NOTES

Coloring in the Gaps of Title VI: Clarifying the Protections Against the Skin-Color Caste System

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INTRODUCTION

In its April 2018 issue, *National Geographic* featured a pair of biracial twins on its cover with diametrically opposite traits: Millie with dark skin, black hair, and brown eyes, and Marcia, with pale skin, blonde hair, and blue eyes.[1] The coverage of this pair raised a perplexing question: what does it mean when two people of the same race could be treated and seen differently? What happens when skin color—traditionally used as a proxy for race—becomes an independent basis for categorizing and treating Marcia and Millie? What happens when race is no longer a "perfect" schema by which we can classify, understand, and presume?

The answer to these questions has always been in the background: color.[2] "Colorism"—the act of discriminating against a person due to differences in skin color—has been used to advance and oppress individuals for centuries, but has been masked by conversations of race. Colorism is the reason why the film *Black Panther* garnered high acclaim for shattering norms and showcasing dark-skinned Black[3] women,[4] and the purported reason why sisters Beyoncé and Solange Knowles have been so successful.[5] As society approaches an ever more

1. *See* Patricia Edmonds, *These Twins Will Make You Rethink Race*, NAT'L GEOGRAPHIC (Apr. 2018), https://www.nationalgeographic.com/magazine/2018/04/race-twins-black-white-biggs/ [https://perma.cc/6NU3-Y65G].

2. Although Marcia and Millie live in England, this Note has restricted its discussion of colorism to the United States and, in particular, the protections afforded under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2012) [hereinafter Title VI].

3. Similar to other colorism scholars, I capitalize "Black" and "White" when referencing these racial groups because these terms have developed into proper nouns for the groups; they are not just adjectives to describe skin color. *See* Kim D. Chanbonpin, *Between Black and White: The Coloring of Asian Americans*, 14 WASH. U. GLOBAL STUD. L. REV. 637, 637 n.2 (2015) (capitalizing "Black" and "White" when referencing racial identity); Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. REV. L. & SOC. CHANGE 657, 665 n.30 (2010) (same).

4. *See, e.g.*, Clarkisha Kent, *'Black Panther' Is Ready to Take Dark-Skinned Actresses (and Colorism) Seriously*, HUFFINGTON POST (Feb. 7, 2018, 7:02 PM), https://www.huffingtonpost.com/entry/Black-panther-is-ready-to-take-dark-skinned-actresses-and-colorism-seriously_us_5a7a090ce4b0d0ef3c0a2049 [https://perma.cc/C34G-ETRP].

5. Jessica Bennett, *EXCLUSIVE: Mathew Knowles Says Internalized Colorism Led Him to Tina Knowles Lawson*, EBONY (Feb. 2, 2018), http://www.ebony.com/entertainment-culture/books/exclusive-mathew-knowles [https://perma.cc/PCX5-JYUC].

multiracial composition,[6] skin color—one of the many proxies for race—is becoming a more noticeable basis for discrimination.[7]

Although color and race have the same root—society's desire to categorize, oppress, and privilege individuals based on some set of characteristics—they are still distinct. Whereas race refers to a social construct that ascribes a certain social meaning to a person,[8] color refers to an inherent physical characteristic[9]—one's skin color—and the resulting social meaning ascribed to that person.[10] Colorism scholars debate about whether colorism is within the umbrella of or distinct from race;[11] this Note is premised on the latter belief.[12] If color is distinct from race, then the discussion of colorism must extend beyond our rigid construction of the Black–White racial dichotomy to a more multifaceted web of subordination that includes interactions between and within certain racial groups.

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6. Research indicates that the millennial generation is forty-four percent minority—making it the most diverse adult generation in American history—and that post-millennial populations will have a non-White majority by 2035. WILLIAM H. FREY, BROOKINGS INST., THE MILLENNIAL GENERATION: A DEMOGRAPHIC BRIDGE TO AMERICA'S DIVERSE FUTURE (2018), https://www.brookings.edu/wp-content/uploads/2018/01/2018-jan_brookings-metro_millennials-a-demographic-bridge-to-americas-diverse-future.pdf. The U.S. Department of Education's National Center for Education Statistics found that students of color comprise over half of public school enrollment nationwide. Adam Fernandez, *Trump Is Undermining Students' Civil Rights. Let's Fight Back*, EDUC. WEEK (June 30, 2017), https://www.edweek.org/ew/articles/2017/06/30/trump-is-undermining-students-civil-rights-lets.html [https://perma.cc/6HNK-MDQ6].

7. Other proxies for race include name, native language, accent, tone, and clothing. *See* Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1497 (2000) (discussing the difference between indicators and that which is being indicated); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3–4 (1994) (discussing how complexion, hair texture, and width of one's nose were used by courts to determine the race of an individual seeking freedom during the slave era).

8. Research has debunked the myth that there is a biological origin to race. *See* López, *supra* note 7, at 11; Kimberly Jade Norwood, *"If You Is White, You's Alright. . . ." Stories About Colorism in America*, 14 WASH. U. GLOBAL STUD. L. REV. 585, 586 n.4 (2015); *see also* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) (noting that the original racial classifications—"Caucasoid, Mongoloid, and Negroid"—have little significance in understanding the human population). Race, here, is discussed solely in terms of its societal construct.

9. Although color is inherent, it is not entirely immutable. *See* Nancy Rosenbaum, *'You Have Dark Skin and You Are Beautiful': The Long Fight Against Skin Bleaching*, MINN. PUB. RADIO (Feb. 25, 2018), https://www.mprnews.org/story/2018/02/25/you-have-dark-skin-and-you-are-beautiful-the-long-fight-against-skin-bleaching [https://perma.cc/6HHZ-ES95] (discussing the practice of skin lightening with skin whitening creams).

10. *See* Jones, *supra* note 7, at 1497. Many scholars include facial features, and, in particular, Afrocentric facial features, as a part of the colorism phenomenon. *See, e.g.*, Angela P. Harris, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 52, 54 (2008). The logic behind this inclusion is that skin color and facial features can be a significant proxy for race, leading to discrimination without actual confirmation or knowledge of one's racial identity.

11. *See* Taunya Lovell Banks, *Multilayered Racism: Courts' Continued Resistance to Colorism Claims*, *in* SHADES OF DIFFERENCE: WHY SKIN COLOR MATTERS 213, 219 (Evelyn Nakano Glenn ed., 2009) (explaining both sides of the debate).

12. Based on my own understanding and research of colorism and racism, I have subscribed to the latter school of thought. As such, I acknowledge that my personal beliefs have influenced the premise of this Note.

This Note's colorism discussion focuses on Title VI of the Civil Rights Act of 1964 (Title VI) because of the breadth of entities and programs the statute influences. Interestingly, legal scholars have yet to discuss colorism claims under Title VI, instead focusing their energy on other civil rights statutes.[13] Unlike its sister provisions, Title VI affects a wide range of entities. Title VI prevents people from being discriminated against on the grounds of race, color, or national origin by "any program or activity receiving Federal financial assistance,"[14] which includes state departments of public safety,[15] colleges,[16] boards of education,[17] medical centers,[18] and private corporations.[19] This breadth is particularly important during a time when there has been a rise in discriminatory conduct.[20] Recently, news magazines and outlets have reported an increasing marginalization of communities of color,[21] resurgence of White supremacy,[22] oppression of legal and undocumented immigrants,[23] and disproportionate policing tactics

13. *See, e.g.*, Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1724 (2000) (discussing Fair Housing Act and Title VII colorism cases); Banks, *supra* note 11, at 216 (same); Kate Sablosky Elengold, *Branding Identity*, 93 DENV. L. REV. 1, 39 n.184 (2015) (same); Jones, *supra* note 7, at 1532 (same); Tennille McCray, *Coloring Inside the Lines: Finding a Solution for Workplace Colorism Claims*, 30 LAW & INEQ. 149, 151 (2012) (focusing on Title VII colorism cases).

14. 42 U.S.C. § 2000d (2012).

15. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 275 (2001) (deciding a case involving Alabama Department of Public Safety).

16. *See, e.g.*, Grove City Coll. v. Bell, 465 U.S. 555, 569–70 (1984) (holding that a college is a recipient of federal funds when it enrolls students who receive federal assistance for educational expenses).

17. *See, e.g.*, Windsor v. Bd. of Educ., No. TDC–14–2287, 2016 WL 4939294, at *9 (D. Md. Sept. 13, 2016) (deciding a case involving a board of education).

18. *See, e.g.*, NAACP v. Med. Ctr. Inc., 657 F.2d 1322, 1332 (3d Cir. 1981) (deciding a case involving a medical center).

19. *See, e.g.*, Middlebrooks v. Godwin Corp., 722 F. Supp. 2d 82, 84 (D.D.C. 2010) (deciding a case involving a private corporation); Dasrath v. Cont'l Airlines, Inc., 467 F. Supp. 2d 431, 432 (D.N.J. 2006) (deciding a case involving Continental Airlines).

20. *See Racial Equality 'Is Under Attack', Experts Warn General Assembly, Urging States to Mark International Day by Stamping out Discrimination, Intolerance*, UNITED NATIONS (Mar. 20, 2018), https://www.un.org/press/en/2018/ga12003.doc.htm [https://perma.cc/8ENT-JHY9].

21. *See, e.g.*, Casey Harden, *How 3 of Donald Trump's Executive Orders Target Communities of Color*, TIME (Feb. 27, 2017), http://time.com/4679727/donald-trump-executive-orders-police/ [https://perma.cc/5926-WK9K]; Danyelle Solomon & Connor Maxwell, *52 Harms in 52 Weeks*, CTR. FOR AM. PROGRESS (Jan. 10, 2018, 9:01 AM), https://www.americanprogress.org/issues/race/reports/2018/01/10/444806/52-harms-52-weeks/ [https://perma.cc/D2FM-EARQ].

22. *See, e.g.*, Sarah Begley, *White Supremacist and Black Nationalist Groups Both Grew During Trump's First Year as President*, TIME (Feb. 21, 2018), http://time.com/5168677/donald-/ [https://perma.cc/7U43-KEFS]; Nicole Chavez et al., *Pittsburgh Synagogue Gunman Said He Wanted All Jews to Die, Criminal Complaint Says*, CNN (Oct. 31, 2018, 12:44 PM), https://www.cnn.com/2018/10/28/us/pittsburgh-synagogue-shooting/index.html [https://perma.cc/7GG8-L89E] (noting that Tree of Life Synagogue shooter allegedly stated he wanted all Jews to die); Zak Cheney-Rice, *When White Supremacists Target the Black Elderly*, N.Y. MAG. (Oct. 28, 2018, 9:15 AM), http://nymag.com/intelligencer/2018/10/white-supremacist-shooting-in-louisville-kentucky-kroger.html [https://perma.cc/5FZC-ZRV9] (discussing how the shooter tried to forcibly enter a Black church but resorted to a local Kroger supermarket when his attempts failed).

23. *See, e.g.*, Dara Lind, *Trump Wants Immigrants to Be Afraid. 2 New Studies Show It's Working.*, VOX (Mar. 5, 2018), https://www.vox.com/policy-and-politics/2018/3/5/17071648/impact-trump-immigration-policy-children [https://perma.cc/EG5G-YPPZ]; Richard Lister, Outcry as Donald Trump

targeting Black people.[24] Moreover, recent considerations to eliminate disparate-impact regulations critical to civil rights laws may enable mortgage lenders, insurance companies, and large banks to adopt policies that are *de jure* neutral but *de facto* discriminatory.[25] Although these current events may not be directly tied to Title VI, they contribute to a climate that may permit more "subtle" forms of discrimination, such as differential treatment on the basis of skin color rather than race. Title VI can be used as a tool to address and defeat this type of color discrimination by leveraging federal government funding to hold recipients accountable.

