Intragroup Discrimination: The Case for "Race Plus"

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INTERRGROUP DISCRIMINATION IN THE WORKPLACE: 
THE CASE FOR “RACE PLUS”

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ABSTRACT: The application of Title VII is uneven. The judiciary applies it to employment discrimination across groups, intergroup discrimination, but is reluctant to do so for discrimination within groups, intragroup discrimination. Even where Title VII recognizes intragroup discrimination, it does so unevenly. A “sex plus” doctrine is used to address intragroup sex discrimination, but no corresponding “race plus” doctrine has emerged for intragroup race discrimination. This Article calls attention to issues of intragroup discrimination, and proposes “race plus” as a natural extension of “sex plus” based on the text, legislative history, and statutory purpose of Title VII. This doctrinal tool would help resolve cases where courts otherwise fail to provide a remedy for intragroup race discrimination.

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INTRODUCTION

Title VII prohibits employers from terminating, or refusing to hire or promote, an individual “because of such individual’s race, color, religion, sex, or national origin.” It has long addressed intergroup discrimination across groups in cases pitting whites against blacks, men against women, and so forth. By contrast, it often overlooks discrimination within groups, such as blacks against blacks, women against women – intragroup discrimination.

Intragroup discrimination is discrimination between members of the same group, typically based on their degree of association with the group. Members of a group may disassociate from the group to the point of discriminating against other group members, e.g., a black who discriminates against another for being “too black.” Alternatively, group members may discriminate against those who do not associate with the group, e.g., a black who discriminates against another for being “not black enough.”

Examples of intragroup discrimination in the workplace abound: the childless female supervisor who singles out the working mother, the light-skinned black manager who fires a dark-skinned black employee, the white Hispanic administrator who denies tenure to an Afro-Latino instructor – all raise the possibility of intragroup discrimination. But courts often lose sight of intragroup discrimination, simply because parties belong to the same race or sex. This judicial myopia is analytically problematic under Title VII, for which the dispositive factor is not the identity of the parties, but rather the motive for discrimination, e.g., “because of” race or sex. It also subverts the stated purpose of Title VII: equal employment opportunity for all.

2 Of course, the distinction between intergroup and intragroup discrimination depends on whether groups are broadly or narrowly defined, as set forth in Part I.
3 This is true even if the variable of assimilation is immutable, e.g., skin color. Thus, a light-skinned black may be less associated with other blacks based on color, even if this individual associates with blacks in other respects.
4 See discussion infra Section II.A.
5 See discussion infra Subsection II.B.1.
6 Because “Hispanic” is the only term that the EEOC defines, this Article uses it instead of “Latino.” See Employer Information Report EEO-1 and Standard Form 100, Appendix Section 4, Race/Ethnic Identification, 1 EMPL. PRAC. GUIDE (CCH) § 1881, 2065-66 (1981) (setting forth guidelines for classification of workers’ race/ethnicity).
7 Since mulatto carries a derogatory connotation, this Article uses the term “Afro-Latino” to describe Hispanics of mixed European and African ancestry. See JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY 99-100 (1995) (explaining that mulatto is derived from the word “mule,” the sterile offspring of a horse and donkey).
8 See discussion infra Subsection II.B.2.
Where the law does recognize intragroup discrimination, it fails to do so equally. Intragroup sex discrimination claims may be cognizable under a “sex plus” doctrine, which recognizes discrimination based on sex plus another characteristic. This helps courts resolve cases where employers do not discriminate against women as a whole, but only a subgroup of women, e.g., women with preschool-age children. Conversely, because no corresponding “race plus” doctrine has gained traction in the case law, courts do not generally recognize intragroup race discrimination claims.

This Article analyzes the problem of intragroup discrimination, and proposes “race plus” as a logical extension of “sex plus.” Part I sets out a model for intragroup discrimination. Part II applies that model in the context of race and gender. Part III builds on “sex plus” doctrine to develop a “race plus” proposal to address intragroup race discrimination under Title VII. Finally, Part IV makes the case for “race plus” based on the text, legislative history, and statutory purpose of Title VII.

I. MODELING INTRAGROUP DISCRIMINATION

At first blush, the distinction between intergroup and intragroup discrimination may seem arbitrary. The one may be reconceptualized as the other, and vice versa, depending on the frame of reference. If the group is defined broadly enough to encompass both the discriminator and the victim, intragroup discrimination ensues. The same becomes intergroup discrimination when groups are drawn more narrowly, such that the discriminator and the victim fall within different groups. Because it accords with the common understanding of group identity, this Article takes a broad view of race and gender groups. Blacks, for example, are taken as a group, light-skinned blacks as a subgroup. Women are a group, women with children a subgroup.

In principle, how groups are drawn should have no bearing on the application of Title VII. The plain language of Title VII prohibits discrimination “because of” race, color, religion, sex, or national origin. The dispositive factor is not the group identity of the parties, but rather the motive for discrimination. Insofar as discrimination occurs “because of” one of the five protected categories, the identity of the parties should be incidental to the act of discrimination itself. For example, if an employer fires an employee because the employee is black, there is discrimination within the meaning of Title VII – even if the employer himself is black. Liability turns not on the race of the parties involved, i.e., both black, but on the basis for discrimination, i.e., race. In practice, however, courts are more

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9 See discussion infra Section II.A.
10 See discussion infra Section II.B.
11 See supra note 1.
likely to find a Title VII violation when there is intergroup rather than intragroup discrimination, partly because the latter is not well understood.\textsuperscript{12}

To cast some light on intragroup discrimination, this Part develops a model of intragroup discrimination as an interaction between three parties: (1) a privileged group; (2) a subgroup of people who assimilate privileged-group norms despite being members of a disadvantaged group; and (3) disadvantaged-group members who remain unassimilated to these norms.\textsuperscript{13}

This Article refers to these parties as the “privileged,” the “assimilated,” and the “unassimilated,” respectively. Here, the assimilated associate more with the privileged and less with the unassimilated, who are not only estranged from the privileged, but also from the assimilated.

To illustrate, imagine an employer who prefers employees without caregiving responsibilities. If men are assumed to have none of these responsibilities, and if women with children are assumed to have more of these responsibilities than women without children, then men are the privileged, childless women the assimilated, and working mothers the unassimilated. Even without direct pressure from the privileged, the assimilated and the unassimilated may discriminate against each other. For example, a childless woman may actively harass working mothers simply because they are mothers. Alternatively, the privileged may directly incite such conflict, either by associating with the assimilated to the exclusion of the unassimilated, or by enlisting the assimilated against the unassimilated. To continue the above example, a male executive may promote only childless women, or may empower childless female supervisors to terminate working mothers who are competent at their jobs but nonetheless viewed as more committed to family than work.

Motherhood was the variable of assimilation in the above example. This and other examples are further developed below. The discussion considers both examples where the assimilated discriminate against the unassimilated, and vice versa.

\textbf{A. Assimilated on Unassimilated}

If the assimilated discriminate against the unassimilated, assimilated-on-unassimilated discrimination ensues. The Supreme Court conceded this possibility in \textit{Castaneda v. Partida}, where a state prisoner filed a habeas petition alleging discrimination against Mexican-Americans in the selection

\textsuperscript{12} See discussion \textit{infra} Part II.

\textsuperscript{13} Assimilation includes adopting the privileged group’s speech patterns, clothing styles, mannerisms, and so on. Kenji Yoshino, \textit{Covering}, 111 Yale L.J. 769 (2002). It also includes embracing privileged-group definitions of educational and professional success. This definition is descriptive rather than normative. It does not pass judgment on assimilation. Nor does it essentialize groups. It merely acknowledges given stereotypes.
of the grand jury that indicted him. The state attempted to rebut the prisoner’s prima facie case by showing that Mexican-Americans held a “governing majority” of elective offices in the county. The Court rejected this, holding that “it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.” By implication, the Court agreed that Mexican-Americans could, conceivably, discriminate against other Mexican-Americans.

