ACTING WHITE?

by

Devon W. Carbado
Professor of Law, UCLA School of Law &

Mitu Gulati
Professor of Law, Duke University School of Law
Introduction

[T]he mountain standing in the way of any true Negro art in America [is] this urge within the race toward whiteness, the desire to pour racial individuality into the mold of American standardization, and to be as little Negro and as much American as possible. . . . . [For example, the Negro clubwoman] doesn’t care for the Winold Reiss portraits because they are ‘too Negro.”

------ Langston Hughes

For generations, blacks have attempted to straighten their hair, lighten their skin, and pass for white. But what blacks need to do is "act white." 

------ Dinesh D’Souza

Go into any inner city neighborhood, and folks will tell you that government alone can’t teach kids to learn. They know that parents have to parent, that children can’t achieve unless we raise their expectations and turn off the television sets and eradicate the slander that says a black youth with a book is acting white.

------ Barack Obama

What does it mean to “too Negro”? What does it mean to “act white”? Though, generally, these questions are rarely openly discussed, Senator Barack Obama’s ascendance to the forefront of American politics—and especially his run for the 2008 Democratic presidential nomination—has inserted them into the public domain. Questions have been asked by the civil rights lobby about his “authenticity as a black man.” Comments have been made—more recently by rival presidential hopeful Senator Joseph Biden, calling Senator Obama “articulate and bright and clean”—about his palatability to white voters. Though he is certainly not the first black candidate to run for president, Obama’s ancestry and personal history have delivered the issue of racial identity to a position of uncommon prominence. And the question being raised is not simply about whether he is black but about how black he is.
Obama is biracial—the son of a black man from a small village in Kenya and a white woman born in Kansas. His professional and academic credentials are impeccable—Harvard Law School graduate, first black president of the Harvard Law Review and law professor at the University of Chicago, among other accomplishments. Recently, Obama has come under fire recently for not being “black enough.” Some, like author Debra J. Dickerson, have declared that Obama is not “black” from an American political and cultural viewpoint because that term refers to those descended from West African slaves. Obama—who she says is “as black as circumstances allow”—has not experienced the burdens of the legacy of slavery. Columnist Peter Beinart has argued that such skepticism of Obama arises out of his being viewed by the black community as a “good black” who has yet to prove his authenticity and loyalty. In comparison, “bad blacks”—agitators—such as Reverend Al Sharpton, do not face this same problem because their loyalty is apparent through their speech and actions.

Significantly, in all of the public fuss about Obama’s racial identity, not one person has said that he is actually white. In terms of phenotype, most people would categorize him as black. Moreover, some of his associational practices also help to mark him as black: He lives on the South Side of Chicago, attends a black church, and is married to a black woman. As Brent Staples puts it, Obama is unequivocally a member of the black community, a community which, according to Staples, has traditionally welcomed any person with any amount of African ancestry. Indeed, African Americans are sometimes critical of people like Tiger Woods whom they believe under-claim or insufficiently identify with their blackness. For Staples, then, it is inexplicable that some segments of the black community are denouncing Obama for his “lack of blackness.”

Staples is right to question whether some African Americans are over-policing the borders of blackness—deciding who is black enough and who isn’t. But, working alongside the question of whether Obama is black enough from a black community perspective is a related question about Obama’s racial identity: From a white community perspective, is Obama “too black” or “not too black”? Of course, whites were not explicitly asking this question. But, as Senator Biden’s comments
about Obama being “articulate and bright and clean” suggest, white people, too, are experiencing Obama in terms of his racial salience or degrees of blackness. His racial standing as a black person is being evaluated by whites and black alike. Both communities are trying to ascertain whether Obama is racially palatable.

The problem of Senator Obama’s “blackness” and racial salience more generally is one that resonates throughout other important arenas for thinking about race. Consider the following three examples.

Example 1. A white police officer observes two black men walking by a department store in the middle of the afternoon. The men are not together. Both are twenty-something and both are roughly the same height and have roughly the same complexion. One is dressed in a suit; the other is wearing baggy jeans, an oversized white t-shirt and a baseball hat. Assume that the officer believes that blacks are more likely to commit crimes than whites. Stipulate that the officer can only stop one of these men. Under these circumstances, the officer is likely to stop the black man wearing the baggy jeans. This decision would be based, at least in part, on an intra-racial distinction: while both men are black, the man dressed in a suit is less racially salient and more racially palatable. The officer could believe that, as between the two, the black man wearing the baggy jeans is more likely to engage in shoplifting because he is more stereotypically black.

One could, of course, take the position that the distinction between the two men is one of class, not race. To demonstrate this point we could change the identities of the men from black to white, and then ask: Wouldn’t a police officer be more suspicious of a white man dressed in a pair of baggy jeans and an oversized t-shirt than he would of a white man dressed in a suit? If the answer is yes, isn’t the difference between the men one of class, not race, as it is between the two black men in the preceding hypothetical?

We do not mean to suggest that class or professional identity are not at play in either of the above scenarios (assuming that baggy jeans and an oversized t-shirt are signifiers of class). Our point is that so plausibly is race. With respect to the two
white men, for example, the officer could believe that the one dressed in the baggy jeans and white t-shirt is “acting black.” To the extent that this is the case, the officer would attribute racial stereotypes that apply to black men to him. Second, because stereotypes about criminality typically do not apply to white men (and certainly not to the same extent that they apply to black men), likely the officer would not perceive either of the white men as criminally suspect; both black men are vulnerable to being so stereotyped. The broader point is that the fact that class or professional identity might help to explain why a police would stop a black man dressed in a baggy jeans and a t-shirt over a black man dressed in a suit does not mean that race is not implicated.

Example 2. An admissions officer at a major university is administering an affirmative action program. Under the program, and to advance the university’s interest in promoting diversity, she is permitted to take race into account in deciding which students to admit. There are a number of admissible black students in the pool. She does not have photographs of any of these students. After a process of narrowing, she is deciding between two students—Patricia and Susan. Susan grew up in the inner city and attended a predominantly black school. She was parented by a single mother. She is a member of the Junior Black Panther Party League and led an organized effort at her high school to hire more black teachers.