However, Title VI colorism case law[26] suggests that the opposite practice is occurring: courts are dismissing meritorious color claims due to the lack of tools and knowledge necessary to understand colorism. An analysis of the case law indicates that a cycle is being perpetuated. The cycle begins with plaintiffs and courts; plaintiffs are not pleading color distinctly enough from race, and courts are ill-equipped to treat these claims using theories of colorism. Thus, courts generate poor precedent for future plaintiffs, either by rejecting color claims when they fail to meet the standard for race claims or by permitting ill-pleaded claims that blend issues of color and race without distinguishing between the two. Consequently, plaintiffs do not know how to properly plead colorism, and courts remain confused. Without any interventions in this ongoing cycle, the practice of alleging color discrimination will be seen as superfluous to race and these claims will consequently be dismissed even though meritorious color claims—distinct from race[27]—exist.

This Note serves as an introduction to this burgeoning Title VI color discrimination doctrine and provides an analysis of the litigation trends that perpetuate

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Calls for a US Muslim Ban, BBC (Dec. 8, 2015), http://www.bbc.com/news/av/world-us-canada-35036567/outcry-as-donald-trump-calls-for-us-muslim-ban [https://perma.cc/JKR9-6Y3D]; Harlan York & Sandra Feist, *A Year of Fear: Immigration Policy Under Trump*, HILL (Mar. 28, 2018, 2:00 PM), http://thehill.com/opinion/immigration/380637-a-year-of-fear-immigration-policy-under-trump [https://perma.cc/7SC6-KCH9].

24. *See* Brentin Mock, *How Structural Racism Is Linked to Higher Rates of Police Violence*, CITYLAB (Feb. 18, 2018), https://www.citylab.com/equity/2018/02/the-role-of-structural-racism-in-police-violence/553340/ [https://perma.cc/GN3Z-6QYE]. *See generally* NAZGHOL GHANDNOOSH, THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUALITY IN THE CRIMINAL JUSTICE SYSTEM (2015), http://sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf (discussing reasons why Blacks and Hispanics are disproportionately represented in the criminal justice system).

25. Adam Serwer, *Trump Is Making It Easier to Get Away with Discrimination*, ATLANTIC (Jan. 4, 2019), https://www.theatlantic.com/ideas/archive/2019/01/disparate-impact/579466/ [https://perma.cc/H32W-X7E3].

26. *See infra* note 98. I have limited my research to federal case law since there are fewer state cases that discuss Title VI claims and the focus of this Note is limited to Title VI, not state derivatives of Title VI.

27. Throughout this Note, I will be using "race" when referring to South Asians and Latinos. "Race," for our purposes, includes ethnicity. *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 605 (holding that a person of Arab ancestry may be protected from racial discrimination under Section 1981); *see also* Lau v. Nichols, 414 U.S. 563, 566 (1974) (holding that failure to provide remedial English to Chinese ethnic minority students violated Title VI).

the cycle discussed above. Part I dives into colorism's past and present to demonstrate that colorism has long been a problem that must be resolved. Part II provides an overview of observations from current Title VI color discrimination case law. Lastly, Part III provides recommendations for how courts, plaintiffs, and civil rights lawyers can establish and expand this important body of law.

I. WHAT IS COLORISM AND WHY IS IT IMPORTANT?

Alice Walker first coined the term "colorism" as the "prejudicial or preferential treatment of same-race people based solely on their color."[28] Colorism encompasses both the preferential treatment of light skin over dark skin[29] and the reverse.[30] Although colorism certainly operates against a backdrop of race discrimination, it extends beyond race and can account for discrimination within and between different racial groups. If society only looks at race, then we obscure our understanding of discrimination, its perpetrators, and its underpinnings.[31] Before diving into an analysis of Title VI and the courts' treatment of color discrimination, it is crucial to understand *why* we must protect against colorism as a distinct phenomenon from racism. Colorism in America has been embedded in the fabric of our society since slavery, but this mode of discrimination also preceded slavery as a global issue. Recognizing that colorism is a global phenomenon is helpful for understanding arguments, made later in this Note, to protect against colorism outside the Black–White paradigm. This Part will briefly review the roots of colorism and the modern manifestations of the skin-color caste system.

A. ROOTS OF COLORISM

1. Colorism as a Global Phenomenon

Colorism as a societal slotting device has a global presence.[32] Although a large-scale discussion about colorism as a global issue is beyond the scope of this Note, it is worthwhile to briefly discuss the reach of this phenomenon for readers who are unfamiliar with its breadth and depth. Although much of the colorism research and discussion in the United States revolves around the Black–White paradigm,[33] it is my hope that this section provides a broader foundation of colorism for readers. In this section, I will first use the example of colorism in the

28. *See* Jones, *supra* note 7, at 1489 n.5 (quoting ALICE WALKER, *If the Present Looks like the Past, What Does the Future Look Like?*, *in* IN SEARCH OF OUR MOTHERS' GARDENS: WOMANIST PROSE 290, 290 (1983)).

29. Igor Ryabov, *Educational Outcomes of Asian and Hispanic Americans: The Significance of Skin Color*, 44 RES. SOC. STRATIFICATION & MOBILITY 1, 6 (2016).

30. *See, e.g.*, Windsor v. Bd. of Educ., No. TDC-14-2287, 2016 WL 4939294 (D. Md. Sept. 13, 2016) (deciding a case in which a light-skinned plaintiff alleged color discrimination).

31. Jones, *supra* note 3, at 665.

32. *See* Norwood, *supra* note 8, at 587–91.

33. *See infra* Section I.B.

Indian subcontinent[34] to discuss colonialism's role in the development of colorism and then provide a glimpse into the broader global skin-whitening market.[35]

India's skin-color caste system is similar to that of the United States: light skin is supreme to dark skin and is a symbol of status and privilege.[36] However this was not the case prior to colonialism. The Hindu pantheon consists of many venerated gods and goddesses that are dark-skinned, indicating that being dark-skinned was not an obstacle to overcome.[37] The names of deities, such as Krishna and Kali, translate to "black" in Sanskrit, and many scriptures include dark-complexioned characters among the leaders, singers, and intellectuals.[38] It was not until the foreign invasions of India—by the lighter skinned Mughals, Portuguese, and British—that skin color became a stratification tool.[39] During British colonialization, the British provided light-skinned Indians with more job opportunities than dark-skinned Indians.[40] The British were quick to draw the line between themselves and Indians, creating "White" and "Black" towns, deeming themselves to be more intelligent, and relegating Indians to the same status as animals.[41] After hundreds of years of stratification, Indians slowly adopted the ideology that fairer skin was superior and began to use colorism as a privileging tool among themselves.

To date, colorism remains a prominent feature of many societies around the world. Several countries, including China, Korea, India, and many in Africa, religiously use skin-bleaching products to obtain lighter skin complexions.[42] Despite

34. I use the term "Indian subcontinent" to discuss India as it existed during British colonization, which included Pakistan, Bangladesh, Sri Lanka, and Nepal.

35. *See* Neha Mishra, *India and Colorism: The Finer Nuances*, 14 WASH. U. GLOBAL STUD. L. REV. 725, 730–35 (2015). The evolution of colorism in India is similar to that of East Asia and West Africa. On the other hand, colorism's origin in Latin America is more similar to that of the United States. As a result of the slave trade, one-third of Latin Americans are of African descent. Tanya Katerí Hernández, *Colorism and the Law in Latin America—Global Perspectives on Colorism Conference Remarks*, 14 WASH. U. GLOBAL STUD. L. REV. 683, 683 (2015). After conducting a study on four large countries in the region, Princeton University's Project on Ethnicity and Race in Latin America (PERLA) concluded that skin color was a "central axis of social stratification." *Id*. at 684.

36. *See* Angela R. Dixon & Edward E. Telles, *Skin Color and Colorism: Global Research, Concepts, and Measurement*, 43 ANN. REV. SOC. 405, 406, 410–11 (2017).

37. Mishra, *supra* note 35, at 729. Lord Ram, Lord Vishnu, Krishna, Draupadi, and Kali are all gods and goddesses with black skin. *Id*. at 729–30. This observation does not necessarily suggest that these deities were worshipped *because* of their skin color, but it is noteworthy that the most idolized beings prior to (and after) colonization had dark skin.

38. *Id*.; *see also* Arin Basu, *"Dark Skinned" Venerable Beings in the Hindu Pantheon*, MEDIUM (June 5, 2016), https://medium.com/thoughts-philosophy-writing/dark-skinned-venerable-beings-in-the-hindu-pantheon-c24ae849d541 [https://perma.cc/X4G8-A5ZS].

39. *See* Mishra, *supra* note 35, at 730–31.

40. *Id*. at 731.

41. *Id*. at 732.

42. *See id*. at 733; Helene Cooper, *Where Beauty Means Bleached Skin*, N.Y. TIMES (Nov. 26, 2016), https://www.nytimes.com/2016/11/26/fashion/skin-bleaching-south-africa-women.html [https://perma.cc/CDN6-XA3X]; Taruka Srivastav, *Skin Whitening Cream Sales Still Boom in India Despite Rules Against Ads Deriding Darker Skin*, DRUM (Sept. 15, 2017, 7:06 AM), http://www.thedrum.com/news/2017/09/15/skin-whitening-cream-sales-still-boom-india-despite-rules-against-ads-deriding [https://perma.cc/G2VF-8KU2]. Because skin lightening has been a practice so ingrained in many of these

the World Health Organization's public service announcements cautioning consumers of the dangerous mercury content of these products,[43] sales are booming. The global skin-lightening market is expected to reach $31.2 billion by 2024.[44] West Africa is home to a multibillion-dollar industry of skin-lightening products, which has persisted despite country-wide bans of chemicals that disrupt melanin production.[45] According to some estimates, seventy percent of West African women use skin-whitening cream;[46] forty percent in Hong Kong, Malaysia, the Philippines, South Korea, and Taiwan;[47] and sixty-one percent in India.[48] In India, the skin-whitening market is valued at over $200 million, accounted for forty-six percent of the facial care market in 2012,[49] and far exceeds its Coca-Cola and tea industries.[50]

Colorism is a phenomenon that has infiltrated many regions throughout the world and, whether rooted in slavery or colonization, it has insidiously privileged certain groups of people over others solely based on one inherent characteristic.

2. Slavery as America's Root in Colorism

Although scholarship on colorism in the United States has been fairly recent phenomenon, the special privileges provided to lighter skinned Black people stretch back to this country's inception.[51] Thus, in alignment with the rest of the world, colorism has been a significant factor in how American society has disparately treated individuals.

The establishment of the slavery regime created the association between white skin and freedom, and black skin and enslavement.[52] Once "escape valves"—or policies that might have provided relief from slavery for some—were largely

countries, skin-bleaching agents have become ubiquitous in beauty and health products. This industry standard has made it difficult for consumers to thwart this norm.

43. *See* WORLD HEALTH ORG., MERCURY & HEALTH (Mar. 31, 2017), http://www.who.int/en/news-room/fact-sheets/detail/mercury-and-health [https://perma.cc/BP32-8M66]; *cf. Mercury Poisoning Linked to Skin Products*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/ForConsumers/ConsumerUpdates/ucm294849.htm [https://perma.cc/9852-LSS8] (last updated July 26, 2016).

