Intragroup Discrimination in the Workplace: The Case for "Race Plus"

*Enrique Schaerer**

ABSTRACT: The application of Title VII is uneven. Courts apply it to employment discrimination across groups (*inter*group discrimination), but are reluctant to do so for discrimination within groups (*intra*group discrimination). Even where courts recognize intragroup discrimination, they do so unevenly by applying "sex plus" doctrine in cases of intragroup *sex* discrimination but no corresponding "race plus" doctrine to intragroup *race* discrimination. This article calls attention to intragroup discrimination and proposes "race plus" as a natural extension of "sex plus" based on Title VII's text, legislative history, and statutory purpose. In particular, two "race plus" approaches—"loose" and "strict"—would help resolve cases where courts otherwise fail to identify and redress intragroup race discrimination based on conduct, color, or both.

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Introduction

Title VII prohibits employers from firing—or refusing to hire or promote—an individual "because of such individual's race, color, religion, sex, or national origin."[1] Title VII cases have long addressed intergroup discrimination in cases pitting whites against blacks, men against women. By contrast, courts often overlook discrimination within groups, such as blacks against blacks, women against women—intragroup discrimination.[2]

Intragroup discrimination arises between members of the same group and is often based on assimilation. As used here, "assimilation" describes the degree to which one is associated with a privileged group, where the variable of assimilation can be mutable (e.g., conduct) or immutable (e.g., appearance or color).[3] For example, blacks may be associated with whites when they are said to "act white" (i.e., conform to white behavioral stereotypes)[4] or "look white" (i.e., possess a lighter shade of skin). Thus, this Article focuses on conduct and color[5] and assumes that conduct is mutable, and color is immutable insofar as it reflects a natural complexion rather than a suntan.[6] Whereas intragroup *sex* discrimination is often conduct-based, particularly as it relates to gender roles,[7] intragroup *racial* discrimination is frequently based on both conduct and color, and occurs not only when

[1] 42 U.S.C. § 2000e-2(a) (2006).

[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] Professor Kenji Yoshino defines assimilation in largely mutable terms: adopting the privileged group's speech patterns, clothing styles, and mannerisms, as well as privileged-group definitions of educational and professional success. Kenji Yoshino, *Covering*, 111 Yale L.J. 769 (2002). But assimilation may also be based on more immutable characteristics, skin color in particular. *See* Rachel F. Moran, Interracial Intimacy: The Regulation of Race & Romance 43-48 (2001) (arguing that light-skinned blacks may assimilate more easily into white American culture); Kevin R. Johnson, How Did You Get to Be Mexican?: A White/Brown Man's Search for Identity 162 (1999) ("[B]lack-skinned Latinos face an entirely different set of assimilation obstacles.").

[4] This construction is descriptive rather than normative: it does not pass judgment on assimilation, nor does it essentialize groups. It merely acknowledges given stereotypes.

[5] As seen below, conduct and color are prominent variables of assimilation and, in turn, central motives for intragroup discrimination.

[6] To be sure, conduct based on habit may not be easily altered, and even color may be artificially manipulated through skin-bleaching agents. Suntanning also calls into question the immutability of color absent racial considerations. *See infra* Part III.A.2.

[7] Technically, *sex* discrimination arises because one is male or female, *gender* discrimination because one is masculine or feminine. The former is based on a biological fact, the latter on a social construction. *Cf.* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1083 n.6 (7th Cir. 1984) ("Biologically, sex is defined by chromosomes, internal and external genitalia, hor-

blacks discriminate against each other for acting "too black" or "not black enough," but also when dark-skinned blacks discriminate against light-skinned blacks, or vice versa, because of color.

Examples of intragroup discrimination in the workplace abound: the childless female supervisor who singles out the working mother,[8] the light-skinned black manager who fires a dark-skinned black employee,[9] the white Hispanic[10] administrator who denies tenure to an Afro-Latino[11] instructor.[12] Despite the prevalence of intragroup discrimination, courts often lose sight of such discrimination simply because the parties belong to the same group.[13] This judicial myopia is less pronounced in cases of intragroup sex discrimination, where courts benefit from a "sex plus" doctrine that expressly recognizes discrimination based on sex *plus* another factor.[14] In this way, courts recognize employer discrimination against subgroups, like women with preschool-age children.[15] However, because no corresponding "race plus" doctrine has gained traction in the case law, courts generally pay little heed to the possibility of intragroup racial discrimination.[16] Instead, they often presume that members of the same race will not discriminate against each other based on race.[17] This presumption is analytically prob-

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mones, and gonads."). This distinction is not strictly preserved here. Nor is it preserved in the case law. *See* cases cited *infra* note 57.

[8] *See* Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004); Walsh v. Nat'l Computer Sys., Inc., 332 F.3d 1150 (8th Cir. 2003).

[9] *See* Sere v. Bd. of Trs. of Univ. of Ill., 628 F. Supp. 1543 (N.D. Ill. 1986), *aff'd*, 852 F.2d 285 (7th Cir. 1988). *Cf.* Walker v. Sec'y of Treasury, 713 F. Supp. 403, 409 (N.D. Ga. 1989) (pitting a light-skinned black plaintiff against her dark-skinned black supervisor).

[10] Because the term "Hispanic" has a longer history of official government use, this Article uses "Hispanic" instead of "Latino." Jeffrey Passel & Paul Taylor, *Who's Hispanic*, PEW HISPANIC CENTER, May 28, 2009, http://pewhispanic.org/reports/report.php?ReportID=111. This choice is not meant to endorse one label over others, but to ensure consistency in terms. Indeed, some people express strong preferences in this respect. *Id.* ("A 2006 survey by the Pew Hispanic Center found that 48% of Latino adults generally describe themselves by their country of origin first; 26% generally use the terms Latino or Hispanic first; and 24% generally call themselves American on first reference. As for a preference between 'Hispanic' and 'Latino,' a 2008 Center survey found that 36% of respondents prefer the term 'Hispanic,' 21% prefer the term 'Latino' and the rest have no preference.").

[11] 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) (noting that mulatto is derived from "mule," the sterile offspring of a horse and donkey).

[12] *See* Arrocha v. CUNY, No. CV021868(SJF)(LB), 2004 WL 594981 (E.D.N.Y. Feb. 9, 2004).

[13] *See infra* note 17.

[14] *See, e.g.*, Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 118-20 (2d Cir. 2004); Walsh v. Nat'l Computer Sys., Inc., 332 F.3d 1150, 1160 (8th Cir. 2003). *But see* Dungee v. Ne. Foods, Inc., 940 F. Supp. 682, 688 n.3 (D.N.J. 1996) ("The fact that the final decision maker and both interviewers are members of the plaintiff's protected class (women) weakens any possible inference of discrimination.").

[15] *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam).

[16] *See infra* note 17.

[17] *See, e.g.*, Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 1002 (5th Cir. 1996) (en banc) ("[P]roof that all of the decision makers were members of the same race as the complaining employee would considerably undermine the probability that race was a factor in the employ-

lematic under Title VII, for which the dispositive factor is not the identity of the parties, but rather the motive for discrimination. The presumption also subverts the stated purpose of Title VII: equal employment opportunity for all.

This article confronts intragroup discrimination and proposes "race plus" as a logical extension of "sex plus." Part I sets out an assimilation model for intragroup discrimination. Part II applies that model in the context of race and gender. Part III builds on "sex plus" to develop two "race plus" approaches—"loose" and "strict"—for addressing intragroup race discrimination under Title VII. Finally, Part IV justifies these approaches based on the text, legislative history, and statutory purpose of Title VII.

I. Modeling Intragroup Discrimination

At first blush, the difference between intergroup and intragroup discrimination may seem arbitrary. 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. But the same becomes intergroup discrimination if the group is drawn more narrowly, to exclude the discriminator. True to the common understanding of group identity, this Article adopts a broad view of race and gender groups. For example, black people are considered a group with light-skinned blacks as a subgroup, and women are considered a group with mothers as a subgroup.

In principle, how groups are drawn should have little bearing on the application of Title VII since its plain language prohibits "discriminat[ion] . . . *because of* . . . race, color, religion, sex, or national origin."[18] Liability turns not on the race of the parties but on the basis for discrimination.[19] Insofar as discrimination occurs "because of" one of the five statutory categories, the identity of each party is incidental to the act of discrimination itself. Thus, if an employer fires an employee for being black, there is discrimination within the meaning of Title VII, even if the decisionmaker is also black. In practice, however, courts tend to fall back on a presumption

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ment decision."); Rajbahadoorsingh v. Chase Manhattan Bank, 168 F. Supp. 2d 496, 502 (D.V.I. 2001) (finding that, where the parties were of the same race, "it is hard to fathom how [defendant's] statements could be construed to show that [plaintiff's] termination was racially motivated"); Toliver v. Cmty. Action Comm'n to Help the Econ., Inc., 613 F. Supp. 1070, 1074 (S.D.N.Y. 1985) (holding that the black plaintiff's race discrimination claim was implausible, in part because six of the eleven decisionmakers were black), *aff'd*, 800 F.2d 1128 (2d Cir. 1986), *cert. denied*, 479 U.S. 863 (1986). *But see* Billingsley v. Jefferson County, 953 F.2d 1351, 1352 (11th Cir. 1992); Hill v. Miss. State Employment Serv., 918 F.2d 1233, 1240-41 (5th Cir. 1990) (rejecting the district court's reasoning that "'[b]lacks never discriminate against other blacks'").

[18] 42 U.S.C. § 2000e-2(a) (2006) (emphasis added).

[19] Admittedly, the race of the parties provides context for the ultimate question of motive, but there should be no presumption against intragroup race discrimination. Courts should conduct a case-by-case analysis with careful attention given to the individual facts of motive in each case.

against intragroup discrimination, partly because they fail to appreciate how and why members of the same group discriminate against each other.[20]

An assimilation-based model of intragroup discrimination explains how and why intragroup discrimination occurs. The assimilation-based model views intragroup discrimination as an interaction between three parties: (1) members of a privileged group, (2) members of a disadvantaged group who are somehow associated with the privileged group, and (3) members of the disadvantaged group who are unassociated with the privileged group.[21] This Article refers to these parties as the "privileged," the "assimilated," and the "unassimilated," respectively. Intragroup discrimination occurs when the assimilated discriminate against the unassimilated because of their unassimilated status, or vice versa.[22]

The Supreme Court conceded the possibility of assimilated-on-unassimilated discrimination in *Castaneda v. Partida*,[23] where a state prisoner filed a habeas petition alleging discrimination against Mexican Americans in the selection 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.[24] In rejecting this argument, the Court stated 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."[25] Justice Thurgood Marshall made the point more forcefully 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."[26] Indeed, these attitudes underlie a good deal of conduct- and color-based intragroup discrimination by the assimilated against the unassimilated, but negative attitudes about a

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[20] *See* cases cited *supra* note 17.

