

THE HISTORY AND LIMITED PROTECTIONS AGAINST INTRA- RACIAL COLOR DISCRIMINATION

FROM A CRITICAL RACE FEMINIST THEORY PERSPECTIVE

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INTRODUCTION

I became aware of my darkness around the age of five. I remember the casual warnings of the trials and tribulations I would experience if I failed to avoid the sun.¹ In rooms with lighter-skinned girls I watched in awe of the benignity and praise adults bestowed upon them. In second grade, my classmate, a lighter-skinned black boy with a beautiful smile, made it his mission to ensure the entire class knew me as charcoal. Throughout my childhood and into my teenage years, family members, friends, and even prophets of my church, shared with me their fears of having their own dark-skinned child, and impressed upon me the importance and the beauty of lighter skin. Lighter skin brought with it an identity of softness and beauty, whereas my darker skin meant that I was destined to be defensive and abrasive. This ideology has been constantly affirmed in casual conversations,

¹ Commonly in communities of color, children are warned to avoid the sun for fear that they will become darker. This message was exposed in the African American community by Toni Morrison in the book *Blue Is the Warmest Color* and, in the novel *Don't Play In the Sun* by Marita Golden.

social media, magazines, television, and film. I could share far more detailed anecdotal evidence of my personal experiences with colorism. Unfortunately, that is where the typical colorism conversation begins and ends; with the individual's perspectives, absent true examination of the institution that creates these experiences.

When confronted with racism, I was taught to speak out against it, and urgently reject white supremacy as a survival tactic. Yet I was never given the tools to address colorism, likely because the people who were expressing these oppressive beliefs were said to be my comrades in the war against racism. I regularly cowered or deflected colorism because not only was it the normality of the black experience, but it was also far less impactful and painful than racism, or so I thought. I had been urged by those perpetuating colorism to believe that they meant no harm and that black peoples' position in society could only improve if we stood together against the tyranny of racism. My community seemed eternally destined to fail to hold accountable those among us who used institutional racism and their proximity to whiteness to subjugate those of us cursed with darkness. I had no idea that the Civil Rights Act, which was intended to protect people of color from white supremacy, could also be used to protect darker people from intra-racial oppression.

Colorism plagues communities of color throughout the world but the conversation on colorism has yet to center around how the institution of colorism oppresses darker-skinned individuals. In the past four decades, the existence and implications of institutional racism have become widely accepted as fact; colorism has yet to be understood similarly. This note examines the institution of colorism and its implications on communities of color, specifically in the African American, Asian American, and Hispanic communities. The note then examines the protections against colorism provided for in the Civil Rights Acts of 1964 and 1968, and explores the few cases of intra-racial color discrimination adjudicated since the passage of the Civil Rights Acts. At the outset, it is important to remark that this note in no way seeks to devalue or discredit the role played by minority institutions in advancing civil rights, but it does seek to hold such institutions accountable for empowering, supporting, and even assisting in the development of institutional colorism.

I. FRAMEWORK

This note is framed through the lens of critical race feminist theory, which consists of both critical race theory, and critical feminist theory. The hybrid application of these two frameworks ensures that gender and race, and the way in which they affect our society, are analyzed and addressed both separately and together. Kimberlé Crenshaw popularized critical race theory

in the late 1980's.² Critical race theory gives scholars the tools to challenge “the ways in which race and racial power are construed and represented in American legal culture.”³ Critical race theory provides a framework to aide in the deconstruction of institutional racism.⁴ In 1990, Stephanie M. Wildman provided a framework for the critical feminist theory, which pushed the feminist movement to become more radical in its quest for equality between men and women.⁵ Critical feminist theory seeks to counter women’s societal subordination by examining theoretical, legal, philosophical, and social research.⁶ For scholars and advocates to properly address all forms of systemic oppression, understanding intersectionality is crucial. Combining critical race theory and critical feminist theory ensures that intersectionality is properly addressed. Critical race feminist theory therefore examines how gender and race intersect to further subjugate and oppress marginalized people.⁷ It provides a feminist perspective to the critical race theory.⁸

² See Angela Onwuachi-Willig, *Celebrating Critical Race Theory at 20*, 94 IOWA L. REV. 1497 (2009).

³ KIMBERLÉ CRENSHAW, NEIL GOTANDA, GARY PELLER, KENDALL THOMAS, *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, XII (3d edition, 1995).

⁴ Theodorea Regina Berry, *Critical Race Feminism*, *ENCYCLOPEDIA OF CURRICULUM STUDIES* 152 (Kraig Kridel ed., 2010).

⁵ Stephanie M. Wildman, *Critical Feminist Theory*, 1 *ENCYCLOPEDIA OF LAW & SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES* 349-350 (David S. Clark ed., 2007).