44. *Obsession with Lighter Skin Tones in Asia, The Middle East, and Africa Drives Opportunities in The Global Skin Lighteners Market*, GLOBAL INDUSTRY ANALYSTS, INC. (Mar. 2018), https://www.strategyr.com/MarketResearch/Skin_Lighteners_Market_Trends.asp [https://perma.cc/KN4S-F34J].

45. *See* Cooper, *supra* note 42.

46. *Id.*

47. Leland Ware, *"Color Struck": Intragroup and Cross-Racial Color Discrimination*, 13 CONN. PUB. INT. L.J. 75, 84 (2013).

48. Coco Khan, *Skin-lightening* Creams *Are Dangerous – Yet Business Is Booming. Can the Trade Be Stopped?*, GUARDIAN (Apr. 23, 2018), https://www.theguardian.com/world/2018/apr/23/skin-lightening-creams-are-dangerous-yet-business-is-booming-can-the-trade-be-stopped [https://perma.cc/3W6X-8NAY].

49. Srivastav, *supra* note 42.

50. Ware, *supra* note 47, at 83.

51. Although there is evidence indicating that the influence of slavery on socio-cultural hierarchical structures is present in both North and South America, I am solely focusing on colorism and racism in the United States.

52. Norwood, *supra* note 8, at 592.

closed,[53] the skin-color hierarchy was cemented by a mosaic of needs, beliefs, and practices that privileged white skin and dehumanized dark skin.[54] White slave owners "privileged" lighter skinned slaves by assigning them more indoor duties and tasks that necessitated direct contact with slave owners, whereas darker skinned slaves were tasked with the more labor-intensive responsibilities outdoors and under the sun.[55] Lighter skin slaves were also considered to be more physically appealing, more valuable economically, and intellectually superior, which ultimately corresponded to more advantages in the White-dominated society.[56] As a result, the purported Black–White dichotomy created by the "one-drop" rule[57] was false. Instead, the system reflected a spectrum of treatment based on color, which was then adopted and perpetuated by the African-American community.[58]

Courts also used skin tone to impose a presumption of enslaved or free status on plaintiffs suing for their freedom, as demonstrated by *Hudgins v. Wright*.[59] In *Hudgins*, three generations of women sued their slave owner, claiming that they were entitled to freedom because they were descendants of a free Native-American woman.[60] Under the laws governing slavery, claimants had the burden to prove a right to freedom by actual emancipation or by demonstrating descent from an emancipated woman.[61] However, because there was no documentation to prove one's maternal lineage, the court judged the claimant's skin color, hair texture, and nose width to determine the claimant's burden of proof and, thus, legal status.[62] The court determined that the claimants were "absolutely free" because of the women's long, straight, black hair and copper skin akin to that of "native

53. *Id*. Initially, African slaves in Virginia and Carolina colonies could be freed if they converted to Christianity, but this escape valve was quickly closed in 1667, which further established the link between skin color and legal status. *Id*.

54. *Id*.

55. JeffriAnne Wilder, *Revisiting "Color Names and Color Notions": A Contemporary Examination of the Language and Attitudes of Skin Color Among Young Black Women*, 41 J. BLACK STUD. 184, 186 (2010).

56. Norwood, *supra* note 8, at 592–93; Wilder, *supra* note 55, at 186 (mentioning that, as a result of these false perceptions, light-skinned Blacks had increased opportunities in education, manumission from slavery, and ability to be landowners).

57. The "one-drop" rule stated that any amount of Black ancestry made a person Black and defined the Black race as it is known today. *See* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1163 (1997).

58. Lance Hannon et al., *The Relationship Between Skin Tone and School Suspension for African Americans*, 5 RACE & SOC. PROBS. 281, 283 (2013). Hannon mentions how activities such as marriage, family formation, and membership organizations were influenced by one's skin color. *Id*. The one-drop rule still defined who was a slave and who was not. But, beyond this bright line, skin color afforded a spectrum of privileges.

59. 11 Va. (1 Hen. & M.) 134 (1806); *see* López, *supra* note 7, at 1–2.

60. *Hudgins*, 11 Va. (1 Hen. & M.) at 137. By 1691, the enslavement of Native-Americans was prohibited under Virginia law. *Id*. at 139.

61. *Id*. at 138.

62. *Id*. ("Nature has stampt upon the *African* and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of colour either disappears or becomes doubtful; a flat nose and woolly head of hair.").

aborigines of this country."[63] Though color was used as a proxy to arbitrarily categorize individuals on the basis of race, this case demonstrates how easily, and confidently, the White-dominant society used color as one of the factors to determine a person's freedom. *Hudgins* and the documented understanding of the slavery regime show the roots of colorism in the United States and inform our understanding of how colorism endures today.

B. PRESENT DAY COLORISM

Today's skin-color caste system has not evolved significantly since *Hudgins*—the shade of one's skin still affords or strips people of opportunity. Even during the civil rights movement, advocacy groups were accused of colorism.[64] This section reviews current literature and research examining skin color's effect on individuals in the contexts of socioeconomic stratification, employment, policing, crime, and the school environment.

1. Socioeconomic Differences

A collection of studies reveal that skin color may provide certain socioeconomic benefits such as higher income, wages, social status, educational attainment, and job security.[65] Income for Black women increases by $673 annually for every incremental increase of lightness on the color scale, which results in a "very light" brown woman earning more than $2,600 more per year than a "very dark" brown woman.[66] For men, skin color also correlated to mean hourly wages, resulting in a ten percent decrease in wages for medium- and dark-skinned men compared to White men but relatively equal pay between light-skinned Blacks

63. *Id.* at 140–41.

64. Although Claudette Colvin refused to give up her bus seat to a white person before Rosa Parks, the movement found Rosa Parks to be a better icon, possibly in part because of her skin color. *See* Margot Adler, *Before Rosa Parks, There Was Claudette Colvin*, NPR (Mar. 15, 2009, 12:46 AM), https://www.npr.org/2009/03/15/101719889/before-rosa-parks-there-was-claudette-colvin [https://perma.cc/9PNZ-GNH4]. Civil rights advocacy groups also employed colorism when making initial leadership appointments. All except one of the twenty-three men and women among W.E.B. DuBois's Talented Tenth program were light-skinned and, at its inception, the National Association for the Advancement of Color People was predominantly staffed with white and light-skinned Black individuals. *See* Jones, *supra* note 7, at 1517; Ibram X. Kendi, *Colorism as Racism: Garvey, Du Bois and the Other Color Line*, BLACK PERSP. (May 24, 2017), https://www.aaihs.org/colorism-as-racism-garvey-du-bois-and-the-other-color-line/ [https://perma.cc/VQ92-9CCH].

65. *See generally* Arthur H. Goldsmith et al., *Shades of Discrimination: Skin Tone and Wages*, 96 AM. ECON. REV. 242 (2006) (concluding that skin color has an important effect on wages); Jennifer L. Hochschild & Vesla Weaver, *The Skin Color Paradox and the American Racial Order*, 86 SOC. FORCES 643 (2007) (discussing how skin color impacts socioeconomic status, education, income, and political outcomes); Margaret L. Hunter, *"If You're Light You're Alright": Light Skin Color as Social Capital for Women of Color*, 16 GENDER & SOC'Y 175 (2002) (analyzing how skin color affects income, education, and spousal status); Maxine S. Thompson & Steve McDonald, *Race, Skin Tone, and Educational Achievement*, 59 SOC. PERSP. 91 (2016) (discussing skin color's significant impact on grade point averages across and within racial groups).

66. Hunter, *supra* note 65, at 183. In this study, there were five categories of skin color: very dark, dark, medium, light, and very light. *Id.* at 180. Trained interviewers rated respondents' skin colors by using a color palette for comparison. *Id.* Lighter skinned Latina women received higher income than darker skinned Latina women, but this result was not statistically significant. *Id.* at 184.

and Whites, suggesting that society treats these two groups similarly.[67] In addition, studies have shown that light-skinned Black individuals, on average, obtained more than two additional years of education,[68] were more likely to find a job,[69] and were more likely to receive a promotion.[70] Similarly, compared to their lighter skinned counterparts, dark-brown-skinned Asians and Hispanics were significantly less likely to complete high school; they were also twenty-six percent and twenty-one percent less likely to attend college and earn a post-secondary degree, respectively.[71] Moreover, studies show light-skinned Black males with only a bachelor's degree and basic work experience, can still be chosen over a dark-skinned Black males with a Master of Business Administration and post-managerial experience for the same position.[72] This same result occurred for women applying for jobs.[73] Together, these studies indicate that the skin-color caste system more adversely impacts the professional and financial potential of darker skinned individuals.

2. Employment Discrimination

Ample data and case law from the United States Equal Employment Opportunity Commission (EEOC) indicate that the skin-color caste system pervades employers' treatment of employees.[74] In 2007, the EEOC launched a new initiative, Eradicating Racism and Colorism from Employment (E-RACE), to address the growing caseload in race- and color-based discrimination, which had increased threefold from 1992 to 2006.[75] The EEOC, which enforces Title VII,

67. *See* Goldsmith, *supra* note 65, at 244–45. The difference in wages between light-skinned men and their White counterparts was slight and statistically insignificant, suggesting that light-skinned Blacks received wages relatively on par with Whites. *Id*. at 245.

68. Thompson & McDonald, *supra* note 65, at 94 (summarizing findings from 1991 to 2005).

69. Igor Ryabov, *Colorism and School-to-Work and School-to-College Transitions of African American Adolescents*, 5 RACE SOC. PROBS. 15, 26 (2013).

70. *See* Hochschild & Weaver, *supra* note 65, at 649 (discussing how skin color affected professional promotions across race and ethnicity and how firm managers hired fair-skinned more than dark-skinned Black job applicants, despite identical credentials).

71. Ryabov, *supra* note 29, at 6.

72. *See* Matthew S. Harrison, Colorism in the Job Selection Process: Are There Preferential Differences Within the Black Race? (Dec. 2005) (unpublished M.S. thesis, University of Georgia) (on file with the Electronic Theses and Dissertation Database, University of Georgia). Controlling for credentials, experiments where White subjects acted like firm managers found that the firm managers hire more fair-skinned than dark-skinned Black applicants. Hochschild & Weaver, *supra* note 65, at 649.

73. *See* Harrison, *supra* note 72, at 22.

74. To file an employment discrimination lawsuit, employees must first file a charge of discrimination with the EEOC. *Filing a Charge of Discrimination*, U.S. EQUAL EMP'T. OPPORTUNITY COMM'N, https://www.eeoc.gov/employees/charge.cfm [https://perma.cc/3FHQ-QZAS] (last visited Nov. 22, 2018). The EEOC will then provide the employee with a Notice of Right to Sue during or after the EEOC investigates the charge, which then permits the employee to file a lawsuit in state or federal court. *Filing a Lawsuit*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/employees/lawsuit.cfm [https://perma.cc/TJ88-3HTK] (last visited Nov. 22, 2018).

75. *EEOC Takes New Approach to Fighting Racism and Colorism in the 21st Century Workplace*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Feb. 28, 2007), https://www.eeoc.gov/eeoc/newsroom/release/2-28-07.cfm [https://perma.cc/YC23-M6EB]. Color-based discrimination complaints increased from 374 in fiscal year 1992 to 1,241 in fiscal year 2006. *Id*.

fielded 1,555 color claims in the 2003 fiscal year,[76] which grew to 2,756 color claims in 2014.[77] Because Title VII has a unique influence on the development of Title VI doctrines, these findings are particularly useful for understanding colorism in the Title VI context.[78] Thus, Title VII colorism claims provide a breadth of cases from which we can glean how color discrimination unfolds in society.