[21] *See supra* note 3 and accompanying text.

[22] While the privileged are often not directly implicated in intragroup discrimination, they may provoke it. One way is for the privileged to associate with the assimilated to the exclusion of the unassimilated, and then cite their association with the assimilated to defend against Title VII claims brought by the unassimilated. *Cf.* Tanya Kateri Hernandez, *Latino Inter-Ethnic Employment Discrimination and the "Diversity" Defense*, 42 HARV. C.R.–C.L. L. REV. 259, 266 (2007) (criticizing judges who "impute to diverse workplaces a shield against discriminatory treatment claims"). Another way is for the privileged to empower the assimilated to discriminate against the unassimilated. *Cf.* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1306 (2000) ("[A racial minority] can make arguments that work to the advantage of [whites] so that [whites] can then claim that their arguments are not purely self interested or even racial."). Because the assimilated are now actively engaged in subordinating the unassimilated at the behest of the privileged, the unassimilated view this conduct as a serious act of betrayal. *See* RANDALL KENNEDY, SELLOUT: THE POLITICS OF RACIAL BETRAYAL 4 (2008) (defining "sellout" as "a person who betrays something to which she is said to owe allegiance").

[23] 430 U.S. 482 (1977).

[24] *Id.* at 492.

[25] *Id.* at 499.

[26] *Id.* at 503 (Marshall, J., concurring).

privileged group may spur discrimination by the unassimilated against the assimilated.

A. Conduct-Based

Conduct is mutable insofar as it can be altered. Even one's identity as a mother or a racial minority can be "covered" by conduct.[27] For example, a working mother may rely on extended childcare, rid her office of children's artwork, and downplay her family life.[28] A racial minority may "assimilate[] to white norms" by "[a]voiding ethnic organizations," "[e]xercising class privilege," and "dressing out of catalogs that feature[] no racial minorities."[29] Conversely, these same individuals may be subject to "reverse-covering," which "demands that [they] act according to the stereotypes associated with their group."[30] At times, these pressures may give way to conduct-based intragroup discrimination.

1. Assimilated-on-Unassimilated

Using the model outlined above, one must determine the variable of assimilation and then identify the privileged, assimilated, and unassimilated parties. These steps must precede the analysis of intragroup discrimination.

In the gender context, imagine an employer who prefers employees with few, if any, caregiving responsibilities. Caregiving (or the lack thereof) is the variable of assimilation. If women are assumed to shoulder these responsibilities, then men are the privileged, childless women the assimilated, and working mothers the unassimilated. Assimilated-on-unassimilated discrimination occurs, for example, where a childless woman actively harasses working mothers simply because they are mothers, or where this same woman terminates working mothers who are competent at their jobs but are nonetheless viewed as more committed to family than work.[31] Accordingly, women in the workplace may "perform manhood" to curry favor with male

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[27] KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS ix (2006) ("To cover is to tone down a disfavored identity to fit into the mainstream.").

[28] *Cf. id.* at 143 ("A mother says a female faculty mentor sent her to a clerkship interview with the parting advice 'Don't front the kid to the judge.'").

[29] *Id.* at 120.

[30] *Id.* at 23.

[31] The "mommy track," which assumes that women will drop out of the workforce once they have children, remains a barrier in the legal field. Rebecca Korzec, *Working on the "Mommy-Track": Motherhood and Women Lawyers*, 8 HASTINGS WOMEN'S L.J. 117, 127 (1997) ("'Mommy-tracking' can be viewed as leading to second-class status. In a survey of three thousand women in the nation's largest law firms, sixty-seven percent of the respondents reported that part-time work results in lesser opportunities."). *See also* 42 U.S.C. § 2000e-2(e)(1) (2006) (providing that an employer may discriminate based on "sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise").

supervisors[32] and may even exhibit hostility toward women who refuse to assimilate to male-oriented workplace norms.

For race, imagine a workplace that adheres to white behavioral stereotypes. To "act white" is the variable of assimilation. Here, whites are the privileged, blacks who "act white" the assimilated, and blacks who "act black" the unassimilated.[33] An example of assimilated-on-unassimilated discrimination arises where a black supervisor refuses to hire blacks who do not "act white," or where this same supervisor fires blacks who "act black." One commentator has referred to this phenomenon as "performing [w]hiteness,"[34] whereby nonwhites internalize the norms of "white supremacy" to exert an elevated social status, real or imagined, over their racial peers.[35]

2. *Unassimilated-on-Assimilated*

"Intragroup policing" is a form of intragroup discrimination by which the unassimilated "police" their own and punish perceived acts of assimilation.[36] They do so for two reasons: (1) to cow the assimilated back into the ranks of the unassimilated, and (2) to deter future defections. In so doing, the unassimilated essentialize their own group and "perform" their own stereotypes.

To continue the above example where men are privileged, the war of "mommy versus mommy" means that "each woman judges women more work-centered than herself as insensitive to her children's needs."[37] If these attitudes among working mothers coalesce into a hostile work environment for a more work-centered woman, unassimilated-on-assimilated discrimina-

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[32] *Cf.* HANDBOOK ON WOMEN IN BUSINESS AND MANAGEMENT 60 (Diana Bilimoria & Sandy Kristin Piderit eds., 2007) (referring to the performance of "womanhood" through the lens of intergroup discrimination). *See generally* Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOCIETY 125-51 (1987) (developing a theory of gender performance).

[33] Once again, these categories are not intended to essentialize groups, but merely to acknowledge given stereotypes. For a discussion of stereotypes, see Part II.B below.

[34] 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).

[35] *See* Palette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 369 (1991) (decrying 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 CAL. L. REV. 1259, 1261 (1997) ("Latinos who can overcome the barriers and assimilate may internalize racism that elevates the status of Whiteness.").

[36] As noted above, one scholar refers to intragroup policing as "reverse-covering." YOSHINO, *supra* note 27, at 23.

[37] JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 146-47 (2001).

tion arises.[38] Similarly, where white norms are privileged, the unassimilated may hurl pejoratives at their assimilated counterparts—racial slurs like "oreo"[39] and "coconut."[40]

Intragroup policing may be seen as 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"[41] and violates the letter and spirit of Title VII, as developed more fully in Part III.

B. Color-Based

Color refers to skin shade, which is immutable insofar as it is linked to race. Differences in pigmentation, or the relative lightness or darkness of skin, provoke a fair amount of intragroup race discrimination.

1. Assimilated-on-Unassimilated

Skin color, albeit immutable, may serve as a variable of assimilation in a color hierarchy where "[l]ighter is better and darker is worse."[42] Under this hierarchy, whites would be the privileged, light-skinned minorities the assimilated, and dark-skinned minorities the unassimilated. Thus, assimilated-on-unassimilated discrimination arises where, say, a light-skinned black refuses to hire dark-skinned blacks based on color.

2. Unassimilated-on-Assimilated

In the above framework, it is possible for the roles to be reversed such that a dark-skinned black person may refuse to hire light-skinned blacks based on color. This is unassimilated-on-assimilated discrimination.

The next Part provides real-world examples of the above forms of intragroup discrimination.

II. The Model Applied

Having articulated an assimilation-based model for intragroup discrimination, this article now applies that model to race and gender discrimination.

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[38] Conduct results in a "hostile work environment" where it is "so severe or pervasive that it create[s] a work environment abusive to employees because of their race, gender, religion, or national origin." Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

[39] Slang for "black on the outside, white on the inside." *See infra* note 94.

[40] Slang for "brown on the outside, white on the inside." *See infra* note 136.

[41] Yoshino, *supra* note 27, at 23 (conceptualizing "authenticity" as being oneself, as experienced by the individual).

[42] Leonard M. Baynes, *If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 Denv. U. L. Rev. 131, 133 (1997).

The law here has not developed equally because courts have the analytical benefit of "sex plus" for intragroup sex discrimination and no "race plus" doctrine for intragroup race discrimination.

A. *Intragroup Sex Discrimination*

Intragroup sex discrimination pits men against men, women against women. The focus here is on woman-to-woman discrimination.[43]

A common type of woman-to-woman discrimination in the workplace involves motherhood.[44] 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.[45] 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.[46] Female attorneys, for instance, may worry about being "mommy tracked"[47] at law firms "top-heavy with men and childless women, [but] supported by a pink-collar ghetto of mommy lawyers."[48] These dynamics invite intragroup 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.[49] This is "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."[50] The foundational case is *Phillips v. Martin Marietta*

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[43] Of course, man-to-man discrimination also occurs, as recognized by the Supreme Court in *Oncale v. Sundowner Offshore Drilling Services, Inc.*, 523 U.S. 75, 80 (1998), where male oil rig workers hazed an effeminate male coworker who then brought suit under Title VII. The *Oncale* Court held that Title VII's protection against "discriminat[ion] because of . . . sex" applied equally to harassment between members of the same sex. *Id.*

[44] *See, e.g.*, Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004); Walsh v. Nat'l Computer Sys., Inc., 332 F.3d 1150 (8th Cir. 2003). 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 MOMS FACE OFF ON THEIR CHOICES, THEIR LIVES, THEIR FAMILIES (Leslie Morgan Steiner ed., 2006).

[45] WILLIAMS, *supra* note 37, at 145.

[46] *See* 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"); *see also* 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).

[47] *See* Felice N. Schwartz, *Executives and Organizations: Management Women and the New Facts of Life*, 67 HARV. BUS. REV. 65 (1989) (proposing that law firms promote "fast track" women employees over more family-oriented women).

[48] Marcy C. Hickey, *The Dilemma of Having It All*, WASHINGTON LAWYER, May/June 1988, at 59.