⁶ *Id.*

⁷ Cheryl Nelson Butler, *A Critical Race Feminist Perspective on Prostitution & Sex Trafficking in America*, 27:1 *YALE L. J. AND FEMINISM* 95, 103-04 (2016).

⁸ Adrien Katherine Wing, *Critical Race Feminist Theory*, 3 *ENCYCLOPEDIA OF LAW & SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES* 350 (David S. Clark ed., 2007).

To comprehensibly understand the institution of colorism, it is imperative to understand the structure of internalized racism. Studying internalized racism allows scholars to examine how the institution of colorism was born, and the role it plays in the oppression of darker-skinned people within communities of color. Internalized racism, “occurs in a racist system when a racial group oppressed by racism supports the supremacy and dominance of the dominating group by maintaining or participating in the set of attitudes, behaviors, social structures and ideologies that undergird the dominating group's power.”⁹ In 1995, Donna Bivens outlined four ways in which internalized racism affects people of color: (1) decision-making, (2) resources, (3) standards, and (4) identifying problems.¹⁰ Due to institutional racism, people of color frequently do not have full decision-making power over their lives.¹¹ Because people of color are raised in communities where people who look like them lack full decision-making power, many have a subconscious belief that white people have more knowledge than them.¹² As a result of this belief, people of color often disvalue the opinions of other people of color.¹³ The third factor in Bivens outline of internalized racism focuses on people of color’s belief that by deliberately spending their

⁹ DONNA K. BIVENS & BARBARA MAJOR, *FLIPPING THE SCRIPT: WHITE PRIVILEGE AND COMMUNITY BUILDING 45* (1995).

¹⁰ *Id.* at 48.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

resources in their racial community, they dismiss other races economic contributions. Due to systematic racism, resources are unequally in the hands of white people, which causes people of color to struggle to believe they have the right to control those resources.¹⁴ People of color have difficulty identifying systematic oppression, because institutional racism mischaracterizes people of color as the cause of all racial disparities. For example, because institutional racism perpetuates the myth that black people experience crime because they are inherently more violent than white people, black people may not consider alternative factors which have contributed to increased rates of crime in their communities, such as the role of the immense state-sanctioned violence inflicted on black communities.¹⁵ In short, to dismantle the institution of colorism, both critical race feminist theory and internalized racism must be at the forefront of advocates' minds.

II. COLORISM AS AN INSTITUTION

A. *The pillars of institutional racism*

In 1967, Kwame Touré, born Stokely Carmichael, a leader in the Black Panther Party, and political scientist Charles Hamilton, coined the term institutional racism in the book they co-authored entitled *Black Power: The*

¹⁴ *Id.*

¹⁵ *Id.* at 49-50.

Politics of Liberation.¹⁶ Touré describes in detail the differences between individual and institutional racism:

Racism is both overt and covert. It takes two, closely related forms: individual whites acting against individual blacks, and acts by the total white community against the black community. We call these individual racism and institutional racism. The first consists of overt acts by individuals, which cause death, injury or the violent destruction of property. This type can be recorded by television cameras; it can frequently be observed in the process of commission. The second type is less overt, far more subtle, less identifiable in terms of specific individuals committing the acts. But it is no less destructive of human life. The second type originates in the operation of established and respected forces in the society, and thus receives far less public condemnation than the first type.¹⁷

In the past half-century, the existence of institutional racism has become widely accepted amongst educators and advocates; however, courts have typically refrained from acknowledging its' existence. Institutional racism is, "the systematic distribution of resources, power and opportunity in our society to the benefit of people who are white and the exclusion of people of color."¹⁸ This differs from individual racism, which is based in expressions of personal opinions of superiority. An example of individual racism is a

¹⁶ KWAME TOURE & CHARLES HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION* (Vintage Edition, 1992).

¹⁷ *Id.* at 20.

¹⁸ SOLID GROUND: BUILDING COMMUNITY TO END POVERTY, DEFINITION & ANALYSIS OF INSTITUTIONAL RACISM 1, 1 (2019), www.racialequitytools.org/resourcefiles/institutionalracism.pdf.

white person using a racial slur or committing a hate crime against a person of color. Institutional racism, by contrast, affects every aspect of life for people of color, and is not limited to personal interactions with white people; it limits access to quality education, economic freedom, housing, employment, healthcare, food, and environmental justice. Banks refusing to give mortgages to people of color, redlining,¹⁹ food deserts, and lead in the water of communities of color, are all examples of institutional racism. Institutional racism has taught and continues to teach people of color that the closer they can get to whiteness, the better their lives will become. This phenomenon is seen throughout various communities of color in the United States. For centuries the ability to assimilate was a survival tactic. As time progressed, the people who were closest to whiteness in their race were placed in relative positions of power. In the same way institutional racism is built upon systematic structures of oppression, institutional colorism is built upon pillars of oppressions, often supported by people of color. By borrowing from the definition of institutional racism, and applying its pillars to institutional colorism, scholars can examine the development and effects of institutional colorism on darker-skinned people of color. Institutional colorism, therefore, is “[the] systematic distribution of resources, power and