One example of a case that started as an EEOC complaint—and is now one of the most cited cases in legal discussions of colorism—is *Walker v. Secretary of the Treasury*.[79] In *Walker*, a light-skinned Black employee filed a Title VII lawsuit alleging that she was wrongfully terminated because her dark-skinned Black employer was prejudiced against light-skinned Blacks.[80] The district court denied the defendant's motion for summary judgment and concluded that the plaintiff presented a question of fact that could not be reached at summary judgment.[81] This case was one of the first times a court addressed colorism directly and prevented the dismissal of a meritorious colorism claim.

Additionally, the EEOC website discusses eight pertinent cases it has settled from 2003 to 2015,[82] including a case in which a dark-skinned Bangladeshi store manager was told that she could not work at a particular storefront because she was too dark.[83] The supervisor told her that she would be terminated if she did not accept a demotion and transfer to another store location where dark-skinned people should be working.[84] The case was settled for $80,000.[85] The growing number of color discrimination claims alleged under Title VI's sister provision, Title VII, provides hope that the protections against color discrimination can be expanded to Title VI.[86]

3. Criminal Justice

The skin-color caste system also permeates the criminal justice system. A 2007 analysis indicated that the average sentence for Black prisoners was 378

76. Joseph A. Sacomano Jr., *Skin Color Bias Is Growing As a Basis for Discrimination Claims*, JACKSON LEWIS (Apr. 7, 2004), https://www.jacksonlewis.com/resources-publication/skin-color-bias-growing-basis-discrimination-claims [https://perma.cc/L6DM-5WMQ].

77. Cynthia Sims & Malar Hirudayaraj, *The Impact of Colorism on the Career Aspirations and Career Opportunities of Women in India*, 18 ADVANCES DEVELOPING HUM. RESOURCES 38, 39 (2016).

78. *See infra* note 98.

79. 713 F. Supp. 403 (N.D. Ga. 1989), *aff'd*, 953 F.2d 650 (11th Cir. 1992).

80. *Id.* at 404–05.

81. *Id.* at 408.

82. *Significant EEOC Race/Color Cases*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/initiatives/e-race/caselist.cfm#color [https://perma.cc/KVN2-TCWG] (last visited Apr. 12, 2019).

83. Complaint in Intervention at 4, EEOC v. Blockbuster, Inc., No. 07-cv-02221 (S.D.N.Y July 3, 2007).

84. *Id.*

85. Consent Decree at 3, EEOC v. Blockbuster, Inc., No. 07-cv-02221 (S.D.N.Y Apr. 7, 2008).

86. But color discrimination cases have often been resolved in favor of the defendant, either by granting the defendants' motions to dismiss or by motions for summary judgment. *See, e.g.*, Lindsay v. Pizza Hut of Am., 57 F. App'x. 648, 649–51 (6th Cir. 2003) (granting summary judgment for defendant); Hill v. Textron Auto. Interiors, Inc., 160 F. Supp. 2d 179, 188 (D.N.H. 2001) (same); Santiago v. Stryker Corp., 10 F. Supp. 2d 93, 99 (D.P.R. 1998) (same).

days longer than White prisoners.[87] When controlling for type of offense, socioeconomic status, and demographics, dark-skinned prisoners received sentences a year-and-a-half longer than those of their White counterparts, and the difference between light-skinned Black offenders and White offenders was statistically indistinguishable.[88] Additionally, research indicates that the same pattern holds true for female offenders: light-skinned Black women's sentences were twelve percent shorter than those of their dark-skinned counterparts.[89]

4. School Environment

The skin-color caste system has also infiltrated the school environment. Scholars have noted that children of color develop color consciousness early on as the result of internalizing their families' "color complex" and of facing increased disciplinary issues in school.[90] A recent study analyzed the National Longitudinal Survey of Youth released by the U.S. Bureau of Labor Statistics, which interviewed 1,797 Black youths and, among other measurements, included interviewer-assessed skin tone as one of its measures.[91] The study found that a very dark-skinned Black female student was more than three times as likely to be suspended compared to a very light-skinned Black female student.[92] Very dark-skinned male students were two and a half times more likely to be suspended compared to their very light-skinned counterparts.[93] Considering that suspensions are closely linked to reduced academic achievement, and in light of the "school-to-prison pipeline,"[94] this study suggests that darker skinned Black students are

87. Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 284 (2010). The analysis consisted of 67,000 first-offense male felons incarcerated in Georgia. *Id*.

88. *Id*. The study analyzed first-time offenders over a span of seven years, from 1995 through 2002. *Id*. Light-skinned Black prisoners, on average, received sentences three and a half months longer than their White counterparts, and medium-skinned Black prisoners were sentenced, on average, a year longer than their White counterparts. *Id*.

89. Jill Viglione et al., *The Impact of Light Skin on Prison Time for Black Female Offenders*, 48 SOC. SCI. J. 250, 255 (2011).

90. *See* Hannon, *supra* note 58, at 292; McCray, *supra* note 13, at 161 (citing KATHY RUSSELL ET AL., THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS 95 (1992)).

91. Hannon, *supra* note 58, at 284.

92. *Id*. at 287.

93. *Id*.

94. The "school-to-prison pipeline" refers to the tendency of schools to funnel students with disciplinary issues into the juvenile justice system. *See, e.g*., Christopher A. Mallett, *The School-to-Prison Pipeline: Disproportionate Impact on Vulnerable Children and Adolescents*, 49 EDUC. & URB. SOC'Y 563 (2016); Carla Shedd, *How the School-to-Prison Pipeline Is Created*, ATLANTIC (Oct. 27, 2015), https://www.theatlantic.com/politics/archive/2015/10/how-the-school-to-prison-pipeline-is-created/433230/ [https://perma.cc/VPV5-73E3]. Many studies have concluded that suspensions correlate with lower academic achievement. *See, e.g*., Matt Barnum, *Suspensions Really Do Hurt Students Academically, New Studies Confirm, But Maybe Less Than Previously Thought*, CHALKBEAT (Aug. 23, 2018), https://www.chalkbeat.org/posts/us/2018/08/23/suspensions-really-do-hurt-students-academically-new-studies-confirm-but-maybe-less-than-previously-thought/ [https://perma.cc/K6KQ-2L9S]; *How School Suspensions Affect Student Achievement*, FUTUREED (Sept. 19, 2018), https://www.future-ed.org/how-school-suspensions-affect-student-achievement/ [https://perma.cc/TU9B-KF3V] (noting that suspensions are tied to lower math and English language arts tests).

more vulnerable to the school-to-prison pipeline than their lighter skinned counterparts.

From school to the courtroom to the workplace, research strongly suggests that the skin-color caste system is a slotting device that privileges some and oppresses others. The question then arises: how can law combat this phenomenon?

II. TITLE VI AND COLORISM

This Note answers the above question with a focus on litigation under Title VI of the Civil Rights Act of 1964. Title VI, which borrows jurisprudence from the analogous Title VII doctrine,[95] is one of the few civil rights provisions that prohibits discrimination on the basis of color.[96] In addition, because Title VI reaches a wide range of programs and activities, and noncompliance with Title VI puts these entities' funding in jeopardy, Title VI incentivizes compliance.[97]

I found thirteen Title VI cases (dating back to 1977) that decided a color discrimination claim or included dicta about colorism.[98] A review of these cases

95. Title VI doctrine leans heavily on Title VII doctrine, and the two are often compared. For example, the Seventh Circuit in *Williams v. Wendler* drew similarities between Title VI and Title VII, stating that "Title VI, like Title VII, forbids discrimination on the basis of 'color' as well as on the basis of 'race.' Light-skinned blacks sometimes discriminate against dark-skinned blacks, and vice versa, and either form of discrimination is literally color discrimination." 530 F.3d 584, 587 (2008). A few other circuits have adopted the Title VII framework when a plaintiff alleges disparate treatment under Title VI, which further reinforces the notion that courts lean on Title VII when analyzing Title VI discrimination claims. *See* Rashdan v. Geissberger, 764 F.3d 1179, 1182 (9th Cir. 2014) (holding Title VII's burden-shifting framework also applies to Title VI disparate treatment claims); NAACP v. Med. Ctr. Inc., 657 F.2d 1322, 1331 (3d Cir. 1981) (noting that the use of an effects test in a Title VI case is in harmony with Title VII).

96. 42 U.S.C. § 2000d (2012). Several titles of the Civil Rights Act of 1964, as well as the Fair Housing Act of the Civil Rights Act of 1968, have "color" in the text of their statutes. *See, e.g.*, Rodriguez v. Gattuso, 795 F. Supp. 860, 865 (N.D. Ill. 1992) (holding under the Fair Housing Act that "[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."); Shah v. Gen. Elec. Co., No. C 83–0654–L(B), 1986 WL 8789, at *2 (W.D. Ky. Apr. 14, 1986) (recognizing color claims under § 1981 and Title VII); Felix v. Marquez, No. 78-2314, 1981 WL 275, at *11 (D.D.C. Mar. 26, 1981) ("Discrimination on account of color is expressly forbidden by the 1964 Civil Rights Act, not only in Title VII (employment), but also in Titles II (public accommodations), III (public facilities), IV (public education), VI (federally assisted programs), VIII (voting) and IX (community relations services).").

There may be debate as to whether the drafters meant to include "color" as a surrogate for race or to prohibit the type of discrimination discussed in this Note. Aside from the plain meaning of the word, legislative history may bolster our understanding of "color." Specific exchanges between representatives during consideration of the Civil Rights Act of 1964 indicate that discrimination on the basis of skin color was intended to be prohibited. Specifically, one representative asked, "would it be illegal not to hire because of the shade of color, that is because the skin of the applicant is too dark?" 110 CONG. REC. H2553 (daily ed. Feb. 8, 1964) (statement of Rep. Abernethy). Another representative responded that this type of discrimination would be covered because "shade of color would be color. The whole embraces all its parts." *Id.* (statement of Rep. Celler). This legislative history demonstrates the intent to target discrimination on the basis of the shade of one's skin, and even suggests protection against intraracial discrimination. *See id.* at H2554 (discussing whether the provisions of the Civil Rights Act would apply in a situation where "light-skinned Negroes refuse to hire Negroes of dark skin").

97. *See* 42 U.S.C. § 2000d.

98. *See* Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655 (2d Cir. 2012); Karlen v. Landon, 503 F. App'x 44 (2d Cir. 2012); Williams v. Wendler, 530 F.3d 584 (7th Cir. 2008); NAACP v. Med. Ctr., Inc.,

sheds light on the courts' confusion around colorism and the resulting incoherencies in the doctrine. Through my review, I have gleaned five insights: (1) many race discrimination cases are actually cases about color discrimination, (2) courts often conflate color and race claims when they are alleged together even though they require different factual supports, (3) color claims can offer protection against intra-racial discrimination, (4) the courts' understanding of colorism is limited to the Black–White paradigm, and (5) the courts' lack of knowledge about colorism may result in their injecting their own skin color assessment when determining a colorism claim. These insights both demonstrate that plaintiffs are not adequately pleading color claims and that courts are ill-equipped to handle these claims. This results in courts muddling the colorism doctrine. Any mention of "muddling the colorism doctrine" below is significant because this muddling leads to confusion for future plaintiffs on how to plead colorism claims, and for courts on how to treat color claims. This, thus, increases the likelihood that meritorious color claims will be dismissed.

A. WRONGLY PLEADED AND WRONGLY DECIDED RACE DISCRIMINATION CASES

Despite Title VI language specifically detailing "color" as a grounds for bringing a claim, courts have been incorrectly treating color discrimination claims as race discrimination.[99] This likely happens because plaintiffs incorrectly plead their cases based on racial discrimination, when they really have a color discrimination claim.[100] In ruling on these poorly pleaded allegations, the court further muddles the race–color line and risks dismissing meritorious colorism cases under the proper standard.