[49] *Cf. infra* notes 58-72 and accompanying text.

[50] Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 118 (2d Cir. 2004).

Corp.,[51] in which the plaintiff alleged that she had been denied employment because of her sex. The district court granted summary judgment for the employer because, although it 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.[52] The Fifth Circuit affirmed.[53] The Supreme Court vacated and remanded,[54] 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.[55] While the Court did not use the term "sex plus," Judge Brown coined it in his dissent from the Fifth Circuit's denial of a rehearing in *Phillips*,[56] and a number of courts have since cited *Phillips* as authority for a "sex plus" theory that prohibits an employer from discriminating based on sex plus another factor.[57] The "sex plus" doctrine is helpful in allowing courts to address woman-to-woman discrimination.

Consider two examples from the case law. In *Walsh v. National Computer Systems, Inc.*,[58] 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.[59] Walsh was pregnant when Mickelson took charge.[60] 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;

[51] 400 U.S. 542 (1971) (per curiam).

[52] *Id.*

[53] *Id.* at 543-44.

[54] *Id.* at 544 (finding the record insufficient to resolve the BFOQ issue).

[55] *Id.*

[56] Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1260 (5th Cir. 1969) (Brown, J., dissenting from denial of en banc rehearing) ("If 'sex plus' stands, [Title VII] is dead . . . . Free to add non-sex factors, the rankest sort of discrimination against women can be worked by employers.") (footnote omitted), *vacated*, 400 U.S. 542 (1971) (per curiam).

[57] *See* Jefferies v. Harris County Cmty. Action Ass'n, 615 F.2d 1025, 1033 (5th Cir. 1980) ("The Supreme Court agreed with Judge Brown that the Court of Appeals erred in interpreting section 703(a) of the Civil Rights Act of 1964 to permit one hiring policy for women and another for men."). *See also* Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428, 438 n.8 (6th Cir. 2004); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Arnett v. Aspin, 846 F. Supp. 1234, 1241 (E.D. Pa. 1994). Notably, some courts have relied on *Phillips* to invalidate policies aimed at subgroups of women as straightforward sex discrimination, without ever referring to "sex plus" or relying on its formal reasoning. *See* Jacobs v. Martin Sweets Co., 550 F.2d 364, 371 (6th Cir.) (holding that a company violated Title VII by firing single women who became pregnant), *cert. denied*, 431 U.S. 917 (1977); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir.) (finding that a no-marriage rule for stewardesses violates Title VII), *cert. denied*, 404 U.S. 991 (1971); Jurinko v. Edwin L. Wiegand Co., 331 F. Supp. 1184, 1187 (W.D. Pa. 1971) (holding that a refusal to hire married women violates Title VII).

[58] 332 F.3d 1150 (8th Cir. 2003).

[59] *Id.* at 1154 (quotations in original).

[60] *Id.*

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."[61] Walsh complained, but to no avail.[62] She had little choice but to resign.[63]

On this record, the Eighth Circuit essentially agreed with Walsh that "she was discriminated against not because she was a new parent, but because she is a woman who had been pregnant, had taken a maternity leave, and might become pregnant again."[64] Without labeling it as such, the court thereby relied on a "sex plus" reasoning to identify the discriminatory motive as Walsh's sex plus her status as a mother.

Woman-to-woman discrimination was also at issue in *Back v. Hastings on Hudson Union Free School District*.[65] The plaintiff, Elana Back, worked as a school psychologist at Hillside Elementary School. She received excellent evaluations during her first two years.[66] 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."[67] Then Brennan, along with the school principal, Marilyn Wishnie, said Back's job was "not for a mother," and they "wanted another year to assess [Back's] child care situation" before granting her tenure.[68] Back was later denied tenure and fired.[69] 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."[70] 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' "—were considered stereotyping and constituted direct evidence of sex discrimination under the Equal Protection Clause.[71] In addition to stereotyping, the

[61] *Id.* at 1155 (quotations in original).
[62] *Id.*
[63] *Id.* at 1155-56.
[64] *Id.* at 1160 (affirming, inter alia, a denial of the employer's motion for judgment as a matter of law).
[65] 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.
[66] *Id.* at 114.
[67] *Id.* at 115 (alterations in original).
[68] *Id.* (alterations in original).
[69] *Id.* at 113.
[70] *Id.*
[71] *Id.* at 120 (alterations in original).

court based its decision on "sex plus," holding that Back was singled out because of her sex plus her status as a mother.[72]

In *Walsh* and *Back*, then, "sex plus" proved an effective doctrinal tool in the battle against intragroup sex discrimination, largely by acknowledging gender-based subgroups and recognizing that not all women are similarly situated with respect to gender.[73]

B. Intragroup Race Discrimination

There is no corresponding "race plus" doctrine to address 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,[74] to say nothing of the profound incoherence surrounding the term as a descriptive legal category.[75] For most people, race is a rule of thumb. We pigeonhole others (and ourselves) into racial groups based largely on phenotype—the color of our skin, the curl of our hair, the broadness of our nose, the fullness of our lips.[76] The law offers little refinement. Historically, race was based on bloodline, as with the one-drop rule,[77] 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,[78] has settled on a smell test.[79]

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[72] *Id.* at 118-19.

[73] *See, e.g.*, McGrenaghan v. St. Denis Sch., 979 F. Supp. 323, 327 (E.D. Pa. 1997) (denying summary judgment for the defendants on a Title VII claim alleging that a female principal discriminated against women with disabled children); *see also* BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 456-58 (3d ed. 1996).

[74] *See, e.g.*, Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1094 (2004) ("[T]he best research in genetics, medicine, and the social sciences reveals that the concept of 'race' is elusive and has no reliable definition.").

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

[76] Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1494 (2000).

[77] Also known as the rule of hypodescent, this rule "ascribes a Black racial identity to persons who possess one drop African blood." Enid Trucios-Haynes, *Why "Race Matters": LatCrit Theory and Latina/o Identity*, 12 BERKELEY LA RAZA L.J. 1, 27 (2001).

[78] In *Takao Ozawa v. United States*, the Supreme Court noted that "the meaning of the words 'white person' is discussed . . . both from the standpoint of judicial decision and from that of the science of ethnology." 260 U.S. 178, 197 (1922). Based on such "reason and authority," the Court agreed "that the words import a racial and not an individual test." *Id.* Accordingly, because "the words 'white person' are synonymous with the words 'a person of the Caucasian race,'" the Court held that the Japanese claimant was "clearly of a race which is not Caucasian." *Id.* at 198.

[79] 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 this new standard. *Id.*

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 or Latino."[80] Thus, for simplicity, this article speaks of the black "race" and the Hispanic "ethnicity."[81] Race is predicated on ostensibly objective biological criteria, whereas ethnicity is based on culture and geographic origin.[82] This distinction is not strictly preserved here.

Intragroup race discrimination can be conduct-based,[83] color-based,[84] or both.[85] Because race has social meaning based on conduct and color, race discrimination may occur both where one acts outside of a defined racial stereotype and where there are pronounced differences in color between a discriminator and victim.

What follows are the stories of intragroup discrimination within the black and Hispanic communities.[86]

1. Black-on-Black

Blacks sometimes discriminate against each other on a number of conduct-based grounds, as well as on the basis of color. Although the topic of black-on-black discrimination is taboo in some circles,[87] it is real, and courts have yet to develop a sufficient framework for addressing it.

a. Conduct-Based

Stereotypes about what it means to "act white" versus "act black," "think white" versus "think black," may spur black-on-black discrimination based on political ideology,[88] residency,[89] marriage,[90] or sexual orienta-

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[80] U.S. Census Bureau, Racial and Ethnic Classifications Used in Census 2000 and Beyond, http://www.census.gov/population/www/socdemo/race/racefactcb.html (last visited Oct. 17, 2009). The federal government uses the Census Bureau's racial and ethnic classifications for statistical, administrative, and civil rights purposes.

[81] 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*, CIVILRIGHTS.ORG, Apr. 12, 2006, http://www.civilrights.org/census/about/race-categories-to-change-on-2010-census-form.html. Rather, the categorization is for illustrative purposes.

[82] 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).

[83] This form of discrimination includes racial slurs like "oreo" and "coconut," as well as criticisms that an in-group member is "too black" or "not black enough."

[84] *See, e.g.*, Arrocha v. CUNY, No. CV021868(SJF)(LB), 2004 WL 594981 (E.D.N.Y. Feb. 9, 2004); Walker v. Sec'y of Treasury, 713 F. Supp. 403 (N.D. Ga. 1989); Sere v. Bd. of Trs. of Univ. of Ill., 628 F. Supp. 1543 (N.D. Ill. 1986), *aff'd*, 852 F.2d 285 (7th Cir. 1988).

[85] *See, e.g.*, Bryant v. Begin Manage Program, 281 F. Supp. 2d 561 (E.D.N.Y. 2003).

[86] Undoubtedly, other communities have similar stories, but those stories are, sadly, beyond the scope of this Article.

[87] *See* Baynes, *supra* note 42, at 140.

[88] *See* Kimberly Jade Norwood, *The Virulence of Blackthink and How Its Threat of Ostracism Shackles Those Not Deemed Black Enough*, 93 KY. L.J. 143, 147 (2004) ("Blackthink is a

tion[91]—all of which are mutable in that they can be covered to varying degrees by conduct.

In the model set forth above, blacks who "act white" are considered the assimilated. A good example is Lawrence Mungin, a black attorney who laughed at racist jokes while in college[92] and disassociated from other blacks at his law firm.[93] These impulses could easily lead someone like Mungin to engage in assimilated-on-unassimilated discrimination if, say, he had refused to hire black applicants whom he interviewed and considered "too black."

Intragroup policing, by contrast, arises where blacks discriminate against blacks who are perceived as "not black enough." As noted above, "oreo" is a slur against those who are said to be "[b]lack on the outside, [w]hite on the inside."[94] Intragroup policing 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," or even "having a diverse group of friends."[95]

In his 2004 address to the Democratic National Convention, Barack Obama, himself an "oreo" in the eyes of some blacks,[96] alluded to this phenomenon when he called on America to "eradicate the slander that says a black youth with a book is acting white."[97] To the extent it is propagated by the black community itself, this slander qualifies as intragroup policing.

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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.").