Justice Thurgood Marshall made this point more straightforwardly in his concurrence: “[M]embers of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority’s negative attitudes towards the minority.” Specifically, Justice Marshall was referring to assimilated-on-unassimilated discrimination. For race, one commentator has referred to this phenomenon as “performing Whiteness,” whereby nonwhites internalize the norms of “white supremacy” to exert an elevated social status, real or imagined, over their racial peers. Similarly, women in the workplace may “perform manhood” so as to curry favor with male supervisors. In so doing, they distance themselves from female peers, either passively through disassociation, or actively through hostility toward women who refuse to assimilate to male-oriented workplace norms.

For both race and sex, the privileged may incite assimilated-on-unassimilated discrimination through association or enlistment.

1. Association

“Association” is a tacit, or even explicit, agreement between the privileged and the assimilated that benefits the assimilated and harms the unassimilated. It functions as follows. First, the privileged discriminate

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15 Id. at 499.
16 Id. at 503 (Marshall, J., concurring).
17 Nonwhites may claim “whiteness in their character, religious practices and beliefs, class orientation, language, ability to intermarry, and a host of other traits that had nothing to do with intrinsic racial grouping.” John Tehranian, Note, Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America, 109 YALE L.J. 817, 821 (2000).
18 See Palette Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 DUKE L.J. 365, 369 (mourning that some black children “reject association with black people and black culture in search of a keener nose or bluer eye”); see also Kevin R. Johnson, “Melting Pot” or “Ring of Fire”?; Assimilation and the Mexican American Experience, 85 CALIF. L. REV. 1259, 1261 (1997) (“Latinos who can overcome the barriers and assimilate may internalize racism that elevates the status of Whiteness.”).
against the unassimilated by passing them over for recruitment and promotion. Second, the privileged associate with the assimilated by offering them the very job opportunities denied to the unassimilated. Finally, the privileged cite their association with the assimilated to defend against Title VII claims brought by the unassimilated. Association thus acts as a shield against liability.  

Consider, for example, an employer who hires light-skinned blacks but refuses to hire dark-skinned blacks. By hiring some blacks to the exclusion of others, the employer may well elude Title VII liability. Statistically, there may be no evidence that the employer discriminates against blacks as a whole. A dark-skinned black therefore cannot make out a race discrimination claim unless the court treats dark-skinned blacks separately from light-skinned blacks. Notably, light-skinned blacks are complicit in assimilated-on-unassimilated discrimination to the extent they are aware of the employer’s practice of excluding their dark-skinned brethren.

2. Enlistment

“Enlistment” is a more active method of discrimination by which the privileged enlist the assimilated to discriminate against the unassimilated. These circuitous means afford the appearance of “clean hands” while achieving the same discriminatory end. For example, “[outside] can make arguments that work to the advantage of insiders so that insiders can then claim that their arguments are not purely self interested.” Unlike with association, the assimilated are now actively engaged in subordinating the unassimilated at the behest of the privileged. Accordingly, the unassimilated view enlistment as a serious act of betrayal.

To continue the above example, assume the employer hires dark-skinned blacks but quickly fires them, ostensibly for cause. As an added precaution against Title VII liability, the employer directs light-skinned blacks to carry out and take responsibility for these terminations. This, too, qualifies as assimilated-on-unassimilated discrimination to the extent light-

20 Cf. Tanya Kateri Hernandez, Latino Inter-Ethnic Employment Discrimination and the “Diversity” Defense, 42 HARV. C.R.-C.L. L. REV. 259, 266 (2007) (describing a similar defense which seeks to “impute to diverse workplaces a shield against discriminatory treatment claims”). While employers may have legitimate nondiscriminatory reasons to prefer the assimilated over the unassimilated in some cases, e.g., job relatedness or business necessity, Title VII liability should otherwise attach. See, e.g., Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); see also infra note 39 (noting the bona fide occupational qualification).

21 Devon W. Carbado & Mitu Gulati, Working Identity, 85 Cornell L. Rev. 1259, 1306 (2000); see also RANDALL KENNEDY, SELLOUT: THE POLITICS OF RACIAL BETRAYAL 4 (2008) (defining “sellout” as “person who betrays something to which she is said to owe allegiance”)
skinned blacks willingly participate in this scheme.

B. Unassimilated on Assimilated

“Intragroup policing” is a form of intragroup discrimination by which the unassimilated “police” their own and punish perceived acts of assimilation. They do so for two reasons: first, to cow the assimilated back into the ranks of the unassimilated; and, second, to deter future defections. In so doing, the unassimilated essentialize their own group and “perform” their own stereotypes. They hurl pejoratives at their assimilated counterparts – racial slurs like “oreo”\(^\text{22}\) and “coconut.”\(^\text{23}\) For gender, the war of “mommy versus mommy” means that “each woman judges women more work-centered than herself as insensitive to her children’s needs.”\(^\text{24}\) One commentator refers to this as “reverse-covering,” which “demands that individuals act according to the stereotypes associated with their group.”\(^\text{25}\)

Intragroup policing seems more excusable than its intergroup counterpart because it often arises out of defensive separatism – the idea that a historically-subordinated group needs to exact loyalty oaths to ensure its survival. But this should not obscure the reality that intragroup policing jeopardizes individual “authenticity,”\(^\text{26}\) and risks turning in-group stereotypes into self-fulfilling prophecies. Notably, it also violates the letter and spirit of Title VII, as set forth in the next Part.\(^\text{27}\)

II. THE MODEL APPLIED

Having elaborated a model for intragroup discrimination, this Article now applies it in the context of race and gender. The law here is not created equal. Whereas courts have the analytical benefit of “sex plus” to address intragroup sex discrimination, there is no “race plus” for intragroup race discrimination.

A. Intragroup Sex Discrimination

Intragroup sex discrimination is discrimination by men against men, or

\(^\text{22}\) See infra note 90.
\(^\text{23}\) See infra note 128.
\(^\text{24}\) JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 147 (2000).
\(^\text{25}\) KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 23 (2006).
\(^\text{26}\) Id. (conceptualizing as being oneself, as experience by the individual).
\(^\text{27}\) One might ask how intragroup policing is discrimination “because of” race, rather than discrimination “because of” behavior, e.g., acting “assimilated” as opposed to acting “unassimilated.” The answer is that, in most cases, behavior only becomes an issue because of race. For example, a black may discriminate against another black for “acting white,” but not discriminate against a white for acting in the same manner, dismissing the behavior as “just something white people do.” To the extent blacks and whites are treated differently for the same behavior, the variable of discrimination is race, not behavior.
by women against women. The focus here is on woman-to-woman discrimination.28

The single best predictor of woman-to-woman discrimination in the workplace is motherhood.29 The reason is that the “organization of market work and family work pits ideal-worker women against women” whose lives are defined, in part, by caregiving.30 Even as fathers take up more of these responsibilities, working mothers must still contend with widely-held stereotypes that question their commitment to work over family.31 Female attorneys, for instance, may worry about being “mommy-tracked”32 at law firms “top-heavy with men and childless women, [but] supported by a pink-collar ghetto of mommy lawyers.”33 This invites woman-to-woman discrimination. Typically, the pattern is childless female supervisors “hazing” working mothers through acts of denigration, exclusion, isolation, and sabotage— all designed to undermine a working mother’s perceived competence and commitment to her job.34 This is classic “sex plus” discrimination.

“Sex plus” is “a judicial convenience developed in the context of Title VII to affirm that plaintiffs can, under certain circumstances, survive summary judgment even when not all members of a disfavored class are discriminated against.”35 The foundational case is Phillips v. Martin Marietta Corp., in which the plaintiff alleged that she had been denied

28 Of course, man-to-man discrimination also occurs, as recognized by the Supreme Court itself. In Oncale v. Sundowner Offshore Drilling Services, Inc., 523 U.S. 75, 80 (1998), male oilrig workers hazed an effeminate male coworker who then brought suit under Title VII. The Oncale Court held that Title VII’s protection against discrimination “because of . . . sex” applied equally to harassment between members of the same sex.

29 Even outside the workplace, there is a divide between working and stay-at-home mothers. See, e.g., MOMMY WARS: STAY-AT-HOME AND CAREER MOPS FACE OFF ON THEIR CHOICES, THEIR LIVES, THEIR FAMILIES (Leslie Morgan Steiner ed., 2006).