A few cases illustrate opportunities where courts could have furthered the Title VI colorism doctrine. For example, in *Dasrath v. Continental Airlines, Inc*., Continental Airlines' treatment of Michael Dasrath was incorrectly categorized as racial discrimination rather than color-based discrimination, leading to an additional ground on which the case could be dismissed. Dasrath, an Indo-Guyanese plaintiff, filed a Title VI claim alleging that Continental Airlines unlawfully discriminated against him when crew members and passengers observed suspicious behavior between two brown-skinned passengers and proceeded to remove all three brown-skinned passengers aboard the flight, including Dasrath, from the plane before departure.[101] Dasrath alleged that the captain and

657 F.2d 1322 (3d Cir. 1981); Desouza v. Kennedy, No. 3:16-cv-01126, 2017 WL 3431393 (D. Conn. Aug. 9, 2017); Peek v. SunTrust Mortg., Inc., 1:16–cv–1415(LMB/IDD), 2017 WL 3258729 (E.D. Va. Feb. 15, 2017); Moore v. City of New York, 15-CV-6600 (GBD) (JLC), 2017 WL 35450 (S.D.N.Y. Jan. 3, 2017); Windsor v. Bd. of Educ., No. TDC-14-2287, 2016 WL 4939294 (D. Md. Sept. 13, 2016); Middlebrooks v. Godwin Corp., 722 F. Supp. 2d 82 (D.D.C. 2010); K.T. v. Natalia I.S.D., No. SA-09-CV-285-XR, 2010 WL 1484709 (W.D. Tex. Apr. 12, 2010); Dasrath v. Cont'l Airlines, Inc., 467 F. Supp. 2d 431 (D.N.J. 2006); Brewer v. W. Irondequoit Cent. Sch. Dist., 32 F. Supp. 2d. 619 (W.D.N.Y 1999); Vigil v. City & Cty. of Denver, No. 77-F-197, 1977 WL 41 (D. Colo. May 23, 1977).

99. *See, e.g*., *Zeno*, 702 F.3d at 655; *Dasrath*, 467 F. Supp. 2d at 431.

100. *See infra* Section II.B.

101. *Dasrath*, 467 F. Supp. 2d at 435–37. The other two passengers were Indian and Filipino. *Id*. at 435.

crew members were *racially* discriminatory and established a prima facie case of discrimination by stating in the complaint that he was a member of a racial minority.[102] However, although Dasrath was assuredly a member of a racial minority, the discrimination he faced was principally on the basis of color. The crew members and passengers used phrases such as "Middle Eastern,"[103] "dark complexioned," and "brown skin men," to describe Dasrath and the other men, suggesting that they were classifying these passengers on the basis of color rather than race.[104] Because the facts of the case—which might have been utilized to mount a credible color-based discrimination claim—failed to meet the standard for race claims, and also because Dasrath failed to demonstrate that the defendant's proffered reason of security risks was mere pretext, the court granted the defendant's motion for summary judgment.[105]

Dasrath demonstrates how an incoherence between the facts and legal claim can work in the defendant's favor. The facts of the case pointed to discrimination on the basis of skin color; however, because the claim was based on race discrimination, the court found that the facts did not support a *race* discrimination claim. It is difficult to deny that colorism influenced the passengers' and crewmembers' suspicions, considering that most of the identifying terms were judgments based on skin color. Although it may not have been enough in this particular decision,[106] alleging color discrimination, and pointing out that all the White passengers remained on the plane while all the "brown skin" passengers were removed, may have strengthened the plaintiff's overall claim. Moreover, it would have at least prevented the court from using these identifying terms as proof that there was no racial discrimination present. Overall, *Dasrath* exemplifies the types of cases that carry an increased potential for dismissal if not properly brought as color discrimination.

Additionally, law pertaining to student-on-student harassment can help to expand the color discrimination theory and prevent meritorious claims from being dismissed. In this context, plaintiffs often allege race discrimination in lieu of color discrimination, likely because courts have never recognized colorism in this context. The harassment must be "discriminatory in effect," but courts often

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102. *Id.* at 446. The plaintiff satisfactorily established a prima facie case of discrimination because he was: (1) a member of a racial minority, (2) a lawful passenger on a flight, and (3) removed from the plane whereas White passengers were allowed to stay. *Id.*

103. Even though crew members referred to the passengers as "Middle Eastern," technically a term referring to national origin, it is still a part of color discrimination because it was based on the plaintiff's skin color, without knowledge of the passengers' national origin.

104. *See Dasrath*, 467 F. Supp. 2d at 447. The court also states that "[e]ven Ms. Brooks's reference to 'brown skin men' was purely as a means of identification of the three men in the first class section." *Id.*

105. *See id.* at 449.

106. This incident took place less than three months after the events of September 11, 2001, and a week after a shoe bomber attempted to bomb an aircraft heading from Paris to the United States. *Id.* at 446. Because of these circumstances, there was likely a heightened concern regarding security and aircraft safety, which outweighed the plaintiff's interests in protecting himself from discriminatory biases during this time.

categorize this as discriminatory harassment, and subsequent deliberate indifference as "racial discrimination" without recognizing colorism when it arises.[107] As a result, the courts further muddle the Title VI race–color doctrinal lines, creating additional inconsistency and uncertainty for future plaintiffs and increasing the risk of meritorious color claims being dismissed.

The following two cases demonstrate factual evidence brought to courts that should be categorized as color, not race, discrimination. In *Zeno v. Pine Plains Central School District*, Anthony, a dark-skinned, biracial (half-White, half-Latino) student moved to a racially homogenous school where he was consistently harassed, menaced, and repeatedly called "nigger"[108] with little response from the school.[109] Anthony did not identify as Black but was the only dark-skinned student, which resulted in this discriminatory conduct.[110] The Second Circuit even framed the harassment as "pejorative references to [Anthony's] skin tone."[111] The Second Circuit in *Zeno* sided with the plaintiff but categorized the taunting as racial, rather than color-based harassment.[112] In *Graham v. Portland Public School District #1J*, the children at issue were biracial and dark skinned.[113] The children were repeatedly harassed by classmates and were called "niggers, Black q-tips, and burnt pieces of toast," but the school failed to respond.[114] The

107. *See* Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 664–65 (2d Cir. 2012) (citing to Title IX cases decided by the Supreme Court in which the board of education and school district were held liable for student-on-student and teacher-on-student harassment). In these Title IX harassment cases, courts have overwhelmingly imported the *Davis v. Monroe County Board of Education* standards, which attribute the deliberate indifference of school employees to address the discriminatory harassment to the recipient of federal funds. In order for liability to arise under the *Davis* standard, the plaintiff must establish that the recipient (1) had substantial control over the harasser, (2) had knowledge of the harassment, (3) was deliberately indifferent to the harassment, and that the harassment (4) "is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 644–50 (1999). Many circuit courts have used *Davis*'s deliberate indifference standard in the Title VI context. *See, e.g.*, *Zeno*, 702 F.3d at 665 n.10 (applying the *Davis* standard to a racial harassment discrimination case); Bryant v. Indep. Sch. Dist. No. I–38, 334 F.3d 928, 934 (10th Cir. 2003) (same); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 206 n.5 (3d Cir. 2001) (acknowledging that *Davis* "applies equally" to harassment under Title VI).

108. Similar to the term "Middle Eastern," I argue that the incredibly reviled invective can be used not only to insult individuals on the basis of their African–American race, but also to insult individuals on the basis of their skin color. Given the historical nature of racism and colorism in America, it is not surprising that many invectives used to target Black people are also used to target darker skinned individuals. This racial slur should be understood within the context of other invectives directed at that individual. Without knowing the student's race, students called Anthony this reviled invective simply because of his dark skin. This use of the invective illustrates that this racial slur can also point to discriminatory conduct or harassment on the basis of color.

109. *See Zeno*, 702 F.3d at 659–60.

110. *Id.*

111. *Id.* at 667.

112. *Id.* at 661–62, 668, 670.

113. No. 3:13–cv–00911–AC, 2015 WL 1010534, at *2 (D. Or. Mar. 5, 2015). Although the court opinion and case filings do not disclose the racial breakdown of the plaintiff and her children, the plaintiff alleges that her children "inherited their father's darker skin tone and 'African-American . . . features.'" *Id.*

114. *Id.*

pro se plaintiff, the children's mother, even distinguished her biracial skin tone from her children's skin color in the complaint, further reinforcing that the harassment was rooted in skin pigmentation rather than race.[115] Similar to *Zeno*, the *Graham* court failed to acknowledge that these factual allegations actually amounted to colorism rather than to racism. [116]

Although the words used by the harassers in both *Zeno* and *Graham* are rooted in racial assumptions, the harassers targeted individuals based on their skin color, not race, which is a critical factor in determining whether this is race or color discrimination. In *Zeno* and *Graham*, the discrimination was based on skin color rather than how the children racially identified. Thus, both *Zeno* and *Graham* demonstrate instances in which courts failed to recognize color discrimination when it arose, instead characterizing it as race discrimination.

Even if a few color claims prevail under the guise of race, there is a risk of uncertainty and inconsistency that remains for future plaintiffs with colorism claims. *Dasrath*, *Zeno*, and *Graham* presented opportunities to further the Title VI color discrimination doctrine by simply acknowledging colorism. By incorrectly categorizing these cases' facts as race rather than color discrimination, courts are muddling the color discrimination doctrine and limiting the ability for plaintiffs to allege color discrimination, which will result in plaintiffs continuing to allege their colorism claim as race discrimination, increasing the likelihood of dismissal.

B. COURTS AND PLAINTIFFS CONFLATE COLOR AND RACE, EVEN THOUGH THEY REQUIRE DIFFERENT FACTS

In contrast to section II.A, where plaintiffs obscure the colorism doctrine by pleading race instead of color, sometimes the plaintiff pleads both, which can also lead to complications. Although courts, in principle, recognize color discrimination as a distinct claim from race discrimination, courts in practice conflate these two claims even though these two claims require different factual supports to be adequately pleaded. Consequently, conflating the two claims means that meritorious colorism claims are not being adequately pleaded because courts are not equipping plaintiffs with an understanding about the specific types of facts required to support a colorism claim. As a result, over time, colorism becomes a superfluous claim.

Certain cases demonstrate that courts acknowledge both race and color claims but ultimately conflate the two in their analysis.[117] For example, in *Moore v. City*

115. *Id.* This does not mean that racial background had nothing to do with the harassment that the children faced. Instead, I argue that the children's skin pigmentation played more of a role in the harassment. Had the children instead been light-skinned Black students, their fellow classmates and teachers may have treated them differently.

116. *Id.* at *6–7 (dismissing the claim without prejudice because the pro se plaintiff cannot sue on behalf of her children).

