more than comparable immigrants with darker skin tones.<sup>11</sup> The researcher notes that the study only looked at immigrants currently employed; thus, if skin tone influences hiring decisions, the effect on wages could be even greater.<sup>12</sup>

More recent studies suggest that the public associates dark skin tones with criminality and untrustworthiness. After the controversy surrounding *Time*

*Magazine's* darkening of O. J. Simpson's mug shot on the cover of its June 27, 1994, issue, social scientist Dwayne Proctor conducted a study in which the skin tone in a photograph accompanying a news article about the arrest of an accused murderer was manipulated. Proctor found that study respondents, when shown the two photographs of the same black man, were more likely to find the black man with dark skin tone guilty than the same man with light skin tone. Proctor concludes that there is a learned association between the word *black* and guilt, and that the accused black "man with light colored skin . . . was judged as less guilty because he was not seen as 'black.'"<sup>13</sup>

Proctor's reasoning might explain the outcome of another study. Since 1865, a disproportionate percent of black elected officials in Congress have been light-skinned, causing social scientists to speculate about whether skin tone differences among black political candidates has any effect on black voters' attitudes, and whether skin tone may be a factor, in addition to race, considered by white voters when evaluating black political candidates.<sup>14</sup> Another researcher concluded that white voters would evaluate dark-skinned black political candidates more negatively than light-skinned black candidates.<sup>15</sup>

The preference for light skin tones may not be a result of conscious bias, but of what Jerry Kang calls "racial mechanics—the ways in which race alters intrapersonal, interpersonal, and inter-group interactions."<sup>16</sup> There are explicit and implicit racial meanings assigned to the racial categories created by law and cultural practices, and the racial meanings associated with that category are triggered when we interact with others.<sup>17</sup> As a result, implicit racial biases—negative stereotypes and prejudices—influenced these interactions. These reactions are automatic in the sense that they are unintentional and outside the actor's awareness.

Individual members of the same race may be treated differently based on whether they have what social psychologist Irene Blair characterizes as "Afrocentric features"—dark skin, wide nose and full lips.<sup>18</sup> Individuals with these features are likely to be judged more harshly than members of the same race with less Afrocentric features as a result of automatic or implicit racial attitudes.<sup>19</sup> The consequences of implicit skin tone and phenotypic biases may be significant.

Using a Florida Department of Corrections photographic database of convicted offenders, and controlling for crime charged and criminal history, Blair compared the length of sentences, looking at race and physical features. Although there was no significant disparity between the sentences of blacks

and whites, Blair found that criminal defendants with Afrocentric features received longer sentences than offenders of the same race with less pronounced Afrocentric features. Unconscious or automatic stereotyping may even transcend race. Blair found that white offenders “with high levels of Afrocentric features (relative to their racial group)” received slightly longer sentences than whites with low levels of Afrocentric features.<sup>20</sup>

Based on the findings of this and earlier research, Blair posits that the sentencing differences within racialized groups may be a consequence of sentencing judges who subconsciously associate criminality more with dark-skinned blacks than with light skinned blacks. Blair and her co-authors speculate “judges were unaware . . . that Afrocentric features might be influencing their decisions and were not effectively controlling the impact of such features.” The researchers conclude that “[r]acial stereotyping in sentencing decisions is . . . not a function of the racial category of the individual. Instead, there is perhaps an equally pernicious and less controllable process at work.”<sup>21</sup> I characterize the phenomena Blair describes as race-related discrimination.

The implications of Blair’s studies about automatic stereotyping are significant. As a general rule, legal relief under antidiscrimination law is based on a showing of some explicit or conscious intent to discriminate. If, as the growing body of social science data suggests, race-related discrimination, especially feature-based stereotyping like colorism, is not only unintentional, but automatic, then current laws provide ineffective remedies.

### Confusion in the Court: Title VII and Other Colorism Cases

Courts and some academic scholars express confusion about the legal basis for color-based discrimination claims. In an earlier article I argued that the courts should treat adverse employment decisions based skin tone as a form of race-based discrimination.<sup>22</sup> Employment discrimination cases based on colorism claims usually rely on two federal antidiscrimination statutes: 42 U.S.C. § 1981, a post-Civil War reconstruction statute that guarantees all persons the same rights as “white citizens,” but makes no reference to the words *race* or *color*<sup>23</sup>; and Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on color as well as race, but defines neither term. Title VII also prohibits discrimination on the basis of ethnicity, gender, religion, and national origin.<sup>24</sup>