¹⁹ Redlining is a form of discrimination that occurs when lenders systematically disinvest and deny lending for housing to racial minorities.

opportunity in our society to the benefit of” lighter-skinned people of color and to the exclusion of darker-skinned people of color.²⁰

B. The invisibility of dark skin in the “Hispanic race”

The characterization of the Hispanic ethnicity as a race is a common misnomer. Defining Hispanic as a race does a disservice to indigenous people and those of African descent. By not acknowledging such racial differences, society fails to acknowledge the disparities in each group’s suffering. Imagine a United States where people were encouraged to identify as Americans only, without any racial distinctions. Although the racial distinctions would not exist in name, the racial disparities would persist: disproportionate incarceration rates, police brutality, wealth-gap. To remove racial distinctions would do nothing more than remove the name, it would never remove the culprit. Institutional racism cannot exist, and thus cannot be dismantled, if there is no race.

Here, in the United States, Hispanics are described as one monolithic group. Statistics gathered on Hispanics do not include the racial distinctions, even though these distinctions directly correlate with access to education, access to healthcare, rates of imprisonment, and employment opportunities.

²⁰ Cf. SOLID GROUND: BUILDING COMMUNITY TO END POVERTY, DEFINITION & ANALYSIS OF INSTITUTIONAL RACISM 1, 1 (2019), www.racialequitytools.org/resourcefiles/institutionalracism.pdf.

As a result, darker-skinned Hispanic people are neither seen, nor heard. This is perpetuated by the incorrect belief that blackness is limited to the descendants of enslaved Africans whom were brought to the United States when in reality, there were far more African slaves brought to Central and South America than to the United States. During the transatlantic slave trade, over ninety percent of enslaved Africans were brought to the Caribbean and South America, while only six percent were brought to North America.²¹ Yet telenovelas, movies, and sitcoms throughout the Americas do not feature darker-skinned Hispanic people. Up until recently, these media barely even acknowledged the existence of people of indigenous or African descent, and when they were acknowledged, they are often relegated to indigent roles.²²

The transatlantic slave trade began in the fifteenth century.²³ During the slave trade, European colonizers from Portugal, Spain, France, and Great Britain, took African slaves to the Americas where indigenous people already resided. Although, the United States and South America share the same

²¹ Steven Mintz, *Historical Context: Facts About the Slave Trade and Slavery*, GILDER LEHRMAN: HISTORY NOW, <https://www.gilderlehrman.org/history-now/teaching-resource/historical-context-facts-about-slave-trade-and-slavery> (Last visited November 24, 2019).

²² Carolina Moreno, *Amara La Negra On the Importance of Holding Latinos Accountable for Their Racism*, HUFFPOST: LATINO VOICES (last updated May 2, 2019), https://www.huffpost.com/entry/amara-la-negra-latino-colorism-racism_n_5a7c7656e4b044b3821a60df; see also Nadege Green, *Afro-Latinos Say Miami Blackface Play Is Part of Bigger Problem with Racism in Latin Communities*, WLRN (May 28, 2018), <https://www.wlrn.org/post/afro-latinos-say-miami-blackface-play-part-bigger-problem-racism-latino-communities>.

²³ Dr. Hakim Adi, *Africa and the Transatlantic Slave Trade*, (Apr. 10, 2012), http://www.bbc.co.uk/history/british/abolition/africa_article_01.shtml.

native roots—native indigenous, white colonizers, and African’s—the Hispanic ethnicity has become its own racial identity in the United States. This is largely due to hegemony. Hegemony is the dominance of one group over another by legitimizing norms and ideas.²⁴ Hegemony stands in contrast to direct coercive forms of domination, such as force or intimidation, by employing cultural institutions that express the dominant class interest as the interest for all classes.²⁵ Through hegemony, the beliefs, ideas, and perceptions, of the elite and powerful become a society’s cultural and political norms.²⁶ This is accomplished through control of media, education, and public communication, by the elite and powerful. Hegemony is seen throughout Latin America and is often masked as patriotism. After the transatlantic slave trade ended, many Latin American countries embraced the idea of racial democracy. The *mestizaje* theories on its surface supported the idea that the mixing of races would remove racism and racial disparities, and lead to a stronger country, but in reality it was a manifestation of white supremacy.²⁷ Latin Americans were encouraged to mix races, under the guise of *mejorar la raza*, which roughly translates to “improve better the race,” or

²⁴ Kathleen O’Reilly, *Hegemony*, ENCYCLOPEDIA OF HUMAN GEOGRAPHY, 206, 207 (2018).

²⁵ *Id.* at 207.