Patricia, by contrast, grew up in the suburbs. Her father is a policeman and her mother is a nurse. Her extracurricular activities include tennis and the Student Club for the Environment. Admitting either of these students would advance the university’s interest in diversity in the sense of increasing the number of black students at the university. But Susan and Patricia are very different in terms of their racial salience. Susan is more racially salient than Patricia. The admissions officer could believe that Patricia is more likely to act white than Susan and/or that Susan is “too black.” Whether the admissions officer admits Patricia or Susan could turn on what the admissions officer finds most palatable—a person who is too black or a person who acts white. The admissions officer could have a hard or fixed preference—for example, for black people who act white over those who are too black. Under this scenario, the admissions officer would always admit the black Patricia of the
world over the black Susans. However, the admissions officer’s intra-racial preference need not be fixed in that way. Indeed, it need not be fixed at all. That is, whether the admissions officer picks Susan or Patricia could turn on whether she believes she has admitted enough black students from either the “acting white” category or the category of blacks who are “too black.” The broader point of this example is that more than phenotype is at work here. Racial salience is playing a role as well.

Example 3. Imagine that a firm is interviewing Theresa and Lauren for the same job. In terms of phenotype, both are “equally black;” however, the employer perceives Theresa to be Afro-centric and Lauren to be assimilationist, in part because of how they dress: Lauren relaxes her hair and wore a blue skirt suit and a white blouse to the interview; Theresa hair is dreaded, and she wore a black trousers suit with a kente cloth blouse and scarf. As in the above example, while both hires would further the firm’s interest in diversity, in the sense of increasing the representation of black women at the firm, the two women are different in terms of their racial salience. The employer could believe that whereas Lauren’s racial difference is only “skin deep,” Theresa’s is more fundamental; that whereas Theresa exists at the core of black racial identity, Lauren exists at the periphery. If the employer uses racial salience as a proxy for whether a prospective employee will exhibit negative stereotypes about race, it is likely to hire Lauren and not Theresa. In this example, Lauren is a good black; Theresa a bad black. Lauren is racially palatable; Theresa is not.

Each of the above examples helps to advance the central argument we make in this book: namely, that racial judgments are based not just on phenotypic differences (or judgments on the basis of a person’s skin color) but on performative differences (judgments based on how a person conforms to behavior stereotypically associated with a certain race). In other words, we judge people based not only on the color of their skin but on the content of their racial performance. By racial performance we simply mean racially-associated ways of being, including, but not limited to, how we dress and style our hair, our institutional affiliations, who we date and/or marry, where we live, how we speak, the people with whom we associate, and our overall mannerisms and demeanor. Think of the foregoing ways of being as a set of racial criteria. University administrators, police
officers, employers and other decision-makers can employ these criteria to ascertain not simply whether the person with whom they are interacting is black in an identity status sense, but also whether that person is black in an identity conduct or performance sense. Put another way, utilizing the above criteria, decision makers across institutional settings can determine the degree of a person’s blackness.

As should already be apparent from the above examples, our discussion of identity performance will cut across a number of different contexts including, affirmative action and racial profiling. But, the majority of this book centers on the contemporary professional workplace. Why? The short answer is that almost all of our conversations about and analysis of employment discrimination focus on whether an employer’s hiring or promotion decisions reflect a preference for whites over non-whites. This interracial frame is too narrow. To fully understand the dynamics of race in the contemporary workplace we have to pay attention to exactly what America has employed Barack Obama’s racial identity to discuss: racial salience—differences amongst and between black people based on their racial performance. As we will show, for at least some employers—including those that profess a commitment to both racial equality and racial diversity—the ideal black employee is one who is identifiably black with respect to phenotype but unconventionally black with respect to conduct or social behavior. From the employer’s perspective, this employee “looks” black but “acts” white—or at least does not act “too black.”

The story we tell about racial status and racial conduct is not a new story. Scholars, policy makers and judges have been telling this story about gender for quite some time. Consequently, most of us understand that a woman’s vulnerability to discrimination derives both from her sex (her status as a female) and from her gender (roughly, whether her female status is performed or expressed as masculine or feminine). In other words, we get that part of the problem of gender discrimination is that some employers (like airline companies) want women to look and act like stereotypical or traditional women; that other employers want their female employers to act like women sometimes and not act like women...
other times; and that few employers want their female workers to act like men.

Significantly, this “looking and acting” dynamic affects men as well. Indeed, there are a growing number of cases in which employers or co-employees discriminate against or harass men whom they perceive to be insufficiently masculine, men who failed to ‘act like men.”

Similarly, with respect to sexual orientation, homophobia cannot be adequately understood without taking into account both status and conduct. “Don’t Ask, Don’t Tell,” the policy the military employs to regulate gay and lesbian participation in the Armed Forces, is, at least in part, based on this dichotomy. Lesbians and gay men may serve in the military so long as they neither announce nor otherwise express their sexual orientation. Under “Don’t Ask, Don’t Tell,” both status and conduct are important.

By contrast, there has been little attempt to understand racial discrimination as a function of both status and conduct. Indeed, although it is currently fashionable to spout the rhetoric that race is a social construction, and not biological, there has been virtually no effort to demonstrate how identity performances shape our understanding of race. This book aims to do just that, and, in the process, broaden how we think about both racial identity and racial discrimination.

While a central point we make is that identity performance matters, we do not want to overstate the claim. Our analysis is not intended as a substitute for broader, structural accounts of racism such as Melvin Oliver’s and Peter Shapiro’s White Wealth Black Wealth or Howard Winard and Micheal Omi’s Racial Formation. Nor, in highlighting the importance of racial performance, do we mean to downplay the significance of phenotype. Phenotype continues to play an enormously important role in determining a person’s vulnerability to discrimination.

But phenotype has never been the sole basis upon which we make decisions about a person’s race. This helps to explain the phenomenon of passing—people who are “really” black “falsely” claiming white identity. The idea of blacks passing as
white, or as Cheryl Harris puts it, trespassing—entering the social world of white identity without permission—makes clear that phenotype is not the only criterion Americans have employed to determine a person’s racial identity.

More importantly for the purpose of this book, even when phenotype is the initial evidence we employ to assign a person to a particular racial category (e.g., black), that person can always challenge the social meaning we typically attribute to that category (e.g., criminality). How much so, is up for grabs. Our point is that identity performances are a means through which an individual can perform that challenge.

For example, something as simple as one’s choice of clothing can shape the social meaning of one’s racial identity. As our earlier example suggests, a black man is much more vulnerable to being stereotyped as a criminal if he wears baggy jeans and an oversized t-shirt than if he wears a suit and tie. His sartorial choices shape the content of his racial identity. For example, reacting to the inability of Cornel West—the distinguished African American professor at Princeton University—to get a cab, Dinesh D’Souza commented, “if he [Cornel West] dresses well he is less likely to be mistaken for criminal.” The basic insight—that identity performance shapes racial meaning—is largely missing in contemporary theories of racial identity and discrimination. We continue to treat race as though it is just a status identity with no performative dimensions; we continue to ignore how perceived racial conduct shapes how we understand race.

