Colorable Claims: The Continuing Significance of Color Under Title VII Forty Years After Its Passage

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I. INTRODUCTION

We believe that all men are created equal—yet many are denied equal treatment. We believe that all men have certain inalienable rights. We believe that all men are entitled to the blessing of liberty—yet millions are deprived of those blessings, not because of their own failures, but because of the color of their skins.1

The fortieth anniversary of the Civil Rights Act of 1964 is a milestone marking the passage of legislation that literally changed the complexion of

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Title VII of the Act prohibits discrimination in employment on the basis of sex, race, national origin, religion, and color. Although the meanings of the terms "color" and "race" may appear to be obvious, they are neither defined by the statute nor discussed in the legislative history of the act. Congress’s failure to define these terms leaves the courts with

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2. "Title VII has indeed accomplished a sea change in the face of employment in America, and it’s easy to take that for granted." William Robinson, Remarks at the “Celebrating the 40th Anniversary of Title VII” panel discussion hosted by the U.S. Equal Employment Opportunity Commission (June 22, 2004), available at http://www.eeoc.gov/abouteeoc/40th/panel/40thpanels/panel1/transcript.html; Ronald Turner, Thirty Years of Title VII’s Regulatory Regime, Rights, Theories and Realities, 46 ALA. L. REV. 375, 386 (1995). “[T]itle VII had an immediate and a demonstrable impact on employment discrimination at the time of and in the years following the enactment of the statute. . . .” Id. at 386.


5. Tauyna Lovell Banks, Colorism: A Darker Shade of Pale, 47 UCLA L. REV 1705, 1732 (2000). The EEOC, the agency charged with administering Title VII, has not defined the term color in its interpretive guidelines or regulations. The agency’s approach to race is found on the employer’s reporting form, known as the EEO-1. The instructions to this form explain race as follows:

Race/ethnic designations as used by the Equal Employment Opportunity Commission do not denote scientific definitions of anthropological origins. For the purposes of this report, an employee may be included in the group to which he or she appears to belong, identifies with, or is regarded in the community as belonging. However, no person should be counted in more than one race/ethnic group. The race/ethnic categories for this survey are:

- **White (Not of Hispanic origin)** - All persons having origins in any of the original peoples of Europe, North Africa, or the Middle East.

- **Black (Not of Hispanic origin)** - All persons having origins in any of the Black racial groups of Africa.

- **Hispanic** - All persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

- **Asian or Pacific Islander** - All persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa.

- **American Indian or Alaskan Native** - All persons having origins in any of the original peoples of North America, and who maintain cultural identification through tribal affiliation or community recognition.
more discretion to define the boundaries of color and race.\(^6\) Thus, the courts have the flexibility to recognize that discrimination based on skin color, which is often tied to perceptions of race, is a distinct harm that includes both interracial and intraracial discrimination.\(^7\)

For purposes of this discussion, colorism describes the tendency to perceive or behave negatively towards members of a racial category based on the lightness or darkness of their skin tone.\(^8\) The majority of colorism cases involve a plaintiff who was treated less favorably due to his or her darker skin color.\(^9\) Although color is an independent basis for a discrimination claim, few plaintiffs have based their discrimination claim on color, resulting in relatively fewer reported cases based on color than on race discrimination.\(^10\) Moreover, many of the cases alleging color discrimination also allege race discrimination, blurring the basis of the plaintiffs' discrimination claims.\(^11\) Furthermore, even the Equal Employment Opportunity Commission, the agency charged with the enforcement of Title VII, tends to be fuzzy on the distinction between the two classifications.\(^12\) As Professor

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\(^6\) See, e.g., Felix v. Marquez, No. 78-2314, 1981 WL 275 (D.D.C. Mar. 26, 1981) ("[T]he legislative history of these acts is silent on the meaning of the term "color," and no definitive interpretation has been provided by the courts . .").


\(^8\) Keith Maddox & Stephanie Gray, Cognitive Representations of Black Americans: Reexploring the Role of Skin Tone, 28 PERSONALITY & SOC. PSYCHOL. BULL. 250 (2002); Jones, at 1488 (defining colorism as "the prejudicial treatment of individuals falling within the same racial group on the basis of skin color").

\(^9\) For this reason, some scholars have adopted the term "colorism" to refer to discrimination against dark-skinned, but not light-skinned blacks. See Banks, supra note 5, at 1709; 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 DENVER U. L. REV. 131 (1997); Ronald E. Hall, Skin Color Bias: A New Perspective on an Old Social Problem, 132 J. SOC. PSYCH. 238 (1998).

\(^10\) See Mary-Kathryn Zachary, Labor Law for Supervisors: Color Discrimination Under Title VII, 64 SUPERVISION 23 (2003) ("For many years after the statute's passage, courts were confronted with cases involving claims of race, religion, sex or national origin discrimination. Color discrimination cases were virtually nonexistent.").


\(^12\) For example, in discussing the settlement of a race discrimination case, EEOC Regional Manager Richard Quick said "[p]eople should not be deterred from getting or keeping a job because of the color of their skin." Press Release, EEOC, Supercuts to Pay $3.5 Million for Race Bias and Train Hundreds of Managers (Aug. 13, 2003), available at http://www.eeoc.gov/press/8-13-03. On the agency's homepage where there is a listing of "Discrimination by Type: Facts and Guidance," color is not listed.
Trina Jones observes, people are not accustomed to thinking about race and skin color as separate concepts:

People often confuse skin color and race because skin color is used to assign people to racial categories. Indeed, color is commonly used to describe the difference between racial categories (i.e., Black is used to describe African-Americans and White is used to describe Caucasians). In addition, people are misled because of the positive correlation between the values associated with being a member of the White race and the values attributed to a lighter skin tone.\(^3\)

The notion that race and color are identical is widespread, despite existing research that demonstrates that an individual’s perception of others is influenced by skin color.\(^4\) For example, an old Christian Sunday school hymn invokes the language of skin color in the lyrics, “Red and yellow, black and white, they are precious in his sight.”\(^5\) Even racial minority groups have adopted the language “people of color” to describe themselves.\(^6\)

Although much of the discourse on color focuses on the difference between races, skin color variations exist within racial groups as well as between them.\(^7\) The prevalence of colorism and its effects are well docu-

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EEOC website, www.eeoc.gov (last visited Dec. 24, 2004). Instead, if one clicks on the listing for “race,” a page opens entitled, “Race/Color Discrimination.” EEOC, Race/Color Discrimination, http://www.eeoc.gov/types/race.html (last visited Dec. 24, 2004). The site explains the prohibited discrimination as follows: “Race-Related Characteristics and Conditions: Discrimination on the basis of an immutable characteristic associated with race, such as skin color, hair texture, or certain facial features violates Title VII, even though not all members of the race share the same characteristic.” See id. The site makes no further distinction between or explanation of race and color.


14. See, e.g., Jennifer Hochschild, From Nominal to Ordinal, Reconceiving Racial and Ethnic Hierarchy in the United States (Jan. 31, 2004) (unpublished manuscript, on file with author). “A smaller but persuasive line of research in psychology shows that skin color affects individuals’ stereotypes of and treatment of others, both within racial or ethnic groups and across them. A huge set of writings in history, popular culture, the law, and literature, as well as an equal number of memoirs and essays, show the impact of skin color on laws, legal decisions, self-definitions, emotions, and interpersonal interactions.” Id. at 65; see Baynes, supra note 9, at 157 (“Society puts people in different color categories in order to place individuals into different racial and ethnic groups. . . . [T]his information is then processed to make judgments about individuals.”).

15. Herbert C. Woolston (lyrics) & George F. Root (music), Jesus Loves the Little Children.

16. In fact, this paper was selected as one of a panel on the fortieth Anniversary of Title VII to be presented at the 2nd National People of Color Scholarship Conference in Washington, D.C. See also Steve Russell, Apples Are the Color of Blood, 28 CRIT. SOC. 65 (2002) (“Color is such a defining characteristic of America’s racial disharmony that minorities often huddle together under the sobriquet ‘people of color.’ ”).

mented. 18 "Color judgments appear with such regularity as to escape notice. Color permeates popular conceptions and preconceptions . . ." 19 Current social science research, the increase in Title VII color discrimination cases, the rise of "appearance" cases, and the growing dialogue on multiracial identification all lend credence to the notion that colorism is alive and well in the United States. 20

One of the most thorough discussions of colorism, its historical development, and its impact on employment can be found in the article entitled Shades of Brown, the Law of Skin Color. 21 In that article, Professor Trina Jones traces the development of colorism from before the Civil War to the present and argues that the legal system must acknowledge and understand colorism in order to ensure equality in employment. 22 In an equally important and seminal article, Colorism: A Darker Shade of Pale, Professor Taunya Lovell Banks conducts a thorough examination of employment discrimination cases based on color and argues that although the courts are willing to recognize colorism in cases involving white and Latino plaintiffs, they are reluctant to do so in cases involving black plaintiffs. 23

This Article, written on the fortieth anniversary of Title VII, builds on the work of these two scholars and provides additional support for the argument that color discrimination litigation will play an increasingly important role in the development of Title VII jurisprudence. The structure of the Article is as follows. Part II briefly describes the historical underpinnings of skin color discrimination in the United States. Part III presents recent social science research indicating the persistence of colorism as well as its lasting effects. This research demonstrates the need to be vigilant about colorism in the workplace and highlight the perniciousness of the problem even as we celebrate the fortieth anniversary of Title VII. Part IV discusses whether colorism arising from other cultural biases which are not linked to the racial subjugation in United States history also should be cognizable under Title VII. 24 Part V reviews recent color discrimination cases and their

18. See, e.g., infra notes 32 & 67.
21. See Jones, supra note 7.
22. Id. at 1500-31.
23. Banks, supra note 5, at 1727.
24. Id. at 1732 n.122 ("The court stated that colorism claims may be based on 'indigenous discriminatory practices around the world having nothing to do with the American experience.' This raises
holdings and notes their increased prominence in light of the EEOC's decision to make cases involving color discrimination one of the agency's priorities.25

II.

A BRIEF HISTORY OF COLORISM IN THE UNITED STATES

Focusing for the moment on Americans who happen to be black, we know and must recognize certain incontrovertible historical and contemporary facts, including the actuality and impact of 250 years of slavery; eighty years of legally enforced subordination of blacks; past and present social norms and realities that have kept and continue to keep many blacks "in the lowest status, least remunerative jobs, and (that have) denied them the chance to move up the occupational ladder"; and current views of African Americans held by many whites.26

Much has been written on the history of skin color discrimination in the United States and its significance in the construction of social roles.27 I shall not retread that ground in this Article, but instead provide a brief explanation of the historical context of colorism to point out the continued need for the inclusion of color as a protected status under Title VII.

As a result of the legacies of slavery and miscegenation, a need arose to determine whether mixed race children were Black or White. This distinction was important because many of the privileges of society were based upon race. In this situation, skin color played an important role in deter-

an interesting point, whether discrimination based on foreign colorism practices, like those at issue in Ali, is actionable under Title VII. However this question is beyond the scope of this article.

25. Another important development that may boost the number of color discrimination claims is the increasing number of individuals who identify themselves as multiracial. See Jones, supra note 7, at 1544-46; Banks, supra note 5, at 1741-43.