Most courts refused to acknowledge race-related discrimination when the employment decision involves two people “raced” the same. Thus, when

one black litigant claims color-based discrimination in hiring by an employer, courts usually dismissed the claim if the employer proves that another black person was hired for the position. However, during the early 1990s, two federal court decisions, *Walker v. Internal Revenue Service*, an employment discrimination case, and *Franceschi v. Hyatt Corp.*, a public accommodations case, recognized intraracial or intraethnic discrimination claims but use different reasoning. The federal judge in the *Walker* case treated the colorism claim like a race discrimination claim, concluding that the light-skinned black plaintiff was alleging discrimination by her dark-skinned black supervisor based on the plaintiff's remote white ancestry.<sup>25</sup> In contrast, the federal district judge in *Franceschi* avoided determining whether Puerto Ricans are white or a separate race, ruling instead that intraracial discrimination claims are actionable if the complaining party was treated like a minority.<sup>26</sup> Although both courts recognized colorism as a legal claim, neither plaintiff recovered.

Colorism cases are hard to prove because, as the *Walker* and *Franceschi* cases suggest, courts are confused about what constitutes a valid colorism claim. In some cases, courts analyze the race and color discrimination claims separately. If there is no evidence that the employer failed to hire applicants based on their race, then the court looks at whether there is evidence that the employer only hired applicants from that racial group with a particular skin tone.<sup>27</sup>

In other cases in which the litigant asserted a race and color claim, the court acknowledged that, in reality, the litigant was setting out a race claim and treated it as such, using the terms *color* and *race* interchangeably. For example, the plaintiff in *Mainigi v. IBP, Inc.* sued, alleging employment discrimination based on national origin (Kenyan/East African) and color.<sup>28</sup> However, it seems his color claim was really a race claim, that he had been discriminated because he was black, and the court treated his case as a race discrimination claim. Similarly, the plaintiff in *Vester v. Henderson* filed a race and color discrimination claim based on her race (Caucasian) and her color (white)<sup>29</sup>; the federal district court treated the case as a race claim. Of course, it is possible that the litigants in these cases were not alleging colorism claims, but were using the terms *race* and *color* interchangeably.

A few courts seem willing to acknowledge colorism claims between Latina/o litigants, demonstrating that courts can handle colorism claims, although not always well or uniformly—a point explored more fully by Tanya Katerí Hernández in Chapter 14 of this volume. Most of these judicial discussions about colorism claims come from the federal district court in Puerto Rico and involve

Puerto Rican parties. Puerto Rico is governed by the same antidiscrimination laws as the United States.

In *Santiago v. Stryker Corp.*, for example, the plaintiff complained of discrimination based on national origin and color. The district judge observed that although both parties were Puerto Rican: “Falero describes himself as a darker skinned, or mulatto, Puerto Rican. . . . Cabrera’s skin color, on the other hand, is admittedly white,” thus recognizing a colorism claim.<sup>30</sup> The judge continued: “The fact that Cabrera’s skin is of a different color places him outside Falero’s protected class, and is enough to satisfy a key element of plaintiff’s case. Although the plaintiff’s pleadings established a colorism claim, the court dismissed the case for other reasons.

Cases like *Santiago* and *Johnson v. Wegman’s* raise an interesting question—namely, who determines skin tone? The plaintiff, defendant, or judge? In *Johnson*, the court accepted the defendant employer’s affidavit describing the skin tone of its black employees. In *Santiago*, the trial judge relied on the plaintiff’s self-description and the judge’s visual observation of the defendant in making this determination. Each method is problematic. Naturally an employer will describe the skin tone of employees in the manner most favorable to its case, whereas reasonable judges and plaintiffs may disagree on a party’s skin tone.

In another Puerto Rican colorism case *Felix v. Marquez*, the plaintiff, Carmen Felix, described herself as dark olive whereas the judge described her as of a medium shade.<sup>31</sup> The terms *medium brown* and *brown*, as they relate to skin tone, have a distinct racial connotation in the United States. These terms describe nonwhites. However, the term *olive*, used in *Felix* is often used to describe southern Europeans like Italians, ethnic groups considered white in the United States. Descriptions of skin tone in this country invariably convey racial meaning.<sup>32</sup>

One of the few successful colorism cases also involved Latino plaintiffs. In *Rodriguez v. Gattuso*, a 1992 federal district court in Illinois recognized interracial discrimination in the leasing of property based on skin tone.<sup>33</sup> The plaintiffs, a dark-skinned Afro-Latino and his light-skinned Latina wife, attempted to lease an apartment from a white landlord. Carole Rodriguez met with the landlord, who agreed to rent the apartment but wanted to meet Carol’s husband before finalizing the deal. When Roberto, her Afro-Latino husband, appeared, the landlord claimed that two other couples were ahead of them on the list for the apartment, adding that he doubted whether Roberto and Carol Rodriguez could pay the rent.