This is a problem. Attention to the status/conduct dichotomy is necessary in today’s anti-discrimination world. Thanks to Brown v Board of Education and the civil rights reforms it helped to produce, few employers today are likely to deny employment explicitly based on race as status. Moreover, there is public pressure for employers to racially diversify their staff, particularly at the level of management. Paradoxically, it is precisely because of this anti-discrimination backdrop that we should be concerned about identity performance.

Antidiscrimination law and the reputational harms of maintaining all-white work environments substantially diminish the likelihood that employers will discriminate against all blacks.
To the extent that employers want to discriminate, they are likely to do so by discriminating against a subset of blacks—those perceived to be “too” black (we call these “bad blacks”) in favor of those perceived as “acting white” (we call these “good blacks”). Good blacks negate racial stereotypes; bad blacks activate them. Good blacks are palatable; bad blacks are not. To the extent that anti-discrimination law focuses on racial status, this good/bad racial line—and its relationship to stereotyping—never gets challenged in court.

We recognize that there are some institutional settings or specific scenarios in which it might be disadvantageous for a black person to be perceived as acting white. This helps to explain the notion of an “uppity Negro,” a black person who is perceived to transcend some aspect of black conventionality. Recall that Supreme Court Justice Clarence Thomas claimed that his confirmation hearings were a form of punishment because he was an “uppity Negro”—in this instance, a black person who refused to toe the black left ideological line with respect to, among other issues, affirmative action. More generally, the notion is that a black person is vulnerable to being viewed as an “uppity Negro” when he crosses or transcends some racial boundary.

While our book focuses on the advantages of being perceived as acting white and disadvantages of being perceived as being too black, we understand that within some institutions and under some circumstances acting white could make a black person a “bad black”—that is, a black person who is racially unpalatable [by whom]. What is significant for our purposes is the existence of the phenomenon and the fact that identity performances determine whether people are situated on the right or left side of this good/bad racial line.

One implication of our theory of identity performance is that people of color are not passive objects of discrimination. They exercise choices to control the content of their racial character; they shape how people racially perceive them. Many people of color understand that to be successful in predominantly white workplaces they have to negotiate *their* difference (just as gays and lesbians have to negotiate *their* difference to be successful in the military, among other places). An important part of this negotiation involves countering
negative racial stereotypes that are often in conflict with institutional norms.

Consider, for example, a workplace that takes collegiality seriously, in which employees who have difficulty getting along are not promoted. Jason, a black man, wants to get promoted, so, like other employees, he will have to demonstrate that he is collegial. But race complicates his ability to do so. The stereotype of blacks as non-team-players, complainers, and institutional troublemakers both increases the pressure for Jason to signal his collegiality and makes it more difficult for his colleagues to experience him in that way. If Jason wants the promotion, he will have to present himself in a way—that is, perform—is identity—to disconfirm the stereotype of the troublemaker black. Why? The short answer is that all of Jason's workplace activities will be evaluated against the background assumption that black people are uncollegial. A hypothetical might help to illustrate this problem more clearly.

Assume that Jason believes that the firm’s hiring policy is bad and so he offers some suggestions as to how the firm might improve it. His colleagues could interpret this institutional behavior positively—as an indication that Jason is engaged in, is committed to, and cares about the firm. However, his colleagues could also interpret his behavior negatively—as evidence of Jason’s tendency both to go against the grain and to complain about firm practices. Because social psychology tells us that we tend to interpret people's behavior to confirm our stereotypes about them, the stereotype that African Americans are troublemakers increases the likelihood that Jason's colleagues will interpret his behavior negatively. Jason’s awareness of this possibility creates an incentive for him to “act white,” or at least to disidentify with and disassociate from his black identity. To the extent that he performs that disassociation and disidentification, he becomes less salient as a black person and is therefore less likely to activate the troublemaker/complainer stereotype.

One of this book’s central claims is that identity performances to disaffirm negative stereotypes can create structural barriers to success in the modern workplace. This is because identity performance is a form of work—shadow work—that, in addition to imposing psychic and emotional costs, limits
the employee’s capacity to productively navigate the workplace. Concretely, to the extent that an employee is overly concerned with negating racial stereotypes, he may take on too much work (to prove that he is not lazy), attend too many social events (to prove that he is “one of the guys”), refuse to ask for help when he needs it (to avoid the impression that he is unqualified), or avoid other racial minorities who might mentor him (to signal that he has no investment in racial group association or politics). In short, an employee who is worried about negating racial stereotypes may end up with more work and fewer resources than his white counterparts.

This racial disadvantage is not necessarily the product of conscious racial thinking. All of us have implicit biases that shape how we see and think about race.5 To borrow from Jerry Kang, with respect to race, our perception is far from “immaculate,” even when we try to see people as blank racial slates. This is the basic thrust of Malcom Galdwell’s Blink. Indeed, according to Gladwell, implicit bias “is at the root of a good deal of prejudice and discrimination.” We agree. In this sense, the fact that an employer’s actions might appear to reflect the notion that blacks are lazy or that Asian Americans are uncreative and disloyal does not mean that the employer’s decision was in fact driven by conscious racism.

Nor does the existence of a predominantly white workplace, by itself, prove illicit race-based decision-making. An employer may believe that managing a homogenous workforce is “cheaper” than managing a diverse one. The notion might be that while sameness oils the wheels of an institution, difference causes them to stick. The body of empirical scholarship that supports this idea asserts that employees who believe that they are relatively the same as other employees trust each other and are more likely to share valuable information and engage in cooperative behavior. From this, one reasonably might conclude that because sameness engenders employee collegiality and cooperation, it is more efficient than difference. Assuming this body of work is correct, the under-representation of people of color in a given workplace need not derive from negative racial thinking but from the employer’s desire to realize the efficiency gains of sameness or racial homogeneity.
This is not to say that an employer’s concerns about efficiency will always result in significant under-representation of people of color. Indeed, even to the extent that a firm is interested in efficiency, it will nevertheless hire some people of color because, as we explained above, failing to do so could create a public relations problem for the employer. Part of the argument we make is that an employer can avoid this public relations problem by discriminating based on identity performance. To achieve diversity and efficiency, the employer simply needs to screen for “but-for” people of color. That is, people of color who, but for phenotypic differences, appear to be just like white employees; people of color who look non-white but (appear to) act white.

Note, then, that this screening is not designed to eliminate the facial differences of race; the people whom the employer screens in remain, phenotypically, recognizably non-white. What gets screened out are the perceived performative differences of race, not race per se.