27. See Deidre Coleman, Janet Shaw and the Complexions of Empire, 36 EIGHTEENTH-CENTURY STUD. 169 (2003); Cheryl I. Harris, Whiteness as Property, 106 HARV. L. REV. 1709, 1710 (1993); Verna M. Keith & Cedric Herring, Skin Tone and Stratification in the Black Community, 97 AM. J. SOC. 760, 761 (1991); Edward H. Ransford, Skin Color, Life Chances, and Anti-White Attitudes, 18 SOC. PROBS. 164 (1970); KATHY RUSSELL ET AL., THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS (1992); Ronald Turner, The Color Complex, 46 LAB. L. J. 679 (1995); R. Washington, Brown Racism and the Formation of a World System of Racial Stratification, 4 INTL. J. POL. & CULTURE 209 (1996). While the legacy of slavery imbued issues of color into the consciousness of a young nation, the significance of color predates the colonization of the America. See, e.g., Thomas Hahn, The Difference the Middle Ages Makes: Color and Race Before the Modern World, 31 J. MEDIEVAL & EARLY MOD. STUD. 1 (2001). "I wish, then, to argue that represented color difference is never innocent, neutral, or without cross-cultural evaluative meaning. While skin pigment (and physiognomy) in the ancient world did not at all signify racial difference in the same way as nineteenth century American, or within eighteenth-century European-African relations, it nonetheless signaled conscious and conventional distinctions based upon appearance, territorial and geopolitical diversity and power relations." Id. at 6.
mining race.\textsuperscript{28} "A fair complexion conferred a decided advantage in the late nineteenth and early twentieth centuries."\textsuperscript{29} This advantage is reflected by the fact that "the scholarly and popular literature regarding the 'mulatto,' from the end of the Reconstruction era to the first World War, reflected and fostered color bias . . . ."\textsuperscript{30}

This light/dark distinction continues to influence not only the way that whites view Blacks, but also the way that Blacks have viewed each other:\textsuperscript{31} a study from the early sixties, for example, found social stratification among Blacks based on skin color. These studies revealed that upper-status members of Black communities tended to be lighter than lower-status members.\textsuperscript{32}

[B]lacks with darker skin have, historically, suffered rejection and discrimination from lighter or fairer blacks as well as from whites; darker skin blacks tend to be poorer less well educated and to occupy a lower social status in black communities than do their brothers and sisters of fairer skin. Indeed . . . 'the black life experience' is tempered with these sociopsychological realities.\textsuperscript{33}

But while colorism in the United States arose from a predominantly Black-White paradigm, the view of darker as negative is not limited to Blacks:

In the United States, a color hierarchy exists between and among people of color, which spans different racial and ethnic groups. The premise is very simple and very clear: Lighter is better and darker is worse. Even if we all

\begin{itemize}
  \item Jones, supra note 7, at 1501-02; see also Baynes, supra note 9, at 142 ("'[H]istorical evidence indicates that (W)hites placed greater economic value on slaves of mixed parentage and used skin tone or degree of visible white ancestry' as a means to determine the kind of treatment the slave would receive.") (citation omitted); H.A. Tyroler & Sherman A. James, Blood Pressure and Skin Color, 68 AM. J. PUB. HEALTH 1170 (1978). "Perhaps as an inevitable product of socialization into a Western system of values, the enslaved descendants of 17th and 18th century Africans also adopted skin color as an index of innate ability and social worth." Id. at 1170
  \item Howard Bodenhor, The Mulatto Advantage: The Biological Consequences of Complexion in Rural Antebellum Virginia, 33 J. INTERDISCIPLINARY HIST. 21 (2002); as Professor Banks writes, "Colorphobia within the Black Community increased with the advent of Jim Crow laws near the end of the nineteenth century. The Black community internalized this colorophobia in ways that subordinated some group members to others." Banks, supra note 5, at 1715.
  \item Tyroler & James, supra note 28, at 1170.
\end{itemize}
agree that race itself no longer matters, color will still be a problem because
darkness casts a longer discriminatory shadow than lightness.\cite{34}

Latinos\cite{35} in the United States, whose physical appearance varies
widely, from a more Anglo appearance to those with indigenous features
and others who appear Black,\cite{36} have also experienced the effects of both
intra and interracial colorism.\cite{37} Colonization played a major role in the
development of colorism in these cultures. The colonizers “established societ-
ies based on dominant-subordinate relationships, with skin color as the
predominant marker of status. Because of the prestige and power of con-
quest, whiteness was given a higher status than nonwhiteness by both the
colonizers and the colonized.”\cite{38} In addition, unlike the Black experience,
color “is also a cue in nativist rhetoric surrounding immigration.”\cite{39} For ex-
ample dark-complexioned Mexican Americans with more indigenous fea-
tures “are more likely to be treated as minorities in everyday life than other
Mexican Americans. They are more likely to be stopped, questioned, or
worse by immigration authorities in border communities.”\cite{40}

III.

RESEARCH ON THE IMPACT OF COLORISM ON RACIAL MINORITIES

Social scientists have conducted numerous studies on the impact of
skin color, both within and between races. The impact of colorism has been
found to be significant:\cite{41}

\begin{footnotes}
\item[34] Baynes, supra note 9, at 133.
\item[35] I recognize that the term Latino can be misleading as a classification in that it applies to a heter-
   ogenous, not homogenous group composed of persons of Mexican, Cuban, Puerto Rican, Central-
    American and other Latin-American ancestry. See Kevin R. Johnson, “Melting Pot” or Ring of Fire?:
    Assimilation and the Mexican American Experience, 10 LA RAZA L.J. 173, 204 (1998). However, each
    of these groups share the common history of colonialism and the internalization of colorism. See, e.g.,
    Edward Murguia & Edward E. Telles, Phenotype and Schooling Among Mexican Americans, 69 SOC.
\item[36] Johnson, supra note 35, at 205.
\item[37] See, e.g., id. at 206. Discrimination based on color varies widely within the Latino community
    however, because of the diversity of skin tones. Id. at 205. See also Marta Cruz-Janzen, Latinegras:
    Desired Women—Undesirable Mothers, Daughters, Sisters, and Wives, FRONTIERS, Sept. 2001, at 168,
    171 (“The more Latinos become immersed in the racial ideology of the United States, the sharper and
    more unyielding the black/white dichotomy becomes and the more powerful is their need and desire to
    free themselves of any and all vestiges of African ancestry.”).
\item[38] Murguia & Telles, supra note 35 at 277; Cruz-Janzen, supra note 37 at 174 (“I have come to
    realize that Latino racism, throughout Latin America, Spain, and the United States, begins with the ne-
    gation of the black presence in history. Whites in Latin America, reflected in census counts and histori-
    cal accounts have systematically minimized or completely obliterated the presence and contribution of
    blacks. The darker the Latino, the greater the oppression of his or her existence and linkages to other
    Latinos.”).
\item[39] Ruiz, supra note 19, at 16.
\item[40] Johnson, supra note 35, at 206.
\item[41] See Maddox & Gray, supra note 8. The authors provide a summary of the social science re-
    search on colorism. Id. at 251-2. See also Carlos H. Arce et al., Phenotype and Life Chances Among
\end{footnotes}
Skin color has been used as a basis (however unreliable and irrational) for assigning racial group membership and with it ascriptions of "high" or "low" social status to individuals. Through such indirect processes, skin color becomes a primary determinant of whether an individual's chances for full human development are to be circumscribed or maximized.\textsuperscript{42}

Intraracial colorism is thought to derive from the internalization of the views of the dominant culture.\textsuperscript{43} While much of this research has focused on the Black community, a significant body of work that demonstrates the "dark is bad concept" has been applied across different racial groups.\textsuperscript{44}

There have been a number of studies on the impacts of colorism, both intraracial and interracial, among various racial groups. The results of these studies are important in that they tend to support Title VII's prohibition against color discrimination. The research demonstrates not only a social effect of colorism, but an economic impact as well.

Early studies demonstrated, for example, that Blacks with lighter skin obtained higher socioeconomic status, that more light-skinned than dark-skinned black held high status managerial jobs,\textsuperscript{45} and that dark-skinned Blacks earned seventy cents for every dollar earned by a light-skinned Black.\textsuperscript{46} Interestingly, these data have remained stable over time.\textsuperscript{47} The studies also provide evidence that darker skin color is linked to higher blood pressure in Blacks.\textsuperscript{48}

\textsuperscript{42}. Tyroler & James, supra note 28, at 1170.

\textsuperscript{43}. See Segura-Mora, supra note 17, at 7 ("White privilege is a value deeply ingrained in our social fabric. ‘Oh look at him, how pretty and blond looking he is,’ is a common expression if the baby has European features and coloring. And if the babies came out dark, like Ernesto? The comments are often, ‘Hay, pobrecito, sali tan prietito’—which translated means, ‘Poor baby, he came out so dark.’").

\textsuperscript{44}. Baynes, supra note 9, at 149 ("Belief in Black inferiority is ingrained in both the White and mulatto Latino society. And this belief in inferiority has contributed to Blacks and native peoples being at the lowest caste in many Latin American countries."); Wagatsuma & Kleinke, Ratings of Facial Beauty by Asian-American and Caucasian Females, 109 J. SOC. PSYCH. 299 (1979).


\textsuperscript{47}. Id. at 1113. The authors looked at 30 years from 1950 until 1980. See infra text accompanying notes 70-73.

\textsuperscript{48}. See Ernest Harburg et al., Skin Color, Ethnicity, and Blood Pressure I: Detroit Blacks, 68 AM. J. PUB. HEALTH 1177, 1179 (1978) ("A modest but positive correlation appears for all blood pressure readings, with darker skin correlating to higher blood pressure. For both sexes, high stress, or working class residents had significantly darker skin than their low stress, middle class counterparts."). Harburg also found that, "Darker skin color for blacks, and in this sample, especially for black males, was related to higher blood pressure in a linear manner. This direct relationship was shown to be independent of stressor areas, education, income, and other factors.") Id. at 1181. Harburg speculates that lower socioeconomic status and residential segregation might be the cause of the higher blood pressure his study
Data on Latinos, skin color and employment reveals a similar trend: "Mexican Americans with a more European... appearance have more enhanced life chances as measured by higher socioeconomic status than Mexican Americans with indigenous Native American features."49

Although one might assume that on the fortieth anniversary of Title VII colorism is no longer an issue, the results of the studies presented below support the contention that even now, color influences the way in which individuals are perceived. The persistence of the "dark as less" view, along with evidence of lingering resentments against lighter skinned individuals,50 demonstrates the continued need for awareness of colorism and the ongoing importance of Title VII’s prohibitions on color discrimination.51

49. Baynes, supra note 9 (quoting Keith & Herring, supra note 27, at 760).

50. Though in the majority of instances, color discrimination operates against those who are darker skinned, this is not always the case. For example, light skinned Mexican Americans may be called gabacho, meaning “Anglo” and challenged by other Mexican Americans as being too white. Johnson, supra note 35, at 206. See also Aaron Celious & Daphna Oyserman, Race from the Inside: An Emerging Heterogeneous Race Model, 57 J. SOC. ISSUES 149 (2001), “In short, the skin tone bias among African Americans both exalts light skin tone and denigrates it. Light skin may act as a kind of currency in one situation, facilitating entry, and as a barrier and source of exclusion in another.” Id at 160. In fact, within the black community children often receive mixed messages about skin tone.

For instance, a Black child may hear statements like “You don’t need anymore sun,” suggesting that s/he is “too dark.” Yet s/he may hear the same person say, “The darker the berry the sweeter the juice,” suggesting the richness of dark skin. In I Know Why the Caged Bird Sings, Maya Angelou wrote “I was described by playmates as being shit color, he was lauded for his velvet-black skin.” The high value placed on dark skin in Angelou’s text is contrasted with the attitude of April Sinclair’s character Jean in Coffee Will Make You Black, who says, “My skin was the color of Cracker Jacks. But most Negroes didn’t get excited over folks who were darker than a paper bag.” These competing messages about beauty as it relates to skin tone are widely acknowledged among many African Americans. The result is a heightened level of consciousness about one’s skin tone, the skin tone of others, and how it is valued differently dependent on the setting.

Id. at 159-60 (internal citations omitted).