[89] *See id.* at 172 (noting that blacks who live in white neighborhoods may be viewed as "wannabes," meaning blacks who want to be white).

[90] *See* Kevin R. Johnson, *The Legacy of Jim Crow: The Enduring Taboo of Black-White Romance*, 84 TEX. L. REV. 739, 760 (2006) ("Marrying outside of one's own race can be viewed as racial betrayal and . . . the internalization of the belief in black inferiority.").

[91] Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1478 (2000) ("[B]eing out as a black gay or lesbian in the black community is race negating.").

[92] PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA 64 (1999).

[93] *Id.* at 41, 42, 44.

[94] Urban Dictionary, Oreo, http://www.urbandictionary.com/define.php?term=oreo (last visited Dec. 17, 2009); *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 (1993) (describing how blacks who failed to wear dashikis were sometimes called "oreos" by Black Nationalists).

[95] URBAN DICTIONARY, *supra* note 94.

[96] KENNEDY, *supra* note 22, at 7 ("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."); Stanley Crouch, Opinion, *What Obama Isn't: Black Like Me on Race*, N.Y. DAILY NEWS, Nov. 2, 2006, at 35 ("Other than color, Obama did not—does not—share a heritage with the majority of black Americans, who are descendants of plantation slaves."); Janny Scott, *A Biracial Candidate Walks His Own Fine Line*, N.Y. TIMES, Dec. 29, 2007, at A1 (noting that the Reverend Jesse Jackson had been quoted by a reporter as saying that Obama "needs to stop acting like he's white").

[97] Barack Obama, Keynote Address at the 2004 Democratic National Convention (July 27, 2004).

One problem with intragroup policing is that it undermines "authenticity,"[98] which is "just as threatened by an imperative to 'act black' as it would be by an imperative to 'act white.'"[99] Another problem with intragroup policing is that it incites intragroup discrimination.

In *Bryant v. Begin Manage Program*,[100] Shirley Bryant, a light-skinned black woman, 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." While color was also a factor, the issue of conduct-based discrimination was more pronounced. 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.[101] Bryant offered direct "evidence of racially-tainted animosity by Sekou"[102]:

> 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.[103]

The court therefore treated Bryant's claim as one of conduct-based race discrimination, with no serious attention given to color, and allowed the suit to survive summary judgment on that basis.[104]

b. Color-Based

Aside from conflict over what it means to be "white on the inside," there is also a good deal of conflict over what it means to be "black on the outside." One commentator reports that, to date, light-skinned blacks are "frequently accused of thinking themselves smarter, more beautiful, and generally better than other Blacks."[105] During the Civil Rights Movement, some light-skinned blacks "felt they had to prove their loyalty to the black

[98] *See* Yoshino, *supra* note 27.
[99] *Id.*
[100] 281 F. Supp. 2d 561, 565 (E.D.N.Y. 2003). Bryant also made a retaliation claim. *Id.*
[101] *Id.*
[102] *Id.* at 570.
[103] *Id.* at 565-66 (citations omitted).
[104] *Id.* at 570, 572.
[105] Paul R. Spickard, Mixed Blood: Intermarriage and Ethnic Identity in Twentieth-Century America 330 (1989).

community, and some complained of discrimination from other blacks."[106] Such interactions breed resentment and color discrimination, or "colorism,"[107] by which light-skinned blacks who are more associated with whites based on color may discriminate against dark-skinned blacks, and vice versa.[108] Indeed, differences in pigmentation across the black community have historically provoked black-on-black discrimination[109] and continue to do so.[110]

Consider the situation in which a light-skinned black person discriminates against a dark-skinned black person. In *Sere v. Board of Trustees of the University of Illinois*,[111] a Nigerian man brought suit against his black supervisor under both Title VII and 42 U.S.C. § 1981.[112] His Title VII claim was dismissed as untimely, but the court reached the merits of his § 1981 claim.[113] 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 person.[114] The court "recognize[d] that discrimination based on skin color may occur among members of the same race,"[115] but concluded that Sere failed to establish that color discrimination was actionable under § 1981.[116] 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."[117] Notably, the court made no attempt at forging a doctrinal tool to guide the future adjudication of such claims.

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[106] F. James Davis, Who Is Black? One Nation's Definition 74 (1991).

[107] *See* Jones, *supra* note 76, at 1488 (defining colorism as "the prejudicial treatment of individuals falling within the same racial group on the basis of skin color").

[108] *Cf.* Hansborough v. City of Elkhart Parks & Recreation Dep't, 802 F. Supp. 199, 202 (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*").

[109] 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.

[110] *Cf.* Clarence Thomas, My Grandfather's Son: A Memoir 42-43 (2007) ("I thought of applying to Morehouse College and Fisk University, two of the most prestigious black colleges . . . . [But] [i]t had long been whispered in Savannah that Morehouse and Fisk admitted only light-skinned blacks . . . .").

[111] 628 F. Supp. 1543 (N.D. Ill. 1986), *aff'd*, 852 F.2d 285 (7th Cir. 1988).

[112] Section 1981 provides, in relevant part, that "[a]ll persons . . . shall have the same right[s] . . . as . . . [are] enjoyed by white citizens . . . ." 42 U.S.C. § 1981 (2006).

[113] *Sere*, 628 F. Supp. at 1544-46.

[114] *Id.* at 1543, 1546.

[115] *Id.* at 1546.

[116] *Id.*

[117] *Id.*

Burch v. Applebee's International, Inc.[118] also made no 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 employee at an Applebee's restaurant. His manager was a light-skinned black person, who allegedly made disparaging comments about Burch's dark skin.[119] When Burch threatened to report the matter to corporate headquarters, his manager had him fired.[120] In response, Burch filed a color discrimination claim with the Equal Employment Opportunity Commission ("EEOC"), who in turn filed against Applebee's in federal court and won a $40,000 settlement on behalf of Burch.[121] Because the matter settled before adjudication, the court issued no opinion. But the case did attract a fair amount of media attention,[122] bringing the issue of color discrimination into plain view. Burch himself publicly stated: "No-one [sic] 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."[123] These words, albeit compelling, lack the force of law.

Dark-skinned blacks may also discriminate against light-skinned blacks. This form of discrimination was alleged in *Bryant*, but was more squarely at issue in *Walker v. Secretary of Treasury*,[124] 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.[125] 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 to demonstrate directly that Lewis disliked light-skinned blacks.[126] 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', [sic] and 'color' is to mean 'color'. [sic] To hold otherwise would mean that Congress and the Supreme Court have either mistakenly or purposefully

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[118] No. 1:02-CV-829 (N.D. Ga. filed 2003).

[119] *Sere*, 628 F. Supp. at 1546.

[120] *Id.*

[121] *Id.*

[122] *See, e.g.*, Press Release, Equal Employment Opportunity Comm'n, EEOC Settles Color Harassment Lawsuit with Applebee's Neighborhood Bar and Grill (Aug. 7, 2003), http://www.eeoc.gov/press/8-07-03.html.

[123] *Id.* (emphasis added).

[124] 713 F. Supp. 403, 408 (N.D. Ga. 1989).

[125] *Id.* at 404.

[126] *Id.* at 405 ("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, 742 F. Supp. 670, 676 (N.D. Ga. 1990).

overlooked an obvious redundancy."[127] 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.[128]

2. *Hispanic-on-Hispanic*

Unlike blacks, Hispanics are not a race but an ethnicity.[129] However, discrimination against Hispanics still qualifies as race discrimination within the meaning of Title VII.[130] 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,[131] but they also have a significant presence in the workplace, where their representation is projected to increase from 12% to 25% by 2050.[132] With rising numbers, Hispanics will increasingly be both the perpetrators and victims of employment discrimination, including Hispanic-on-Hispanic discrimination.

a. *Conduct-Based*

Immigration incites a fair amount of assimilated-on-unassimilated discrimination within the Hispanic community. The "unequal distribution of legal rights" across the Hispanic community—caused by low naturalization rates—exacerbates this conflict.[133] Many Hispanics favor a more restrictive immigration policy,[134] and accuse their immigrant counterparts both of being too poor and of damaging the schools attended by non-Spanish-speaking

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[127] *Walker*, 713 F. Supp. at 406.

[128] *Id.* at 408.

[129] The Census Bureau "considers race and Hispanic origin to be two separate and distinct concepts." U.S. Census Bureau, Overview of Race and Hispanic Origin: Census 2000 Brief 2 (2001), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf.

[130] *See, e.g.*, Rasco v. Potter, 265 Fed. App'x 279 (5th Cir. 2008); Beauchat v. Mineta, 257 Fed. App'x 463 (2d Cir. 2007); Almazan v. Pepperidge Farms, Inc., 210 Fed. App'x 511, 512 (7th Cir. 2006). *But see* Church v. Kare Distrib., Inc., No. Civ. A. H-05-2800, 2005 WL 2675064, at *3 n.1 (S.D. Tex. Oct. 20, 2005) (noting that Hispanics are not a race for Title VII purposes).

[131] U.S. Census Bureau, The American Community: Hispanics (2004), *available at* http://www.census.gov/prod/2007pubs/acs-03.pdf (recording Hispanics or Latinos at 14.2% of the total U.S. population); *Minorities Getting Closer to the Majority*, CNN, May 11, 2006, http://www.hispanic7.com/minorities_getting_closer_to_the_majority.htm.

[132] *Second-Generation Latinos to Exert Major Workforce Influence, Pew Report Says*, Daily Lab. Rep. (BNA) No. 199, at A-7 (Oct. 15, 2003).

[133] Kevin R. Johnson, *Immigration and Latino Identity*, 19 Chicano-Latino L. Rev. 197, 199-200 (1998).

[134] David G. Gutierrez, Walls and Mirrors: Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity 3-4 (1995). *Cf.* Johnson, *supra* note 133, at 201 (reporting that around 25% of Hispanic voters in California supported Proposition 187, which would have barred undocumented persons from receiving public benefits). *But cf.* Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 Wash. L. Rev. 629, 658-59 (1995) (reviewing exit poll data and noting that voting on Proposition 187 was polarized along white-Latino lines).

children.[135] If Hispanic Americans discriminate against Hispanic immigrants in the workplace based on these views, conduct-based intragroup discrimination ensues.