117. *See, e.g.*, Desouza v. Kennedy, No. 3:16-cv-01126, 2017 WL 3431393 (D. Conn. Aug. 9, 2017); Moore v. City of New York, No. 15-CV-6600(GBD)(JLC), 2017 WL 35450 (S.D.N.Y. Jan. 3, 2017); Cannizzo v. Lab Corp. of Am., No. 07–C–01214–WDM–KLM, 2008 WL 68846 (D. Colo. Jan. 3, 2008);

of New York, the plaintiff filed a Title VI claim against his employer, the City of New York, alleging a series of discriminatory actions that occurred for two years until his retirement in 2015.[118] The district court acknowledged both race and color claims but only addressed how the alleged facts failed to support racial animus.[119] The court stated that the plaintiff failed to demonstrate a causal link between the plaintiff's *race* and the defendant's actions and, because there were no specific factual allegations giving rise to a plausible inference of racial animus, the court dismissed both the plaintiff's race and color discrimination claims.[120]

Based on the record, the plaintiff's Title VI claims in *Moore* likely warranted dismissal because the plaintiff only used "race and color" as a collocation, rather than explicitly alleging *both* race and color discrimination separately. However, by focusing only on the race claim in its analysis, the courts sent a message that the color claim was superfluous. If the court had simply stated that the color discrimination claim was separately unfounded because no facts about light or dark skin were alleged, its reasoning would have still helped to distinguish the two claims and inform future plaintiffs that the facts to be alleged for race and color discrimination claims are distinct. Because courts do not distinguish between these two claims when both are alleged, courts perpetuate a cycle in which plaintiffs, as a result of confusion, continue to plead both claims without recognizing the distinct factual support that is required. Until courts begin to distinguish between these claims, meritorious color claims will continue to be dismissed.

Although courts often conflate race and color claims, the required factual support for each is distinct and, therefore, both claims cannot be alleged with an identical set of facts.[121] Unlike race discrimination, which requires a showing that the plaintiff was treated differently than other similarly situated individuals outside of his or her race, color discrimination requires a showing based on skin color differences.[122] For example, in *Friedman v. Lake County Housing Authority*, the

see also Hernandez v. New York, 500 U.S. 352, 371 (1991) (suggesting skin color would be a surrogate for race); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 579–81 (1st Cir. 1999) (treating race and color discrimination claims under Title VII as one), *abrogated by* Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

118. *Moore*, 2017 WL 35450, at *2–7. Among the discriminatory actions, Moore alleges that he was unfairly targeted in an investigation, had disciplinary charges filed against him, and was denied a reasonable request for a favorable transfer, religious accommodations, and vacation time. *Id.* at *2–3.

119. *Id.* at *12–13.

120. *Id.* at *15; *see also id.* at *14 (ignoring the color claim and stating that to survive a motion to dismiss, there must be a causal link between the alleged discriminatory conduct and the plaintiff's *race*).

121. The Seventh Circuit has stated that "[d]istrict courts are accorded 'a great deal of latitude and discretion' in determining whether one action is duplicative of another, but generally, a suit is duplicative if the 'claims, parties, and available relief do not significantly differ between the two actions.'" *See* Serlin v. Arthur Andersen & Co., 3 F.3d 221, 223 (7th Cir. 1993) (quoting Ridge Gold Standard Liquors v. Joseph E. Seagram & Sons, Inc., 572 F. Supp. 1210, 1213 (N.D. Ill. 1983)).

122. The comparison can be simple, such as a demonstration that others are not receiving the same treatment. *See* Porter v. Ill. Dep't of Children & Family Servs, No. 98-1152, 1998 WL 847099, at *4 (7th Cir. Nov. 23, 1998) (holding that a direct statement that the supervisor did not like plaintiff's skin color is sufficient to show that the supervisor "was motivated at least in part by his race and/or color when she took actions that significantly contributed to Porter's termination"); Windsor v. Bd. of Educ., No. TDC-14-2287, 2016 WL 4939294, at *8 (D. Md. Sept. 13, 2016) (holding that the plaintiff, who

court dismissed a "duplicative" color discrimination claim when the plaintiff alleged that she was discriminatorily discharged on the basis of her race and color under Title VII.[123] The court clarified the differences in factual support required. In the case of color-based claims, the court stated that the plaintiff must allege that the "particular hue of the plaintiff's skin is the cause of the discrimination." The court then stated that the cause of action in *Friedman* was duplicative because the facts alleged for both race and color discrimination claims were indistinguishable.[124] *Friedman* reinforces that for a color claim to avoid dismissal, it will need distinct factual support from any race claim brought.

C. LIMITATIONS OF THE BLACK–WHITE PARADIGM

Discussions of colorism in the United States typically revolve around how discriminatory conduct exclusively impacts Black Americans or those with African ancestry, limiting colorism's application only to those color discrimination cases that are rooted in this dichromatic paradigm.[125] As a result, meritorious colorism claims fail because courts do not have the vocabulary nor understanding to recognize these cases as bona fide discrimination claims under Title VI. A robust understanding of colorism would help courts move beyond the Black–White paradigm that otherwise preoccupies race-based discussions in America. The two cases below demonstrate that if courts do not further their understanding of the different ways in which colorism can arise meritorious color discrimination claims will be dismissed.

Not only was *Dasrath*, discussed in section II.A, a wrongly pleaded and wrongly adjudicated case, it also displayed the type of color discrimination that is foreign to courts.[126] As discussed earlier,[127] crew members and passengers developed heightened safety concerns after noticing suspicious behavior by two brown-skinned passengers, and, consequently, Dasrath was forcibly removed from his flight pursuant to the final decision of the airline's pilot.[128] The court

alleged disparate treatment because she is "fair skinned," sufficiently stated a plausible claim under Title VII and Title VI when it was factually supported by a statement made by her union representative that her supervisor did not like the plaintiff because she was "light-skinned and 'pretty'"); *cf.* Brown v. William Rainey Harper Coll., No. 16 C 1071, 2017 WL 3278822, at *5 (N.D. Ill. 2017) (holding that, at the motion to dismiss stage, the plaintiff's allegation that similarly situated White students received more favorable treatment is sufficient to state a Title VI claim).

123. No. 11 C 785, 2011 WL 4901280, at *1–2 (N.D. Ill. Oct. 14, 2011). The plaintiff also alleged discrimination on the basis of national origin. *Id.*

124. *Id.* at *2 (citing Sullivan v. Presstronics, Inc., No. 96 C 7436, 1997 WL 327126, at *2 (N.D. Ill. June 11, 1997)).

125. Colorism claims have also prevailed among those who identify as Hispanic or Latino/a. *See, e.g.*, Rodriguez v. Gattuso, 795 F. Supp. 860 (N.D. Ill. 1992); Cubas v. Rapid Am. Corp., 420 F. Supp. 663 (E.D. Pa. 1976). For more on racism and colorism relevant to Latin American communities, see Tanya Katerí Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, a United States-Latin America Comparison*, 87 CORNELL L. REV. 1093 (2002).

126. *See* Dasrath v. Cont'l Airlines, Inc., 467 F. Supp. 2d 431 (D.N.J. 2006); *see also supra* Section II.A. (arguing that *Dasrath* was wrongly pleaded and decided as a racial discrimination case instead of a color discrimination case).

127. *See supra* Section II.A.

128. *Dasrath*, 467 F. Supp. 2d. at 432.

characterized the terms used by crew members and passengers as innocuous terms of identification rather than identifiers upon which discriminatory presumptions were made, namely that brown-skinned passengers commit acts of terrorism. These identifiers were certainly a mechanism used to privilege one class of people—light-skinned and White passengers—and disadvantage others—brown-skinned passengers—but the court did not see it that way. Because the captain had discretion to remove passengers and because he was not the one who made these remarks (he was merely the one to whom the remarks were made), the court found it reasonable that the captain would consider the passengers a risk and remove them from the plane.[129] Ten cases have cited to *Dasrath* due to similar issues of forcible removal from airplanes on the basis of color or assumptions of national origin.[130] Until courts begin to understand and accept the occurrence of color discrimination in other unorthodox contexts beyond our historic notions of Black–White colorism, cases like this will likely fall short in the burden-shifting framework.

Additionally, courts' lack of cultural understanding of colorism has resulted in the dismissal of intra-racial color discrimination claims. In *Ali v. National Bank of Pakistan*, a light-skinned Pakistani citizen from the Punjab province working in New York accused his supervisor, a dark-skinned Pakistani citizen from the Sind province, of favoring and promoting darker skinned Pakistanis.[131] The court concluded that the plaintiff failed to establish a prima facie case of disparate treatment because he was not a member of a protected class.[132] "Although differences in complexion exist between Ali and other employees of the Bank," the court noted, "the testimony regarding skin color variations among the peoples of Pakistan does not suffice to merit the division of Pakistanis into distinct and 'protected classes' according to color."[133] The court continued to justify its conclusion by pointing out that the "presumption of a protected class status on the basis of color is bound up with an entire national racial history" and that other types of discriminatory practices have "nothing to do with the American experience."[134] Here, the district court limited the application of color claims to only a select set of experiences; although the court recognized that the lines of privilege were

129. *Id.* at 448. The court also stated that there is "undisputed evidence linking Mr. Dasrath to the other two men," namely that they were seated near each other. *See id.*

130. *See, e.g.*, Cerqueira v. Am. Airlines, Inc., 520 F.3d 20 (1st Cir. 2008); Cerqueira v. Am. Airlines, Inc., 520 F.3d 1 (1st Cir. 2008); Abdallah v. JetBlue Airways Corp., No. CIV.A. 14-1050 JLL, 2015 WL 3618326 (D.N.J. June 9, 2015); Xiaoyun Lu v. AirTran Airways, Inc., No. 1:13-CV-1846-CC, 2015 WL 5936934 (N.D. Ga. Mar. 31, 2015); Mercer v. Sw. Airlines Co., No. 13-CV-05057-MEJ, 2014 WL 7206881 (N.D. Cal. Dec. 18, 2014); Adams v. U.S. Airways Grp., 978 F. Supp. 2d 485 (E.D. Pa. 2013); Al-Watan v. Am. Airlines, Inc., 658 F. Supp. 2d 816 (E.D. Mich. 2009); Shaffy v. United Airlines, No. CV 07-4338 GAF (CTx), 2008 WL 11429999 (C.D. Cal. July 9, 2008); Cerqueira v. Am. Airlines, Inc., 484 F. Supp. 2d 232 (D. Mass. 2007); Shqeirat v. U.S. Airways Grp., 515 F. Supp. 2d 984 (D. Minn. 2007).

131. 508 F. Supp. 611, 611 (S.D.N.Y. 1981).

132. *Id.* at 613.

133. *Id.*

134. *Id.*

being drawn on the basis of color, the court could not understand *why* and dismissed the case for failure to establish a prima facie case of disparate treatment.

Both *Dasrath* and *Ali* demonstrate that, without further understanding of the seemingly "unorthodox" contexts in which color discrimination may arise, namely that they do not arise within the Black–White paradigm, meritorious color discrimination claims will continue to be dismissed.

D. INTRA-RACIAL DISCRIMINATION

Preserving color discrimination as a distinct claim from race discrimination is also important because color provides a right of action based on intra-racial discrimination. Where inter-racial discrimination occurs when a member of one racial group makes a distinction based upon skin color between members of another racial group, intra-racial discrimination occurs when a member of one racial group excludes or distinguishes another member of the racial group based on skin color.[135] The Seventh Circuit acknowledged the existence of intra-racial discrimination when it stated that, "Title VI, like Title VII, forbids discrimination on the basis of 'color' as well as on the basis of 'race.' Light-skinned Blacks sometimes discriminate against dark-skinned Blacks, and vice versa, and either form of discrimination is literally color discrimination."[136] Without effectively untangling race and color claims, there is a higher likelihood that courts will dismiss these meritorious intra-racial claims for failing to fit neatly within the courts' understanding of race discrimination.