51. Colorism may be an issue for some whites. See, e.g., Celious & Oyserman, supra note 50, at 158 (“Skin-tone based advantage is often assumed to be a historic legacy. It is assumed that having lighter skin affords advantages in the workplace for all Americans, whether of African, European, or other background. . . .” (citing Daniel Bell, Ethnicity and Social Change, in ETHNICITY 138 (John Hutchinson & Anthony D. Smith eds., 1996))). For studies of colorism as it affects whites, see DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991) (describing how the white community defines itself and other groups); John Sanford, Scholar Offers Provocative Hypothesis About Skin Color, Identity, STANFORD REP., May 14, 2003 (“[E]ven European Americans are affected by color gradations—or were in earlier generations. ‘Throughout the 20th century, members of the old immigrant groups—light-skinned northern Europeans, with the usual exception of the Irish—have had higher standing in the eyes of fellow white Americans than have members of the new immigrant groups—darker-skinned eastern and southern Europeans,” quoting Jennifer Hochschild’s speech on “The Politics and Morality of a Skin Tone Ordering,” delivered at Stanford University on May 6, 2003), available at http://news-service.stanford.edu/news/2003/may14/ordering-514.html; “Intricately linked to ideas about class, race and sex, acquired skin tones have always formed an integral component of the fashion system. Before the birth of the leisure class, sun darkened skin marked you as the sort of unfortunate soul who toiled in the fields. But by the mid-1920’s all that started to change. With the sporting life and Jazz Age in full bloom, tans became chic—a trend
A. African Americans and Colorism

“When people see me, they invariably look past the person and see my color.”

To prevail in a Title VII disparate treatment claim, a plaintiff alleging color discrimination must show that she was subjected to an adverse employment action based on her color. As might be imagined, there will rarely be a “smoking gun” situation in color discrimination cases, making it difficult for a plaintiff to prove the employer’s bias, or intent. Social science research might be used to substantiate the existence of color discrimination and to bolster the claim of the employee who is trying to raise an inference of discrimination as it could provide evidence of the continued prevalence of colorist attitudes.

The studies presented immediately below provide data on blacks, skin color, stereotyping and the socioeconomic impact of colorism. The first study from Tufts University looks at the attitudes of both whites and black towards skin color variations among blacks by having the participants assign traits to blacks of varying skin tones. The second study examines the socioeconomic impact of skin color. The final study presented below looks at how skin color impact voters’ choices.

In the Tufts University 2002 study of both intraracial and interracial colorism, researchers asked participants to watch a simulated interaction among six men discussing what activity they would perform on a particular day. Statements were randomly attributed to each of the six speakers.

facilitated by the image of a cinnamon toned Coco Chanel cruising to Cannes on the Duke of Westminster’s yacht.” Ginia Bellafante, The Way We Live Now: 8-12-01; Tan is the New Black, N.Y. TIMES, Aug. 12, 2001, § 6 (Magazine), at 13. The ambiguity about the preference of light or dark skin is similar to that in the black community as discussed above.

52. Yolanda Adams, Don’t Want to be Black Anymore (Dark-Skinned African American Feels More Comfortable with Caucasians), ESSENCE, Aug. 1999, at 54.


54. For a criticism of this approach to proof of discrimination (which is apropos in light of the study described below), see Turner, supra note 2, at 384.

[To] the extent that the courts construct a discrimination paradigm based solely or primarily on discriminatory intent or motive, the reach of Title VII will be limited to the rare number of obvious “smoking gun” cases involving unsophisticated employers. Such a paradigm of discrimination takes what can be a very complex matter and whittles it down to a claim requiring proof that the employer’s conduct was of the “I did not hire you because you are black (or a woman or Latino or Asian),” which fails to address and provide a remedy for other more subtle forms of discrimination and the associated biases, stereotypes, and proxies which exist in the “real world.”

Id.

55. Maddox & Gray, supra note 8, at 253.
One group of participants watched a discussion among six Black men and the other group observed a discussion among three white and three Black men.57

The skin color of the men in the Black group was digitally manipulated. Later, the participants were asked to match the speaker to the statement. The results of the study showed that all participants in the study used race and skin color to organize the discussion. The results supported the hypothesis that "perceivers do notice skin tone and can use it as an organizing cue, suggesting that skin tone is a basis of categorization among both Black and White perceivers."58

Noting that skin tone perception is a precursor to skin tone-based stereotypes, the researchers then tested previous findings that dark-skinned Blacks were more closely aligned with negative cultural stereotypes.59 The researchers had participants complete questionnaires that purported to "examine both their knowledge and cultural beliefs about various racial and ethnic groups."60 Each page of the questionnaire listed a specific social group, followed by directions to list positive, negative, and neutral traits associated with each group.61

What the researchers found confirmed earlier studies. Although the finding that "White participants associated a greater number of positive compared to negative traits to light-skinned male targets" was not statistically significant,62 the finding that these same individuals assigned more negative attributes to dark-skinned men was statistically significant.63 The data also showed that both racial groups were aware of cultural distinctions between light and dark-skinned Blacks.64 According to the researchers,

56. Id. at 253.
57. Id.
58. Id. at 254.
59. Previous studies had found that "compared to those with darker skin tone, lighter-skinned blacks have been more closely associated with attractiveness, personal charm, intelligence, social mobility, and emotional stability." Id. at 255 (citing Claud Anderson & Rue Cromwell, "Black is Beautiful" and the Color Preferences of Afro-American Youth, 46 J. NEGRO EDUC. 76 (1977), J. Bayton & T. Muldrow, Interacting Variables in the Perception of Racial Personality Traits, 3 J. EXPERIMENTAL RES. PERSONALITY 39 (1968), and E. Marks, Skin Color Judgments of Negro College Students, 38 J. ABNORMAL & SOC. PSYCH. 370 (1943)).
60. Id. at 255.
61. Id.
62. Id. at 256.
63. Id.
64. Id. at 257. More specifically the researchers found that:

Both Black and White participants were significantly more likely to use the traits criminal and tough/aggressive and less likely to use the trait wealthy to describe dark-skinned men as compared to light-skinned men. Although only statistically reliable for one group of participants, the traits poor, ostentatious, unattractive, and uneducated tended to be more closely associated with dark men, whereas the traits educated and intelligent tended to be more closely associated with light men. There was even more agreement in participants' discussion of women. Both Black and White participants were more likely to use the traits attractive and intelligent, and
"this procedure tapped into common aspects of a predominantly negative cultural stereotype of Blacks that appears to be closely associated to Blacks with dark skin. Participants described dark skinned Blacks using more negative and stereotypic traits, whereas light-skinned Blacks were described with more positive and counterstereotypic traits." The study also found that in looking at individual trait assignments, "in each case where a reliable difference was found, it was always in the direction describing dark-skinned Blacks as more closely aligned with the traditionally negative stereotype of Blacks."

While the Tufts University study reveals underlying attitudes towards skin color, another examines the socioeconomic impact of colorism. The results of this second study support the idea that not only does American society hold negative perceptions based on skin color, but these stereotypes lead to reduced opportunities for those perceived as dark. Hill tested two competing theories used to explain socioeconomic differences between dark and light-skinned Blacks. The first theory, social origin, posits that "color stratification stems from historical advantages passed down from privileged white and mixed-race ancestors to their descendants." The second theory, colorism, is based on "social stigmatization of dark skin and physical traits associated with African Ancestry."

To test the two theories, the researcher used longitudinal data from the census to examine the socioeconomic attainment of Black men classified as Black or mulatto. The results of the study confirmed previous findings that document the skin color advantage for light-skinned Blacks. "[M]en identified as mulatto enjoyed a modestly higher socioeconomic attainment compared with men identified as Black," which lent support to the colorism theory. The data, however, did not strongly support the social origin

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65. Id. at 257-58.
66. Id. at 258.
68. Id. at 1444.
69. Id. at 1443-44. Colorism as used in legal literature generally encompasses both the current negative perceptions of observers as well as the historical advantage gained based on such perceptions as applied to one's ancestors. See Baynes, supra note 9, at 141-43; Jones supra note 7; Banks supra note 5, at 1713.
70. Hill, supra note 67, at 1437.
71. Id. at 1454.
According to Hill, "These results give prima facie support to the importance of color bias as an explanation of color-based stratification among African-Americans and are consistent with the assertion that African Americans who approximate European standards of physical attractiveness are viewed as more competent than their darker peers." This finding provides support for the idea that perceptions of competency play a direct role in determining which of two candidates most deserves a promotion or raise.

In a third study, Terkildsen examined colorism in the political process by determining the effect of Black skin color on voters. The study found that the "darker-skinned Black candidate was evaluated much more harshly than his lighter-skinned peer. Racially intolerant whites were particularly brutal in their evaluations of the darker-skinned candidate." The author concludes,

regrettably, if voters continue to base their evaluations on candidate race and subtle skin color differences, two infamously unreliable criteria for determining individual qualities and job suitability, the elective future of African Americans is pessimistic. Such findings seem to indicate that no amount of structural reforms can compensate for the deeply held racial beliefs and physically supported misconceptions white voters hold about black politicians.

Though Terkildsen's study looks the effects of color on political attitudes, the results of this study are relevant to the employment setting where individuals are also judged based on appearances. Additionally there is a great deal of social distance between a potential candidate and a voter, yet the effects of colorism were significant. Given that, it is reasonable to as-

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72. "[M]ulatto subjects enjoyed modestly advantageous backgrounds compared with their black counterparts..." These advantages apparently translated into a small color gap in school attendance favoring mulattos. Nevertheless the lack of exceptional origin differences between these black and mulatto men casts some doubt on the common assumption that lighter African Americans have greatly benefited from substantial social and material privileges that can be traced to the antebellum period..."

Id. at 1452.

73. "Skin color of [Black Americans] is related to their own socioeconomic status and that of their spouses, such that light skin is associated with higher socioeconomic status; these effects of skin color are not due to the fact that persons with light skin color come from higher socioeconomic backgrounds..." The effects of skin color on socioeconomic achievement variables (comparing those with light skin to those with dark skin) are nearly as strong as the effects of race (comparing whites to blacks) on those same variables.

Id. at 1114.


75. Id. at 1048.

76. Id. at 1050-51.

sume that any color biases of an interviewer would be magnified in a workplace setting, when choosing a potential coworker. Finally it is not likely that the attitudes exhibited by the respondents in the study are compartmentalized and unlikely to be replicated in a workplace setting.

B. Latinos and Colorism

Colonialism led to stratified race relations in Mexico and other former Spanish territories. In the case of Mexico, the militarily superior Spanish conquered numerous Indian nations and constructed a society of Spanish elite and Indian slaves. With the miscegenation of these two groups and the creation of a large population of mestizos (persons of mixed race) a racial hierarchy, based largely on skin color, evolved. Light skinned and European persons tended to be at the top of the social hierarchy, and the darkest most Indian-looking persons tended to be at the bottom.78

Although colorism in the Latino community does not receive as much attention and study as the issues of colorism faced by the Black community,79 its effects are nonetheless present:80 “[p]henotype differences have influenced life chances for Chicanos in past generations, as demonstrated by fathers’ and mothers’ schooling and occupational prestige.”81 Previous studies have also found that regardless of education, income, and language

78. Murguia & Telles, supra note 35, at 278. But see KATHY RUSSELL ET AL., THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS 66-68, 107-09 (1992) (noting that before white contact Central American Aztec women would use an ointment of yellow earth on their faces during courtship because being golden was more attractive than being brown).


80. One writer describes the experience of his wife, a fair-skinned Mexican whose college acquaintance told her that she
did not "look" Mexican, a seemingly innocuous comment likely meant as a compliment that has stayed with her over the years. Now, what did this person mean, that Virginia was light-skinned and that Mexicans were supposed to be dark? That she was attractive and that Mexicans were not? Or, maybe that Mexicans looked different from the norm and she looked "normal"? None of the possible interpretations rescue the comment from being offensive.