A key element of the story this book narrates is that employment decisions based on intra-group differences ought to be conceptualized as discrimination. By and large, anti-discrimination law focuses on inter-group differences—differences, for example between whites and blacks. Increasingly, however, we are looking at intra-group differences—differences, for example, among blacks or among women. Kimberle Crenshaw’s work has helped to reveal why this is important. Focusing on black women, Crenshaw demonstrated that historically, courts took the position that an employer could defeat a black woman’s racial discrimination claim by showing that it did not discriminate against black men; similarly, an employer could defeat a black woman’s sex discrimination claim by showing that it did not discriminate against white women. The failure on the part of courts to examine the intra-group differences of race and gender (differences among black people based on gender and differences among women based on race) created an anti-discrimination gap through which black women’s experiences fell.

Employing the theory of identity performance, this book pushes the intra-group difference insight further. Focusing still on black women, the basic idea is that while it is important to
recognize the differences between black women and white women, on the one hand, and black women and black men on the other, we should not lose sight of the differences that exist among black women based on how they (are perceived to) express or perform their black female identity. The previously discussed Lauren/Theresa hypothetical reveals how this dynamic can play itself out.

A few caveats. Nothing we have said is intended to suggest that there is some authentic way to express identity or that there is some true racial essence. We do not argue, for example, that Theresa, because she has dreads, is more authentically black than Lauren, who relaxes her hair. Nor do we invoke the Obama phenomenon to suggest that he is not “black enough.” Indeed, we are not at all interested in defining the boundaries of authentic racial identities—whatever racial authenticity means.

Nor is it our claim that Lauren has “sold out” but Theresa has not. As Randall Kennedy’s recent book demonstrates, there is a real concern within the black community about the practice of labeling people “sell outs.” Part of Kennedy’s argument is that the widespread employment of the term “sell out” does more harm than good. We do not take a position on this issue. Nor do we make value judgments about people’s self-presentation choices. Nowhere in this book do we argue that some identity performances are good and others are bad. Our concern here is with the relationship between identity performances and racial discrimination; not with evaluating particular identity performance choices.

Finally, in presenting the Theresa and Lauren hypothetical we do not mean to suggest that people of color are always consciously engaged in identity performances. The fact that incentives exist for black people to “act white” or to present their identities in racially palatable ways does not mean that they are always consciously doing so. Further, apart from Theresa and Lauren’s intentions about their identity performances, how they are racially interpreted by others is going to derive at least in part from the performative aspects of their identities. People’s racial impressions of both women are not going to be based entirely on the fact that, in an identity-status sense, they are black. In this sense, while Lauren may not intend for her identity to signal racial palatability relative to Theresa, the employer is
likely to experience her in that way based on her self-presentational choices. Lauren does not have to intend to be a “good black” for the employer to perceive her in that way.

As we have said, while we are interested in the identity performance problem outside of the corporate context, the theory of racial identity performance this book develops is grounded in the context of the modern professional workplace. Most of our examples are drawn from the context of large corporate law firms, investment banks, management consultancies, and other high-level service-sector organizations, but these models are clearly relevant to various other workplaces. As will become clear, our aim is not merely to describe the identity performance discrimination problem in the corporate setting, but also to discuss a variety of solutions—at the levels of individual responsibility (what can senior employees of color do to help?), institutional reform (how can corporate culture be changed to ameliorate the problem?), and anti-discrimination law (is this a problem anti-discrimination law can and should fix?). Our bottom-line conclusion is that we can neither meaningfully understand race nor effectively combat racial discrimination across different domains unless we begin to see race as a dynamic identity; one that shifts in meaning not simply over time, but from context to context, from personal interaction to personal interaction, from performance to performance.

The remainder of the book is organized as follows. Chapter 1 (“Why Act White?”) asks a fundamental question about identity performance: why would people of color engage in it. Asked another way, why might people of color “act” white? The short answer is to be racially palatable to the majority race. It is hard to be palatable to the extent that there are negative stereotypes associated with one’s identity. Chapter 1 describes the incentives that exist for people of color to perform their identities to disconfirm these racial stereotypes. There are a myriad of strategies a person might use to do so. These include strategic passing (“I might look black but I am not really black”), racial comforting (“I won’t make you feel guilty about being white”), and racial distancing (“I don’t hang out with other black people”). We articulate the costs of these strategies, and explain the ways in which the pressures to perform them are racially burdensome.
Chapter 2 (“Why Hire Blacks Who Act White”?) explains why employers might prefer black people who are perceived as acting white to those who are not so perceived. The answer is not necessarily racial hatred or animosity. The employer might simply want to reduce the transaction costs of managing a diverse workplace—that is, the cost of getting people to trust each other and to work closely together in teams. The employer could believe that difference is more costly or difficult to manage than sameness. Difference makes for grit in the workplace; sameness provides grease. Because the employer cannot discriminate against all blacks, it screens applicants for those who, though different in terms of phenotype, are the same as whites in terms of social behavior. From the employer’s perspective, these blacks look black but act white. They are “good blacks”—racially palatable. This chapter identifies the selection mechanisms an employer might utilize to screen these “good blacks” into the workplace.

Chapter 3 (“Acting Like A Black Woman?”) focuses specifically on performance dynamics as they affect black women. Black feminists have long argued that black women are doubly burdened, inside and outside of the corporate context, because of their race and gender. As previously mentioned, Kimberle Crenshaw explains this in terms of intersectionality—namely, that black women’s experiences reside at the intersection of two roads of disadvantage: racism and sexism. Scholars often employ Rogers v. American Airlines, an important anti-discrimination law case, to make this point. Rogers was terminated from her job because she wore her hair in braids. In part, the intersectionality argument is that American airlines policy prohibiting its employees from wearing braids disparately impacts black women—that is, it impacts black women more than it does black men (because they are not women) and more than it does white and other women (because they are not black). Chapter 3 argues that the Rogers case is not just about intersectionality or the double-bind; it is also about identity performance. Hair is a part of a person’s performative identity. As a general matter, in the corporate context, black women who wear their hair in braids or dreadlocks are less palatable and more racially salient than black women who do not. An employer could interpret the decision to braid or dread one’s hair as a decision not to act white and/or as decision to act too black.
Our hope is that the preceding chapters will persuade readers that we should take the “acting white”/”acting black” phenomenon seriously. One might be sympathetic to our argument but nevertheless think that chapters 1, 2 and 3 ask us to push antidiscrimination law and social policy beyond their intended reach. Surely the civil rights struggle was not about protecting a black women’s right to wear her hair in braids. Racial performance claims go too far.