30 WILLIAMS, supra note 24, at 145.

31 See Joan C. Williams & Nancy Segal, Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job, 26 HARV. WOMEN’S L.J. 77, 108 (2003); see also Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 731-32 n.5 (2003) (referring to the view that “women’s family duties trump those of the workplace” as a “gender stereotype”).


34 See infra notes 42-56; see also Peggy Orenstein, The Working Mother: Almost Equal, N.Y. Times, Sect. 6 (Magazine), Apr. 5, 1998, at 42, 27 (describing the gender war that pits mothers against women without children).

employment because of her sex. The district court granted summary judgment for the employer because, although the employer refused to hire women with preschool-age children while hiring men with such children, the percentage of women hired was roughly equal to the percentage of women who applied. The Fifth Circuit affirmed. The Supreme Court vacated and remanded, holding that Title VII does not permit an employer to have “one hiring policy for women and another for men” based on their parenting status. In effect, the Court prohibited “sex plus motherhood” discrimination. More broadly, “sex plus” prohibits an employer from discriminating based on sex plus a fundamental right or an immutable characteristic. This doctrinal tool is effective, even against woman-to-woman discrimination.

Consider two examples from the case law. In Walsh v. National Computer Systems, Inc., Shireen Walsh, a customer service representative, brought suit against her supervisor, Barbara Mickelson, for sex discrimination under Title VII. Before Mickelson became her supervisor, Walsh had been considered a “top performer,” receiving multiple promotions, regular raises, and favorable performance evaluations. Walsh was pregnant when Mickelson took charge. After returning from maternity leave, Walsh was repeatedly harassed by her supervisor: Mickelson suggested that “maybe [Walsh] should look for another job”; Mickelson posted an “Out – Sick Child” sign to Walsh’s cubicle whenever Walsh had to care for her son; Mickelson referred to Walsh’s son as “the sickling”; and, the day after Walsh fainted at work due to the stress of her situation, Mickelson told her “you better not be pregnant again.” Walsh complained to Bruce Haseley, the human resources manager, but to no avail. Walsh had little choice but to resign.

On this record, the Eighth Circuit held that Walsh “was discriminated against not because she was a new parent, but because she is a woman who

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36 400 U.S. 542, 543 (1971) (per curiam).
37 Id.
38 Id. at 543-44.
39 Id. at 544 (finding the record insufficient to resolve the issue of whether having preschool-age children was “demonstrably more relevant to job performance for a woman than for a man,” and thus whether sex was a bona fide occupational qualification).
40 Id.
41 See, e.g., Willingham v. Macon Tel. Publ’g Co., 507 F.2d 1084, 1091-92 (5th Cir. 1975).
42 332 F.3d 1150, 1154 (2003).
43 Id.
44 Id.
45 Id. at 1155.
46 Id.
47 Id. at 1155-56.
had been pregnant, had taken a maternity leave, and might become pregnant again.” This is “sex plus,” although the court did not expressly identify it as such. The motive for discrimination appears to have been Walsh’s sex plus her status as a mother. The record also contains traces of “enlistment,” whereby the male human resources manager may have condoned Mickelson’s actions. Notably, the record indicates that no human resources investigation occurred either before or after Walsh’s departure.

Woman-to-woman discrimination was also at issue in Back v. Hastings on Hudson Union Free School District. The plaintiff, Elana Back, worked as a school psychologist at Hillside Elementary School. She received “excellent” evaluations during her first two years. But after she returned from maternity leave, as her tenure review was approaching, her supervisor Ann Brennan inquired about how Back was “planning on spacing [her] offspring”; asked that Back “not get pregnant [again] until I retire”; and suggested Back “wait until [her son] was in kindergarten to have another child.” Then Brennan, along with the school principal, Marilyn Wishnie, said Back’s job was “not for a mother,” and “wanted another year to assess [Back’s] child care situation” before granting her tenure. Back was later denied tenure and fired. Back claimed that Brennan and Wishnie “presumed that she, as a young mother, would not continue to demonstrate the necessary devotion to her job, and indeed that she could not maintain such devotion while at the same time being a good mother.” The district court granted summary judgment for Brennan and Wishnie.

The Second Circuit reversed, holding that comments made about a woman’s inability to combine work and motherhood – particularly, that a woman cannot “be a good mother” and have a job that requires long hours, or that a mother who received tenure “would not show the same level of commitment [she] had shown because [she] had little ones at home” – constituted direct evidence of sex discrimination under the Equal Protection Clause as stereotyping. In addition to stereotyping, the court based its holding on “sex plus,” by which Back was singled out because of her sex plus her status as a mother.

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48 Id. at 1160.
49 Id. at 1155.
50 365 F.3d 107 (2d Cir. 2004). This case was brought under the Equal Protection Clause, although a Title VII claim may also have been sustained. See id. at 118-19.
51 Id. at 115.
52 Id.
53 Id. at 113.
54 Id.
55 Id. at 119-20.
56 Id. at 118-19 (“Although we have never explicitly said as much, ‘sex plus’ discrimination is certainly actionable in a § 1983 case. The Equal Protection Clause forbids
Accordingly, as in *Walsh* and *Back*, “sex plus” is an effective doctrinal tool in the battle against intragroup sex discrimination.  

**B. Intragroup Race Discrimination**

There is no corresponding “race plus” doctrine for intragroup race discrimination. The result is that intragroup race discrimination often goes undetected and, therefore, undeterred. The problem is not only that the case law falls short, but also that race itself is a slippery notion.

Race has no fixed meaning outside of law, to say nothing of the profound incoherence surrounding the term as a descriptive legal category. For most people, race is a rule of thumb. We pigeonhole others (and ourselves) into racial groups largely based on phenotype – the color of our skin, the curl of our hair, the broadness of our nose, the fullness of our lips. The law offers little refinement. Historically, race was based on bloodline, as with the one-drop rule, but deciding how far back to trace the family tree became an arbitrary exercise. The Supreme Court itself, which once approached race as a scientific inquiry, has settled on a smell test.

In the 2000 Census, there were six racial categories – “American Indian or Alaskan Native,” “Asian,” “Black or African American,” “Native Hawaiian or Other Pacific Islander,” “White,” and “Some Other Race” – along with two ethnic categories – “Hispanic or Latino” and “Not Hispanic sex discrimination no matter how it is labeled.”).

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58 Sharona Hoffman, *Is There a Place for “Race” as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1094 (2004) (“The best research in genetics, medicine, and the social sciences reveals that the concept of ‘race’ is elusive and has no reliable definition.”).

59 See id. (summarizing the debate over the meaning of race, and arguing that a lack of consensus undermines antidiscrimination law based on racial categories).


62 See Takao Ozawa v. United States, 260 U.S. 178, 198 (1922) (holding that “the words ‘white person’ are synonymous with the words ‘a person of the Caucasian race,’” and that the Japanese claimant was “clearly of a race which is not Caucasian”).

63 In *United States v. Thind*, the Supreme Court reversed itself in *Ozawa* and set forth a common-knowledge test: “What we now hold is that the words ‘free white persons’ are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word ‘Caucasian’ only as that word is popularly understood.” 261 U.S. 204, 214-15 (1923). It went on to hold that Asian Indians, like the claimant, did not satisfy the test.
or Latino.” Thus, for simplicity, this Article speaks of the black “race” and the Hispanic “ethnicity.” Race is predicated on ostensibly objective biological criteria, whereas ethnicity is based on culture and geographic origin. This distinction is not strictly preserved here.

Skin color is to intragroup race discrimination what motherhood is to woman-to-woman discrimination. It is the single best predictor of black-on-black, as well as Hispanic-on-Hispanic, discrimination. Generally, the light skinned mistreat the dark skinned in adherence to a color hierarchy where “[l]ighter is better and darker is worse.” But the inverse can also occur, the hierarchy stood on its head. What follows are the stories of intragroup discrimination within the black and Hispanic communities.

1. Black on Black

Blacks may discriminate against each other on a number of grounds – political ideology, residency, marriage, sexual orientation. The focus here is on color discrimination, or “colorism,” in the workplace.