²⁶ *Id.*

²⁷ TANYA KATERI HERNANDEZ, RACIAL SUBORDINATION IN LATIN AMERICA: THE ROLE OF THE STATE, CUSTOMARY LAW, AND THE NEW CIVIL RIGHTS RESPONSE 2 (CAMBRIDGE 2013).

more colloquially “to whiten the race.”²⁸ By contrast, in the United States, Jim Crow segregation laws ran rampant.

Colorist policies that promoted the invisibility of dark skin in Latin America, coupled with hegemony, and mestizaje theories, make tracing the disparities and effects of institutional colorism on the Hispanic population immensely difficult. Nevertheless, some statistics do highlight the effects of institutional colorism on darker-skinned people throughout Latin America. Conservative estimates indicate that approximately 150 million people, roughly one-third of the total Latin American population, are of African descent.²⁹ Of those 150 million people, forty percent live in poverty.³⁰ There are also numerous anecdotal examples of institutional racism in Latin American countries. For example, in Argentina, a popular expression is *negro de mierda*, which translates to “shitty Negro” in English.³¹ Argentinian children’s songs are riddled with phrases like, “I like the white” and “let the black die.”³² Primary school textbooks in Brazil depict black people like animals, and inferior to people with lighter skin.³³ In Cuba, a person doing a

²⁸ Maria Alejandra Casale-Hardin, ‘Mejorar la Raza’: An Example of Racism in Latino Culture, (Dec. 6, 2017), https://www.huffpost.com/entry/mejorar-la-raza-an-exampl_b_7558892

²⁹ KATERI HERNANDEZ, *supra* note 26 at 1.

³⁰ *Id.*

³¹ *Id.* at 5.

³² *Id.*

³³ *Id.*

poor job is to said to be “doing things like a black person.”³⁴ In Ecuador, a chief of police stated in an interview, “there is a type of race that is inclined toward delinquency, to commit horrible acts... that is the black race [*raza Morena*] that is taking over the urban centers of the country, forming belts of poverty conducive to delinquency because of their ignorance and audacity.”³⁵ These stark examples of systemic institutional oppression are pervasive throughout Latin America, and can be found in culture, education, government, and public opinion.

In the United States, Latin Americans have taken on the Hispanic racial identity. While the Bureau of Labor Statistics does not recognize Hispanic as a race, it presents statistics of the Hispanic population in relation to other racial groups.³⁶ The disparities between differing racial groups that are forced to identify as Hispanic remains, but because the United States government and public perception refuse to recognize the racial identity of each of these groups, it is all but impossible to address the resulting inequities. In order to address the institution of colorism amongst Hispanics, one must

³⁴ Tanya Kateri Hernandez, *Hate Speech and the Language of Racism in Latin America: A Lens for Reconsidering Global Hate Speech Restrictions and Legislation Models*, 32 U. Pa. J. Int'l L. 3, 817 (2011).

³⁵ KATERI HERNANDEZ, *supra* note 26 at 6.

³⁶ *Asian women and men earned more than their White, Black, and Hispanic counterparts in 2017*, Bureau of Labor Statistics, U.S. Department of Labor, The Economics Daily (Aug. 29, 2018), <https://www.bls.gov/opub/ted/2018/asian-women-and-men-earned-more-than-their-white-black-and-hispanic-counterparts-in-2017.htm>.

first acknowledge the differences of color within the Hispanic population, and then clearly analyze the disparities based on those colors.

C. The illusory model minority myth and the unnoticed suffering of darker Asians

Generally, the model minority narrative presents Asian Americans as more successful than other minority group, because of their tenacity and intellectual ability. Although, on its surface the model minority myth seems benevolent and well meaning, this framework continues to cause pain both within and outside of the Asian community. The model minority image creates detrimental and inaccurate depictions of the Asian community. The myth creates a harmful social pressure for Asian youth to excel, and it causes people to assume that Asian Americans do not need assistance.³⁷ In order to dispel the idea that racism and oppression cause disparities in communities of color, the model minority myth, based on the success of some Asian Americans, developed into a stereotypical expectation placed on all Asians. In reality, the model minority myth has only served to increase the gap between Asians and other communities of color, and to further subjugate minorities. One of the major flaws with the model minority myth, is that it

³⁷ Lisa Kiang, Virginia W. Huynh, Charissa S.L Cheah, & Yijie Wang, *Moving Beyond the Model Minority*, 8, *ASIAN AM. J. PSYCHOL.*, 2 (2017).

creates a monolithic perception of the Asian American community, void of struggle, and excluding the community's most subjugated members.