Johnson, supra note 35, at 197; see also Telles & Murguia, supra note 35; Edward E. Telles, The Continuing Significance of Phenotype Among Mexican Americans, 73 SOC. SCI. Q. 120 (1992); Hunter et al., The Significance of Skin Color Among African Americans and Mexican Americans, PERSPECTIVES, Winter 2001, at 173; Larry Rohter, Multiracial Brazil Planning Quotas for Blacks, N.Y. TIMES, Oct. 2, 2001, at A3. Brazilian society, with the largest black population outside of Africa, has over 300 terms to designate skin color. Black Brazilians have long complained about being kept at the bottom of the ladder and the government has adopted a quota system in order to remedy the problem. Id. But see Alok K. Bohara & Alberto Davila, A Reassessment of the Phenotype Discrimination and Income Differences Among Mexican Americans, 73 SOC. SCI Q. 114 (1992) (finding no color impact on the economic status of darker-skinned Mexicans).

proficiency, U.S. born and raised Chicano men with darker and more Indian phenotypes suffered more depression.\textsuperscript{82}

The Latino population in the United States is diverse, composed of people of varying national origins,\textsuperscript{83} and the research reflects this fact. In the first study described below, the author set out to examine the effects of skin color on subgroups such as Dominicans and Puerto Ricans.\textsuperscript{84} The authors of the second study set out below describe their findings on the labor market impact of skin color on Mexican, Puerto Rican and Cuban workers. In the third study, the authors attempt to measure the existence of both intra and interracial colorism among Hispanics and Chileans. Because the three studies focus on the colorism as experienced by different subgroups within the Latino community, they provide some notion of the prevalence of skin color bias.

To date, most of the research on colorism in the Latino community has focused on Mexican and Chicano men in the Southwest.\textsuperscript{85} However, one recent study focused on a less-studied group, Caribbean Latinos.\textsuperscript{86} This multiracial group of Spanish, Indian, and African origin displays a “complex array of phenotypes.” More specifically, the study considered such questions as whether lighter-skinned Latinos benefited from their appearance and whether a dark-skinned Latino with African features is disadvantaged relative to a dark person of Mexican heritage with indigenous Indian features. The study also examined the impact of skin color on Latinas.\textsuperscript{87}

The data tended to show that “dark skin continues to have a negative impact on earnings controlling for other human capital variables.”\textsuperscript{88} Gomez found that lighter skinned Latinos had more education, had a greater level of home ownership and were more likely to be married.\textsuperscript{89} One interesting finding of this study is that there was no skin color effect on economic factors for the Latinas in the study.\textsuperscript{90} While this may seem like good news, the bad news is that the Latina workforce in this study was concentrated in low-paying, low-skill jobs, so that the lack of a skin color effect was most likely attributable to the fact that they were concentrated in second-tier jobs.\textsuperscript{91}


\textsuperscript{83} Gomez, \textit{supra} note 81, at 94.

\textsuperscript{84} Id. at 95.

\textsuperscript{85} Id. (“The darker- skinned Latinos had lower socioeconomic status, received lower earnings and had less schooling than their lighter-skinned, European-looking counterparts.”).

\textsuperscript{86} Gomez, \textit{supra} note 81, at 95.

\textsuperscript{87} Id. at 96.

\textsuperscript{88} Id. at 99.

\textsuperscript{89} Id. at 98.

\textsuperscript{90} Id.

\textsuperscript{91} Id. at 99.
They tended to be employed as factory workers, office cleaners and other low skilled jobs. Therefore, Gomez suggest that “the effect of skin color might be muted due indirectly to the narrower variability in their salaries as a direct result of their concentrations in secondary tier, low wage jobs.”

The impact of skin color on the occupational status of Puerto Rican, Mexican, and Cuban Americans workers within the Latino community was the focus of a second study. The authors hypothesized that darker-skinned Puerto Ricans, Cuban Americans, and Mexican Americans would face greater labor market discrimination and thus have lower occupational prestige scores than their lighter-skinned cohorts. What the authors found was that “in all cases, very light Latinos have a higher occupational prestige than very dark Latinos.” The research confirmed earlier studies finding that for light-skinned Mexicans and Cubans skin color produced a statistically significant result in terms of occupational prestige scores. The darker Latinas in these groups fared even more poorly than the men. Mexican women had occupational rankings nearly one and a half units below that of Mexican males, and Cuban women had a ranking two and a half units less than Cuban men. The authors conclude that despite efforts to rid the workplace of discrimination, many darker-skinned Latinos continue to experience more discrimination in the labor market than their lighter-skinned counterparts. More specifically, the data showed that Mexican and Cuban individuals who look more European have higher occupational prestige scores than Mexican and Cuban individuals who have less indigenous or African appearances.

A third study, released in 2002, focused on intraracial colorism among American Hispanics and Chileans. The researchers in this study examined both implicit and explicit attitudes of American Hispanics and Chileans towards darker skin color. They also examined both groups’ attitudes

92. Id.
94. Id. at 614. The authors used the Huaser & Warren composite Occupational Prestige Ratings, an index which tends to rely less on earnings to measure occupational prestige. The index ranks all occupations on a scale of 1 to 100. Id. at 615.
95. Id at 617.
96. Id. However the same did not hold true for Puerto Ricans, a result the authors could not explain.
97. Id. at 618.
98. Id. The authors offered no explanation for this finding, but it may reflect Gomez’s findings above that these women were lower skilled and tended occupy low age service sector jobs.
99. Id. at 621.
100. Eric Uhlmann et al., Subgroup Prejudice Based on Skin Color Among Hispanics in the United States and Latin America, 20 SOC. COGNITION 198 (2002).
101. Id. The authors do not define who is encompassed by the term Hispanic as used in their study except for the skin color distinctions they test.
towards whites. What they found was that both the Hispanic Americans and the Chileans had an implicit preference for lighter-complexioned individuals. As they expected, however, this attitude was substantially larger in magnitude among the Chileans. On the measures of explicit attitude, only the Chileans expressed a preference for lighter-skinned individuals. As far as the groups’ attitudes towards whites, Chileans tended to favor whites over Hispanics, but American Hispanics did not favor either group.

While it is not possible to draw a definite conclusion on the basis of this study, what it suggests for employment discrimination purposes is that recent immigrants of some cultures may be more likely to harbor negative intraracial stereotypes than people of color currently living in the United States. The study’s authors suggest that this difference may be due to the fact that in the United States, “‘race is seen as an important issue: antiracist social movements publicly challenge the legitimacy of racially biased laws, policies and ideology, and groups encourage their members to celebrate their ingroup identity. In Latin America despite the prevalence of a skin color based hierarchy, there are fewer antiracism movements.”

Issues of discrimination are often viewed through the lens of this country’s history. This research suggests in the context of employment decisions, issues of color are not be confined solely to non-immigrant decision makers in the workplace.

These studies described above provide evidence of the current effects of past discrimination as demonstrated by the economic impact of colorism on Latinos as well as Blacks. Both groups confront the reality of interracial colorism through its impact on earnings, occupational status, and income, yet both also continue to battle the demon within, which is increasingly important in the workplace as America “browns.”

While race discrimination has been an influential factor in the earnings and occupational gap, the

102. Id. at 218.
103. Id. The authors expected this distinction because previous studies have shown that greater value is placed on light skin color in Latin America than among Hispanic Americans. Id. at 200 (citing SUZANNE OBOLER, ETHNIC LABELS, LATINO LIVES: IDENTITY AND THE POLITICS OF REPRESENTATION IN THE UNITED STATES (1998); PETER WADE, RACE AND ETHNICITY IN LATIN AMERICA (1997)).
104. Uhlmann, supra note 100, at 219.
105. Id. at 220; See also Tanya K. Hernandez, An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context, 33 U.C. DAVIS L. REV.1135 (2000). Cuba, with a long history of racial subordination that continues to exercise its influence today, disdains race-conscious measures because they are viewed as promoting racial divisions. Id. at 1136.
106. Benjamin E. Griffith, Multi-Racial Self-Classification and Census 2000: Effect on Voting Rights Litigation and Allocation of Federal Funds (Nov. 10, 1998) (paper presented at IMLA 63rd Annual Conference) (“In 2050 the population in the United States is projected to be approximately 53% white, 25% Hispanic, 14% Black, 8% Asian Pacific American, and 1% American Indian and Alaska Native.”), available at http://www.vralitigator.com/public-files/files/Multiracial%20Self-Classification.html; see Banks supra note 5, at 1734 (“I expect future colorism cases claims that challenge employment practices favoring light-over dark-skinned members of the same race.”).
effects of color, which are measurable, have typically been overlooked. In light of the evolving demographics of the workplace, it is important to acknowledge the persistence of both interracial and intraracial colorism.

C. Asians and Colorism

In contrast to media perceptions that Asian and Pacific Islanders have integrated successfully into American society, studies portraying the current social reality experienced by various Asian and Pacific Islander groups portray a different story.\textsuperscript{107}

One of the problems with current writing is that it tends to ignore the diversity of ethnicities and experiences among Asian people. While some groups may obtain an advantage based on skin color, other groups with darker skin do not.\textsuperscript{108} For example, only 12.4 percent of Samoans, 13.3 percent of Vietnamese, 13.5 percent of Guamanians, and 16.6 percent of Hawaiians held managerial and specialty occupations, compared with 28.5 percent Japanese and 32.5 percent of Chinese.\textsuperscript{109} Whether this disparity is attributable to colorism is a topic in need of research, but it highlights the socioeconomic differences within the Asian community and at least suggests that perhaps color has an impact on economic opportunity within this community as well.

The lack of research on the topic of Asian Americans and colorism initially suggested that perhaps it was not an issue in Asian communities.\textsuperscript{110} However, the few existing studies suggest that skin color affects this community's perceptions as well and that its effect cannot be overlooked.\textsuperscript{111}


\textsuperscript{108} See Baynes, \textit{supra} note 9, at 134. Asian-Americans are viewed as model minority because those from Northeast Asia are lighter in complexion than African Americans. Id. at 133. However, the advantage would not necessarily be conferred upon Cambodian, Laotian, or Malaysians, who tend to be darker-skinned. Just as is true with blacks and Latinos, Asian skin tones range from very fair to dark.

\textsuperscript{109} Gould, \textit{supra} note 107, at 143. One study of poverty rates among Asian head of household revealed that Southeast Asians, Hawaiians, and other Asians had the highest poverty rates. See Kathleen M. McInnis, \textit{The Economic Well Being of Asian/Pacific Islander Female-Headed Households, in Social Work Practice With Asian Americans} (Sharlene Furoto et al. eds., 1992).

\textsuperscript{110} Roksana B. Rahman, Color As Status: The Role of Skin Color Among Hindu Indian Women 23 (May 1, 2002) (unpublished qualifying paper for Rutgers University, Sociology Department), available at http://sociology.rutgers.edu/colloquium/PDF/rahman.pdf ("Literature on skin color and Indian (and other South Asian) women living in the U.S. is virtually non-existent . . ."); see also Vanessa E. Jones, \textit{The Color Complex: A Formerly Taboo Topic Among Asian-Americans and Latinos Comes Out Into the Open as Skin Tone Consciousness Sparks a Backlash, THE BOSTON GLOBE, Aug. 19, 2004, at D-4. The reason for the lack of research on this topic is unclear. Perhaps it is because such topics have been traditionally taboo: "This is dirty-laundry territory. Ethnic groups don’t want this aspect of their culture publicized." Id.

\textsuperscript{111} Jones, \textit{supra} note 110, at D-4. "The fair-is-best mentality prevails, however. Skin-whitening creams do big business in Hong Kong, the Philippines, Japan, and Malaysia. The stars of telenovelas, the Spanish-language soaps that air on Telemundo and Univision, are generally blond and pale. Flick on the TV and you may catch L’Oreal’s ad for its True Brown hair color featuring Aishwarya Rai. With
The diversity that the term Asian American encompasses makes it important to acknowledge that different ethnicities within the classification may have very different experiences with skin color discrimination. However, the few existing studies do shed light on the phenomenon of colorism as experienced by Asians and can to some degree inform this discussion.