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64 See U.S. Census Bureau, Racial and Ethnic Classifications Used in Census 2000 and Beyond, www.census.gov/population/www/socdemo/race/racefactcb.html (last visited ). The federal government uses the Census Bureau’s racial and ethnic classifications for statistical, administrative, and civil rights purposes.

65 In so doing, this Article does not endorse this categorization, which itself is subject to change in the 2010 Census. See Tyler Lewis, Race Categories to Change on 2010 Census Form, Leadership Conference on Civil Rights (Apr. 12, 2006), available at www.civilrights.org. Rather, the categorization is for illustrative purposes.

66 For more on the race/ethnicity distinction, see Stephen H. Caldwell & Rebecca Popenoe, Perceptions and Misperceptions of Skin Color, 122 ANNALS INTERNAL MED. 614 (1995).


68 Undoubtedly, other communities have similar stories. But those stories are sadly beyond the scope of this Article.

69 See Kimberly Jade Norwood, The Virulence of Blackthink and How Its Threat of Ostracism Threatens Those Not Deemed Black Enough, 93 KY. L.J. 147, 147 (2005) (“Blackthink is a form of prejudice . . . presum[ing] that all Blacks are unquestionably liberal, pro-affirmative action, pro-choice, pro-gay rights, pro-welfare, and most definitely anti-Republican.”).

70 See id. at 172 (noting that blacks who live in white neighborhood may viewed as “wannabes,” blacks who want to be white).


72 Devon W. Carbado, Black Rights, Gay Rights, Civil Rights, 47 UCLA L. REV. 1467, 1473 (2000) (“[B]eing out as a black gay or lesbian in the black community is race negating.”).

73 See Jones, supra note 60, at 1488 (defining colorism as “the prejudicial treatment of individuals falling within the same racial group on the basis of skin color”).
Although the topic of black-on-black discrimination is taboo in some circles, it is real—and the law cannot afford to turn a blind eye.

a. Assimilated on Unassimilated

Blacks who are more associated with whites may discriminate against blacks who are perceived as “too black.” Skin color, albeit immutable, is thus a variable in assimilation. Differences in pigmentation across the black community have historically provoked a good deal of black-on-black discrimination, and continue to do so today.

Consider the situation in which a light-skinned black discriminates against a dark-skinned black. In Sere v. Board of Trustees, a Nigerian man brought suit against his black supervisor under both Title VII and section 1981. His Title VII claim was dismissed as untimely, but the court reached the merits of his section 1981 claim. Although the lawsuit alleged race and national origin discrimination, the real issue appears to have been color. Edward Sere, a dark-skinned black counselor in an educational program, was fired by his light-skinned black supervisor and subsequently replaced by a light-skinned black. The court “recognize[d] that discrimination based on skin color may occur among members of the same race,” but concluded that Sere failed to establish that color discrimination was actionable under section 1981. The court cautioned against “the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit.” Notably, the court made no attempt at forging a doctrinal tool to guide the future adjudication of such claims.

Burch v. Applebee’s Neighborhood Bar & Grill also made no

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74 Cf. Hansborough v. City of Elkhart Parks & Recreation Dep’t, 802 F. Supp. 199, 203 (N.D. Ind. 1992) (noting that, under Title VII, “[c]ertainly it is not impossible for one black person to discriminate against another black person on the basis of race or color.”) (emphasis in original).
75 See Baynes, supra note 67, at 140.
76 Light-skinned blacks established separate communities based on color. For instance, they created exclusive social clubs like the Blue Vein Society of Nashville, and even worshipped in different churches. KATHY RUSSELL ET AL., THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS 25, 27-28 (1992). Blacks could attend “color conscious” congregations only if the skin on their arm was lighter than the color of a paper bag, the so-called “paper bag test.” Id. at 27. Light-skinned blacks even formed separate professional and business associations. Id. at 30-31.
77 628 F. Supp. 1543 (N.D. Ill. 1986), aff’d, 852 F.2d 285 (8th Cir. 1988).
78 Section 1981 provides, in relevant part, that “[a]ll persons . . . shall have the same right[s] . . . as is enjoyed by white citizens . . . .” 42 U.S.C. § 1981.
79 Id. at 1544-46.
80 Id. at 1543, 1546.
81 Id. at 1546.
82 Id.
83 Id.
substantive contribution to the case law in this respect, although the outcome was more favorable to the plaintiff. Dwight Burch was a dark-skinned black employed at Applebee’s. His manager was a light-skinned black, who allegedly made disparaging comments about Burch’s dark skin. When Burch threatened to report the matter to corporate headquarters, his manager had him fired. In response, Burch filed a color discrimination claim with the EEOC, litigated in federal court, and won a $40,000 settlement. Because the matter settled, no opinion was handed down. But the case did attract a good deal of media attention, bringing the issue of color discrimination into plain view. Burch himself publicly stated: “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 even worse.” But these words lack the force of law.

Even assuming the fact of discrimination in these cases, questions remain. But for Sere’s color, would his supervisor have made the same decision to fire him? What role, if any, did other decisionmakers play? And why did Applebee’s corporate officers allow Burch to be fired without first investigating his complaint? These questions were left unresolved.

b. Unassimilated on Assimilated

Intragroup policing occurs when blacks discriminate against blacks who are perceived as “not black enough.” For example, “oreo” is a slur against those who are said to be “black on the outside, white on the inside.” It plays on gross stereotypes about what it means to “act black” versus “act white,” and seeks to punish perceived acts of racial betrayal, also highly stereotyped – “speaking proper English,” “getting good grades,” “dating [C]aucasian girls,” even “having a diverse group of friends.”

In his 2004 address to the Democratic National Convention, Barack

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85 Id.
86 Id.
87 Id.
89 Id. (emphasis added).
90 URBAN DICTIONARY: RIDONKULOUS STREET SLANG DEFINED (2007), available at http://www.urbandictionary.com/define.php?term=oreo [hereinafter URBAN DICTIONARY]; see also CAROLYN EDGAR, BLACK AND BLUE, RECONSTRUCTION 13, 16 (1994) (describing how the author, a black woman, was called an “oreo” by other blacks when she associated too much with whites); Gary Peller, Notes Toward a Postmodern Nationalism, 1992 U. ILL. L. REV. 1095, 1099 (describing how blacks who failed to wear dashikis were sometimes called “oreos” by Black Nationalists).
91 URBAN DICTIONARY, supra note 90.
Obama, himself an “oreo” in the eyes of some blacks, alluded to this phenomenon when he called on America to “eradicate the slander that says a black youth with a book is acting white.” To the extent it is propagated by the black community itself, this slander qualifies as intragroup policing. One problem with intragroup policing is that it undermines “authenticity,” which is “just as threatened by an imperative to ‘act black’ as it would be by an imperative to ‘act white.’” Another problem is that it incites intragroup discrimination.

The discussion thus far has focused on conflict over what it means to be “white on the inside.” But there is also a good deal of conflict over what it means to be “black on the outside.” During the Civil Rights Movement, some light-skinned blacks “felt they had to prove their loyalty to the black community, and some complained of discrimination from other blacks.” One commentator reports that, to date, light-skinned blacks are “frequently accused of thinking themselves smarter, more beautiful, and generally better than other blacks.” This breeds resentment and, in turn, black-on-black color discrimination.

This form of intragroup discrimination was at issue in Walker v. Secretary of Treasury, where a light-skinned black typist, Tracy Walker, established a prima facie case of color discrimination against her dark-skinned black supervisor, Ruby Lewis. Walker claimed that Lewis had fired her out of “personal hostility” due to Walker’s light skin. The employer countered that Walker was fired because of tardiness, laziness, incompetence, and attitude problems. The court refused to grant summary judgment on the color discrimination claim even though Walker was unable

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92 RANDALL KENNEDY, SELLOUT: THE POLITICS OF RACIAL BETRAYAL 7 (2008) (“Barack Obama has had to deal with doubts about his loyalty to blackness because of his ancestry (his mother was white), his upbringing (he was raised in Hawaii, apart from a cohesive black community), and perhaps most of all because many white people have strongly supported him.”); Janny Scott, A Biracial Candidate Walks His Own Fine Line, N.Y. TIMES, Dec. 29, 2007, at _ (noting that the Reverend Jesse Jackson had been quoted by a reporter as saying that Obama “needs to stop acting like he’s white”); Stanley Crouch, Barack Obama—Not Black Like Me, N.Y. DAILY NEWS, Nov. 2, 2006, at _ (“Other than color, Obama did not—does not—share a heritage with the majority of black Americans, who are descendants of plantation slaves.”).