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."[136] 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."[137] Mexican immigrants, for instance, often criticize Mexican Americans for their poor Spanish and for being "traitors" to their ethnic heritage.[138] This also raises the possibility of conduct-based intragroup discrimination.

b. Color-Based

To complicate matters, not all Hispanics are "brown on the outside." Thus, Hispanic-on-Hispanic color discrimination also occurs where a dark-skinned Hispanic calls a light-skinned Hispanic *gabacho* (Anglo), an insult meaning "too white."[139] Coming from diverse stock,[140] Hispanics exhibit a wide array of skin tones, hence the colorful terminology Hispanics use to describe each other, e.g., *hincha* ("glass of milk"), *morena* ("brown"), *trigueño* ("olive-skinned"), and *café con leche* ("coffee with milk").[141] Though 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."[142] For many Hispanics, light skin is a highly-valued status symbol.[143]

Fittingly, the first Title VII case in which "an allegation of color discrimination [was] not subordinated to a more familiar claim of racial dis-

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[135] Johnson, *supra* note 133, at 202.

[136] Urban Dictionary, Coconut, http://www.urbandictionary.com/define.php?term=coconut (last visited Dec. 17, 2009).

[137] *Id.*

[138] Johnson, *supra* note 133, at 203.

[139] *See* Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican American Experience*, 85 Cal. L. Rev. 1259, 1292 (1997); *id.* at 1293 ("[M]any Latinos of mixed heritage at various times feel less than fully accepted by the Latino community.").

[140] Michael V. Hernandez, *Bridging Gibraltar: Latinos as Agents of Reconciliation in Relations Between Black and White America*, 11 La Raza L.J. 99, 105 (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.").

[141] *See* Vanessa E. Jones, *Pride or Prejudice?: 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.

[142] *Id. See also* Peter Wade, Race and Ethnicity in Latin America 53-55 (1997) (commenting on the symbolic import of skin color in Latin America).

[143] Eric Uhlmann et al., *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").

crimination" involved Hispanic-on-Hispanic discrimination.[144] In *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.[145] Felix 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.[146] But she offered little evidence,[147] and the court was at a loss on the issue.[148] Accordingly, the court rejected her color discrimination claim, although it noted in dicta that color discrimination is actionable under Title VII.[149]

Another case, *Arrocha v. CUNY*, also concerned alleged color discrimination within the Hispanic community.[150] 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.[151] 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.[152] 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."[153] This reasoning 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 the next Part.

III. The "Race Plus" Proposal

This article proposes two "race plus" approaches to help courts address the intragroup discrimination injuries revealed by an assimilation-based model. The first approach addresses race-plus-conduct discrimination; it is referred to as "loose race plus" because it is based on a loose reading of Title VII, which does not strictly prohibit conduct-based discrimination. The

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[144] Felix v. Marquez, No. 78-2314, 1981 WL 275, at *1, 11 (D.D.C. Mar. 26, 1981).

[145] *Id.* at *2-3.

[146] *Id.* at *8.

[147] Tanya Kateri Hernandez, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison*, 87 Cornell L. Rev. 1093, 1152 (2002) (observing that Felix could have offered evidence that, in Puerto Rico, "skin color [is] a proxy for intelligence and good character").

[148] *Felix*, 1981 WL 275, at *8 n.6 ("Felix's own skin color, which she described as dark olive, appeared to the court to be a medium shade . . . . 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.").

[149] *Id.* at *11.

[150] Arrocha v. CUNY, No. CV 021868(SJF)(LB), 2004 WL 594981, at *6 (E.D.N.Y. Feb. 9, 2004).

[151] *Id.* at *1-2.

[152] *Id.* at *6.

[153] *Id.*

second approach, which addresses race-plus-color discrimination, is referred to as "strict race plus" because it is based on a strict reading of Title VII, as proscribing both race and color discrimination. Both approaches draw inspiration from "sex plus," but are distinguishable from the "sex plus" reasoning. Both approaches draw inspiration from the "sex plus" doctrine, but are distinguishable from that doctrine, as well as the related doctrine of intersectionality.[154]

A. *Defining "Race Plus"*

"Race plus" extends the logic of "sex plus" to race by addressing discrimination based on race *plus* another factor. To be effective, "race plus" must address both conduct- and color-based intragroup discrimination. Accordingly, this Section sets out two "race plus" approaches.

As with "sex plus," "race plus" is a heuristic for exposing unlawful discrimination where the discrimination is not straightforward. Straightforward sex discrimination occurs solely, or primarily, because of sex, and the same is true for straightforward race discrimination. Straightforward race discrimination is likewise based on race.[155] But "sex plus" discrimination is not so straightforward—and neither is "race plus." As its name implies, a "race plus" case presents more than one discriminatory motive—where a discriminator acts both because of race and because of a "plus." The proper analysis under "race plus" depends on whether the "plus" is one of Title VII's other statutorily protected categories: color, religion, sex, or national origin.

If the "plus" is not a statutorily protected category, this article prescribes a "loose race plus" approach to resolve what is, at a minimum, a "mixed motives" claim. The paradigmatic case here is race-plus-conduct discrimination, where one discriminatory motive (race) is unlawful under Title VII and the other (conduct) is not. As amended in 1991, Title VII provides express coverage for "mixed motives" cases, where race is a motivating factor in a job-related action.[156] But race may well be *the* motivating factor where conduct only matters because of race, as with racial stereotyping. If so, there is straightforward race discrimination, subject not to the "mixed motives" scheme,[157] but to the *McDonnell Douglas* burden-shifting framework.[158]

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[154] Intersectionality is a doctrine that pushes back against the tendency to view racism and sexism as mutually exclusive. *See infra* Part III.B.2.

[155] 42 U.S.C. § 2000e-2(a) (2006).

[156] *Id.* § 2000e-2(m). *See also id.* § 2000e-5(g)(2)(B) (restricting remedies under § 2000e-2(m) if the employer proves that it would have taken the same action in the absence of an impermissible motivating factor).

[157] *See* statutes cited *supra* note 156. *See also* discussion *infra* Part III.A.1.

[158] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). The framework is outlined in Part III.A.1. *See infra* note 165 and accompanying text.

If, on the other hand, the "plus" is a protected category, this article endorses a "strict race plus" approach to address what is termed here a "combined motives" claim. The paradigmatic case is race-plus-color discrimination, where race and color are both impermissible motivating factors under Title VII. This scenario is analyzed exclusively under the *McDonnell Douglas* framework, where race and color are viewed as discrete, albeit related, statutory categories.

Both approaches, further developed below, would help identify and resolve intragroup race discrimination cases through a step-by-step analysis where courts can see that members of the same race can be differently situated with respect to race based on perceived indicators of assimilation status: conduct, color, or both.

1. "Loose Race Plus" for Conduct-Based Intragroup Discrimination

"Loose race plus" is a heuristic for resolving race-plus-conduct cases. These include intragroup discrimination cases like *Bryant*, where the record suggests that the plaintiff was singled out both because she was black and because she "acted white." This approach is referred to as "loose" to reflect that only one aspect of race-plus-conduct (i.e., discrimination because of race) is prohibited under Title VII.

Since conduct is not a protected category, race-plus-conduct discrimination presents, at a minimum, a "mixed motives" case "where both legitimate and illegitimate reasons motivated [an employment] decision."[159] In 1991, Congress devised a statutory scheme for resolving these cases through two new Title VII provisions. First, § 703(m) provides that discrimination is actionable so long as the plaintiff "demonstrates that race, color, religion, sex, or national origin was *a* motivating factor for any employment practice, even though other factors also motivated the practice."[160] Second, if the plaintiff so proves, the employer can avail itself under § 706(g)(2)(B) of a limited affirmative defense by "demonstrat[ing] that [it] would have taken the same action in the absence of the impermissible motivating factor."[161] This defense does not absolve the employer of liability, but it does restrict the remedies available to the plaintiff.[162]

Under this "mixed motives" statutory scheme, "loose race plus" would provide a minimum baseline of protection against race-plus-conduct discrimination. By isolating race as *a* motivating factor, this approach prevents courts from dismissing the race-plus-conduct claim out of hand. But "loose

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[159] Desert Palace, Inc. v. Costa, 539 U.S. 90, 93 (2003) (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion)).

[160] § 2000e-2(m) (emphasis added). The plaintiff may do so by a preponderance of the evidence using either direct or circumstantial evidence. *Desert Palace*, 539 U.S. at 98-101.

[161] § 2000e-5(g)(2)(B).

[162] The available remedies include only declaratory relief, certain types of injunctive relief, and attorney's fees and costs. *Id.*

race plus" also recognizes valid legal grounds to treat race-plus-conduct discrimination as more than a simple case of "mixed motives." First, the "legitimate" reason for an employment decision in a "mixed motives" case is usually job-related (e.g., a black employee was insubordinate).[163] Pretext aside, an employer would be hard-pressed to show that terminating a black employee who "acts white" is even arguably related to job performance. And because notions of "acting white," for instance, are defined by social conceptions of race, discrimination on that basis is necessarily based on race. This strongly suggests that race is not only *a* motivating factor, but also *the* motivating factor.

As such, race-plus-conduct discrimination will often rise to the level of straightforward race discrimination. Where this is borne out by the record, "loose race plus" calls for a traditional disparate-treatment analysis[164] under the three-step *McDonnell Douglas* framework: if the plaintiff carries her initial burden to prove a prima facie case of discrimination (step one), the burden shifts to the defendant to proffer a legitimate, nondiscriminatory reason for a job-related action (step two), in which case the burden shifts back to the plaintiff to show pretext (step three).[165] At step one, "the prima facie case requires 'evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion . . . .' "[166] For race-plus-conduct discrimination, the plaintiff must show that race was the primary motive. Then, if the employer can proffer legitimate reasons for its decision, the plaintiff will prevail only if she can show that the employer's reasons are pretextual.