Whether colorism is the result of colonization of Asian countries, or whether it existed before contact with whites is a subject of discussion. Regardless of its origin, the sting of colorism is felt in the Asian community. Professor Raj, who addresses this issue in her classes, attributes colorism to internal racism. She described her experiences growing up in the South Asian community of Jackson, Miss., [where] beauty also equaled pale. According to Raj, “You hear this a lot. ‘She’s so beautiful, she’s so fair.’” Raj’s sister conveys the same values to her children by cautioning them to stay out of the sun.

her striking blue-gray eyes and milky skin, the Bollywood actress could easily pass for white. Despite the pervasiveness of the message, the preference for light complexions among Asian-American and Latino communities is so minimally explored you most often read about it in scholarly articles or books.”


113. See Gould, supra note 107, at 143 (describing the socioeconomic differences among Asian Americans: “[M]ajor differences exist among Asian and Pacific Islanders on socioeconomic indicators. For example, the groups with the highest percentage of families living below the poverty level were the Vietnamese (35.1 percent) followed by the All Other Asian and Pacific Islander group (32.2 percent) and by Samoans (27.5 percent).”). Ronald E. Hall, SKIN COLOR AS A POST-COLONIAL ISSUE AMONG ASIAN-AMERICANS I (2003) (“Local schools of thought dominated by the Black/White dichotomy have failed to take notice of the growing Asian presence in American life. The study of Asian-Americans in the post-colonial era can be neither understood nor assessed without a universal frame of reference. This study gives insight into the implications of skin color for Asian-Americans, characterizing the taboo concept of hierarchy as manifested on the basis of skin color.”).

114. See, e.g., JOHN HOPE FRANKLIN & ALFRED A. MOSS JR., FROM SLAVERY TO FREEDOM 27-56 (1994); “Indian folk songs praised the beautiful woman who has ‘the color of butter’ (Indian butter is white, not yellow). Pre-colonial Indonesian women used plant-based skin treatments to make their complexion pale.” Color Q World, Pre-European-Contact Colorism and Post-colonial Racism in Asia and North Africa, http://www.colorq.org/Articles/2002/colorism.htm (last visited Dec. 29, 2004) (“Ihara Saikaku, a 17th century Japanese writer, contrasted the beauty of the black-haired, pale-skinned urban youth to the unattractiveness of orange-haired, sun-tanned rural boys. Peasant boys who worked outdoors had their black hair bleached orange by sun and sweat. Thus, for the pre-modern Japanese, pale hair and dark skin came to be signifiers of an under-privileged lifestyle, just as black hair and pale skin symbolized urban sophistication and privilege.”).

115. See, e.g., Adam Easton, Women Have Deadly Desire for Paler Skin in the Philippines, 352 LANCET 555, 555 (1998) (“Thousands of Filipino women are exposing themselves to the dangers of severe skin disorders and possibly even cancer through their desire to have paler skin.”).

116. Id. supra note 110, at D-1.

117. Id. at D-2.

118. Id.
Three recent studies shed light on the nature of colorism as it currently exists in the Asian community. One study examined the role skin color plays in marriage choice among Hindu Indian women living in New Jersey.\(^\text{119}\) The second, of a similar nature, considered the impact of color on spouse selection in the South Asian Muslim community.\(^\text{120}\) The third study compared two groups of students, Asian-Canadian and European-Canadian,\(^\text{121}\) to determine the skin color preferences of both groups.\(^\text{122}\)

As a preface to her study focusing on Hindu women, Rahman explains that “the existence of hierarchical skin tone beliefs” is documented among South Asians: “Indian folk literature, folk songs, and traditional wedding songs place a high value on fair skin color. The ideal bride almost always has a light complexion."\(^\text{123}\) “The wide popularity of hair and complexion lighteners among South Asians (living in and outside of Asia) predominantly women, attests to the high value placed on skin tone.”\(^\text{124}\) Rahman’s study describes the status of skin color for women in the marriage market\(^\text{125}\) and strives to explain the role that caste,\(^\text{126}\) color, and socioeconomic status play in marriage.\(^\text{127}\)

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120. See Assisi, supra note 17 (describing Zareena Grewal’s study).
121. One writer suggests, however, that the experiences of minority groups in Canada may be different from those living in the United States: “In contrast to the American experience in which minority groups are expected to assimilate into majority society, Canadian society has adopted a model of multiculturalism and greater integration of diverse ethnic groups. In American society, where majority-minority distinction is made clear, the promotion of ethnic identity through various civil rights movements helped to bolster the self esteem of visible minorities...” See Sarita Sahay, Self-Esteem and Ethnic Identity Among South Asian-Canadian and European-Canadian Female University Students: Implications for Education, in MULTICULTURAL EDUCATION: THE STATE OF THE ART, STUDIES OF CANADIAN HERITAGE 66 (Keith McLeod ed., 1995), available at http://www.caslt.org/pdf/self_esteem2.pdf
123. Rahman, supra note 110, at 23 (quoting “Radha,” a participant in the study). Names of the respondents are in quotes because the women are referred to by aliases.
124. Id. at 1.
125. The author looked at fifteen newspaper matrimonial advertisements and found that for Indians, family background, region or origin, and skin color were the most important features in selecting a bride. A sample ad she included in her paper seeks a “fair to wheatish” complexioned woman. Id. at 17. She describes the origins of colorism and the impact of the caste system on perceptions of skin color. Under the caste system, white is associated with the Brahmins and black with the Shudras. She suggests that “the hierarchy of skin color is thought to be a result of caste division. Id. at 7. Beside conveying status, attractiveness and marriageability, the caste system tends to sexualize the women in the Shudra caste. “[L]ower caste darker-skinned female bodies are more sexualized than upper caste fairer skinned bodies. For example, there is a wide measure of tolerance of extra-marital relations between men of superior and women of inferior varna or color...” Id. at 12.
126. One problem with her study in its examination of castes was that none of the respondents identified themselves as Shudras, most likely due to the Shudras’ lack of resources and capacity to be able to migrate to the United States. Id. at 20.
127. Id. at 18.
Rahman found that for Hindu women, skin color is an important consideration in marriage and that light skin is equated with beauty:128 “[a] darker girl is often a liability to her family. It is difficult to arrange a marriage for her. Even a dark Brahmin girl has a low value on the marriage market. Many brides’ families are forced to provide a dowry for features that do not match the ideal bride.”129 This issue of skin color is much more significant for the bride than the groom.130 As one participant in the study explained, “The groom should be able to support the daughter financially. In our system nobody really cares about how dark the male is as long as the bride is light skinned.”131 Most of the women in the study who identified themselves as light-skinned were married to upwardly mobile men.

The second study examines many of the same issues in the South Asian Muslim immigrant community in Michigan.132 Similar to the respondents in the New Jersey study, the immigrants in the Michigan study also greatly valued white skin.133 The author comments in her study that “particular physical qualities are always fetishized in constructions of beauty. However, in these communities, the stigma attached to dark color intersects with broader racial discourse in the United States. That’s why a light-skinned a mother of three sons in their twenties, explicitly refers to dark coloring as a physical abnormality and deficiency.”134 Such attitudes reflect both intra and interracial colorism. One participant in this study thought that things were “much worse here than in India and Pakistan because over there if you are ugly... if you have any kind of deficiency then at least you can make it up with money. ‘Ok, my daughter’s not beautiful, but I can give you a house.’ But here no one needs money.”135

The third study, which focused on both inter and intraracial colorism. Sahay interviewed South Asian-Canadian and European-Canadian female college students.136 Sahay hypothesized that South Asian female students

128. Id at 23-24. The author notes that “in addition to whiteness or lightness being equated with beauty... a woman’s self concept develops in part from observing and internalizing what others think of her.” Id at 24. As a result of this colorism, “a dark-skinned woman is constantly reminded that she is ugly and that she must be well versed in domestic activities in order to attract a decent suitor...” This influence may cause her to internalize her “ugliness” as a “moral or psychological attitude.” Id at 25.

129. Id at 23 (quoting “Kiran”). One participant in the study, described as being dark as bitterness chocolate, expressed her resentment of being stereotyped on the basis of her skin color. As a child, she was constantly reminded of her skin color and its implications for her marriage potential. She “did not understand why her skin color should indicate her ability or lack of ability to be a good wife or dictate whom she could or could not marry.” Id at 24.

130. Id at 23.

131. Id. The study also found that while caste was important, skin color within caste was just as critical. Id at 25.

132. See Assisi, supra note 17 (describing Zareena Grewal’s study).

133. Id.

134. Id.

135. Id.

136. Sahay & Pirhan, supra note 122, at 162.
would have a greater desire to be light than would the European students, and that the darker their skin tone, the less body satisfaction the participants would have. What Sahay found was that while the South Asian women wished themselves to be significantly lighter than they perceived themselves to be, it was the medium-dark women for whom this desire was the strongest. However, they did not desire to be so light as to be white.

Interestingly, the European-Canadian wished to be darker, but not so dark as to lose their whiteness. In fact, the European-Canadians desire to be dark was statistically as strong as the Asian-Canadian desire to be light. The findings as to the European-Canadian women are consistent with the following observation concerning American women: "White women... could confidently declare that lily white complexion was ‘passé’—that skin tone was a matter of fashion, that a dark complexion was one choice among many—as long as the boundary between black and white was secure." In terms of body image, it was the medium-skinned women who had the lowest body image. Sahay speculated that their desire for lightness and lower body image derived from the fact that they were close to the ideal, yet unable to attain it, and that unlike the darkest South Asian women, they were "not dark enough to retreat from White standards of beauty and thus [were] unable to appreciate their own beauty."

Although there is very little data directly showing the socioeconomic impact of colorism on members of the Asian community, it is clear that there are cultural biases that perpetuate the "light is right" mindset. Such attitudes clearly can give rise to both intra and interracial colorism. These studies do not prove a direct connection between colorism and socioeconomic status (except for darker women in the marriage arena), however they reveal the persistent nature of colorism and given its impact on other communities of color, suggest the need for further research focused upon its labor market impact.

I do not argue that these studies presented in this section of the paper are definitive or sufficiently broad enough to be conclusive. I offer them as confirmation of the continued existence of colorism and the barriers it poses especially for the darkest members of the Asian, Latino, and Black communities. Furthermore, I do not mean to imply that every member of each

137. Id. at 163.
138. Id. at 164.
139. Id.
140. Id.
141. Id. at 166.
142. Bellafante, supra note 51.
143. Sahay & Pirhan, supra note 122, at 167.
144. Id. at 168.
145. Unfortunately, the census data is not broken into subgroups of the Asian population. See, e.g., Reeves & Bennett, supra note 112.
group discussed is a victim of colorism; I merely aim to point out that colorism is a reality in all of our communities. As one writer notes, "It is important not to overlook the role played by color in current power relationships. That's one way to combat racism from without, and within."146

What if the color bias is based not on the history of the United States, but has its origins in the cultural assumptions and biases of other countries and brought to this country by immigrants as described in some of the studies in this Part? Should that "imported" colorism be the basis of a Title VII claim?