94 See supra note 26.

95 Id.

96 DAVIS, supra note 61, at 74.


99 Id.
to directly demonstrate that Lewis disliked light-skinned blacks. On the question of whether color differences were actionable under Title VII, the court reasoned that “when Congress and the Supreme Court refer to race and color in the same phrase, . . . ‘race’ is to mean ‘race’, and ‘color’ is to mean ‘color’. To hold otherwise would mean that Congress and the Supreme Court have either mistakenly or purposefully overlooked an obvious redundancy.” The court also weighed but ultimately dismissed the Sere concern over the “unsavory business of measuring skin color” as a factual question best left to the jury.

In another case, Bryant v. Begin Manage Program, Shirley Bryant, a light-skinned black, brought a Title VII action alleging that her two dark-skinned black supervisors, Iesha Sekou and Deborah Nelson, had discriminated against her because she was light skinned and insufficiently “Afrocentric.” Whereas Sekou dressed in African-style attire and kept her hair wrapped in an African hair dress, Bryant wore business suits and had short, curly blond hair, dyed from its natural brown. Against this backdrop, Bryant offered direct “evidence of racially-tainted animosity by Sekou”:

In one encounter, Sekou, referring to Bryant’s blond hair, called her a “want to be” which Bryant claims is “a common phrase in the black community” referring to someone “wanting to be white.” In another encounter, Sekou asked Bryant why she dyed her hair, and told Bryant that the chemicals in the dye would damage her hair. In March 2000, Bryant overheard Sekou telling Nelson, as Bryant walked into Sekou’s office, “here comes the wannabe.” Sekou also told Bryant that there is no need for her to wear a suit, and that Bryant “should dress like me,” pointing to herself (Sekou) while wearing what Bryant characterized [as] Afrocentric attire.

The court treated Bryant’s case as one solely based on race discrimination, with no serious attention given to color, and allowed the suit

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100 Id. (“There is evidence that Ms. Lewis might have harbored resentful feelings towards white people, and therefore by inference, possibly towards light-skinned black people.”). However, the plaintiff went on to lose her case after a trial on the merits. Walker v. Sec’y of Treasury (Walker II), 742 F. Supp. 670, 671 (N.D. Ga. 1990).
102 Id. at 408.
103 281 F. Supp. 2d 561, 565 (E.D.N.Y. 2003). Bryant also made a retaliation claim. Id.
104 Id.
105 Id. at 570.
106 Id. at 565-66 (internal citations omitted).
to survive summary judgment on that basis.\(^{107}\) The court thus sidestepped the issue of color discrimination.

2. Hispanic on Hispanic

Unlike blacks, Hispanics are not a race but an ethnicity.\(^{108}\) However, discrimination against Hispanics still qualifies as race discrimination within the meaning of Title VII.\(^{109}\) Accordingly, the distinction between race and ethnicity is not strictly preserved here.

Hispanics are not only the largest and fastest growing minority group in America,\(^{110}\) but they also have a significant presence in the workplace, where their representation is projected to increase from 12\% to 25\% by 2050.\(^{111}\) With rising numbers, Hispanics will increasingly be both the victims and perpetrators of employment discrimination, including Hispanic-on-Hispanic discrimination.

a. Assimilated on Unassimilated

Immigration incites a good deal of assimilated-on-unassimilated discrimination within the Hispanic community. The conflict is exacerbated by the unequal distribution of legal rights across the Hispanic community due to low naturalization rates.\(^{112}\) Many Hispanics favor a more restrictive immigration policy,\(^{113}\) and accuse their immigrant counterparts of being too

\(^{107}\) Id. at 570, 572.


poor and uneducated.\footnote{Johnson, \textit{supra} note 112, at 202.}

Skin color is also a sensitive issue within the Hispanic community. Coming from diverse stock,\footnote{Michael V. Hernandez, \textit{Bridging Gibraltar: Latinos as Agents of Reconciliation in Relations Between Black and White America}, 11 LA RAZA L.J. 99, 105 (1999/2000) (“\([M]\)ore than one-half the population of Latin America is of mixed ancestry, representing the largest mixture of African, Caucasian, and Asian blood found anywhere in the world.”).} Hispanics exhibit a wide array of skin tones; hence, the colorful terminology Hispanics use to describe each other, e.g., \textit{hincha} (glass of milk), \textit{morena} (brown), \textit{trigueño} (olive-skinned), and \textit{café con leche} (coffee with milk).\footnote{See Vanessa E. Jones, \textit{A Formerly Taboo Topic Among Asian-Americans and Latinos Comes Out Into the Open as Skin Tone Consciousness Sparks a Backlash}, BOSTON GLOBE, Aug. 19, 2004, at D-4.} Outwardly benign, these terms are fodder for color discrimination in a culture where “skin color has everything to do with perceptions of class and wealth.”\footnote{Id.; see also Peter Wade, \textit{Race and Ethnicity in Latin America} (1997) (commenting on the symbolic import of skin color in Latin America).} For many Hispanics, light skin is a highly valued status symbol.\footnote{Eric Uhlmann et al., \textit{Subgroup Prejudice Based on Skin Color Among Hispanics in the United States and Latin America}, 20 SOC. COGNITION 198 (2002) (finding that the preference for light skin among Hispanics “supersedes national boundaries and can reverse the ubiquitous in-group favoritism effect usually obtained in intergroup research”).}

Fittingly, the first Title VII case in which “an allegation of color discrimination [was] not subordinated to a more familiar claim of racial discrimination” concerned Hispanic-on-Hispanic discrimination. In \textit{Felix v. Marquez}, Carmen Felix, a dark-skinned Puerto Rican woman, alleged that she was denied grade promotions by Joaquin Marquez, her light-skinned Puerto Rican supervisor, because of her color.\footnote{27 Empl. Prac. Dec. (CCH) ¶ 32,241, at *1, 11 (D.D.C. Mar. 26, 1981).} She testified that only two of the twenty-eight employees in her office were darker than she, and that all the other employees were white Hispanics.\footnote{Id. at *20.} But she offered little evidence,\footnote{Tanya Kateri Hernandez, \textit{Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison}, 87 CORNELL L. REV. 1093, 1152 (2002) (Felix could have offered evidence that, in Puerto Rico, “skin color [is] a proxy for intelligence and good character.”).} and the court was at a loss on the issue.\footnote{\textit{Felix}, 27 Empl. Prac. Dec. (CCH) ¶ 32,241, *20 n.6 (“Felix’s own skin color, which she described as dark olive, appeared to the court to be a medium shade”); id. (“Two other witnesses described by Felix as white, Maria Lopes and Iris Fernandez, however, appeared to the Court to be of a shade quite similar to Felix’s and quite different from witnesses Camilo Farinas and Laudenberger, who also were described as white, but who appeared to be significantly lighter in color.”).} Accordingly, the court rejected her color discrimination claim, although it noted in dicta that...
colorism is actionable under Title VII.\textsuperscript{123}

Another case, \textit{Arrocha v. CUNY}, also concerns alleged color
discrimination within the Hispanic community.\textsuperscript{124} Jose Arrocha, an Afro-
Latino Spanish tutor from Panama, brought suit under Title VII alleging
that his university had failed to renew his position because of his race and
national origin.\textsuperscript{125} Although Arrocha did not formally allege color
discrimination, the court sua sponte converted his case into a color
discrimination claim, and allowed the case to survive summary judgment on
that basis.\textsuperscript{126} The court reasoned that “discrimination based upon skin
coloration is a more accurate description of [Arrocha’s] claim since it
alleges that light-skinned Hispanics were favored over dark-skinned
Hispanics.”\textsuperscript{127} This is a step in the right direction, but falls short of a
workable doctrinal tool for intragroup race discrimination, such as the “race
plus” proposal outlined in Part III.