To illustrate how "loose race plus" might operate in practice, consider the intragroup policing claim in *Bryant*, where race and conduct were at issue.[167] Regardless of whether this claim is subject to the "mixed motives" scheme or the *McDonnell Douglas* framework, the first stage of analysis is similar: " '[P]laintiffs must present enough evidence to permit a finding that there was differential treatment in an employment action and that the adverse employment decision was caused *at least in part* by a forbidden type of bias.' "[168] For race-plus-conduct, this requires some proof that the employer's decision was based on racial stereotyping. As in *Bryant*, the plaintiff may offer both direct evidence (e.g., comments about Bryant's being a

[163] *See, e.g.*, *Desert Palace*, 539 U.S. at 95 ("[Ms. Costa had a] series of disciplinary sanctions . . . ."). *See also Price Waterhouse*, 490 U.S. at 252 ("[Ms.] Hopkins' interpersonal problems were a legitimate concern.").

[164] "Disparate treatment" is a term of art referring simply to intentional discrimination. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2672 (2009).

[165] This framework was first set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

[166] O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996) (quoting Teamsters v. United States, 431 U.S. 324, 358 (1977) (alterations and emphasis omitted)).

[167] Bryant v. Begin Manage Program, 281 F. Supp. 2d 561, 565. Color was also at issue in *Bryant*, but is not considered here.

[168] Chadwick v. WellPoint, Inc., 561 F.3d 38, 45 (1st Cir. 2009) (quoting Hillstrom v. Best W. TLC Hotel, 354 F.3d 27, 31 (1st Cir. 2003) (emphasis added)).

"wannabe") and circumstantial evidence (e.g., exhortations that Bryant adopt her supervisor's African-style attire).[169] The analysis turns on the strength of the evidence. If the court is not convinced that race was *the* motivating factor, but is nonetheless convinced that race was *a* motivating factor under § 703(m), the plaintiff is entitled to relief, and the employer can only limit such relief by showing that it would have made the same decision notwithstanding race (i.e., that Bryant was unqualified and would have been fired in the absence of racial stereotyping by her supervisors).[170] But, as noted above, plaintiffs in most nonfrivolous cases should be able to show that race was the primary motive for discrimination, in which case the analysis proceeds to *McDonnell Douglas* step two, and possibly step three.

"Loose race plus" therefore affords flexibility to conduct the analysis under the "mixed motives" scheme or the *McDonnell Douglas* framework depending on the strength of the evidence. In so doing, "loose race plus" can bring greater refinement to the analysis of conduct-based intragroup discrimination while operating well within the bounds of Title VII.

2. *"Strict Race Plus" for Color-Based Intragroup Discrimination*

"Strict race plus" is a heuristic designed to guide the judicial inquiry for race-plus-color cases like *Sere* and *Walker*. It is so termed because it is consistent with even a strict reading of Title VII, as prohibiting "discriminat[ion] . . . because of . . . race [and] color."[171] Since either race or color discrimination alone would be actionable under Title VII, as both race and color are statutory categories, it follows a fortiori that race-plus-color discrimination should be actionable as well. This Article refers to race-plus-color discrimination, where two unlawful motives are combined, as a "combined motives" case.

"Strict race plus" analyzes the "combined motives" case under the burden-shifting framework, but takes pains to recognize race and color as discrete, albeit related, statutory categories. As in *Sere* and *Walker*, the greatest challenge occurs at *McDonnell Douglas* step one: how does a plaintiff prove a prima facie case of discrimination based on race *and* color? "Strict race plus" offers guidance by (1) affirming that Title VII prohibits discrimination based on color and (2) recognizing that race imbues color with meaning, such that individuals can be differently racialized based on the lightness or darkness of their skin, even within the same race. This understanding is further unpacked below, but, at bottom, "strict race plus" clarifies the analysis at *McDonnell Douglas* step one by ensuring, for example, that dark- and light-skinned blacks are not treated as part of the same

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[169] 281 F. Supp. 2d at 565-66.

[170] *Cf. id.* at 570 ("Bryant . . . was qualified for the job, given that . . . the program coordinator[ ] of another department . . . was willing to have Bryant come work for her.").

[171] 42 U.S.C. § 2000e-2(a) (2006).

cohort for evidentiary purposes. Thus, a dark-skinned black person could survive summary judgment if there is a triable issue as to whether the employer treats dark-skinned blacks differently from light-skinned blacks.

As its name implies, "strict race plus" is based on a stricter reading of Title VII than the reading embodied by "loose race plus." By addressing only protected "pluses," "strict race plus" is not infinitely additive, but instead draws from a fixed menu of "pluses": color, sex, national origin, and religion. Without such limits, the fear is that employment discrimination may become "a many-headed Hydra, impossible to contain within Title VII's prohibition."[172] This article focuses on race-plus-color, which is one particular application of "strict race plus."

Although Title VII law stands to benefit from a deeper understanding of the relationship between race and color discrimination,[173] there are two obstacles. The first obstacle is that courts conflate race and color, 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*."[174] The lower courts have not done much better.[175] Nor has the EEOC.[176] Although color is an independent cause of action under Title VII, plaintiffs seldom make use of it.[177] When they do, plaintiffs often couple color with race discrimination claims, and, as a result, color becomes conflated with race.[178] 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.[179] Title VII liability would thus attach whenever a supervisor discriminates against an employee because of a

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[172] Judge v. Marsh, 649 F. Supp. 770, 780 (D.D.C. 1986).

[173] *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).

[174] 427 U.S. 273, 284 (1976) (emphases added).

[175] *See, e.g.*, Hopwood v. Texas, 78 F.3d 932, 957 (5th Cir. 1996), *overruled on other grounds by* Grutter v. Bollinger, 539 U.S. 306 (2003).

[176] 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)." U.S. EEOC, Race/Color Discrimination, http://www.eeoc.gov/types/race.html (last visited Dec. 10, 2006).

[177] *See* Cynthia E. Nance, Symposium, *Colorable Claims: The Continuing Significance of Color Under Title VII Forty Years After Its Passage*, 26 BERKELEY J. EMP. & LAB. L. 435, 437 (2005); Mary-Kathryn Zachary, *Labor Law for Supervisors: Color Discrimination Under Title VII*, 64 SUPERVISION 23, 23 (2003).

[178] Some courts treat race and color discrimination claims as race discrimination alone. *See, e.g.*, Fernandes v. Costa Bros. Masonry, 199 F.3d 572, 579-81 (1st Cir. 1999); Love v. United Airlines, No. 98-C-6100, 1999 U.S. Dist. LEXIS 4069, at *7-8 (N.D. Ill. Mar. 25, 1999).

[179] *See, e.g.*, ALICE WALKER, *If the Present Looks Like the Past, What Does the Future Look Like?*, *in* IN SEARCH OF OUR MOTHER'S GARDENS 290, 290-91 (1983); Nance, *supra* note

difference in color, irrespective of racial prejudice. At first glance, this may appear reasonable. But, by this approach, "a claim of pure color discrimination, without ethnic or racial undertones, would include a claim by a suntanned person against a fair-skinned person of the same race."[180] Therefore, to untether color from race opens the door to the "many-headed Hydra," for which the slightest suntan may be fodder for Title VII litigation.[181]

Other commentators would emphasize color to the exclusion of race, even eliminating race altogether as a descriptive category under Title VII.[182] These commentators downplay the role of race in intragroup race discrimination,[183] attempt to disentangle race from color,[184] and advance the central tenet that color alone should be actionable under Title VII.[185] But this approach is flawed to the extent it throws the "baby" of race out with the "bathwater" of doctrinal confusion. As Cornel West observed, "race matters."[186] It matters in the popular imagination: 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.[187] 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

177, at 437; Zachary, *supra* note 177, at 23; Baynes, *supra* note 42, at 141; Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2507 (1994).

[180] Amy Weinstein, *Must Employers Be Colorblind? Title VII Bars Intra-Racial Employment Discrimination*, 68 WASH. U. L.Q. 213, 223 n.85 (1990). While undermining the immutability of color, a suntan is not always a matter of aesthetic choice (e.g., a farmhand out in the sun).

[181] Based *solely* on the text of Title VII, which prohibits "discriminat[ion] . . . because of . . . color," 42 U.S.C. § 2000e-2(a)(1) (2006), there is no principled reason why a suntan could not give rise to a color discrimination claim. Attempts to limit such claims to immutable differences in color link, perhaps unwittingly, color back to race, both because color is largely derivative of race and because race imbues color with meaning. *See infra* notes 189, 208, and accompanying text.

[182] *See supra* note 179.

[183] *See* Nance, *supra* note 177, 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 76, at 1543.

[184] *See* Nance, *supra* note 177, at 437 ("[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 76, at 1487, 1497-98. This is all the more reason to consider them together, as race-plus-color.

[185] *See* Nance, *supra* note 177, 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.").

[186] CORNEL WEST, RACE MATTERS (1993).

[187] Hernandez, *supra* note 147, 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.").

racial stereotypes. Further, a good deal of intragroup race discrimination is based on color. To conflate color with race is to obscure the reality of such conflict, permitting superficial racial similarities to mask the real bases of discrimination within racial groups.[188]

"Strict race plus" offers a solution to this doctrinal conundrum: it retains race but permits the introduction of color into the analysis of unlawful 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.[189] Immutability is more easily presumed when skin color reflects a plaintiff's "natural" complexion rather than a suntan. Faced with the suntan critique, Title VII law should not concern itself with relatively slight, temporary color variations that result from suntanning.[190] Notably, this limitation does not undermine the effectiveness of "strict race plus" as a doctrinal tool for combating color-based intragroup discrimination.

B. Distinguishing "Race Plus" from Related Doctrines

Having defined two "race plus" approaches, this part now distinguishes each of them from "sex plus" and intersectionality.

1. "Sex Plus"

Properly understood, "sex plus" is guided by a motivation principle, for which the central inquiry is not the type of "plus," but rather the motive for discrimination. This was the understanding of the Supreme Court in its first and only pass at "sex plus," in which it reversed the Fifth Circuit's per curiam decision in *Phillips*.[191] A number of courts have since embraced this approach, emphasizing the motive for discrimination and deemphasizing the type of "plus."[192] But other courts have adopted a rule by which the "plus"

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[188] Jones, *supra* note 76, at 1543.

[189] To a large extent, color is derivative of race. Race mixing itself has added to the variety of skin color. Walker, *supra* note 179, 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." Felix v. Marquez, No. 78-2314, 1981 WL 275, at *28 (D.D.C. Mar. 26, 1981).

[190] The Latin maxim is *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 lines (e.g., a white supervisor who remarks that a white employee "looks Mexican" because of a suntan, and harasses the employee on that basis).