The trial judge found that the landlord only had one Latino tenant in each of his buildings and those tenants were of “white Latino ancestry.” The judge based this determination on his visual observations. He wrote: “[t]his Court’s physical observation of [the Latino tenants in the apartment] light-skinned Latino Mitchell Gonzalez (whose wife Laura was described as ‘white’) and . . . light-skinned Latino Carol, as contrasted with Roberto’s characterization as a ‘black Latino,’ demonstrates graphically that persons such as Gattuso’s [the landlord] could be (and in this case was) biased against Roberto because of his color and that Gattusos discriminated against him for that reason and that reason alone.”<sup>34</sup> The judge, although treating the case as a colorism claim, was nonetheless relying on conventional racial references: white and black.

### Is Colorism a Form of Race Discrimination?

Arguably, the judge in the *Rodriguez* case, like the judge in the *Walker* case, treated the colorism claim like a racial discrimination claim in which a landlord prefers white tenants over black tenants. What remains unclear is whether colorism practices constitute race-based or race-related discrimination, or some entirely new form of discrimination. Law professor Trina Jones argues that colorism is a form of discrimination independent of race.<sup>35</sup>

According to Jones, colorism evokes different stigmas and stereotypes that are not based on race, but on skin tone. “[I]t is the social meaning afforded skin color itself that results in differential treatment. . . . [A]ny difference in treatment results not from racial categorization per se, but from values associated with skin color itself.” She concedes that race and colorism claims may overlap, but argues that colorism claims are “analytically different” from race discrimination claims.<sup>36</sup> Professor Jones’ more recent discussion of colorism practices also appears in this volume (Chapter 13).

Increased recognition by social scientists of skin tone’s impact on important life decisions like employment and criminal punishment confirms racism’s persistence in the twenty-first century, and its ability to reinvent itself in ways that both disguise and deny its continued existence. From a remedial legal perspective, it also matters whether colorism claims are race or nonrace claims. Race-based claims have the benefit of a long, although tortured, jurisprudence grounded in constitutional, federal, and state laws. Judges and legislators understand the underlying reasons for race-based laws. Creating a new cause of action independent of race raises questions about the legal basis for the action and the appropriate analytical framework courts would use when assessing colorism claims.

Jones' approach to colorism claims ignores the ability of racism to metamorphose into new forms and assumes a willingness of increasingly hostile courts to consider new legal actions expanding the basis for discrimination claims. In the short term, this country's race discrimination jurisprudence, however flawed, may be a more promising avenue for securing some legal redress. Nevertheless, legal scholars need to explore the possibility for developing new and effective theories to remedy harmful colorism practices outside of race discrimination law.

### Moving Beyond the Intent Requirement

Although intentional race-based or race-related discrimination may have become less common during the twenty-first century, automatic and unconscious discrimination has not disappeared. Thus, the biggest obstacle to colorism claims remains the requirement that the plaintiff prove the discrimination was intentional. This country's current race jurisprudence resists acknowledging that most race-based discrimination today is unintentional. Arguments by several legal writers for expanding antidiscrimination laws to cover unintentional acts of discrimination have fallen on deaf ears.<sup>37</sup>

As mentioned previously, numerous empirical social science studies establish the existence of unconscious or automatic negative stereotype bias toward groups on the basis of race, age, or gender and demonstrate that these unintentional biases influence decision making.<sup>38</sup> A few studies found that the automatic stereotyping process can be controlled or minimized using a variety of methods and strategies, including sensitizing decision makers to control their unconscious racial stereotyping.<sup>39</sup> Thus, sensitivity training might be appropriate for some decision makers like employers, and special instructions or cautions might be warranted for legal decision makers like judges and juries.<sup>40</sup> These changes might be instituted as safeguards without abandoning the intent-to-discriminate requirement.

However, sensitizing methodologies do not address one disturbing finding from a Blair study. The same individuals who, if sensitized, can control their racial stereotypical attitudes are unable to control stereotypes based on skin tone and Afrocentric features even when sensitized to the existence of these stereotypes.<sup>41</sup> Thus, the thorny question is whether a predictable and fair legal standard can be developed that addresses automatic stereotyping based on skin tone or phenotype, because automatic skin tone stereotyping is as damaging as intentional race-based or race-related discrimination.