b. Unassimilated on Assimilated

Intragroup policing also occurs in the Hispanic community. The
Hispanic equivalent of “oreo” is “coconut,” a slur against those who are
said to be “brown on the outside[,] white on the inside.”\textsuperscript{128} Being “white on
the inside” is once again viewed in highly stereotyped terms – Hispanics
who “can’t or won’t speak [S]panish” or “are ashamed of their heritage.”\textsuperscript{129}
Mexican immigrants, for instance, often criticize Mexican Americans for
their poor Spanish and for being “traitors” to their ethnic heritage.\textsuperscript{130}

To complicate matters, not all Hispanics are “brown on the outside.”
Thus, Hispanic-on-Hispanic color discrimination also occurs when a dark-
skinned Hispanic calls a light-skinned Hispanic \textit{gabacho} (Anglo), an insult
meaning “too white.”\textsuperscript{131} The thrust of these insults is that one is “not
Hispanic enough.”\textsuperscript{132}

III. The “RACE PLUS” PROPOSAL

With this background the Article now presents the case for “race plus.”
It proposes using “sex plus” as a blueprint for a new doctrine designed to
\textsuperscript{123} Id. at *28.
\textsuperscript{125} Id. at *1-3.
\textsuperscript{126} Id. at *17-18.
\textsuperscript{127} Id.
\textsuperscript{128} \textsc{Urban dictionary}, supra note 90, available at
\textsuperscript{129} Id.
\textsuperscript{130} Johnson, supra note 112, at 203-04.
\textsuperscript{131} See Kevin R. Johnson, “Melting Pot” or “Ring of Fire”?: Assimilation and the
\textsuperscript{132} Id. at 1293 (“[M]any Latinos of mixed heritage at various times feel less than fully
accepted by the Latino community.”).
guide the judicial inquiry in cases of intragroup race discrimination, particularly those involving color discrimination. It justifies “race plus” based on the text, legislative history, and statutory purpose of Title VII.

A. Defining “Race Plus”

“Race plus” extends the basic logic of “sex plus” to the context of race: An employer cannot discriminate against an employee based on race _plus_ another factor. The paradigm case here is “race plus color,” prohibiting discrimination based on race plus skin color, or shade. This would allow a dark-skinned black to survive summary judgment under Title VII if there is a triable issue as to whether the employer treats dark-skinned blacks differently from light-skinned blacks. Notably, “race plus color” ensures that dark- and light-skinned blacks are not treated as part of the same cohort for evidentiary purposes.

Too loosely defined, “race plus” would protect against discrimination based on race plus any factor or combination of factors. The danger here is that too many “pluses” would create, as one court so vividly described, “a many-headed Hydra, impossible to contain within Title VII’s prohibitions.” It is therefore important to imbue “race plus” with limiting principles. A first cut is to limit the number and kind of pluses: “Race plus” only targets discrimination based on race plus one or more of Title VII’s other statutory categories. This ensures that “race plus” is not infinitely additive, but draws from a fixed menu of pluses: color, sex, national origin, and religion. To narrow the discussion still further, this Part focuses on one particular application of “race plus,” i.e., “race plus color.” After all, slurs like “oreo” and “coconut,” discussed above, take their force from the vocabulary of color.

Title VII law stands to benefit from a deeper understanding of the relationship between race and color discrimination. There are two obstacles. The first is that courts conflate race and color discrimination, treating color as a mere indicator of race. In _McDonald v. Santa Fe Transportation Co._, for example, the Supreme Court defined race discrimination as retaining “employees of one _color_ while discharging those of another _color_.” The lower courts have not fared much better.

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134 See supra note 1.
135 Moreover, color discrimination looms large in the relevant case law explored thus far. See supra notes 74, 77-89, 98-107, 119-120 & 119-127.
136 Cf. Kathryn Abrams, _Title VII and the Complex Female Subject_, 92 MICH. L. REV. 2479, 2539 (1994) (claiming that more particularized accounts of intragroup discrimination in cases like _Walker_ may shed light on the relationship between race and color).
138 See, e.g., Hopwood v. Texas, 78 F.3d 932, 957 (5th Cir. 1996), overruled on other
has the EEOC. Although color is an independent cause of action under Title VII, plaintiffs seldom make use of it, and when they do, they often couple it with race discrimination claims such that color becomes conflated with race. The result is that “color” is read out of the statute.

The second obstacle is referred to here as the “suntan critique.” To counteract the tendency to conflate race and color, a growing number of commentators have proposed making color discrimination actionable under Title VII apart from race discrimination. Title VII liability would thus attach whenever a supervisor discriminates against an employee because of a difference in color, irrespective of racial prejudice. At first glance, this appears reasonable. But, by this approach, “a claim of pure color discrimination, without ethnic or racial undertones, would include a claim by a sun-tanned person against a fair-skinned person of the same race.”

To untether color discrimination from race discrimination, therefore, is to open the door to the “many-headed Hydra,” for which the slightest suntan becomes fodder for Title VII litigation.

Some commentators would emphasize color to the exclusion of race, even eliminate race altogether as a descriptive category under Title VII. They downplay the role of race in intragroup race discrimination, attempt

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139 On its homepage, the EEOC offers no distinction between race and color; instead, there is a link to a page entitled “Race/Color Discrimination,” which explains the prohibition against discrimination because of “race-linked characteristics (e.g., hair texture, color, facial features).” EEOC, Race/Color Discrimination, http://www.eeoc.gov/types/race.html (last visited Dec. 10, 2006).
142 See, e.g., Alice Walker, If the Present Looks Like the Past, What Does the Future Look Like? (1982), in IN SEARCH OF OUR MOTHER’S GARDENS 290, 290-91 (1983); Kathryn Abrams, Title VII and the Complex Female Subject, 92 Mich. L. Rev. 2479, 2507 (1994); supra note 67; infra note 140.
144 See supra note 142.
145 See Nance, supra note 140, at 441-42 (“Even if we all agree that race itself no longer matters, color will still be a problem because darkness casts a longer discriminatory shadow than lightness.”). This assumes that “colorism and racism are distinct phenomena that sometimes overlap.” Jones, supra note 60, at 1543.
to disentangle race from color,\textsuperscript{146} and advance the central tenet that color alone, i.e., without regard to race, should be actionable under Title VII.\textsuperscript{147} But this is flawed to the extent it throws the “baby” of race out with the “bathwater” of doctrinal confusion. As Cornel West observed, “race matters.”\textsuperscript{148} It matters in the popular imagination: Even if race is ambiguous, and even when the law draws no formal distinctions based on race, day-to-day expressions of prejudice will continue to be racialized.\textsuperscript{149} The use of race under Title VII is a blunt policy instrument precisely because racism itself is a blunt social phenomenon. Race also matters because it accounts for the most salient variations in color, and because color almost always plays into racial stereotypes. Therefore, race should be retained. Color should likewise be retained. A good deal of intragroup race discrimination is based, in part, on color. To conflate color with race is to obscure the reality of such conflict, permitting superficial racial similarities to mask real differences in color.\textsuperscript{150}

Accordingly, “race plus color” offers a solution to this doctrinal conundrum. “Race plus color” is desirable because it retains race but permits the introduction of color into the analysis of discrimination. By retaining race, this approach ensures that skin-color variations are only actionable under Title VII insofar as they are immutable, largely arising out of racial differences.\textsuperscript{151} Immutability is more easily presumed when skin color reflects a plaintiff’s “natural” complexion, rather than a suntan. Faced

\textsuperscript{146} See id. at 447 (“[M]any of the cases alleging color discrimination also allege race discrimination, blurring the basis of the plaintiffs’ discrimination claims.”). Jones observes that people are not accustomed to thinking about race and skin color as separate concepts. Jones, supra note 60, at 1487, 1497-98. This is all the more reason to consider them together, as “race plus color.”