[191] Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam) (holding that Title VII does not permit "one hiring policy for women and another for men—each having pre-school-age children").

[192] *See, e.g.*, Chadwick v. WellPoint, Inc., 561 F.3d 38, 43 (1st Cir. 2009); Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428, 432 (6th Cir. 2004); Back v. Hastings On Hudson Union

must be an immutable characteristic or a fundamental right.[193] This limitation appears nowhere in *Phillips*,[194] and "is directly contrary to the plain language of [Title VII] and is unsupported by its legislative history."[195]

a. *"Loose Race Plus"*

"Loose race plus" embodies the motivation principle, where the proper inquiry at the first stage of analysis is whether race was a motive for discrimination. This accords with the original understanding of "sex plus" in *Phillips*, where the Supreme Court emphasized the impermissible aspect of parenthood discrimination based on sex. More recently, the First Circuit recognized that "sex plus" is, at bottom, straightforward sex discrimination:

> ["Sex plus"] may be a bit misleading . . . because the "plus" does not mean that more than simple sex discrimination must be alleged . . . Ultimately, regardless of the label given to the claim, the simple question posed by sex discrimination suits is whether the employer took an adverse employment action *at least in part* because of an employee's sex.[196]

This reasoning closely tracks the analysis under "loose race plus." "Loose race plus" is thus is a logical extension of the motivation principle from the first line of "sex plus" cases discussed above.

b. *"Strict Race Plus"*

Because race and color are both statutory categories, race-plus-color claims should be afforded greater protection than "sex plus," where the "plus" is not a protected category. In the interest of administrability,[197] "strict race plus" is limited to race plus one or more of Title VII's other statutory categories. Although some "sex plus" cases impose limits, the

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Free Sch. Dist., 365 F.3d 107, 118-19 (2d Cir. 2004); Jacobs v. Martin Sweets Co., Inc., 550 F.2d 364, 371 (6th Cir. 1977).

[193] *See, e.g.*, Wislocki-Goin v. Mears, 831 F.2d 1374 (7th Cir. 1987); Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975); Willingham v. Macon Tele. Publ'g Co., 507 F.2d 1084 (5th Cir. 1975).

[194] To be sure, procreation is a fundamental right. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 926-27 (1992). But the analysis in *Phillips* emphasized sex as the discriminatory motive, rather than the "plus" as a fundamental right. *See Phillips*, 400 U.S. at 544.

[195] *Earwood*, 539 F.2d at 1352 (Winter, J., dissenting) ("To me, it is manifest that the length of hair is significant only with respect to men and that therefore the [hair length] regulation discriminates on the basis of sex.").

[196] *Chadwick*, 561 F.3d at 43 (citing, inter alia, § 703(m) of Title VII). *See also Back*, 365 F.3d at 119 ("The . . . issue is not whether a claim is characterized as 'sex plus' . . . but rather[ ] whether the plaintiff provides evidence of purposefully sex-discriminatory acts."); Jurinko v. Edwin L. Wiegand Co., 331 F. Supp. 1184, 1187 (W.D. Pa. 1971) ("If the company discriminates against married women, but not against married men . . . the discrimination, based on solely sexual distinctions, [is] invidious and unlawful.").

[197] *See* discussion *infra* Part IV.B.3.

reach of "sex plus" is far more sweeping: it goes beyond statutory categories to cover, at a minimum, "sex plus an immutable characteristic" or "sex plus a fundamental right." The reason for this divergence is that "strict race plus" takes pains to mitigate the administrability concerns of a "many-headed Hydra," as referenced in the case law.[198]

Accordingly, "race plus" is better situated not within the line of cases following *Phillips*, but rather the line following *Jefferies* and *Judge*, as discussed in Subsection IV.B.3 below. While it draws its inspiration from "sex plus," "strict race plus" is more carefully crafted to avoid slippery-slope concerns within the context of race and color.[199]

2. *Intersectionality*

Both "race plus" approaches are also distinguishable from Professor Kimberlé Crenshaw's intersectionality theory.[200] Crenshaw focuses on the intersection between race and sex; her paradigm case is black women.[201] As one court correctly noted, "discrimination against black females can exist even in the absence of discrimination against black men or white women,"[202] 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."[203] According to Crenshaw, black women may be discriminated against not because they are black, nor because they are women, but rather because they are *black women*.[204]

a. *"Loose Race Plus"*

"Loose race plus" addresses race and conduct, while intersectionality emphasizes race and sex. While sex is both immutable[205] and a protected

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[198] Judge v. Marsh, 649 F. Supp. 770, 780 (D.D.C. 1986).

[199] It does so by limiting "pluses" to statutory categories, which even Judge Brown assumed were protected "pluses" when he coined the term "sex plus." Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1260 n.10 (5th Cir. 1969) (Brown, C.J., dissenting from denial of en banc rehearing) (noting that Title VII surely would not tolerate "sex plus" discrimination where "the 'plus' [was] one of the other statutory categories of race, religion, national origin, etc."). Notably, Judge Brown used Latin shorthand to refer to "color," further stressing the need to reclaim it as a statutory category.

[200] *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1244 (1991).

[201] *Id.* at 1243.

[202] Jefferies v. Harris County Comm'y Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980).

[203] *Id. See also id.* at 1034 ("[T]he fact that Jones, who won the promotion Jefferies sought, was black does not bring him within Jefferies' protected class for purposes of her prima facie case. Similarly, when pretext is at issue[, i.e.,] when Jefferies 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[,] . . . black males and white females must be treated as persons outside Jefferies' class.").

[204] Crenshaw, *supra* note 200, at 1243-44.

[205] Of course, surgical intervention calls into question the immutability of sex.

category under Title VII, conduct is neither. Thus, even if intersectionality could be viewed simply as race-plus-sex, which is disputed below, it would still diverge from "loose race plus." Because race and sex are statutorily protected categories, intersectionality qualifies as a variant of "strict race plus."

Race-plus-conduct and intersectionality are subject to similar treatment at the first stage of analysis: pinpointing the discriminatory motive. Because intersectionality is concerned with the unique plight of black women, the proper inquiry is not whether the plaintiff was discriminated against because she is black, or because she is a woman, but rather whether she was discriminated against because she is a *black woman*. Similarly, the proper inquiry for intragroup policing in the black community, for instance, is not whether the plaintiff was discriminated against because she was black, or because she "acted white," but whether she was discriminated against because she was a *black person who "acted white."* If courts can combine race and sex for evidentiary purposes in cases alleging both race and sex discrimination,[206] there is no good reason why they cannot likewise combine race and conduct in race-plus-conduct cases. The common thread is that the variables of discrimination are applied simultaneously rather than sequentially: it is the operation of the two variables together, rather than in tandem, that constitutes discrimination.

b. "Strict Race Plus"

Intersectionality is not simply a permutation of "strict 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.[207] This con-

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[206] Lam v. Univ. of Hawai'i, 40 F.3d 1551, 1562 (9th Cir. 1994) ("[W]hen a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or of the same sex.") (emphasis in original); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987) ("[I]n determining the pervasiveness of the harassment against a plaintiff, a trial court may aggregate evidence of racial hostility with evidence of sexual hostility."); *Jefferies*, 615 F.2d at 1032 (concluding that discrimination against black females could exist even in the absence of discrimination against black men or white women).

[207] 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 exclusively on a particular shade of skin. Dark-skinned Asian Indians and dark-skinned blacks, for example, do not generally identify with some imagined community of "dark-skinned people"; instead they

struction 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 may well be treated differently from a dark-skinned black person, largely because race imbues color with meaning. If dark skin signals an Indian identity, a person may be stereotyped as "tech savvy." But if dark skin signals a black identity, that same person may be stereotyped as uneducated.[208]

"Strict 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 person, 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,"[209] concerns about race and color tend to converge: if one worries about the devaluation of the black racial identity, one 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,"[210] this Article aims to disrupt the impulse to view race and color as synonymous and redundant. While perhaps less efficacious in the race-and-sex cases, "strict race plus" is useful for identifying race-plus-color discrimination.

IV. The Interpretive Case for "Race Plus"

As seen above, the case law stands to benefit from both "race plus" approaches. This Part makes the case for each approach more explicit, based on the text, legislative history, and statutory purpose of Title VII.

A. *"Loose Race Plus" as Race-Plus-Conduct*

"Loose race plus," although based on a loose statutory reading, operates well within the bounds of Title VII.

1. *Text*

"Loose race plus" is anchored in the text of Title VII. In 1991, Congress amended the statute to include § 703(m), which provides that "an unlawful employment practice is established when the [plaintiff] demonstrates

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identify as Indian and black, respectively, or more generally as people of color, but not as people of *dark* color.

[208] Baynes, *supra* note 42, at 133 n.17.

[209] Crenshaw, *supra* note 200, at 1251-52.

[210] *Id.* at 1244 n.9.

that race, color, religion, sex, or national origin was *a* motivating factor for any employment practice, even though other factors also motivated the practice."[211] This provision expressly accounts for "mixed motives" cases, which easily include race-plus-conduct discrimination.[212]

Moreover, insofar as employees of one race are treated differently from employees of another race based on their conformity (or nonconformity) to racial stereotypes unrelated to job performance, race-plus-conduct discrimination runs afoul of Title VII's plain language prohibiting "discriminat[ion] . . . because of . . . race."[213] Writing for a unanimous Court in *Oncale v. Sundowner Offshore Services, Inc.*, Justice Scalia endorsed a similar statutory reading in the gender context: "'The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'"[214] The *Oncale* Court relied heavily on textual analysis to conclude that same-sex sexual harassment is actionable under Title VII so long as the plaintiff "prove[s] that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimina[tion] . . . because of . . . sex.'"[215] Similarly, while race-plus-conduct requires more than isolated incidents of racial stereotyping, the claim is actionable if the plaintiff can show, as in *Bryant*, that an employment decision was actually based on such stereotyping (e.g., she was fired because her supervisors viewed her as a "wannabe"). As such, "loose race plus" comports with the letter of Title VII, which makes motive the touchstone in the analysis of unlawful discrimination.