Colorism in Asia dates to the pre-colonial period. For example, in Japan, white skin was seen as a trait of "aristocratic female beauty."³⁸ The institution of colorism transcends the boundaries of continental Asia, and directly affects Asian Americans in the United States. A 2016 nationwide study conducted by Igor Ryabov, found that Asian Americans with light skin are more likely to be college educated than darker-skinned Asian Americans.³⁹ The same study found that the chances of obtaining some level of college education are significantly lower for darker-skinned Asian Americans than for those with lighter skin.⁴⁰

In dispelling the myth of the model minority, we must recognize that while some Asian Americans have done exceptionally well in economic and educational achievement, those on the other side of the economic disparity have suffered greatly at the expense of this myth, and their pain continues to be ignored. This is particularly true for Southeast Asian Americans, who on average have darker skin than East Asians.⁴¹ The myth holds that Asian

³⁸ Igor Ryabov, *Colorism and educational outcomes of Asian Americans: evidence from National Longitudinal Study of Adolescent Health*, 19, SOC. PSYCHOL. EDUC., 303, 304 (2016).

³⁹ *Id.* at 318.

⁴⁰ *Id.* at 316.

⁴¹ *Id.* at 304.

Americans are high academic achievers. This is true for some communities, evidenced by the fact that Asian Americans account for one fifth of the population in Ivy League schools, but represent only six percent of the total United States population.⁴² Yet in stark contrast of this powerful statistic, data shows that Hmong, Cambodian, Vietnamese, and Laotian communities struggle immensely in academic achievement.⁴³ One 2013 study found that 34.3% of Laotian, 38.5% of Cambodian, and 39.6% of Hmong adults over the age of twenty-five do not have a high school diploma or equivalency degree.⁴⁴ The same study found that 51.1% of Vietnamese Americans, 63.2% of Hmong Americans, 66.5% of Laotian Americans, and 65.8% of Cambodian Americans, have never attended college.⁴⁵

The economic gap between different Asian American ethnicities is just as astonishing as the educational gap. In 2018, the Bureau of Labor Statistics reported, “Asian women and men earned more than their White, Black, and Hispanic counterparts in 2017.”⁴⁶ The report stated that Whites

⁴² Jennifer Lee, *It Takes More than Grit: Reframing Asian American Academic Achievement*, Insights from the Social Sciences (Jan. 23, 2018), <https://items.ssrc.org/from-our-programs/it-takes-more-than-grit-reframing-asian-american-academic-achievement/>.

⁴³ *Id.*

⁴⁴ SOUTHEAST ASIAN RESOURCE ACTION CENTER, OVERVIEW OF SOUTHEAST ASIAN EDUCATIONAL CHALLENGES FACT SHEET, <http://www.searac.org/wp-content/uploads/2018/04/Overview-of-Southeast-Asian-Educational-Challenges-Why-Are-Southeast-Asian-American-Students-Falling-Behind.pdf>. (Feb. 2013)

⁴⁵ *Id.*

⁴⁶ BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, ASIAN WOMEN AND MEN EARNED MORE THAN THEIR WHITE, BLACK, AND HISPANIC COUNTERPARTS IN 2017, <https://www.bls.gov/opub/ted/2018/asian-women-and-men-earned-more-than-their-white-black-and-hispanic-counterparts-in-2017.html>. (last visited November 24, 2019).

earned 88 percent as much as Asian people.⁴⁷ Because the study treats Asian Americans as a monolithic group, it fails to take into account economic disparities within the Asian population, particularly when it comes to Southeast Asians. While roughly 11% of the total United States population lives below the poverty line, up to 12 % of Laotian Americans, 13% percent of Vietnamese Americans, 18% of Cambodian Americans, and 27% of Hmong Americans live below the poverty line.⁴⁸

When contrasted to the rest of the Asian American population, the rate of educational and economic achievement amongst Southeast Asians is appalling. The model minority myth does a disservice to all Asians, especially Southeast Asians. In order to break barriers of intra-racial discrimination; we must first acknowledge the economic and educational disparity amongst Asian Americans, which has caused so much pain within certain Asian American groups. Furthermore, more studies must be conducted with the goal of examining the effect darker skin has on various populations within the Asian American community.

⁴⁷ *Id.*

⁴⁸ SOUTHEAST ASIAN RESOURCE ACTION CENTER, OVERVIEW OF SOUTHEAST ASIAN EDUCATIONAL CHALLENGES FACT SHEET, <http://www.searac.org/wp-content/uploads/2018/04/Overview-of-Southeast-Asian-Educational-Challenges-Why-Are-Southeast-Asian-American-Students-Falling-Behind.pdf>. (2013)

D. African American institutions that employed and profited from the institution of colorism

Discussions on colorism in the black community rarely extend beyond the context of the slave plantation. Slaves who were lighter-skinned—most commonly the bastard descendants of slave owners—were given preferential treatment over darker-skinned slaves. The lighter-skinned slaves were given privileged positions as overseers, or were allowed to work inside the home, whereas the darker-skinned slaves were forced to toil in the field. It is important to note that no matter the color, a slave was a slave, forced to work on another's behalf and often repeatedly raped and beaten. Just as the cruelty of slavery inflicted pain upon all slaves, so too has institutional racism inflicted pain on all African Americans to some degree, regardless of complexion. Although, white people treated light-skinned slaves differently, they still felt that all blacks were inferior to white people. This rhetoric rang true even after slavery ended, as noted by white sociologist Edward Byron Reuter in 1918: "Regardless of color or training, [blacks] would never be in any social organization of cultured white people anywhere in America."⁴⁹ The belief, based on proximity to whiteness, that lighter African Americans are inherently more intelligent and virtuous than darker-skinned black people, has persisted throughout the twentieth and into the