\textsuperscript{147} See id. at 437 (“[C]ourts 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.”); see also Taunya Lovell Banks, Colorism: A Darker Shade of Pale, 47 UCLA L. REV. 1705, 1713 (2000) (“[C]ourts already have the basic jurisprudence to address some colorism claims brought by black litigants and must be prepared for the more complex claims they are likely to confront in the twenty-first century.”).

\textsuperscript{148} CORNEL WEST, RACE MATTERS (1993).

\textsuperscript{149} Hernandez, supra note 121, at 1099 (“[T]he Latin American experience with race counsels great caution in any move to discard or devalue race as a unit of critical analysis and transformative action in the United States.”).

\textsuperscript{150} Jones, supra note 60, at 1543.

\textsuperscript{151} To a large extent, color is derivative of race. Race mixing itself has added to the variety of skin color. Walker, supra note 142, at 1670. As the court observed in Felix, which involved one of Title VII’s earliest color discrimination claims, “[c]olor is a rare claim, but considering the mixture of races and ancestral national origins in Puerto Rico, it can be an appropriate claim for a Puerto Rican to present.” 27 Empl. Prac. Dec. (CCH) ¶ 32,241, at *28 (D.D.C. 1981).
with the suntan critique, Title VII law should not concern itself with relatively slight, temporary color variations that result from suntanning.\textsuperscript{152} Thus, the law stands to benefit from the proposed “race plus” approach.

\section*{B. Distinguishing “Race Plus” from Similar Doctrines}

Notably, “race plus” is distinguishable from similar antidiscrimination doctrines, including “sex plus” and intersectionality, as set forth below.

1. “Sex Plus”

In the interest of administrability,\textsuperscript{153} “race plus” is limited to race plus one or more of Title VII’s other statutory categories: color, sex, religion, and national origin. Although “sex plus” also imposes a limit on pluses, its reach is far more sweeping. It goes beyond the statutory categories to cover “sex plus immutable characteristic,” or “sex plus fundamental right.”\textsuperscript{154} The reason for this divergence is that “race plus” takes pains to mitigate the administrability concerns of a “many-headed Hydra,” as referenced in the case law.\textsuperscript{155}

Accordingly, “race plus” is better situated not within the line of cases following 

\begin{itemize}
  \item Phillips, the foundational “sex plus” case,\textsuperscript{156}
  \item but rather the one following Jefferies and Judge, as discussed in Section IV.C below. While it draws its inspiration from “sex plus,” “race plus” is more carefully crafted to avoid slippery slope concerns within the context of race and color. It does so by limiting pluses to statutory categories, whereas “sex plus” may even have been initially conceived to prohibit the use of these categories as pluses.\textsuperscript{157}
\end{itemize}

2. Intersectionality

“Race plus” is also distinguishable from Kimberle Crenshaw’s

\footnote{The Latin maxim is \textit{de minimis non curat lex} – “The law does not concern itself with trifles.” However, insofar as suntanning destabilizes race, one may have an actionable race-plus claim if there is proof that discrimination occurred along racialized line, e.g., a white supervisor who remarks that a white employee “looks Mexican” because of a suntan, and harasses the employee on that basis.}

\footnote{Wislocki-Goin v. Mears, 831 F.2d 1374 (7th Cir. 1987) (refusing to find woman-to-woman sex discrimination where a judge fired her subordinate for being too feminine, because femininity was assumed to be neither an immutable characteristic nor a fundamental right).}


\footnote{See 400 U.S. at 543 (finding that subcategorizing women based on gender plus some other characteristic violates Title VII).}

\footnote{Judge Brown, the judge credited with the creation of the term “sex plus,” unequivocally stated that the plus could not be one of the other statutory categories of race, religion, or national origin. Phillips II, 416 F.2d 1257, 1260 n.10 (5th Cir. 1969) (Brown, J., dissenting), overruled per curiam by 400 U.S. 542 (1971).}
intersectionality theory. Crenshaw focuses on the intersection between race and sex. Her paradigm case is black women. As one court correctly observed, “discrimination against black females can exist even in the absence of discrimination against black men or white women,” such that “an employer [can] not escape from liability for discrimination against black females by a showing that it does not discriminate against blacks and that it does not discriminate against females.” According to Crenshaw, black women may be discriminated against neither because they are black nor because they are women, but rather because they are black women.

But intersectionality is not simply a permutation of “race plus,” as “race plus sex.” Indeed, “race plus color” is more than an intersection between race and color. The difference is where and how the intersection takes place. Intersectionality is an intersection between two independent characteristics where neither characteristic necessarily assumes greater import than the other. On a Venn diagram, it is a true intersection, in which an identity circle of race overlaps with one of sex. “Race plus,” by contrast, is an intersection that occurs inside the identity circle of race. On a Venn diagram, it is not so much an intersection as an encapsulation. The identity circle of race does not merely overlap with that of color, but subsumes it, such that a smaller color circle falls within a larger race circle. This construction is not arbitrary, but reflects the way color discrimination operates in practice. In the popular imagination, not all dark-skinned people are created equal. Even if their complexion is similar, a dark-skinned Asian Indian is likely to be treated differently from a dark-skinned black, largely because race imbues color with meaning. If dark skin signals an Indian identity, that person may be stereotyped as “tech savvy.” But if it signals a

159 Jeffries v. Harris County Community Action Ass’n, 615 F.2d 1025, 1032 (5th Cir. 1980).
160 Id.; see also id. at 1034 (“[T]he fact that Jones, who won the promotion Jeffries sought, was black does not bring him within Jeffries’ protected class for purposes of her prima face case. Similarly, when pretext is at issue [sic] that is, when Jeffries attempts to show that the employer’s purported reason for the adverse employment action is merely a mask for discrimination by showing that persons outside her class were treated differently than herself [sic] black males and white females must be treated as persons outside Jeffries’ class.”).
161 Crenshaw, supra note 158, at 1243-44.
162 This Article does not assign color its own circle on the Venn diagram. One would be hard pressed to identify any salient group who bases its in-group identity on a particular shade of skin, alone. Dark-skinned Asian Indians and dark-skinned blacks, for example, do not generally identify with some imagined community of “dark-skinned people”; instead they identify as Indian and black, respectively, or more generally as people of color, but not as people of dark color.
black identity, that same person may be stereotyped as uneducated. \[163\]

“Race plus” is also more than an intersection because it extends to cases where one is discriminated against not because she is a dark-skinned black, per se, but because her dark color leads her to be racialized as black and then mistreated on that basis. Both race and color are implicated, albeit not simultaneously. Moreover, while “intersectionality highlights the fact that women of color are situated within at least two subordinated groups that frequently pursue conflicting political agendas,” \[164\] concerns about race and color tend to converge: If one worries about the devaluation of the black racial identity, she may also worry about the more general devaluation of dark skin. Another distinction is that, whereas Crenshaw offers “a methodology that will ultimately disrupt the tendencies to see race and gender as exclusive or separable,” \[165\] this Article aims to disrupt the impulse to view race and color as synonymous and redundant. Although perhaps less efficacious in the context of race and sex, “race plus” is thus a desirable alternative to intersectionality in the context of race and color.

IV. THE CASE FOR “RACE PLUS”

As discussed above, the case law stands to benefit from “race plus.” This Part makes the case for “race plus” more explicit. Specifically, “race plus” accords with the text, legislative history, and statutory purpose of Title VII.

A. Text

First, “race plus” accords with the plain language of Title VII, which prohibits employment discrimination based on “race, color, religion, sex, or national origin.” \[166\]

As held by the Fifth Circuit in Jefferies v. Harris County Community Action Association, “[t]he use of the word ‘or’ [in setting out statutory categories] evidences Congress’ intent to prohibit employment discrimination based on any or all of the listed characteristics.” \[167\] This reasoning fits with “race plus,” yielding the possibility of “race plus color plus religion plus sex plus national origin.” Although it is difficult to imagine a case involving such a narrow class, litigants themselves would have a powerful incentive not to raise such complex claims as they would be exceedingly difficult to prove. \[168\]

\[163\] Baynes, supra note 67, at 133 n.17.
\[164\] Crenshaw, supra note 158, at 1251-52.
\[165\] Id. at 1244 n.9.
\[166\] See supra note 1 (emphasis added).
\[167\] 615 F.2d 1025, 1032 (5th Cir. 1980).
\[168\] Cf. Finch v. Hercules Inc., 865 F. Supp. 1104, 1129-30 (D. Del. 1994) (“If a plaintiff attempts to define the subset too narrowly, he or she will not be able to obtain
The cannon of avoiding surplusage also recommends “race plus.” To conflate race and color, as is typical in most combined race and color claims, is to read color out of Title VII. Because it treats “race” and “color” as distinct terms, “race plus” thus comports with the “endlessly reiterated principle of statutory construction . . . that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage.”