In fact, however, antidiscrimination law and social policy already take performance dynamics into account. Chapters 4 and 5 demonstrate two contexts in which this is so. Central to Chapter 4 (“Acting Like a (White) Woman”) is the widespread recognition that a woman’s vulnerability to discrimination is a function of identity performance, or the way she expresses her gender. Institutions treat women differently depending on whether the women in question are perceived to be masculine or feminine—depending, in other words, on whether women are acting like a woman or acting like a man. A recent case involving a Nevada casino that terminated one of its female bartenders because she refused to wear makeup amply demonstrates this point. We discuss this case to illustrate the relationship between identity performance and sex discrimination.

Chapter 5 (“Acting Straight”) moves the discussion to sexual orientation. The most cursory examination of the personal ads of gay and lesbian publications make clear that gay men want to know whether other gay men “act” straight or gay. In other words, in the marketplace of gay desire, identity (and not just sexual) performance matters. Identity performances—and whether gay and lesbians are perceived to act straight or not—matter outside of this marketplace as well. Chapter 5 illustrates the extent to which this is so by focusing on the military’s Don’t Ask, Don’t Tell Policy. Both the policy itself and the gay rights community’s response to it reveal how identity performance—whether a gay or lesbian person is perceived to be “flaunting” his/her sexuality and/or is stereotypically gay/lesbian—shapes how we experience gay and lesbian identities. Together, Chapters 4 and 5 asks: If we take performance dynamics seriously in the context of gender and sexual orientation, is there a good reason for us not to do so in the context of race?
Broadening the discussion beyond the corporate arena, Chapters 6 and 7 answer that question in the negative. Chapter 6 (“Not Acting Black”) focuses on racial profiling. Identity performances play a crucial role in the context of both police interactions and public policy discussions about racial profiling. To avoid being stopped by the police, black people might choose to drive less flashy cars; to terminate a police encounter a black person might consent to searches he has a right to refuse. Doing so could disconfirm the stereotype that he is carrying drugs. In both of these examples, the identity performance strategy is to signal law abidingness against a background stereotype of criminality. This strategy is also at play in public policy discussions about racial profiling. For example, the ACLU’s campaign against racial profiling involves the circulation of images of well-dressed and seemingly respectable black men. The implicit message of this campaign is that because racial profiling is affecting the lives of “good” black men, the practice should be abolished.

Chapter 7 (“Acting Different”) focuses on affirmative action. The Supreme Court has made clear that diversity is a compelling justification for affirmative action. In accepting this rationale, the Court rejected a number of others, including the existence of societal discrimination, role modeling, and the under-representation of minorities in certain professional and occupational settings. Focusing on higher education, Chapter 7 raises the question of whether the diversity rationale for affirmative action creates incentives for people of color and blacks more specifically to perform “difference”—on their applications, in the classrooms and in their broader engagements with the university and with other students. We argue that these incentives do in fact exist but that it is not clear that they overwhelm the incentives for students of color to perform “sameness.”

Chapters 8 and 9 focus on solutions. To do so, they return the discussion to the corporate setting. The questions at the heart of both chapters are these: Are there possible solutions to the problem of employers preferring blacks who are perceived to act white over other blacks. Is there something we can do to eliminate the corporate pressures for blacks to act white? Chapter 8 (“Acting Within the Law”) begins with a discussion of
law and identifies several anti-discrimination approaches judges and employers might take to tackle the problem.

Chapter 9 (“Acting White to Help Other Blacks?”) explores whether solutions may lie at the level of individual action. To this end, we ask: how might the presence of people of color in senior management positions ameliorate the discrimination problems detailed in this book? Part of our answer is pessimistic: the presence of people of color at the top of the corporate hierarchy may do little to help those at the bottom. To put this more pointedly, notwithstanding the strong notion in the black community that African Americans should “lift as we climb,” incentives exist for people of color to race to the top of the corporate ladder and pull it up behind them once they get there. Doing so helps them to blend in. On the flips side, to the extent that one develops the reputation as a person committed to, for example, increasing the number of blacks in the firm, one would racially stand out as a person who is not acting white. That’s the pessimism.

But there is reason for optimism as well. Our hope is that explicitly identifying the disincentives for blacks at the top of the corporate ladder to lift as they climb, these senior black professions will become more aware of and work actively work to counteract them. This chapter provides concrete ways in which senior black decision-makers can do so.

Chapter 10 concludes the book. Here we discuss some of the objections one might reasonably raise to our arguments. Are we saying that race is mere behavior—that one can act one’s way into and outside of a racial category, that we can put on and take off our race? Do we mean to articulate a “blame the victim” story—that people of color invite discrimination by failing to properly manage and perform their identity—by failing to act white? Is it our claim that identity performances are always conscious? Does recognizing the problem of racial identity performance take us down a dangerous slippery slope such that the law would have to recognize all claims to cultural difference? Are we affirmatively advocating a right to difference? Do we believe that identity performances occur solely in the context of the workplace—that outside of the workplace people are free to be their “true” selves? Does the working identity phenomenon apply only to people of color? Are we arguing that people should
have a right to be different? Are we suggesting that there is some true way to be white or non-white? Does our focus on identity performance obscure the broader structural problems of race? Are we advancing a normative claim about what race should be? Is our argument an endorsement of multiculturalism? Are we seeking to protect what one might call racial culture? The short answer to each question is no. We elaborate further in the conclusion.

***

CHAPTER 4

ACTING LIKE A BLACK WOMAN?

Central to the concept of identity performance is the idea that intra-group differences matter. Employers make racial decisions based not only on inter-racial preferences but on intra-racial preferences as well. Our claim that anti-discrimination law should pay attention to the latter is not new. The theory of intersectionality makes precisely this point. This chapter explains how performance theory builds upon and adds to intersectionality.

Intersectionality pushes for the legal recognition and delineation of specific status identities. The notion is that particular social groups (e.g., black people) are constituted by multiple status identities (e.g., black lesbians, black heterosexual women, and black heterosexual men). According to intersectionality theory, the different status identity holders within any given social group are differently situated with respect to how much, and the form of, discrimination they are likely to face. Intersectionality argues that, in ascertaining whether a particular individual is the victim of discrimination, courts should pay attention to the specific status identity that the person occupies. For example, if the plaintiff bringing a discrimination suit is a heterosexual Asian American female attorney, courts should adjudicate her discrimination claim with
that status identity in mind. More specifically, the fact that the employer in question treated Asian American men (or white or other women) well should not be taken as dispositive evidence that the employer did not either exhibit animus towards or harbor negative impressions of Asian American women.