⁴⁹ AUDREY ELISA KERR, *THE PAPER BAG PRINCIPLE: CLASS, COLORISM, AND RUMOR AND THE CASE OF BLACK WASHINGTON, D.C.* 5 (1 ed. 2006).

twenty-first century. This belief continues to penetrate all racial communities and scholarly writings, both nationally and internationally. For example, in 2002, *Population and Environment* published an article, written by North Irelander Lynn Richard, which concluded that lighter-skinned African Americans were smarter than darker-skinned African Americans because they possess more white genetics.⁵⁰

The primary problem with centering the issue of colorism on the division created by slavery is that white scholars have ignored the role that the African American community, and major African American institutions, have played in perpetuating colorism. The house-slave, field-slave dialogue is regularly used in the black community to jokingly indicate the difference in perceived power and experience amongst various shades of black people. This narrative places the responsibility for the curse of colorism solely on slavery, and fails to hold black people, specifically lighter-skinned black people, accountable for their role in creating colorist institutions. Amongst the white population, lighter-skinned black people were bestowed some benefits over dark-skinned blacks, but still very much subjugated. However, within the black community, lighter-skinned black people reigned supreme, particularly after slavery ended. After the abolishment of slavery, elite

⁵⁰ Richard Lynn, *Skin Color and Intelligence in African Americans*, 23 *POPULATION AND ENV'T*, no. 4, 2002, at 1.

lighter-skinned black and mixed-race people created institutions that were intended to help the progression of black people, falsely believing that they were more intelligent and therefore more capable of helping the black population progress. These institutions would become structures in the institution of colorism.

Slavery ended in 1865, and the ensuing years were filled with the creation of black institutions such as churches, schools, businesses, social clubs, and media outlets. Many of these black institutions employed colorist tactics to further subjugate and exert power over darker-skinned people. While some black institutions justified their choice to further perpetuate colorism as a matter of survival and as a means of fostering black progression in a majority white society, many of these institutions functioned only within the black community, making the white voice immaterial. Color within the black community became a non-negotiable identity, an identity that exists to this very day. Specific character traits, personalities, and mannerisms became associated with one's color. For over a century, these traits have been memorialized in black music. In 1929, Fats Waller, a black pianist and singer, created the song *Black and Blue*, which describes the struggle in dating for darker skinned black women:

*Browns and yellors all have fellers,
Gentlemen prefer them light,
Wish I could fade, cant make the grade,
Nothin' but dark days in sight.*⁵¹

Eighty years later, rapper Lil' Wayne expresses the same message in the song *Every Girl*, when he exclaims, "I like a long hair thick redbone⁵²."⁵³ Throughout the decades, black music, art and television have continued to support colorism by promoting the typecast of darker skin black women as undesirable, sassy, and unintelligent, while lighter skin black women are portrayed as delicate, clever, and attractive.

Outside of the messages given through art and media, colorism was perpetuated through one of the strongest black institutions—the church. In 1899 W.E.B. DuBois wrote, "The Negro church came before the Negro home, it antedates their social life, and in every respect it stands to-day as the fullest, broadest expression of organized Negro life."⁵⁴ During the reconstruction era, and for many years later, numerous black churches employed colorism to refuse attendance and membership to darker-skinned black people.⁵⁵ The churches that employed these tactics were black churches, which served black communities. Their decision to discriminate

⁵¹ Fats Waller, *Black and Blue*, (1929).

⁵² Red bone is a modern term to describe light skin black women.

⁵³ Lil Wayne, *Every Girl*, (2009).

⁵⁴ W.E.B. DUBOIS, ON SOCIOLOGY AND THE BLACK COMMUNITY 228 (Dan S. Green & Edwin D. Driver eds., 1980).

⁵⁵ AUDREY ELISA KERR, *supra* note 49 at 104.

was not a matter of survival in a white world; rather, the purpose was oppression within the black community. The *Washington Bee*, a District of Columbia based newspaper, wrote in 1887: “There is a certain class of colored people in the [Washington] community who carry their prejudice in the church [and] the pulpit. . . . We know cases to have existed where members were too black for the congregation.”⁵⁶

Black social clubs were used as networking and fellowship opportunities for young innovative, educated, professional black people. These clubs systematically refused to include darker-skinned black people. This discrimination was in no way clandestine, but was very much common knowledge, passed down generationally. Blue vein societies emerged in the early twentieth century. These were exclusive organizations where the highfaluting lighter-skinned could separate themselves from the darker ignorant black population. Writers throughout the twentieth century memorialized these organizations and their practices. Langston Hughes wrote his observations on these societies in the District of Columbia: “Some nice mulatto friends of ours spoke of the ‘wonderful society life,’ among Negroes in Washington. And some darker friends of ours hinted at ‘pink teas’⁵⁷ and

⁵⁶ *Id.* at 106.