Windsor v. Board of Education of Prince George's County demonstrates the potential success that intra-racial discrimination issues may have when pleaded as color discrimination. In *Windsor*, the court recognized the plaintiff's Title VI and Title VII intra-racial color discrimination claims, but dismissed the Title VI claim solely for procedural reasons.[137] Suzanne Windsor, a light-skinned, multi-racial teacher alleged that her dark-skinned supervisor acted discriminatorily when the supervisor excluded her from an email announcing new administrative positions.[138] Specifically, her complaint included two allegations to bolster her claim: (1) that her supervisor excluded only her and another light-skinned teacher from the email and (2) her union representative said that the plaintiff was disliked because she was "light-skinned and pretty."[139] The district court dismissed the Title VI color discrimination as time-barred, but denied the defendant's motion to dismiss the Title VII claim because the plaintiff had successfully established a prima facie color discrimination claim.[140] The special protection against intra-

135. Jones, *supra* note 7, at 1498–99.

136. Williams v. Wendler, 530 F.3d 584, 587 (7th Cir. 2008).

137. Windsor v. Bd. of Educ., No. TDC-14-2287, 2016 WL 4939294, at *9 (D. Md. Sept. 13, 2016) (stating that the Title VI claim was time-barred based on the applicable statute of limitations).

138. *Id.* at *1; Complaint at 3–4, 22–23, *Windsor*, 2016 WL 4939294 (No. TDC-14-2287) (noting that the plaintiff was part-Black and part-Native American whereas her supervisor was Black).

139. *Windsor*, 2016 WL 2939294, at *8 (applying the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to the plaintiff's Title VII claim).

140. *Id.* at *8–9.

racial discrimination demonstrates the importance of color discrimination claims for plaintiffs. If courts continue to conflate race and color claims or view color as superfluous to race, meritorious color claims, such as intra-racial discrimination claims, will be dismissed.

E. COURTS INJECTING THEIR OWN OPINIONS OF SKIN COLOR

Colorism cases also inform us that, without a solid foundation to address colorism claims, courts are at risk of inaccurately injecting their own opinions to resolve genuine issues of material fact, namely disputes of skin color, at the summary judgment stage. For example, in *Felix v. Marquez*, the court used its own assessment of the plaintiff's skin color to hold that there was no color discrimination at issue.[141] In *Felix*, the plaintiff filed a Title VII color discrimination claim and alleged that her dark olive skin color was the reason the defendant failed to promote her.[142] Felix claimed that only two of the other twenty-eight employees had darker skin than Felix and that the rest were White.[143] Based on the judge's own estimations, the court determined that Felix "appeared to the court to be a medium shade," and that two of the other witnesses Felix categorized as White "appeared to the Court to be of a shade quite similar to Felix's and quite different from [two other] witnesses . . . who also were described as white."[144] The court concluded that these observations "contradict[ed Felix's] placement of a rigid line between white and non-white employees . . . ."[145] Thus, the court granted the defendant's motion for summary judgment.[146] This case indicates that a courts might be ill-equipped to understand colorism and may not realize that their own assumptions and observations lead them to make inaccurate fact-finding determinations. As a result, the court dismissed what likely would have been a meritorious claim of color discrimination.

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Together, the five different observations discussed in this section highlight a perpetual cycle. First, plaintiffs are incorrectly or inadequately pleading their color discrimination claims as race claims, and courts are ill-equipped to adjudicate colorism, often conflating colorism with racism. Next, these claims are either dismissed because they do not adequately comport with the race discrimination doctrine or they are granted without courts drawing the distinction between race and color in their analyses, which confuses future plaintiffs as they attempt to allege colorism. As a result, courts dismiss meritorious color claims. Devising ways to address the cycle discussed in this section may help to rectify the Title VI color discrimination doctrine at this early stage of development.

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141. No. 78-2314, 1981 WL 275, at *11–12 (D.D.C. Mar. 26, 1981).
142. *Id.* at *8 n.6, *12.
143. *Id.* at *8.
144. *Id.* at *8 n.6.
145. *Id.*
146. *Id.* at *13.

III. RECOMMENDATIONS

The analysis above demonstrates the flaws in how courts adjudicate colorism claims, which perpetuate the cycle of muddling the colorism doctrine and dismissing meritorious claims. One may argue that protecting against race discrimination, regardless of inaccuracy or inconsistency, should be the focus; society is more familiar with race discrimination, rather than color discrimination, so more progress can be made under the frame of preventing race discrimination. But even if one or two incorrectly pleaded color discrimination claims prevail under a race discrimination theory, there is no guarantee that the court will consistently protect against colorism without properly categorizing it and applying the appropriate doctrine. To this end, I propose the following five recommendations to clarify and improve the state of the Title VI color discrimination doctrine: (1) the U.S. Department of Education (ED) should increase data collection and tracking on colorism; (2) civil rights advocacy organizations should bring forth adequately pleaded color discrimination claims; (3) courts should properly tease apart color and race claims when they are alleged; (4) courts should refrain from inserting their own biases when determining whether there is a material issue of skin color, and (5) courts should accept cultural evidence to understand the full nature of a complaint. These five recommendations will provide clarity to future plaintiffs alleging color discrimination and will enhance courts' ability to address colorism. Fulfilling these objectives will allow for more robust and complete consideration of meritorious colorism claims.

A. THE U.S. DEPARTMENT OF EDUCATION SHOULD INCREASE DATA COLLECTION ON COLORISM

Independent researchers are already collecting data on how colorism affects people's lives,[147] but ED should also utilize its resources to better understand how colorism affects student achievement. First, ED should follow the EEOC's lead and track the colorism complaints it receives. The EEOC's tracking of colorism in employment highlighted the rise of colorism complaints separate from racism,[148] which informed the EEOC that colorism was a growing issue distinct from race discrimination. ED can easily mirror this practice by adding an additional checkbox on complaint forms. But because many parents and students may not know that colorism can be a cause of action, it would also be helpful for an ED employee to sift through incoming complaints and categorize race discrimination complaints as colorism where appropriate. This collection of data will allow for a better understanding of the frequency of colorism claims that arise in the school system.

Second, advocates should begin to use ED's Civil Rights Data Collection (CRDC) to collect data to better understand how skin color affects access to academic achievement. Since 1968, ED has used the CRDC to collect critical data

147. *See supra* Section I.B.
148. *See supra* Section I.B.2.

on civil rights issues at the school and district level.[149] The Trump Administration has recently announced that it will preserve the Obama Administration's fulsome usage of the CRDC, which will provide insight on the interactions between race, gender, discipline, and academic achievement.[150] Given that the Trump Administration is actively rolling back the collection and publication of critical civil rights data,[151] as well as many ED initiatives to combat systemic racial discrimination,[152] it is even more imperative to collect color data in systems that will be preserved.

Some may fear that collected skin-color data may be used for the government's perverse and racist purposes. For example, collecting such data may allow for the government to implement policies that target darker skinned individuals rather than individuals of a certain race. However, the CRDC already collects data to understand student enrollment, educational services and disciplinary mechanisms; this data is already disaggregated by sex, race and ethnicity, disability, English proficiency, and economic status.[153] The CRDC's collects data with the purpose of creating a transparent and informed system to better understand how it enforces civil rights statutes.[154] If this is the case, and there is a possibility that students of a certain skin shade were invidiously treated, then it is of utmost importance that ED be aware of and address this discrimination. Despite potential uncertainty about the implications of color data collection, ED can slowly roll out this method and deploy sample trial versions in a few school districts to test its

149. *Civil Rights Data Collection (CRDC)*, U.S. DEP'T OF EDUC., https://www.ed.gov/about/offices/list/ocr/data.html [https://perma.cc/35L9-8XR6] (last updated Sept. 25, 2018).

150. Benjamin Wermund, *Might New Civil Rights Data Influence DeVos on Discipline?*, POLITICO (Apr. 25, 2018, 10:00 AM), https://www.politico.com/newsletters/morning-education/2018/04/25/might-new-civil-rights-data-influence-devos-on-discipline-182895 [https://perma.cc/35TT-6SY7]; Benjamin Wermund, *Trump Administration Will Keep up Civil Rights Data Collection*, POLITICO (Oct. 20, 2017, 10:00 AM), https://www.politico.com/tipsheets/morning-education/2017/10/20/trump-administration-will-keep-up-civil-rights-data-collection-222912 [https://perma.cc/P2GK-QHCS].

151. *See generally* THE LEADERSHIP CONFERENCE EDUC. FUND, MISINFORMATION NATION: THE THREAT TO AMERICA'S FEDERAL DATA AND CIVIL RIGHTS (Dec. 2017), http://civilrightsdocs.info/pdf/policy/Data-Policy-Brief.pdf (providing an overview of steps the Trump Administration has taken to undermine principles of civil rights data collection). The Trump Administration is rolling back the collection and publication of data on employment, health, housing, crime, and climate. *Id.* at 1, 4.

152. The new Office for Civil Rights Case Processing Manual, under the direction of Secretary Betsy DeVos, omits any mention of "systemic investigation," limiting the scope of influence litigation can have on discrimination issues. Benjamin Wermund, *DeVos Rewrites Rules for School Civil Rights Probes*, POLITICO (Mar. 1, 2018, 1:49 PM), https://www.politico.com/story/2018/03/01/betsy-devos-school-civil-rights-rules-711790 [https://perma.cc/TA49-YAV4]. The Administration's budget proposal has cut the staff of ED offices such as the Office for Civil Rights by 40% and has also sliced funding overall by 13.6%, or $9.2 billion. Coleton Whitaker et al., *The Trump Administration's Slow but Steady Undoing of the Department of Education*, CTR. FOR AM. PROGRESS (Nov. 20, 2017, 9:00 AM), https://www.americanprogress.org/issues/education-k12/news/2017/11/20/442737/trump-administrations-slow-steady-undoing-department-education/ [https://perma.cc/58XZ-W9KV].

153. *Civil Rights Date Collection (CRDC)*, *supra* note 149. CRDC data is self-reported by parents and students, which is then collected and reported by school districts to ED. Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education, 72 Fed. Reg. 59,266, 59,274 (Oct. 19, 2007).

154. *Civil Rights Data Collection (CRDC), supra* note 149.

effectiveness. These pilot schools can utilize color palettes to assist parents and students in self-reporting and focus on five basic categories consistent with studies discussed in section II.B.: very dark, dark, medium, light, very light. Although this may not provide incredibly accurate data, this tool can help shed light on the general differences in treatment between dark-skinned and light-skinned students in the same way the murky reporting of race and ethnicity data[155] demonstrates a stark contrast in treatment of Black and White students.[156] Overall, this data would allow civil rights advocates, policy makers, and scholars who focus on colorism to better understand how the colorism phenomenon adversely impacts certain students, and to discuss how it can be combated.

B. IMPACT LITIGATION BY CIVIL RIGHTS ADVOCACY GROUPS

In addition, civil rights advocacy groups should assist in establishing the Title VI color discrimination doctrine by using impact litigation to bring forth well pleaded claims in order to generate clearer judicial precedent under the doctrine. Many of the cases in which the plaintiff alleges color discrimination have been brought by pro se plaintiffs,[157] which results in many of these claims being dismissed without actually addressing their merits. In addition, many of these claims are poorly pleaded, either with insufficient or no factual support, meaning that courts are ruling on inadequate complaints. Although advocacy groups, like individual plaintiffs, are limited to disparate treatment claims,[158] organizations can still clarify the colorism doctrine by litigating claims of disparate treatment on the basis of color, such as *Windsor*.[159] Civil rights organizations have a stake in this issue because, as discussed in Part I, colorism infiltrates and affects all aspects of people's lives and access to opportunities. With the resources at their disposal, civil rights advocacy groups can bring forth these cases properly, which will guide future plaintiffs to plead color claims fulsomely and effectively.