Because “Congress cannot be presumed to do a futile thing,” it would not have included both “race” and “color” in the text of Title VII unless it intended for courts to imbue them with separate meanings.

Accordingly, the plain language of Title VII recommends “race plus.”

B. Legislative History

“Race plus” also comports with the legislative history that statutory categories, like race, need not be considered in isolation.

The Fifth Circuit in Jefferies noted that the House rejected a proposed amendment to add the word “solely” before the word “sex,” concluding that Congress had not intended sex to be considered in isolation from other statutory categories. The same is true for “race” by extension. Because the House considered a restrictive modifier for sex, it had the option to use the same qualification on race. Declining to adopt such language, Congress therefore did not intend to preclude combinations like race plus color. In fact, the legislative record for Title VII notes “that the basic purpose of Title VII is to prohibit discrimination in employment on the basis of race or color.” Even if Congress intended these statutory categories to be isolated, or conflated race and color, legislative history cannot trump statutory text.

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169 Qi-Zhuo v. Meissner, 70 F.3d 136, 139 (D.C. Cir. 1995).
171 Id. (citing 110 Cong. Rec. 2728 (1964)).
172 Cf. Griffith v. Des Moines, No. 03-3266 (8th Cir. 2004) (noting that Congress expressly rejected the notion that Title VII liability attached only when discrimination was the sole cause of the employment action) (citing 110 Cong. Rec. 13,837-38 (1964)).
173 110 Cong. Rec. 2556 (1964) (remarks of Congressman Cellar) (emphasis added); see also McDonald v. Santa Fe Transp. Co., 427 U.S. 273, 287 (1976) (noting that Civil Rights Act of 1866, Title VII’s historical precursor, was initially described by Senator Trumbull as applying to “every race and color”) (citing Cong. Globe, 39th Cong., 1st Sess., 211 (1866)). The disjunctive term “or” may lend credence to the argument that race and color were not intended to be conflated. But see Hansborough v. City of Elkhart Parks & Recreation Dep’t., 802 F. Supp. 199, 203 (N.D. Ind. 1992) (referring to color discrimination as a “specie of discrimination [that] was not even a minor consideration in the eyes of the sponsors of the legislation”).
Although Title VII was enacted with intergroup discrimination in mind, its text is clearly expansive enough to accommodate “race plus” to meet the challenge of intragroup discrimination. This may be what one commentator calls “the unenvisaged case.” Still, what little legislative history there is for color as a statutory category suggests the adoption of a “race plus color” approach. At least some members of Congress clearly understood Title VII to prohibit “shade” discrimination, as referenced in a colloquy between Representatives Celler and Abernethy:

Mr. Abernethy. I will ask another question. If it should be illegal . . . not to hire because of the shade of color, that is because the skin of the applicant is too dark?

Mr. Celler. I suppose shade of color would be color. The whole embraces all its parts.

“Race plus” therefore draws support from the legislative record for Title VII, in addition to its text.

C. Statutory Purpose

“Race plus” also advances the statutory purpose of Title VII: equal employment opportunity. “Race plus color,” for instance, is a doctrinal tool to address intragroup race discrimination based on color. If courts cannot probe beyond race, intragroup race discrimination based on color may well go undetected and, therefore, undeterred.

This detracts from equal employment opportunity. To date, few courts have reached the merits of a color discrimination claim under Title VII without conflating race and color. In any event, “race plus” avoids a disturbing policy result in which employers are free, say, to discriminate against some blacks so long as they do not discriminate against all blacks. In the absence of “race plus,” the law would tolerate discrimination against dark- and light-skinned subsets of a race. A related concern was expressed by the Fifth Circuit in *Jefferies*:

If both black men and white women are considered to be within the same protected class as black females for purposes of the *McDonnell Douglas* prima facie case and for purposes of proof of pretext after an employer has made the required showing of a legitimate, non-discriminatory reason for the adverse employment action, no remedy will exist for

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175 Ronald Turner, *The Unenvisaged Case, Interpretive Progression, and the Justiciability of Title VII Same-Sex Sexual Harassment Claims*, 7 Duke J. Gender L. & Pol’y 57, 60 (2000) (“The unenvisaged case arises when it is urged that a statute passed to deal with a specific problem also applies to a problem neither known to nor foreseen by the enacting legislature.”).

discrimination which is directed only toward black females.\textsuperscript{177}

Accordingly, “race plus” is preferable to the status quo as a matter of public policy. “Race plus” has the added benefit of administrability to recommend it. Because it is limited in scope, it avoids the “many-headed Hydra.”

This metaphor comes from \textit{Judge v. Marsh}, which allowed a black woman employed by the U.S. Army to state a claim under Title VII based on sex and race.\textsuperscript{178} Picking up on \textit{Jefferies}, the court held that “[r]ace discrimination directed solely at women is not less invidious because of its specificity.”\textsuperscript{179} But it also criticized \textit{Jefferies} as overbroad, articulating its own limiting principle: “[T]he \textit{Jefferies} analysis is appropriately limited to employment decisions based on one protected, immutable trait or fundamental right, which are directed against individuals sharing a second protected, immutable characteristic.”\textsuperscript{180} In so doing, the court set forth strict parameters so that Title VII would “not be splintered beyond use and recognition.”\textsuperscript{181} Albeit less restrictive, “race plus” similarly cautions against an infinitely additive approach.\textsuperscript{182} Limits may not be ideal, but they serve an important administrative interest.\textsuperscript{183} The goal is to strike a proper balance between justice and administrability.

In sum, although courts must draw a principled line, that line should at least be drawn such that “race plus” is actionable under Title VII.

\textsuperscript{177} 615 F.2d 1025, 1032-33 (5th Cir. 1980).
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{183} Immutability is another doctrinal safeguard against the slippery slope, although it may not make sense in all cases. \textit{See} Willingham v. Macon Telegraph Publ’g Co., 507 F.2d 1084, 1091 (5th Cir. 1975) (concluding that sex-plus discrimination was not discrimination on the basis of sex for purpose of Title VII unless the plus involved “immutable characteristics” or a “fundamental right”); \textit{YOSHINO}, supra note 25, at 177 (“‘Immutability’ is the word scrawled on the wall the judiciary has built across the slippery slope.”).
CONCLUSION

Title VII law stands to benefit from “race plus.” As discrimination becomes more refined, so must Title VII. The law must stand ready to respond if it hopes to keep pace with change and thereby secure its lofty statutory purpose: equal employment opportunity. The need is clear, but the fear is that this will place the law on a slippery slope. What about the “many-headed Hydra”? Will law become hopelessly lost in the minutiae of intragroup differences? This fear is well-founded but it should not bind us, irrevocably, to the status quo. The law should strike a balance between continuity and change, stability and utility.

As proposed in this Article, “race plus” can strike that balance, bringing greater sophistication to the doctrine without overreaching. The limit is clear: only statutory categories as pluses. The application is narrow: race plus color to address intragroup race discrimination based on color. And the need is compelling: skin color is one of the most salient differences provoking intragroup race discrimination. Telling the stories of intragroup discrimination has value in itself, raising awareness and forcing us to face hard facts. Albeit less conspicuous than its intergroup counterpart, intragroup discrimination nonetheless subverts equal employment opportunity. The law should do more to preserve that goal, and to promote the ideal of a level playing field, where hard work and skill are rewarded regardless of how we look, where the content of our character matters far more than the race of our forebears, or the color of our skin.