IV.
COLORISM—"MADE IN THE U.S.A."

The international nature of skin color-based bias is well documented.147 It is clear that colorism is not unique to America. Given that fact and the fact that the United States is a nation of immigrants, what should the result be when "imported" bigotry inserts itself into the workplace? To put it another way, what should be the result if the colorism alleged by a plaintiff stems not from the legacy of slavery and colorism in the United States, but is based on prejudices unique to the history and social constructs of another country? Such was the case in Ali v. National Bank of Pakistan.148

In Ali, a light-skinned Pakistani plaintiff from Punjab province alleged that he was discriminated against by darker-skinned supervisory employees from Sind province.149 More specifically, he alleged that was demoted, denied tuition reimbursement, made to run personal errands, and ultimately terminated on the basis of his skin color. The court recognized that "the literal language of the statute which prohibits discrimination on the basis of 'color' would seem to apply to Ali's claim," but stated that "the testimony regarding skin color variations among the peoples of Pakistan does not suf-

146. Assisi, supra note 17.
147. See Banks, supra note 5, at 1746 n.152 (extensive listing of international studies); Kari Browne, supra note 17 (Egypt); Christopher A. Charles, Skin Bleaching, Self Hate, and Black Identity in Jamaica, 33 J. BLACK STUD. 711 (2003); Easton, supra note 115 (Philippines); Ronald E. Hall, A Descriptive Analysis of Skin Color Bias in Puerto Rico: Ecological Applications to Practice, 4 J. SOC. & SOC. WELFARE 171 (2000); Tanya K. Hernandez, supra note 105; Darcus Howe, The Hierarchy of Skin Colour Presumes that Caribbean Folk Are at the Bottom of the Pile, NEW STATESMAN, Aug. 16, 2004, at 10 (England); Marta Cruz-Janzen, supra note 37; Theola Labbe, Iraq in Black, THE CRISIS, Mar.-Apr. 2004, at 20; Lewis Machipisa, Rights-Zimbabwe: The Last Minority Group to Find a Voice, GLOBAL INFORMATION NETWORK, Nov. 25, 2002, at 1, available at http://ipsnews.net/ interna.asp?idnews=14122; Felix Neto & Lizalía Paiva, Color and Racial Attitudes in White, Black and Biracial Children, 26 SOC. BEHAV. & PERSONALITY 233 (1998) (Portugal); Garry Pierre-Pierre, A Vivid Look at Race in Brazil, EMERGE (July, 1999) at 78; Larry Rohter, supra note 80.
149. Id. at 612. Ali is unusual in that it deals with a light-skinned plaintiff alleging darker-skinned coworkers discriminated against him. However, as noted at the outset of this Article, colorism is defined as discrimination on the basis of skin color.
fice to merit the division of Pakistanis into distinct 'protected classes' according to color.'

The latter language apparently referred to Ali's allegation that the bank had "a policy of discrimination . . . against light-skinned Pakistan citizens from the Punjab province in favor of darker-skinned Pakistan citizens from the province of Sind . . . ." However, the court needlessly complicated the color issue by noting that it did not have the knowledge of Pakistani culture to determine whether color was a reflection of origin: "[c]olor alone does not suffice to establish provincial origin of a Pakistan citizen." The court failed to recognize that the essential issue in the case was whether Ali suffered adverse employment consequences because of his color, regardless of whether his color was specific to a certain region of the country.

The court also found that there was "[n]o statistical evidence presented with respect to the number and color of the employees of the Bank over any stated period of time." But Ali brought his claim under the theory of disparate treatment, not disparate impact, so the court's reference to statistical evidence seems odd given that the gist of Ali's claim is that he was treated differently based on his color. The unusual nature of the court's comment becomes clearer if one imagines that Ali had brought his claim based on race discrimination rather than color. Ali was not required to present data that other employees were also mistreated to make out his disparate treatment claim although statistical evidence can be used in a disparate treatment claim as circumstantial evidence of discrimination.

The focus of the remainder of this Part of the Article is this language used by the court to describe the interaction between color and other protected categories:

150. *Id.* at 613.

151. *Id.* at 611.

152. *Id.* at 612.

153. *Id.*

154. As established by the Supreme Court in *McDonnell Douglas* a complainant in a disparate treatment trial under Title VII of the Civil Rights Act of 1964 must establish a prima facie case of racial discrimination by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants with the complainant's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

155. Disparate impact claims are based on facially neutral policies that have a disproportionate effect on a protected class. "To succeed on a disparate impact claim, a plaintiff must make out a prima facie case by showing that the plaintiff is a member of a protected class and that a challenged employment practice had a significant disparate impact on that class." *District Council 37 AFSCME v. New York City Dep't Parks and Recreation*, 113 F.3d 347, 351-52 (2d Cir. 1997). Typically, a plaintiff proves impact with statistics. "The evidence in . . . 'disparate impact' cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1997).
It would be presumptuous of this court to seek to explain the derivation of the inference of discrimination recognized by the Supreme Court in McDonnell Douglas. Suffice it to note that the presumption of a protected class status on the basis of color is bound up with an entire national racial history. It may well be that there are indigenous discriminatory practices around the world having nothing to do with the American experience. However, there is no basis on this record for the recognition of skin color as a presumptive discriminatory criterion (rooted, one would suppose, in the intermingling of distinctive national or racial groups) in employment in Pakistan, or among Pakistanis in New York, under the McDonnell Douglas guidelines.\(^*\)

The *Ali* court struggled with the question posed at the beginning of this Part: Can color discrimination claims be based on biases brought to the employment setting from other countries and contexts? For a number of reasons, I argue that colorism brought to this country by immigrants should not be distinguished from the historical colorism of the United States. Title VII's protections against color discrimination prohibit an employer from making detrimental employment decisions based on the immutable characteristics of color, regardless of the specific life experiences that shaped the employer's prejudices.\(^*\) This Article presents a number of reasons the courts should recognize claims arising from “imported” colorism.

\(^{156}\) *Ali*, 508 F. Supp. at 613. There is never a need for the court to recognize color as a presumptive discriminatory criterion in a disparate treatment case, whatever the cultural background of the plaintiff and defendant. The *McDonnell Douglas* test does not create presumptions, cultural or otherwise.

\(^{157}\) I recognize that there are those, including my friend, civil rights scholar David Chappell, author of *A Stone of Hope*, who argue that the prohibitions of Title VII are based upon the 15\(^*\) Amendment and should be interpreted in light of the “badges and incidents of slavery” the reconstruction amendments were meant to eliminate. Interview with David Chappell, Professor, University of Arkansas, in Fayetteville, Ark. (Jan. 4, 2005).

There are a few reasons to disagree with this view however. First, the cat is out of the bag, so to speak. In *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), a case brought under § 1981, the Supreme Court’s interpretation of race was much broader than the racial history of this country would suggest. In that case, the court found that a claim could be brought between people of the same race, white, who were of different ethnicities. The statute, the court reasoned, was designed to protect “identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.” The plaintiff in *Saint Francis* was a man of Iraqi descent surely not a plaintiff within the contemplation of the drafters of the reconstruction amendments. And while St. Francis was brought under § 1981, and not Title VII, this expansive view of the protected classes is not limited to § 1981. See, e.g., Kara L. Gross, *Toward Gender Equality and Understanding: Recognizing that Same-Sex Harassment is Sex Discrimination*, 62 BROOKLYN L. REV. 1165 (1996).

Congress' use of the unmodified term 'race,' instead of the specific term 'African-American race,' enables Title VII to prohibit discrimination against any race, regardless of the race of the employer or employee. Therefore, while Title VII's prohibition against racial discrimination was originally intended to protect only African-Americans—a historically disadvantaged group—the statute has been recognized to protect all races, including whites—a historically empowered group. Indeed, the unmodified term race allows a majority race to bring suit against a minority' race for alleged discriminatory practices.

*Id.* at 1172 (citations omitted).
First, regardless of the source of the defendant employer's beliefs, the impact on the plaintiff is the same. He has impermissibly been denied a job or benefit of employment on the basis of an immutable physical characteristic. As the studies discussed in Part IV make clear, there is a real economic cost to those who are discriminated against on the basis of their skin color. The fact that an employer comes from Brazil and harbors colorist views based on the sociopolitical dynamics of Brazilian society, for example, is as irrelevant as the fact that a white American employer dislikes Blacks because he was once robbed by a Black person. The issue is not the reason behind the animus; it is the animus itself that is prohibited.

Second, denying claims based on "imported" colorism, would produce an anomalous result. The employer who discriminates based on color but provides no reason for harboring the colorist views, or who clearly has been influenced by the cultural influences of this country may be found liable for color discrimination. But, the employer whose foreign background makes it clear that the discrimination comes from cultural values brought to the workplace from elsewhere would not. The dicta of *Ali* suggests that because the latter employer's views are not "bound up with [the] entire national racial history" of the United States, the claim would not be cognizable. However, Title VII, in its plain language, seeks to prohibit discrimination on the basis of color. To make such a determination, Title VII does not require an examination of the interaction of color and national origin. Taking the "national racial history" language of the *Ali* court to an extreme, color claims by light-skinned persons or white persons should not be allowed because historically they have benefited from their skin color. Because skin color is not relevant to an employee's ability to perform a job,

As a union side labor lawyer, I take a broader and more inclusive view of the statute. Ultimately all deserve to be treated fairly. Whether that "waters down" the impact of the statute remains to be seen.

Statutes are not static, nor drafted to anticipate every possible fact scenario. Assume, *arguendo*, that Title VII's prohibition on color discrimination was initially intended only to apply to blacks. Adopting such a limited view of Title VII's coverage is not a helpful framework for addressing current issues such as those faced by South Asians and others in the wake of September 11, 2003 who find themselves discriminated against on the basis of their appearance.

Finally, Professor Chappell argues that there is political fallout from an expansive reading of the statute, which ultimately dilutes its support amongst whites, because some will view an expansive reading of the statute as having gone too far. He suggests there is a willingness to acknowledge the continuing legacy of slavery and racism in the country, but allowing a Pakistani to bring a color claim for example, is not within the intended purview of the statute. He argues that there is too much frivolous litigation which has gone far beyond the wrongs the statute was designed to correct. My view of this, and perhaps it is idealistic is that the political support for this approach to the statute is broader when it is perceived as being applicable to all who face discrimination in the workplace. Interviews with David Chappell, Professor, University of Arkansas, January 4, 2005 and with John Walker, noted Civil Rights Attorney, in Little Rock Arkansas, at Philander Smith College, symposium on The Civil Rights Act: Celebrating the 40th Anniversary of Title VII (September 13, 2005).
discrimination on that basis is, and should be unlawful regardless of the race of the employee.

Third, it is possible to separate personal or regional animosity from colorism. The *Ali* court implies that the antagonism between the parties may be rooted in "the intermingling of distinctive national or racial groups." To get to the heart of the matter, the question ultimately is whether the decision maker would have come to the same conclusion had the plaintiff been of a different color. The court also seems concerned about the fact that it was unfamiliar with the racial climate of the regions of Pakistan, but this knowledge is not essential to the resolution of the matter.\(^{158}\) However, keep in mind that the plaintiff's burden is not to prove the existence of a specific societally based color bias, but rather that the employer made an employment decision based on color bias.

Another reason not to distinguish claims is that the underlying harm is the same regardless of its origin, as are the policy reasons for prohibiting the discrimination. The color provisions of Title VII recognize a history of racism and the continuing effects of that history. But if equal employment opportunity is the guiding principle of the Title VII, then employment decisions based on any impermissible immutable characteristic that results in illegal discrimination should be prohibited. To effectuate the purposes of Title VII, courts should not be reluctant to recognize color claims regardless of the underlying societal basis for the discrimination. Workplace decisions based on skin color is unlawful discrimination no matter what its origin.