⁵⁷ Pink tea is a formal afternoon tea that affluent or successful women partook in at the turn of the 20th century.

the color line that was drawn there.”⁵⁸ Hughes makes a conclusion about the people who by their own admission were the best of black Washington, D.C.: “[Or] perhaps I didn’t really meet the best society after all. Maybe I met only the snobs and the high-yellows, and the lovers of fur coats and automobiles and fraternity pins and A. B. degrees.”⁵⁹ The District of Columbia was divided into two black worlds, and in many ways these separate worlds continue to exist today. The historically bright, formally educated, middle to upper-middle class, lighter-skinned African Americans, and the impoverished, darker-skinned black community.

The chosen elite of black social organizations bore a direct correlation to color. On the surface, groups like Jack and Jill purported to support and uplift black youth and make stronger black communities, but with very little digging one would find that such organizations actually sought to distance lighter-skinned and mixed-race black people from the commonly held stereotypes of the black race, namely that black people were ignorant, unskilled, and wild. Conversely, the black community perceived members of these elite groups as refined, brilliant, and the very definition of excellence. Jack and Jill was founded in Philadelphia in 1938, by African American mothers who wanted to ensure that their children socialized with other

⁵⁸ LANGSTON HUGHES, *ESSAYS ON ART, RACE, POLITICS AND WORLD AFFAIR* 41 (Christopher C. De Santi ed., 2002).

⁵⁹ *Id.* at 44.

affluent African American children.⁶⁰ The organization is known to have employed colorist tactics in their early years.⁶¹ Elite organizations like Jack and Jill were composed of doctors, lawyers, educators, and their descendants, creating a legacy that would, for decades, fail to allow room for darker-skinned black people.

Upon the abolishment of slavery, historically black colleges emerged with the goal of educating and empowering an elite black population. These universities sought to create an educated black population that could further progress the black race. Sadly, many of these spaces used color to further disenfranchise darker-skinned black people. By 1914, there were fifty-seven black universities and colleges, however of the thirty-one black university presidents, twenty-six identified as mulatto.⁶² In *The Paper Bag Principle*, author Audrey Elisa Klein exposes the role of color in the early admission practices of Howard University.⁶³ Howard University, founded in 1866, was and continues to be one of the most powerful black institutions in the country.⁶⁴ By 1940, Howard was responsible for forty-six percent of black doctors, forty percent of black dentists, forty-six percent of black lawyers,

⁶⁰ Vernon C. Thompson, Jack and Jill Chapters: The Top of the Hill for Black Professionals, WASHINGTON POST (Oct. 5, 1978).

⁶¹ Janita Poe, *Jack and Jill Fights Label of 'Black Elite*, Chicago Tribune (Nov. 27 1992).

⁶² AUDREY ELISA KERR, *supra* note 49 at 89.

⁶³ *Id.* at 93.

⁶⁴ *Id.* at 88.

and forty-nine percent of blacks with master's degrees.⁶⁵ For years, Howard University required a photograph to be submitted with each application. Upon receipt of the application, admissions staff were known to disqualify applicants if their skin was deemed too dark.⁶⁶ Although there were some exceptions to the rule, it is clear in reviewing Howard's yearbooks from the early twentieth century, that color played a major role in admissions decisions. Considering the magnitude of Howard's role in creating black scholars, educators, and professionals, it is evident that this level of discrimination would greatly impact the black community by further subjugating darker-skinned black people through denial of access to education. Although, it is believed that Howard stopped employing these tactics at some point during the 1960's, the damage had been done over one hundred years, creating a large disparity in black wealth that directly reflected the color divide in the black community.

Even after Howard discontinued the color test, student organizations—especially fraternities and sororities, which are of tremendous value for black employment opportunities—kept these practices alive. According to Dr. Daniel, a black man who pledged in the black fraternity Alpha Phi Alpha on Howard campus in 1951, it was common

⁶⁵ *Id.* at 89-90.

⁶⁶ *Id.* at 93.

practice to decide whether an applicant was “too dark” to pledge in the fraternity.⁶⁷ Dr. Daniel noted that “too dark” meant any shade of brown.⁶⁸

Slavery in the United States may have provided the basis for the structure of institutional colorism, but powerful and privileged black people who could have truly changed the trajectory of impoverished black communities instead used these institutions to separate themselves from the negative imagery of blackness. Institutional colorism perpetuated by black people, is thus a major contributor to the disparity in black wealth and education in the United States.