C. COURTS SHOULD UNTANGLE RACE AND COLOR CLAIMS WHEN PLEADED TOGETHER

Rather than conflating race and color claims, or viewing color claims as duplicative, courts should clearly articulate the distinction between the two claims and

155. The Final Guidance on the CRDC data collection states that students who are multi-racial or who also identify as Hispanic/Latino will be counted separately from their respective racial categories. *See* Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education, 72 Fed. Reg. at 59,270. For example, a student who self-reports as Hispanic/Latino and Asian will only be reported in the Hispanic/Latino category. *See id.* These methodical choices demonstrate that even though the race and ethnicity reporting process is flawed, it still fulfills its purpose of providing transparency to stakeholders.

156. *See, e.g.*, U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT: SCHOOL DISCIPLINE (2014), https://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf (stating that CRDC data indicates that Black students are suspended and expelled at a rate three times greater than White students).

157. *See, e.g.*, Peek v. SunTrust Mortg., Inc., No. 1:16-cv-1415(LMB/IDD), 2017 WL 3258729, at *1 (E.D. Va. Feb. 15, 2017); Graham v. Portland Pub. Sch. Dist. #1J, No. 3:13-cv-00911-AC, 2015 WL 1010534, at *3 (D. Or. Mar. 5, 2015).

158. *See* Alexander v. Sandoval, 532 U.S. 275, 279–81, 293 (2001).

159. *See supra* Section II.D.

dismiss racial discrimination claims that are actually based on color discrimination. Doing so will provide more clarity for future plaintiffs alleging colorism and enhance the courts' adjudication of color discrimination claims.

First, courts can untangle race and color claims by simply acknowledging color claims separately and making this distinction in their opinions. When color discrimination is wrongfully alleged as race discrimination, or when it is collocated, it behooves courts to acknowledge that the discrimination claim was incorrectly alleged and explain why. Teasing apart race and color discrimination claims provides notice and clarity for litigants, which will allow for more accurate pleadings of color discrimination claims in the future. The Seventh Circuit in *Williams v. Wendler* provides an example of how to do this.[160] In *Williams*, three Black sorority students alleged their suspension for hazing another student constituted a more severe punishment than the punishment they would have received had they been White.[161] Though the plaintiffs only alleged race discrimination, they pleaded that the discrimination was on the basis of "race/color."[162] In response, Judge Richard Posner teased the two apart and noted that a color discrimination claim would have existed had the plaintiffs alleged that light-skinned Black hazers were punished more severely than dark-skinned Black hazers or vice versa, which was absent in this case.[163] The court then proceeded to examine the Title VI race discrimination claim on its merits. This dictum in *Williams* provides clarity and predictability to color discrimination claims, which will help Seventh Circuit plaintiffs better distinguish between race and color claims in the future.

Second, to improve the state of the color discrimination doctrine, courts should recognize when cases are wrongly pleaded as race discrimination, dismiss them without prejudice, and guide the plaintiff to properly re-plead the claim as color discrimination with particular leniency toward pro se litigants.[164] The practice of pleading under the more modern *Twiqbal* standard[165] has resulted in a pro-defendant approach where the plaintiff must collect enough facts before filing the claim to cross the "plausibility" threshold for each element of the claim.[166] The

160. 530 F.3d 584 (7th Cir. 2008).

161. *Id.* at 585–86.

162. *See* Complaint and Demand for Jury Trial at 24–25, *Williams*, 530 F.3d 584 (No. 07-3315); *see Williams*, 530 F.3d at 587.

163. *See Williams*, 530 F.3d at 587. Some may argue that the disparate treatment between Black and White students is still "color" discrimination, but this understanding would conflate the use of the terms "Black" and "White" as descriptions of skin color rather than as racial classifications. This type of discrimination is distinct from color discrimination because it looks at differences based on a totality of proxies indicating race, not differences in skin pigment within races.

164. Although critics may caution courts in affording different treatment to pro se litigants, Rule 8(e) of the Federal Rules of Civil Procedural states that "[p]leadings must be construed so as to do justice," FED. R. CIV. P. 8(e), which should include providing flexibility to plaintiffs when they wrongfully interchange "color" and "race." In fact, the Supreme Court held that a document filed pro se "is to be liberally construed" and "must be held to 'less stringent standards than formal pleadings drafted by lawyers.'" Estelle v. Gamble, 429 U.S. 97, 106 (1976) (quoting Haines v. Kerner, 404 U.S. 519, 520 (1972)).

165. Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 554 (2007).

166. *See* SCOTT DODSON, NEW PLEADING IN THE TWENTY-FIRST CENTURY: SLAMMING THE FEDERAL COURTHOUSE DOORS? 110 (2013).

Twiqbal standard creates a more efficient system, screening meritless claims that would have prevailed under the old standard, but ultimately results in false negatives, or meritorious claims being screened out.[167] As Scott Dodson points out, the screening of false negatives may occur because plaintiffs do not know the appropriate claim that applies to their set of facts.[168] Similarly, in the colorism context, plaintiffs may not know that color discrimination is a viable claim that applies to their set of facts. Therefore, if courts are dismissing ill-pleaded claims to clarify the color discrimination doctrine, they should inform plaintiffs of the availability of color claims and encourage re-pleading. Because of the uptick in claim dismissals after "*Twiqbal*,"[169] it is even more important that plaintiffs learn how to plead their discrimination claims with accuracy, namely by pleading color discrimination when appropriate. Although this practice may increase litigation costs, it will ultimately lead to the more efficient and accurate pleading of color discrimination claims in the long run.

D. COURTS NEED TO REFRAIN FROM COLORING THE FACTS

In at least one instance, we have seen the court inject its own assessment of the plaintiff's skin color, which resulted in the court granting the defendant's motion for summary judgment.[170] To ensure that meritorious color discrimination claims are not incorrectly dismissed, courts must refrain from injecting their own biases into proceedings at the early stages of the litigation process. As stated in *Sere v. Board of Trustees*, courts should refuse to partake in "the unsavory business of measuring skin color and determining whether the skin pigmentation of parties is sufficiently different to form the basis of a lawsuit."[171] The court in *Walker v. Secretary of the Treasury* echoed this sentiment when it stated that "distinctive physiognomy" is not necessary for a Title VII color claim and that discrepancies of color are "genuine and substantial" difficulties "that cannot be reached by summary judgment."[172] The district court in *Felix* may not have realized that this was a material issue of fact that should have been determined at trial, but it is worth reminding courts that disputes of skin color, when reviewing a color discrimination claim, cannot be resolved at summary judgment. Courts must ensure that they are making determinations based on the evidence or acknowledge that it is a material issue of fact that must be determined by a fact finder. Courts should also

167. *See id*. at 107.

168. *See id*. at 108.

169. In 2010, the Administrative Office of the U.S. Courts collected data on dismissal rates four months prior to *Twombly* and four months after *Iqbal*. *Id*. at 113. It found a 1.8% increase in the filing of Rule 12 motions to dismiss, from 34.4% to 36.2%, which was statistically significant. *Id*. Filing a motion to dismiss has "become routine" to trial practice. *Id*. at 114.

170. *See* Felix v. Marquez, No. 78-2314, 1981 WL 275, at *8, n.6 (D.D.C. Mar. 26, 1981) (finding that the plaintiff's skin tone "appeared to the court to be a medium shade" and classifying a witness as Black despite or in addition to witness's self-identification as Puerto Rican); *supra* Section II.E.

171. 628 F. Supp. 1543, 1546 (N.D. Ill. 1986), *aff'd*, 852 F.2d 285 (7th Cir. 1988), *and abrogation recognized by* Jordan v. Whelan Sec., 30 F. Supp. 3d 746, 752–53 (N.D. Ill. 2014).

172. 713 F. Supp. 403, 408 (N.D. Ga. 1989), *aff'd*, 953 F.2d 650 (11th Cir. 1992) (quoting Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987)).

attempt to use an objective procedure to determine skin color, such as the use of color palettes implemented by some studies mentioned earlier in this Note.[173] So long as courts substitute the skin color assessment with their own opinions and explicitly state whose assessment of the plaintiff's skin color they are accepting, meritorious colorism claims will remain at risk of being dismissed.

E. IMPORTANCE OF CULTURAL EVIDENCE

Courts are already unclear on how to treat colorism claims, and the situation only worsens when they are not familiar with ways in which colorism operates beyond the rigid Black–White paradigm, as demonstrated by *Dasrath* and *Ali*.[174] To combat this status quo, as Taunya Lovell Banks proposes, plaintiffs should introduce cultural evidence to support the court's understanding of the complaint.[175] Cultural evidence typically includes additional fact-finding or expert testimony to shed light on certain cultural norms.[176] Circuit courts have previously permitted expert testimony on cultural issues so long as it is relevant, reliable, and not biased.[177] Banks points out how this tool has proven useful in state courts, using *Muhammad v. Islamic Society* as an example.[178] In *Muhammad*, a Black Muslim woman sued her Islamic society under Title VII when her South Asian director fired her as principal of the Islamic school and replaced her with a light-skinned woman.[179] At trial, the plaintiff introduced an expert witness to provide cultural testimony on Muslim cultural beliefs and attitudes, during which the expert testified that "lighter skinned people are regarded more highly than darker skinned people."[180] The court upheld the introduction of the expert's testimony and the plaintiff prevailed at trial.[181] Thus, cultural testimonies like the one presented in *Muhammad* can bolster meritorious claims of color discrimination that have different cultural roots and prevent their dismissals due to confusion and lack of knowledge.

CONCLUSION

As our society becomes increasingly diversified and multiracial, it is inevitable that color discrimination will continue to rise in relevance and prevalence, and

173. *See supra* Section I.B.1.

174. *See* Taunya Lovell Banks, *Colorism Among South Asians: Title VII and Skin Tone Discrimination*, 14 WASH. U. GLOBAL STUD. L. REV. 665, 673–75 (2015) (stating that the lack of understanding of the root of South Asian colorism may create difficulties when courts apply anti-discrimination laws).

175. *Id*. at 680.

176. *See id*.; *see also* Anthony Good, *Cultural Evidence in Courts of Law*, 14 J. ROYAL ANTHROPOLOGICAL INST. S47, S47–48 (2008) (discussing expert witnesses' role in producing cultural evidence).

177. *See* Jinro Am. Inc. v. Secure Invs., Inc., 266 F.3d 993, 1004–05 (9th Cir. 2001) (citing the Supreme Court's interpretation of permissible expert testimony in *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)).

178. No. G036534, 2008 WL 855127, at *16–18 (Cal. Ct. App. Mar. 28, 2008).

179. *Id*. at *8–11; Banks, *supra* note 174, at 680.

180. *Muhammad*, 2008 WL 855127, at *17.

181. *Id*. at *19, *22.

that litigation will be a tool for recourse. To ensure that the judicial system is prepared, we must ask ourselves how plaintiffs will bring their discrimination claims to court. As seen from the cases discussed throughout this Note, plaintiffs do not know how to allege a color discrimination claim under Title VI, sometimes misalleging their claims as race discrimination or omitting the colorism claim entirely, thereby only alleging race discrimination. There may also be cases where plaintiffs strategically allege only race discrimination because they know it is a more viable claim than color discrimination. Because more color discrimination cases lie ahead, it is imperative that courts evaluate meritorious Title VI color discrimination claims more fulsomely, while staying attuned to distinctions between race and color. Therefore, we must equip plaintiffs, civil rights advocates, ED, and courts with a clearer understanding of colorism, how it operates today, and trends in Title VI colorism adjudication. Arming these key players with this knowledge will bring us one step closer to deconstructing the skin-color caste system that permeates through all aspects of our society, from the courtroom to the workplace to the classroom. Only then will our society be truly fit for the Marcias and Millies among us.