V. 
COLORISM IN THE COURTS

A. Cases Brought By the EEOC

Many employees are not aware that color discrimination is covered by Title VII or, for that matter, what color discrimination is or is not. But that is changing. As a result of 9/11, there is a greater awareness of color discrimination. I also believe as a result of political events (such as the conflict in Iraq) this awareness will continue.\(^{159}\)

Workplace discrimination suits based on skin color are increasing as workforce diversity increases and as employees become aware that skin color is a protected status. In the late 1980's and 1990's, the EEOC re-

\(^{158}\) In a situation where the plaintiff wished to show that such colorist thinking was pervasive in a particular culture, it would be possible to present expert testimony to that extent, which could provide context for the claim. This evidence might be helpful given the courts' reluctance to find intrarace color discrimination. *See* Banks, *supra* note 5.

ceived fewer than 500 complaints a year alleging skin color discrimination.\textsuperscript{160} The agency has taken 19 color discrimination cases to court since 1985.\textsuperscript{161} That is changing: “While color discrimination claims account for only about 3 percent of all charges filed with the Equal Employment Opportunity Commission (EEOC), the number has trended upward in the past 15 years, especially since 1994. The EEOC received 1,382 color charges in 2002, almost half of them in the Northeast.”\textsuperscript{162}

There has been an increased awareness of color discrimination as reflected by recent press coverage.\textsuperscript{163} Perhaps the case that has received the most press was brought by the Atlanta office of the EEOC on behalf of a dark-skinned plaintiff against an Atlanta Applebee’s restaurant.\textsuperscript{164} The restaurant settled the claim for $40,000 while denying any wrongdoing.\textsuperscript{165} The plaintiff was a dark-skinned Black employee who alleged that his lighter-skinned manager fired him.\textsuperscript{166} The plaintiff, Dwight Burch, was hired on as a waiter at the restaurant.\textsuperscript{167} Not long thereafter, a new general manager was hired and soon began to make derogatory remarks about the waiter.\textsuperscript{168} After the waiter called the headquarters of Applebee’s, the harassment escalated into written reprimands, ending in termination.\textsuperscript{169} In addition to monetary damages for the plaintiff, the EEOC and Applebee’s signed a consent decree requiring training and reporting by the chain.\textsuperscript{170} Commenting on the emotions he felt after the settlement, the plaintiff in the case said, “I liked my job and got along well with everyone. No one should have to put up with mean and humiliating comments about the color of their skin on the job.... It makes no difference that these comments are made by someone of your own race. Actually that makes it worse.”\textsuperscript{171}

\textsuperscript{161} Id.
\textsuperscript{162} Id., supra note 159, at 63.
\textsuperscript{166} Id.
\textsuperscript{167} Id., supra note 164.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
The EEOC also recently brought a case against two car dealerships. The plaintiffs' problems began during the time Osama Bin Laden was featured prominently in the news. Six finance managers and a sales manager, all Afghani-Americans, claimed that they had been called "terrorists" and "thieves" and derided for their skin color and Muslim faith. Some of the Afghani employees felt they had no choice but to resign; others were fired after complaining about the discrimination. The suit was settled for $500,000 and the dealerships agreed to implement training, revise their anti-discrimination manuals, and to set up a complaint procedure.

A third high profile color discrimination suit filed by the EEOC was brought on behalf of an American Indian whose supervisor subjected him to repeated acts of harassment. The harassment, which lasted several months, included inappropriate comments about the color of his skin. Other employees also complained on his behalf, but the company failed to act to stop the abuse. This case is still pending.

According to the Chairwoman of the EEOC, this is the "mélange millennium" in which the nation is becoming more diverse. The agency, in light of the "increased number of racial blends... [is] trying to work out a way to determine what kind of adverse employment decisions can occur as a result." But the claims brought by the EEOC are a select few, raising the question: How are private plaintiffs faring as we mark the fortieth anniversary of Title VII?

B. Cases Brought By Individuals

Professors Jones and Banks noted many of the difficulties encountered by plaintiffs bringing color claims. The color discrimination cases decided over the last five years in federal court are noteworthy for several reasons. First, they suggest that the courts continue to struggle with recognizing colorism, and to conflate color with race. Nevertheless they appear to

173. Id.
175. Id.
176. Id.
177. See Mirza, supra note 159 at 66.
178. Id.
179. Id.
180. Valbrun, supra note 160.
181. Id.
182. Jones, supra note 7; Banks, supra note 5.
183. The courts' confusion is mirrored in the bar and amongst diversity specialists. Mirza interviewed both for an article on skin color bias and found that they "were surprised to learn that employees can file charges based on skin color alone and that these charges can be fundamentally different from traditional charges of race discrimination." See Mirza, supra note 159, at 62.
be increasingly willing to recognize claims based on color. Recent cases involve both inter and intraracial colorism and allege the failure to promote or transfer or hire, hostile work environment, and layoff. The majority of the cases involve dark-skinned plaintiffs, although a few involve light-skinned plaintiffs. South Asian immigrants were the dark-skinned plaintiffs in four of the cases, although unlike Ali, these plaintiffs alleged not intra, but interracial colorism. All of the cases involving light-skinned plaintiffs were brought by Black plaintiffs.

1. Cases Brought by Light Skinned Plaintiffs

Of the color cases, fewer are brought by light skinned plaintiffs of any race than by darker skinned plaintiffs. One of the earliest reported cases on intraracial colorism, and certainly the most cited, is *Walker v. Secretary of the Treasury, I.R.S.*, in which the plaintiff alleged that her dark-skinned Black supervisor discriminated against her because of her light skin. The *Walker* court noted the “unsavory business of measuring skin color and determining whether skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit.” Having said that however, the court rejected the IRS’s argument that because skin color and race are essentially the same characteristic, Walker’s claim should fail.

It would take an ethnocentric and naive world view to suggest that we can divide caucasians into many sub-groups but some how all blacks are part of the same sub-group. There are sharp and distinct contrasts amongst native black African peoples (sub-Saharan) both in color and physical characteristics.

Holding that the plaintiff alleged sufficient facts to survive summary judgment, the court cited with approval the Supreme Court’s holding in *Griggs v. Duke Power Co.* that Title VII was “specifically designed to remove artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously discriminate on the basis of racial or other impermissible classification.”

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184. In *Lindsay v. Pizza Hut of Am.*, 57 Fed. App’x 648, 2003 WL 244826 (6th Cir 2003), a pro se plaintiff’s hostile environment claim was unsuccessful because he did not present enough evidence: The record is devoid of competent summary judgment evidence of discrimination that is severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive. Lindsay primarily alleges that a supervisor rolled her eyes at him, allowed another employee to “curse” him, and offered to wager $50 that Lindsay would never be a manager. The supervisor’s actions are devoid of any indication she had any discriminatory animus towards Lindsay because of his gender, race, or “light skin” color ...

186. *Id.* at 408 (citing Sere v. Bd. of Trs., Univ. of Illinois, 628 F. Supp. 1543 (N.D. Ill. 1986)).
187. *Id.* at 406-07.
188. *Id.* at 407-08.
The facts of Bryant v. Begin Manage Program, a recent case on colorism, are similar to those of Walker. In Bryant, a light-skinned Black plaintiff alleged that her supervisor denied her a transfer and ultimately terminated her because she was light-skinned and not sufficiently Afrocentric. The plaintiff wore business suits and wore her hair in a curly blond style. However, the court treated Bryant's claim as one based on race, rather than as one based on color. "Bryant is claiming that she was treated differently because she was black—that she suffered an adverse employment action because as a black woman, she was obligated to dress in a particular manner."

Even though it focused on race rather than color, the court found that Bryant's claim was cognizable under Title VII. "[T]o the extent that any adverse employment action arose out of Sekou's views of how a black employee should dress (or not dress), the resulting adverse employment action would be actionable under Title VII." Ultimately, the court found that Bryant was also able to show that the reasons proffered for her termination were pretextual. Combined with her "independent evidence that the supervisor who recommended her termination was the one who exhibited the prohibited animosity," the court found she had enough evidence to allow a factfinder to conclude that her termination was based upon unlawful discrimination under Title VII.

In the Singletary case the light skinned plaintiff was a legally blind Albinos who brought a claim against the District of Columbia. His initial internal discrimination complaint was rejected and he appealed. Three weeks after he appealed his supervisor transferred him, along with sixteen other employees to a different department. But, unlike the other employees,

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191. Id. at 565. Afrocentric is a term used to describe, among other things, African style hair and clothing.
192. Id.
193. Id. at 570.
194. Id. at 569.
195. Id. at 570. In determining whether Bryant had alleged sufficient facts to support her claim of discriminatory discharge, the court stated:
Bryant has submitted evidence of racially-tainted animosity by Sekou, the person who advocated that Bryant be terminated. The comments by Sekou that Bryant dress "like me" (while pointing at her "Afrocentric" dress) and the disparaging of Bryant's dyed, blond hair do not, by themselves, give rise to an inference of discrimination. However, coupled with the comments of Bryant being a "wannabe," Bryant has presented a prima facie of a prohibited animus giving rise to an inference of discrimination.
196. Id. at 570.
197. Id. at 573.
198. Id. at 572.
Singletary was assigned to work in a storage room. He was not given a regular office until three years later. Additionally, Singletary was given no job position description and no job duties which meant he was ineligible to transfer to other positions and might not receive workers compensation for an injury occurred on the job. Following these incidents, Singletary applied for several promotions and was denied.

Singletary's EEOC charge alleged hostile work environment discrimination on the basis of color and disability and retaliation. As to Singletary's hostile work environment claim, the court held that he had raised a number of meritorious allegations, including those regarding the unheated storage room he was required to work in and the lack of a job description. A curious aspect of this case, however, is that the Court of Appeals accepted without any discussion the plaintiff's allegation that the hostile treatment he experienced was based upon his color.

2. Cases Brought by Dark-Skinned Plaintiffs

Four of the recent cases were straightforward color claims brought by darker-skinned plaintiffs. Hill v. Textron Automotive Interiors, Inc. was an unusual case because the plaintiff categorized himself as both a person of color and as a "Caucasian and member of the white race" who had "skin darker than a Caucasian's." He alleged that he was subjected to a hostile work environment and discrimination in reinstatement because of his skin.

200. Id. at 521. The district court's description of Singletary's new "office" was as follows:

The storage room was dirty, dusty and without heat, ventilation or adequate lighting. Access to the storage room was through a clinic to which plaintiff did not have keys. As a result, he could not enter the room at will, and he and colleagues visiting him in the room risked being locked in the room. The phone in the room often did not work, and plaintiff's colleagues often could not get hold of him. No other employee used the storage room as an office space before defendants assigned the room to plaintiff. None of the other employees assigned to the Vending Facility Program at that time were placed in workplaces similar to plaintiff's office...

RSA had vacant offices available in the same building.

201. Id. at 521.

202. Id. The district court had denied Singletary's retaliation claim as untimely. Id. The Court of Appeals held that there was sufficient evidence that he had continued to engage in protected activity, and that there was a close temporal relationship between this activity and the adverse employment action he suffered. His retaliation claim was remanded to the district court. Id. at 525.

203. Id. at 527. The district court had found this claim to be untimely as well, but the Court of Appeals noted that all Singletary needed to demonstrate was that the acts he complained about were part of the same actionable hostile work environment, which he did. Id. at 526-27.

204. Hill, 160 F. Supp. 2d 179, 181 (D.N.H. 2001). Plaintiff was of Portuguese and English descent. Id. at 181. Commenting in a footnote on the unusual nature of plaintiff's claim, the court noted that, "[b]oth Textron and Hill always considered him to be Caucasian, apparently based on his European heritage. Consequently, it is unclear exactly what Hill means when he says that he is 'a person of color' other than he considers his skin tone to be slightly darker than that of a 'white Caucasian.'" Id. at 186 n.2.
color. Hill’s claims were based on the fact that coworkers called him “Hadji,” “brother,” “Rick,” and “Chico.” However Hill admitted that he did not find the nicknames “cruel” or “offensive” and that he would tease the employees who teased him by calling them similar nicknames. Additionally the court found that even if Hill had presented a prima facie case, he was not able to show that he availed himself of the internal complaint procedures insofar as his hostile environment claim was concerned. Further, the court held that he did not prove that his skin color was the employer’s reason for not reinstating him; rather, that he turned down the position himself.