2. *Legislative History*

"Loose race plus" also accords with Title VII's legislative history. Even before the statute was amended to account expressly for "mixed motive" claims, the logic of the emerging "sex plus" doctrine properly recognized that Congress could not have intended to exempt discrimination based on one protected category, so long as it was also based on another, unprotected factor. As Judge Brown noted in his *Phillips* dissent, "Congress could hardly have been so incongruous as to legislate sex equality in employment by a statutory structure enabling the employer to deny employ-

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[211] 42 U.S.C. § 2000e-2(m) (2006) (emphasis added). *But see id.* § 2000e-5(g)(2)(B) (2006) (restricting the remedies available to plaintiffs proving violations of § 703(m)).

[212] Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003) (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994)).

[213] 42 U.S.C. § 2000e-2(a) (2006).

[214] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1997) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

[215] *Oncale*, 523 U.S. at 81 (referring to 42 U.S.C. § 2000e-2(a)(1) (2006)). *See also Oncale*, 523 U.S. at 82 (Thomas, J., concurring) ("I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.'").

ment . . . through the simple expedient of adding to sex a non-statutory factor."[216] This reasoning applies with equal vigor to race-plus-conduct. Indeed, the legislative record indicates that a broad interpretation of discrimination was intended. An interpretative memorandum submitted by Title VII's floor managers, Senators Case and Clark, defined "to discriminate" as "to make a distinction, to make a difference in treatment or favor . . . ."[217] Insofar as race-plus-conduct discrimination makes a distinction between races, and singles out a race for disparate treatment, it coheres with this congressional understanding.

Congress's 1991 amendment to Title VII lends further credence to this view. Had Congress not intended to protect "plus" discrimination, it would not have amended Title VII to specifically prohibit "mixed motives" discrimination where a protected category was "a motivating factor."[218] In so doing, Congress superseded a limiting Supreme Court precedent, under which no "mixed motives" claim could have survived unless the plaintiff first proved that a protected category was "a substantial factor."[219] Congress thereby clarified that a plaintiff could proceed with her claim simply by showing that a protected category was a motive for discrimination, albeit not the sole or primary motive.

Thus, even if Congress did not specifically contemplate "loose race plus,"[220] congressional intent for Title VII is broad enough to accommodate race-plus-conduct descrimination. In any event, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[221]

3. *Statutory Purpose*

Finally, "loose race plus" is consistent with Title VII's broad statutory purpose. By expanding protection to race-plus-conduct discrimination, "loose race plus" is "consistent with the important purpose of Title VII—that the workplace be an environment free of discrimination, where race is not a barrier to opportunity."[222] To allow employers to discriminate against some races and not others, based on stereotypes and the like, would make

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[216] Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1261-62 (Brown, J., dissenting from denial of en banc rehearing).

[217] 110 CONG. REC. 7213 (1964).

[218] 42 U.S.C. § 2000e-2(m) (2006).

[219] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion); *id.* at 276 (O'Connor, J., concurring). The Supreme Court has recognized that the *Price Waterhouse* plurality was superseded by statute on this issue. Desert Palace, Inc. v. Costa, 539 U.S. 90, 94-95 (2003) (citing § 2000e-2(m)). *See also* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2348-49 (2009).

[220] Because it was reacting to the *Price Waterhouse* plurality, Congress most likely had "sex plus conduct" in mind.

[221] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

[222] Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009).

race a barrier to opportunity and therefore offend "Title VII's broad rule of workplace equality."[223] Indeed, Title VII's commitment "to promote [employment based on] job qualifications, rather than on the basis of race or color,"[224] is thwarted to the extent that case law overlooks race-plus-conduct discrimination, particularly in intragroup settings. "Loose race plus" therefore comports with the broad statutory purpose for which Title VII was enacted.

B. "Strict Race Plus" as Race-Plus-Color

The case for "strict race plus" is, perhaps, even stronger because it addresses "combined motives" cases, where both motives are unlawful under Title VII. As race and color are protected categories, the judicial task is simply a matter of vindicating the letter and spirit of Title VII.

1. Text

"Strict race plus" accords with the plain language of Title VII, which prohibits "discriminat[ion] . . . because of . . . race, color, religion, sex, *or* national origin."[225] As the Fifth Circuit held in *Jefferies v. Harris County Community Action Association*, "[t]he use of the word 'or' evidences Congress' intent to prohibit employment discrimination based on any or all of the listed characteristics."[226] This reasoning comports with "strict race plus," yielding the possibility of a claim alleging discrimination based on 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.[227]

The canon of avoiding surplusage also recommends "strict 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 the text treats "race" and "color" as distinct terms, "strict 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."[228] Because "Congress cannot be presumed to do a futile thing,"[229] Congress would not have included both "race" and "color" in the text of Title VII unless it intended for courts to give these terms sepa-

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[223] Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

[224] Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).

[225] 42 U.S.C. § 2000e-2(a) (2006) (emphasis added).

[226] 615 F.2d 1025, 1032 (5th Cir. 1980).

[227] *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 reliable statistics upon which to prove a prima facie case.").

[228] Qi-Zhuo v. Meissner, 70 F.3d 136, 139 (D.C. Cir. 1995).

[229] Halverson v. Slater, 129 F.3d 180, 185 (D.C. Cir. 1997).

rate meanings. Accordingly, "strict race plus" squares with the letter of Title VII.

2. *Legislative History*

"Strict race plus" also comports with the legislative history suggesting that protected 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.[230] 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. By declining to adopt such language, Congress therefore did not intend to preclude combinations like race-plus-color.[231] 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."[232] Even if Congress intended these statutory categories to be isolated, or conflated race and color,[233] legislative history cannot trump statutory text.[234]

Still, what little legislative history there is for color as a protected 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?

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[230] 615 F.2d at 1032 (citing 110 CONG. REC. 2728 (1964)).

[231] *Cf.* Griffith v. Des Moines, 387 F.3d 733 (8th Cir. 2004) (citing 110 CONG. REC. 13,837-38 (1964)) (noting that Congress expressly rejected the notion that Title VII liability attached only when discrimination was the sole cause of the employment action).

[232] 110 CONG. REC. 2556 (1964) (remarks of Rep. Celler) (emphasis added). *See also* McDonald v. Santa Fe Transp. Co., 427 U.S. 273, 287 (1976) (citing CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866)) (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"). 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 interracial discrimination as a "specie of discrimination [that] was not even a minor consideration in the eyes of the sponsors of the legislation").

[233] Significantly, the colloquy on "shade" discrimination cited at footnote 235 provides a partial answer to a possible original-meaning critique that the lexicon of 1964 and 1991—when Title VII was enacted and amended, respectively—may not have distinguished between "race" and "color." However, an extensive historical analysis of the use of "race" and "color" in popular speech is necessary to address this claim directly and, therefore, is beyond the scope of this Article.

[234] *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521 (1992).

> Mr. Celler: I suppose shade of color would be color. The whole embraces all its parts.[235]

"Strict race plus" therefore draws support from the legislative record of Title VII, in addition to its text.

3. *Statutory Purpose*

"Strict 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, "strict 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 "strict 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 [an] employment action, no remedy will exist for discrimination which is directed only toward black females.[236]

Accordingly, "strict race plus" is preferable to the status quo as a matter of public policy. "Strict race plus" has the added benefit of administrability to recommend it because it is limited in scope and thereby avoids the "many-headed Hydra." This metaphor comes from *Judge v. Marsh*,[237] which allowed a black woman employed by the U.S. Army to state a claim under Title VII based on sex and race. Picking up on *Jefferies*, the court held that "[r]ace discrimination directed solely at women is not less invidious because of its specificity."[238] But it also criticized *Jefferies* as overbroad, articulating its own limiting principle: "[T]he *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."[239] In so doing, the court set forth strict

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[235] *See* 110 Cong. Rec. H2553 (daily ed. Feb. 8, 1964), *reprinted in* U.S. EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964, at 3193-94 (1968).
[236] Jefferies v. Harris County Cmty. Action Ass'n, 615 F.2d 1025, 1032-33 (5th Cir. 1980).
[237] 649 F. Supp. 770, 780 (D.D.C. 1986).
[238] *Id.*
[239] *Id.*

parameters so that Title VII would "not be splintered beyond use and recognition."[240] Albeit less restrictive, "strict race plus" similarly cautions against an infinitely additive approach.[241] While some limits may not be ideal, they serve an important administrative interest.[242] The goal is to strike a proper balance between justice and administrability.[243] Thus, although courts must draw a principled line, that line should at least be drawn so that "race plus" is actionable under Title VII.

Conclusion

As our understanding of discrimination becomes more refined, so must our application of Title VII. The need is clear, but the fear is that "race plus" will place the law on a slippery slope and become hopelessly lost in the minutiae of intragroup differences. Mindful of these concerns, "race plus" brings greater sophistication to the case law without overreaching. For race-plus-conduct, "loose race plus" helps address discrimination based on racial stereotypes unrelated to job performance. In race-plus-color cases, "strict race plus" reads "color" back into Title VII. In so doing, "race plus" helps resolve cases where courts would likely fail to redress intragroup race discrimination based on conduct, color, or both.

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 playing field where hard work and skill are rewarded without regard to stereotypes, where the content of our character matters far more than the race of our forebears or the color of our skin.

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[240] *Id.*

[241] For more discussion, see Bradley Allan Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 Geo. Mason U. Civ. Rts. L.J. 199 (2006); Osa A. Benson, *The Intersection of Race, Sex, and Parental Status: Employment Discrimination Against Single Black Women with Children*, 4 Howard Scroll Soc. J. Rev. 37, 48 (1999) (criticizing limitations on the number of pluses in sex-plus doctrine); Pamela J. Smith, *The Ties That Bind Also Free: Revealing the Contours of Judicial Affinity for White Women*, 3 J. Gender Race & Just. 107, 177, 178 (1999) (arguing for recognition of "sex plus race plus marriage" and "sex plus race plus children").

[242] Immutability is another doctrinal safeguard against the slippery slope, although it may not make sense in all cases. *See* cases cited *supra* note 193. *See also* Yoshino, *supra* note 27, at 177 ("'Immutability' is the word scrawled on the wall the judiciary has built across the slippery slope.").

[243] *Cf.* Connecticut v. Teal, 457 U.S. 440, 463 (1982) (Powell, J., dissenting) ("Today's decision takes a long and unhappy step in the direction of confusion.").