## Broader Implications of Colorism and Phenotypic Bias

*United States v. White* illustrates how unconscious skin tone and phenotypic bias may impact in other areas like jury selection and relief for the discriminatory exclusion of blacks from juries.<sup>42</sup> John Terrence A. Rosenthal recounts how the judge in *White*, when quizzing potential jurors, asked whether “they could be fair and impartial given that the defendant was a black male.”<sup>43</sup> The trial judge observed that only one potential juror “appeared to be African-American. . . . At that point, [another] juror, . . . stated that she wanted the judge to know that she was African-American. The judge thanked her for her candor, and stated that he would not have recognized her as African-American and he believed that not many others would have recognized her as being African-American.”<sup>44</sup>

Both the prosecution and the defense may dismiss, with the judge’s permission, any potential juror for “cause” (obvious bias in favor or against one of the parties, lawyers or witnesses). Each side also has a number of preemptory challenges that may be used against potential jurors without stating a reason. The prosecutor exercised his preemptory challenge dismissing only the “visibly black” juror.<sup>45</sup> The exclusion of one of two black jurors, the visibly black but not the racially ambiguous-looking juror, raises interesting legal questions about what constitutes impermissible race-based exclusion of jurors.

In 1986, the United States Supreme Court in *Batson v. Kentucky* revised the process for establishing racial discrimination in jury selection.<sup>46</sup> To prevail, the defendant must establish that (1) the prosecution used its preemptory challenges to exclude a member of the juror panel from the same racial group as the defendant and (2) the circumstances surrounding the exclusion of the juror raises an inference of racial motivation—intentional conduct.

If racially motivated, the use of a preemptory challenge against the visibly black juror in *White* might be the basis of a *Batson* challenge. However, in cases like *White*, a successful challenge may be problematic because only one of the two identified black potential jurors was struck. Because one known black person was left on the jury, a *Batson* challenge may be inappropriate under the current legal regime because the rule is grounded on a view of race as monolithic.

Should it matter for race discrimination purposes whether the light-skinned black person is not regarded as black by the lawyers? Furthermore, it may be difficult or impossible to determine whether the prosecutor’s actions in *White* were intentional or the product of automatic stereotyping. Both reasons are equally harmful for criminal defendants, but the law as currently constructed does not prohibit unconscious or automatic racially biased decision making.

## Conclusion

The faces of the people left behind at the Convention Center and Superdome in New Orleans during Hurricane Katrina in 2005 remind us of the continuing connection between race, skin tone, and socioeconomic class in America. *CNN News* commentator Wolf Blitzer's unselfconscious comments reflect the reaction of the nation. Blitzer, in obvious distress, reported to the television viewing audience that the New Orleans residents left behind were "so poor and . . . so *black*."<sup>47</sup> His "so black" comment highlighted the reality of the post-Katrina tragedy. A disproportionate number of people the media identified as left behind and most in need of help were not simply black, poor, aged, and infirm, they were dark-skinned black people. The empirical studies suggest that this circumstance was not a mere accident of fate. Legal institutions, like courts, facilitate colorism practices in the United States by failing to provide effective legal remedies for this form of race-related discrimination. This failure reinforces existing dominant social, economic, and cultural norms that operate against black people with the darkest skin tones.

The continuing importance of skin tone in how race is experienced in the United States, and the persistence of courts and legal scholars in viewing race as a monolithic phenomenon actionable only if intentional, highlights the need to rethink progressive race jurisprudence in America. The studies on implicit automatic stereotyping are new weapons to use in attacking the intent-based requirement in antidiscrimination law. Social science research may be an effective means to persuade courts to remedy more subtle and pernicious forms of race-based discrimination like colorism. New legal theories must be flexible enough to address the varied faces of racism in the twenty-first century.

As more empirical studies help us better understand how race-related discrimination is manifested, how automatic stereotyping perpetuates race-related decision-making, and how to measure and thwart implicit stereotyping, legal scholars will be better able to craft effective theories to combat this and other more subtle forms of discrimination like colorism. Unless courts can be persuaded to acknowledge how automatic race-related stereotyping, like colorism, results in economic discrimination and possible loss of liberty, discriminatory racialized decision making will not be eliminated. The failure to develop more complex definitions of actionable race-based or race-related discrimination and to expand recovery to include instances of unintentional conduct means that racial injustices will persist well into the twenty-first century.