Brack v. Shoney’s, Inc. involved a dark-skinned restaurant manager who introduced evidence that his supervisor called him “little black sheep,” compared his hair to that of the light-skinned employee and stated that the difference between him and the coworker was like “night and day.” She also transferred Brack from his restaurant to less desirable location because the restaurant at which he was initially employed needed someone who was “fair skinned.” Brack alleged that he was subjected to a hostile work environment, was demoted, had his hours reduced, and was discharged based on unlawful color discrimination. He also alleged retaliation.

According to the court, the comments by Brack’s supervisor were “not direct evidence because the trier of fact would be required to make inferences to determine whether the statements were discriminatory in meaning.” Examining each specific claim, the court first found that the plaintiff’s demotion claim failed because he “failed to show that he was replaced by someone outside the protected class when he was demoted.” Likewise, his claim based on reduced hours failed because he “did not offer any evidence to establish that he was treated less favorably than someone who

205. Id. at 181.
206. Id. at 186. The court found that “Rick” was intended to be demeaning, and that “Chico” referred to the Freddie Prinze character from the “Chico and the Man” television show. Id.
207. Id. at 186.
208. Id. at 187.
209. Id.
211. Id.
212. Id. at 945.
213. Id. at 946.
214. Id. at 948. Perhaps it is a matter of perspective, but it is difficult to imagine anything other than a pejorative meaning of the majority of the statements relied upon by the plaintiff to prove discrimination. The court’s dicta seems to support Professor Banks’ research that courts are reluctant to recognize colorism claims of black plaintiffs.
215. Id. at 950. The employer argued that Brack’s replacement was a person who was darker than he. Id. at 949. Brack’s response was to assert that he “had no knowledge of these facts and [could] not agree or disagree.” Id. at 949-50. The court then found that his claim was based on speculation because he did not present facts essential to his claim. Id. at 950.
had lighter skin . . . "216 His discharge claim also failed because Brack did not offer evidence to dispute the fact that his replacement was an individual of the same skin tone:217 "Plaintiff does not offer any specific fact to establish that he was treated less favorably than someone with lighter skin by being terminated for allegedly failing to call or show up for his shift."218

Brack was more successful with his retaliation and hostile environment claims. He was able to prove that his supervisor's comments were made on a regular basis.219 The court found that this evidence was sufficient to establish that the comments were pervasive enough to alter the conditions of his employment.220 He also was able to avoid summary judgment on his retaliation claim because he presented enough evidence to establish that there was a causal link between his termination and the filing of his EEOC charges:221

First, the termination occurred shortly after the filing of the EEOC charges. Second, [plaintiff's supervisor's] testimony, given during an unemployment compensation hearing and at her deposition, is contradictory . . . The court finds that the contradictions in her testimony and the temporal proximity of the discharge to the EEOC filings are enough for a fact finder to infer that a causal connection exists.222

In Sidique v. University of Pittsburgh, a physician from India alleged that he was denied a position in a residency program in dermatology on the basis of his "Indian race, dark skin color and/or national origin."223 Six faculty members sat on the selection committee by which he scored lower than twenty-three other applicants in the selection process.224 Sidique had relied upon the Department Chair's assurances that he would be "ranked high on the residency interview portion of the selection process."225 The court found this evidence lacking.

Even assuming the veracity of Dr. Sidique's allegations, there exists a theoretical disconnect between such purported evidence of pretext and the Plaintiff's claims of employment discrimination. Simply put, counsel has failed to demonstrate how Title VII (or any other law) may be read to bind Dr.
Falo to his alleged promises to give Dr. Sidique preferred treatment or consideration.226

The real problem for Sidique was that he failed to present any evidence that would make a connection between the decision and any discriminatory comments or motive on the part of the selection committee.227 Sidique made an interesting but ultimately unsuccessful argument based upon the university requiring residency applicants to provide pictures.228 This was “specious” evidence of pretext, according to the court, which noted that the pictures were required by the Electronic Residency Application Service, not under university policy.229

In Munshi v. Alliant Techsystems, Inc., a supervisor’s comments supported a dark-skinned Indian employee’s color discrimination claim.230

Munshi has . . . raised a specter of discrimination in comments made by Meyers at his deposition. Although it is undisputed that Munshi is dark-skinned and has such a heavy accent that it is often difficult to understand him, Meyers testified that there was no difference between the color of his skin (Meyers is white) and the color of Munshi’s skin . . . . According to Meyers, Munshi’s accent and skin color were not an issue for him. To paraphrase Shakespeare, perhaps Meyers doth protest too much. A reasonable jury could view Meyer’s comments as indicating that he may have had a discriminatory motive when he decided to terminate Munshi.231

Munshi had been terminated, allegedly as part of a reduction in force.232 However, he was able to offer additional evidence that the head of human resources referred to his termination as an “individual job elimination.”233 He was also able to prove that the despite the supervisor, Meyer’s assertions his job was redundant, Meyer did not know what Munshi did or that he saved the company four million dollars in one year alone.234 The court found this evidence sufficient to preclude summary judgment.235

226. Id. at *5. In dicta, the court notes that Title VII makes it “abundantly clear” that an employer need not give preferential treatment to minorities. Id. It also attributed the Dr’s assurances to the motivation to continue to receive free research assistance from the plaintiff pending the results of the placement interviews. Id. at *5 n.7.
227. Id. at *6.
228. Id. at *8.
229. Id.
231. Id. at *3.
232. Id. at *1.
233. Id. at *4.
234. Id. at *5.
235. Id. at *6.
3. Cases that Confl ate Color with Race and/or National Origin

Although "color discrimination arises when the particular hue of the plaintiff's skin is the cause of the discrimination," the courts in several of the recent cases conflate color and race or color and national origin. This tendency is in part due to the courts' attempt to liberally construe the plaintiffs' claims. In filing a charge with the EEOC, the plaintiff completes a complaint form which contains boxes which the plaintiff checks as to the "cause of discrimination based on," such as color, race, national origin, and other protected classifications. In several of the cases, the plaintiffs failed to check one of the boxes for a classification they later alleged was a reason for the discrimination. Typically, the defendant employer then moved to dismiss the claim because it was not alleged on the face of the EEOC charge. At this point, the court had to determine whether the new claims were "reasonably related" to the conduct alleged in the charge.

For example, in Ofudu v. Barr Laboratories, Inc., the plaintiff, a Black employee, failed to check the box indicating that he alleged color discrimination, but did check the box for race. There were no facts presented in the case that the defendant employer discriminated against the plaintiff on the basis of his skin color. Nevertheless, Ofudu argued that his color claim was reasonably related to his race claim. The court did not dismiss his color claim, but its rationale went beyond that of the "reasonably related" rule:

Frankly, to the uninitiated (which most charging parties are), the difference between race discrimination and color discrimination is imperceptible. Actually, it is virtually imperceptible to this court... After reviewing the
materials Plaintiff appended to his charge, I have no doubt that his allegations of race and color are not only reasonably related but indistinguishable.\(^{246}\)

In making such a determination, the court went out of its way to recognize a color discrimination claim, but in doing so, it misstated the law.\(^{247}\)

Similar results were reached in a case involving a Panamanian adjunct professor who alleged that the university failed to reappoint him due to unlawful race and national origin discrimination.\(^{248}\) The plaintiff, Arrocha, described in the opinion as having a dark complexion, alleged that his department discriminated against black Hispanics.\(^{249}\) Although Arrocha alleged race discrimination, the court stated that "discrimination based upon skin color is a more accurate description of the claim since it alleges that light skinned Hispanics were favored over dark-skinned Hispanics."\(^{250}\) Arrocha, similar to the plaintiff in Ofudu, did not check the box on his EEOC complaint form to indicate that he was making a color discrimination claim.\(^{251}\) In a footnote, the court found that the plaintiff’s color claim was reasonably related to his race discrimination claim.\(^{252}\)

While the court fashioned a color discrimination claim for the plaintiff, it did not confuse the classifications, as the court had in Ofudu. In fact, the court in Arrocha dismissed the national origin claim:

The crux of plaintiff’s allegations are that white employees were favored over black employees. Plaintiff does not contend that Panamanians were subjected to adverse actions while dark-skinned natives of other Latin American countries received preferential treatment . . . [T]he complaint and supporting materials filed with this court fail to indicate that national origin discrimination motivated defendant’s decision.\(^{253}\)

In another case, Sharabura v. Taylor, the district court used the “reasonably related” test to find that a Russian nurse who alleged national origin discrimination could also bring claims for race and color discrimination.\(^{254}\) The nurse alleged that she and other Russian nurses were discriminated against in favor of Black nurses.\(^{255}\) Although the plaintiff did not allege race and color discrimination, “her description of the alleged dis-

\(^{246}\) Id.
\(^{247}\) Ultimately, however, the plaintiff failed to prevail on either the race or color claim because the court found that his evidence of discrimination was based on conclusory statements that were insufficient to withstand a summary judgment motion. Id. at 516.
\(^{249}\) Id. at *1-2.
\(^{250}\) Id. at *6.
\(^{251}\) Id. at *6 n.2.
\(^{252}\) Id.
\(^{253}\) Id. at *7.
\(^{255}\) Id. at *1.
The court's language is perplexing. It was not necessary to include color allegations because there was no indication that the nurse was treated any differently because of her skin tone. These facts clearly suggested a national origin and race claim, not a color claim. Although the court took a liberal view of the plaintiff's allegations, its results were unwarranted in this case.

_Ghosh v. Southern Illinois University_, brought by a medical resident who was terminated, is similar in that the plaintiff did not allege color discrimination. However, the court analyzed a stray comment about the plaintiff's color and accent as evidence of national origin discrimination. Ghosh was in a meeting with her supervisors who said that "people are biased and prejudiced against you if you're not white, if you speak with an accent." The court described this conversation as one in which "skin color came up." This was one of the meetings during which Ghosh's supervisors talked with her about the challenges she was having in her residency. There was no other evidence related to skin color discrimination.

In each of the cases set out above, the court displayed a willingness to recognize color discrimination claims even where they were not originally alleged. As previous scholars have written, it is clear that the courts continue to have difficulty distinguishing between claims based on color and those based on race.

**V. CONCLUSION**

So what is the status of color discrimination on this fortieth anniversary of Title VII? First it is apparent from current research that colorism and its detrimental personal and economic effects remain an issue in this country. Moreover this issue is not isolated to any particular community, but is found within all racial groups and notably within groups towards members of the same group. Second, given the prevalence of colorism, both here and
abroad, courts should take care not to confuse issues of national origin with those of color discrimination. In analyzing a plaintiff’s claim, the court should not be concerned about the source of the employer’s bias as the ultimate question is whether an adverse employment decision was made on the impermissible basis of skin color. Regardless of whether an employer’s skin color bias is “made in America,” or brought here from another culture, the result is the same.

The recent prominence of color cases, the upswing in the number of filings, and the EEOC’s interest in these cases suggest that color claims will continue to increase. Whether courts are reluctant to recognize the claims of Blacks, as earlier writers have suggested, is difficult to determine based on the cases decided most recently. Among the reported cases, the Black plaintiff’s claims survived summary judgment in two of the three cases. Blacks brought claims both on the basis of light and dark skin.

Most interesting, however, is that the majority of the color discrimination cases have been brought by South-Asian employees. In each of the cases except one, the courts acknowledged the existence of color as a protected classification. However with this new acceptance of the claim, there is obvious confusion over the difference between race and color or national origin and color. Hopefully, as more color cases filter into the courts, the jurisprudence on this issue will become more reflective of the intent of the statute.

Until our society moves beyond the practicing of judging one another on the basis of skin tone, Title VII will continue to provide a remedy to employees harmed by the practice of colorism in the workplace.

262. This Article reviewed cases decided within the past five years as this time period encompasses cases decided after the publication of Professors Banks and Jones' articles.