The significance of paying attention to the plaintiff's specific status identity is that it allows courts to consider evidence on the question of whether the plaintiff's discrimination derives from an intra-group distinction. Typically, courts conceptualize racial discrimination as an inter-group distinction, a distinction, for example, between whites and Asian Americans. Under this conceptualization, an Asian American plaintiff will typically be required to demonstrate that she was treated differently (disparately) from a similarly situated non-Asian American (usually a white) employee. But our hypothetical plaintiff might not be the victim of this form of discrimination. As noted in the prior paragraph, it is possible that her firm prefers Asian American men to Asian American women, discriminating against the latter but not the former. Framing the discrimination question solely in terms of the plaintiff's Asian American identity ignores the fact that the plaintiff's discrimination could be a function of her more specific status identity, her identity as an Asian American female.

This chapter demonstrates how identity performance theory builds on intersectionality's insight that discrimination is based both on inter-group and intra-group distinctions. Central to performance theory is the idea that to appreciate a person's vulnerability to an intra-group distinction, identity performances must be taken into account. This is because intra-group distinctions are based not only on identity status but on identity performance as well. Thus, while a firm might prefer Asian American men to Asian American women (an intra-racial status distinction), it is also true that a firm might employ stereotypes to prefer one Asian American woman over another (an intra-racial performance distinction). As presently articulated, intersectionality does not capture the latter distinction, a distinction that performance theory conceptualizes as potentially (though not necessarily) discriminatory.

***
Almost twenty years ago, Kimberlé Crenshaw published *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*. The article remains preeminent in this area. In it, Crenshaw identifies an anti-discrimination problem that derives from the employment of "single axis frameworks" to adjudicate discrimination claims brought by black women. These frameworks typically focus on just race or just sex, failing to consider that these two identities interact--intersect--in ways that materially shape a person's vulnerability to and experiences of discrimination.

One can read intersectionality to mean that personhood can be disaggregated into its constitutive parts--that, for example, race can be separated from gender. This is because the notion that two things "intersect" brings readily to mind a Venn diagram within which each thing exists both inside and outside of the intersection. Indeed, this is the conception of intersectionality that students being introduced to Critical Race Theory most often articulate. Some of them even reproduce this understanding schematically along the lines of the diagram below.

Insert diagram

The diagram invites us to think that there are social moments in which race and gender exist apart from each other as "pure" identities. Although the metaphor of intersectionality conveys this idea, the fuller theory of intersectionality, and Crenshaw's conceptualization of this theory, rejects it. Fundamental to intersectionality theory is the notion that race and gender are interconnected; they do not exist as disaggregated identities (in other words, there are no non-intersecting areas in the diagram). In this sense, there might be a tension between the substantive theory that intersectionality presents and the conception of identity that the intersectional metaphor invites. Perhaps because of this tension, scholars have employed other terms-cosynthesis, multidimensionality, multiple consciousness, compoundedness, interconnectivity, and multiplicity-to discuss the "single axis" problem (or some variation of the problem) that Crenshaw identified. None of this terms--several of which Crenshaw herself employs in her original articulation of the theory--alters the fundamental insight of
intersectionality—that the overlapping nature of our identities shapes our vulnerability to discrimination.

To better understand how intersectionality implicates anti-discrimination law, consider the following hypothetical.

Tyisha, a black woman, is interviewing with an elite corporate firm. There are eighty attorneys at the firm, twenty of whom are partners. Only two of the partners are black, and both are men. The firm has three female partners, and all three are white. There are no Asian American, Native American, or Latina/o partners. The firm is more diverse at the associate rank. There are fifteen female associates: three, including Tyisha, are black, two are Asian American, and one is Latina. The remaining female associates are white. Of the forty-five male associates, two are black, two are Latino, three are Asian American, and the rest are white.

Stipulate that five other recent law school graduates are interviewing for the job: a black man, an Asian American male, one white man, and one white woman. The firm does not hire Tyisha and a white male associate. Tyisha brings a disparate treatment discrimination suit under Title VII. She advances three separate theories: race discrimination, sex discrimination, and race and sex discrimination. She does not have any direct evidence of animus against her on the part of the employer. In other words, Tyisha can point to no explicit statements such as "We don't like you because you are a woman," or "We think that you are incompetent; all blacks are." The evidence is circumstantial: Tyisha was highly qualified, but was rejected for a position that was arguably open.

The court, ruling in favor of the firm’s summary judgment motion, rejects all three of Tyisha's claims. With respect to the race discrimination claim, the court reasons that it is not supported by evidence of intentional or animus-based discrimination. According to the court, there is no evidence that the firm dislikes (or has a taste for discrimination against) blacks. In fact, argues the court, the evidence points in the other direction. The very year the firm denied employment to Tyisha, it offered an associate position to another African-American. Moreover, the court points to the fact that the firm had, in the past, promoted African Americans to the rank of partnership. The court concludes that the simple act of not hiring one black person, especially when other blacks have been promoted, is
insufficient to establish discrimination.

The court disposes of Tyisha's gender discrimination claim in a similar way. That is, it concludes that the fact that the firm hired a white woman the very year it did not hire Tyisha, and the fact that the firm has promoted white women to the rank of partnership, suggests that the firm did not engage in sex-based discrimination against Tyisha.

The court concludes its dismissal of Tyisha's compound discrimination claim (the allegation of discrimination based on her race and sex) with an argument about cognizability. It explains that while Tyisha may argue that the firm discriminated against her based on her race or based on sex, she may not argue that the firm discriminated against her based on her race and sex. According to the court, there is no indication in the legislative history of Title VII that the statute intended "to create a new classification of 'black women' who would have greater standing than, for example, a black male." According to the court, "[t]he prospect of the creation of new classes of protected minorities, governed only by mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's Box."

The foregoing hypothetical articulates the classic intersectionality problem wherein black women fall through an anti-discrimination gap constituted by black male and white female experiences. The problem can be framed in terms of essentialism. Consider first the court's response to Tyisha's race discrimination claim. In determining whether Tyisha experienced race discrimination, the court assumes that there is an essential black experience that is unmodified by gender. The court's adjudication of Tyisha's race discrimination claim conveys the idea that racism is necessarily total. It is a particular kind of animus that reaches across gender, and affects men and women in the same way. It is about race--a hostility against all black people. This conception of discrimination suggests that it is unlikely that institutions possessing this animus will make intra-racial distinctions, or that if such distinctions are made (i.e., a firm promotes and hires some black people but does not promote and hire others), what is at play is not racial animus. With this conception of anti-discrimination law, it is not surprising that the court would have difficulty with Tyisha's race
discrimination claim. After all, this claim emerges out of a factual context in which there is no allegation that the firm discriminated against black men.

Yet this is precisely what Tyisha is arguing. The intra-racial distinction argument is that the firm distinguishes between black women and black men, that it prefers the latter, and that this preference is discriminatory. However, to the extent that a court essentializes race (by, for example, conceptualizing race without gender specificity), it makes it likely that the court will not view the preference Tyisha identifies as racially discriminatory. Put another way, if, as in our hypothetical case, a court's anti-discrimination starting point is buttressed by an essential conception of race, that court may have difficulty understanding how a racist firm might promote some black people (e.g., men) but not others (e.g., women).

Consider now the court's adjudication of Tyisha's sex discrimination claim. Here, too, the court's analysis reflects essentialism. The essentialism in this context conveys the idea that women's experiences are unmodified by race. The court assumes that if a firm engages in sex discrimination, such discrimination will negatively affect all women--and in the same way. Thus, the possibility that an institution might make intra-gender distinctions does not occur to the court. The intra-gender distinction argument is that the firm distinguishes between black women and white women, that it prefers the latter, and that this preference is discriminatory. However, to the extent that a court essentializes gender (by, for example, conceptualizing gender without racial specificity), likely that court will not view the preference Tyisha identifies as gender discrimination. In other words, if, as in our hypothetical case, a court's anti-discrimination starting point is buttressed by an essential conception of gender, that court may have difficulty understanding that a sexist firm might promote some women (e.g., whites) and not others (e.g., blacks).

Finally, consider the court's rejection of Tyisha's compound discrimination claim. Here, the court doctrinally erases black women's status identity as black-women. Its conclusion that this identity status is not cognizable means that, for purposes of Title VII, black women exist only to the extent that their experiences comport with the experiences of black men.
or white women. Under the court's view, and in the absence of explicit race/gender animus, black women's discriminatory experiences as black-women are beyond the remedial reach of Title VII.

But let's now assume that a court is sympathetic to intersectionality? Doing so helps us to introduce the identity performance. To appreciate the nature of this problem, assume again that Tyisha is an African American female seeking employment with a predominantly white elite corporate law firm. Stipulate now that four other black women are interviewing with the same firm. The firm hires each of these four black women, but it does not hire Tyisha, the fifth black woman.

This hiring decision creates a buzz around the firm. The firm had never hired so many non-white attorneys. Moreover, the firm has never hired a class within which they were only non-white attorneys. Indeed, prior to 1980, the firm had never hired a single black female associate. Further, most of those who were hired after that date left within two to three years of their arrival. Given the history of black women at the firm-- low hiring rate, high attrition rate, low promotion rate--associates at the firm dubbed this year the "year of the black woman."

Tyisha, however, is not happy with the firm's decision to deny her a job. She files a Title VII discrimination suit, alleging (1) race and sex compound discrimination, i.e., discrimination against her on account of her being a black woman, and (2) discrimination based on identity performance. The firm moves for summary judgment on two theories. First, it argues that Tyisha may not ground her discrimination claim on her race and sex. According to the firm, Tyisha may separately assert a race discrimination claim and/or a sex discrimination claim; however, she may not, under Title VII, advance a discrimination claim combining race and sex. Second, the firm contends that whatever identity Tyisha invokes to ground her claim, there is simply no evidence of intentional discrimination.

With respect to the first issue, the court agrees with Tyisha that a discrimination claim sounding in race and sex is, under Title VII, legally cognizable. The court has read,
understood, and agrees with the literature on intersectionality. Under the court’s view, black women should be permitted to ground their discrimination claims on their specific status identity as black women. According to the court, failing to do so would be to ignore the complex ways in which race and gender interact to create social disadvantage: a result that would be inconsistent with the goals of Title VII.19

With respect to second issue, the court agrees with the firm. The court reasons that recognizing Tyisha’s status identity does not prove that the firm discriminated against her because of that identity. It explains that the firm hired four associates with Tyisha’s precise status identity—that is, four black women. Why, the court rhetorically asks, would a racist/sexist hire, not one or two of these women—but four? The court suggests that when there is clear evidence of non-discrimination against the identity group within which the plaintiff is situated, that produces a strong inference, if not a presumption, that the plaintiff was not the victim of discrimination.

The court rejects the plaintiff’s arguments that Title VII itself and the Supreme Court’s interpretation of Title VII focuses on protecting individuals, not groups, from discrimination.20 According to the plaintiff, a black applicant who is not promoted may bring a discrimination claim even if another black person is promoted instead or even if there are other black employees represented in the position for which the plaintiff is applying and/or in the workplace more generally. Central to the plaintiff’s argument is the idea that an employer cannot escape liability for having a group represented in the workplace; there is no “bottom line” defense to discrimination.21

The court maintains that, as a "theoretical matter," the plaintiff is right. That is, the firm's non-discrimination against the four black women is not proof positive that it did not discriminate against the fifth. The court insists, however, that such evidence is persuasive. It explains that

[proof that [the employer's] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided. We cannot say that such proof would have absolutely no
probative value in determining whether the otherwise unexplained rejection of the minority applicants was discriminatorily motivated. Thus, although we agree that such proof neither was nor could have been sufficient to conclusively demonstrate that [the employer's] actions were not discriminatorily motivated, [it is proper] to consider the racial mix of the work force when trying to make the determination as to motivation.22

The court also rejects Tyisha’s performance argument. It reasons that Title VII protects against discrimination based on immutable characteristics. More particularly, the Court argued that, because Title VII provides no protection for an employee’s choices relating to appearance,23 there is no need to engage the question of whether Tyisha’s means of self-presentation (e.g., her hair style and manner of dress) caused discomfort to the lawyers who interviewed Tyisha for the job.

The problem with the court’s approach is that it fails to consider whether Tyisha was the victim of an intra-racial (or intra-gender) distinction based not simply on her identity status as a black woman but on her performance of that identity. In effect, the court’s approach essentializes the identity status “black female.” The court assumes that Tyisha and the other four black women are similarly situated with respect to their vulnerability to discrimination. However, this might not be the case. The social meaning of being a black woman is not monolithic and static but contextual and dynamic. It is shaped by performance. In other words, how black women present their identity can affect whether and how they are discriminated against.

Consider the extent to which the following performance issues might help to explain why Tyisha was not promoted, but the other black women were. Stipulate that the following information was visually apparent, disclosed on the resume or revealed in the context of the interview.

Name. Each of the four black women have names that are perceived to be conventional (Mary, Susan, Helen, Tiffany and Sarah). Tyisha’s name has a black racial signification.

Hair. While Tyisha wears her hair in dreadlocks, the other
black women relax their hair.

Dress. Tyisha does not wear makeup and wore a trousers suit with a Kente cloth scarf to the interview. Each of the four black women wears makeup and each wore a skirt suit with a white cotton blouse.

Projected Institutional Identity. Tyisha’s resume revealed that, as a law student, she was a student activist and served on, among other committees, "The Black Student Solidarity Committee" and "The Students for Faculty Diversity Committee." Only one of four black women participated on an identity-related committee--"Students for Interracial Cooperation." Two were members of the Federalist Society.

Projected Social Identity. All four of the black women play tennis and two of them play golf; Tyisha plays neither.

Marital Status. All four of the other black women are married. Two are married to white men and each of them is married to a professional. Tyisha is a single mother.

Residence. Each of the other four black women lives in predominantly white neighborhoods. Tyisha lives in the inner city, which is predominantly black.

Religious Affiliation. Tyisha is a member of the Nation of Islam. The religious identities of the other four black women are unknown.

Because the court conceptualizes Tyisha’s discrimination case solely in terms of her identity status as a black female, it does not consider any of the foregoing performance dynamics. Yet any one of them could (and all of them together would) explain the firm's decision not to promote Tyisha. In other words, it is possible that the partnership’s promotion decisions reflect an identity preference based on performance.

Admittedly, we exaggerated the performative aspects of Tyisha's identity. We do not mean to suggest, then, that Tyisha can stand in for most or even a significant number of black women. We are not advancing an empirical claim. Our argument is a theoretical one--that performance dynamics can shape how
an employer responds to an employee's race and gender identity.

Assuming the foregoing performance issues obtain in Tyisha's case (again, we think it unlikely that any one individual will exhibit the aspects of identity we attribute to Tyisha), do they reflect impermissible discrimination? The answer is not obviously yes. Perhaps the partners use the aforementioned criteria to ascertain the extent to which each of the women is likely to fit comfortably within the law firm. Working in an organization is not only about doing work. It is also about getting along with people and getting them to like you. An argument can be made that a firm could reasonably conclude that, based on Tyisha's performative identity, she exhibits a less than collegial institutional identity. The other four black women, in contrast, based on their performative characteristics, look to be collegial. A firm's judgment in this respect, right or wrong, one might argue, does not evidence racial animus. Indeed, it is precisely concerns about collegiality and fit that explain the proliferation of such books as How to Win Friends and Influence People.

Our modest claim in this chapter is that the foregoing set of facts could reflect a story about discrimination. The notion is that the employer might have perceived Tyisha to be "more black" in a negative social meaning sense than the other black women. That perception, in turn, made Tyisha more vulnerable to the attribution of negative racial stereotypes than the other women. One can restate this point employing a term from social psychology: priming. Tyisha performance of blackness is a stronger racial prime, a stronger catalyst for the triggering of negative racial stereotypes, than the other four black women. We develop this idea more fully in the context of our discussion of anti-discrimination law. For now it is enough to understand that race could be (though is not necessarily) implicated in the employer's decision not to hire Tyisha.

If we are right in thinking that our hypothetical potentially reflects a racial problem, the question is: Can the law intervene to manage it? More normatively, should the law be pushed in that direction? These are questions we take up in Chapter 6. Before doing so, the next chapter turns to a discussion about gender and identity performance. Our sense is that there is
widespread understanding that performance dynamics shape women’s vulnerability to discrimination. To some extent, this understanding is reflected in the distinction we draw between sex and gender. Sex is sometimes understood as a biological identity that takes the form of either male or female; gender is sometimes understood as the social roles assigned to our sex, and these social roles fall into one of two categories: masculine and feminine. Performance discrimination occurs when people refuse or fail to align their sex with their gender. So, for example, men who are feminine or women who are masculine are vulnerable to performance because of the disalignment or non-conformity between their sex and gender.

Some readers may be surprised to learn that courts recognize discrimination claims based on gender non-conformity. Chapter 5 focuses on a very recent case involving a casino that terminated one of its female bartenders, notwithstanding her outstanding employment evaluations, because she refused to wear makeup. The bartender sued, arguing sex discrimination. Describing the nature of this case, explaining how it implicates sex discrimination, and revealing how the law has responded to gender performance claims more generally helps us to make the case Tyisha should have her day in court, that race-based (or race and gender-based) performance discrimination claims should be cognizable.


7 Of course, this simple comparison to white men (who were taken as the norm) has become more complex since discrimination law was expanded to recognize claims by white men themselves.

8 Crenshaw, “Demarginalizing the Intersection.”


10 Crenshaw, “Demarginalizing the Intersection” 139.

11 See Peter Kwan, “Jeffrey Dahmer and the Cosynthesis of Categories,” Hastings Law Journal 48 (1997): 1280 (suggesting that ”[c]osynthesis offers a dynamic model whose ultimate message is that multiple categories through which we understand ourselves are sometimes implicated in complex ways with the formation of categories through which others are constituted”).


16 See Adrien Katherine Wing, “Brief Reflections Toward a Multiplicative Theory and Praxis of Being,” *Berkeley Women's Law Journal* 6 (1990-91): 181 (observing that each person has multiple identities that constitute one indivisible being).


18 The actual case analyzed in Crenshaw’s article, “Demarginalizing the Intersection,” was DeGraffenreid v. General Motors 43 F. Supp. 142, Fed. Dist. Ct., E.D. Mo. 1976, where five black women had brought a discrimination claim against their employer, General Motors. In Crenshaw’s words, “[b]ecause General Motors did hire women—albeit white women—during the period that no Black women were hired, there was, in the court’s view, no sex discrimination that the seniority system could conceivably have perpetrated.” Crenshaw, “Demarginalizing the Intersection” 142.

19 [Insert Cite to] Lam opinion.

20 See 42 US Code. Sec. 2000e-2a2. 2000 (prohibiting an employer from "limit[ing], or classify[ing]... applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities...") (emphasis added); Connecticut v. Teal 457 U.S. 440, 455. U.S. Sup. Ct. 1982 ("It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group.... [T]he statute's focus on the individual is unambiguous." ) (citation omitted).

21 See Furnco Constr. Corp. v. Waters 438 U.S. 567, 579. U.S. Sup. Ct. 1978 ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.... It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force.") (citing Espinoza v. Farah Manufacturing Co. 414 U.S. 567, 580. U.S. Sup. Ct. 1973. In Espinoza, a Mexican was not hired for a position within a workplace in which there was a very high percentage of employees of Mexican descent (96%). While the Court explained that such statistics "do not automatically shield an employer" from a discrimination claim because the Court did not rely on any other evidence. "[T]he plain fact of the matter is that [the employer] does not discriminate against persons of Mexican national origin... In fact, the record shows that the worker hired in place of [the plaintiff] was a citizen with a Spanish surname." Espinoza and Furnco suggest that courts sometimes do deny plaintiff's discrimination claims if members of the plaintiff's protected class are represented in the workplace or if someone of plaintiff's protected class was hired instead of the plaintiff).


24 See Devon W. Carbado, *The Legal Construction of Race* (manuscript on file with author).