III. COLOR PROTECTIONS UNDER THE CIVIL RIGHTS ACTS OF 1964 AND 1968

A. Overview of the 1964 and 1968 Civil Rights Acts

In 1964, Congress passed the Civil Rights Act, which brought an end to Jim Crow in the United States. Prior to this, the country was riddled with laws that openly discriminated against minorities and women. At the time, the Civil Rights Act was considered the strongest legislation to end racial discrimination since the Reconstruction Era. The Act was composed of

⁶⁷ *Id.*

⁶⁸ *Id.*

eleven titles that provided protection for people who had been discriminated against based on their race, color, religion, sex, or national origin.⁶⁹

Title I of the Civil Rights Acts prohibited voting discrimination practices.⁷⁰ Title II outlawed discrimination in any place of public accommodation, such as hotels, theaters, and restaurants. Title III barred government agencies from prohibiting entrance to public places based on an individual's race, color, religion, or national origin. Title IV provided legislation to desegregate public schools. Title V prohibited organizations that receive federal funds from discriminating on account of one's race, color, or national origin. If an organization violated Title V, then Title VI provided that the organization would lose its federal funding. Title VII prohibited employment discrimination on the basis of color, race, sex, national origin, or religion. As a follow up to the Civil Rights Act of 1964, Congress passed the Civil Rights Act of 1968, commonly referred to as the Fair Housing Act.⁷¹ This Civil Rights Act prohibited discrimination in the sale, rental, and financing of housing.⁷²

⁶⁹ Civil Rights Act, 42 U.S.C. § 2000(e) (1964).

⁷⁰ *Id.*

⁷¹ Fair Housing Act, 42 U.S.C. § 3601 (1968).

⁷² Fair Housing Act, 42 U.S.C. § 3604 (1968).

B. Intra-racial Color Discrimination Under the Civil Rights Act

Although, the Civil Rights Act provided the tools to protect against racial or color discrimination, few claims were brought by people who experienced intra-racial discrimination, or discrimination based on color. This is likely because the people who truly needed this protection represented a marginalized subgroup within a larger marginalized group. While many racial organizations like the NAACP were established for the purpose of supporting the progress of racial minorities, such organizations are unlikely to hold people who commit intra-racial oppression accountable. This deficit in accountability is largely due to the misbelief that holding minorities accountable for harming other minorities will not further racial progress. The years following the enactment of the Civil Rights Act were filled with cases that challenged discrimination based on race, but for years the court viewed discrimination based on color synonymously with discrimination on race. This interpretation of the statute left people who experienced intra-racial discrimination without remedies or protection. It was not until 1987 that this changed, when the Supreme Court ruled in *Saint Francis College v. Al-Khazraji*. Sadly, because the people harmed by intra-racial discrimination are members of the most marginalized sector of the minority group, it was highly unlikely that they would have the resources or knowledge on how to bring

forth a claim. As a result, there are hardly any cases brought challenging intra-racial color discrimination.

Prior to the Supreme Court's ruling in *Saint Francis College v. Al-Khazraji*, Federal Courts consistently failed to address intra-racial discrimination. The Northern District of Illinois did just that in *Sere v. Board of Trustees*.⁷³ Mr. Sere, a darker-skinned African man, filed an employment discrimination action against his employer, alleging that his former manager, a lighter-skinned black man, discriminated against him.⁷⁴ Although the court recognized that discrimination based on skin color could occur intra-racially, the court refused "to create a cause of action that would place it in the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit."⁷⁵ This statement frames the ignorance of the court to intra-racial discrimination, and this same ignorance has historically plagued the legislators.

Until *Saint Francis College v. Al-Khazraji*, neither the court, nor legislators adequately addressed intra-racial color discrimination, likely because they are simply unaware. In *Saint Francis College v. Al-Khazraji*, Professor Al-Khazraji sued Saint Francis College for discrimination,

⁷³ *Sere v. Bd. of Tr. of Univ. of Ill.*, 628 F. Supp. 1543 (N.D. Ill., 1986).

⁷⁴ *Id.* at 1546.

⁷⁵ *Id.*

claiming that the reason he was denied tenure was because of his Arab ethnicity and Muslim religious beliefs.⁷⁶ Before appealing to the Supreme Court, the Western District Court of Pennsylvania held that Professor Al-Khazraji did not have a discrimination claim, because he was racially Caucasian and there is no cause of action for intra-racial discrimination.⁷⁷ The court of appeals reversed, and the Supreme Court affirmed, holding that Congress did not intend to limit its protections solely to those who are members of a race different than that of the defendant's.⁷⁸

The court's deficiency in addressing intra-racial color discrimination improved after *Saint Francis College v. Al-Khazraji*. More cases were brought forth on the grounds of intra-racial discrimination. In *Rodriguez v. Gattuso*, decided in 1992, Mr. Rodriguez, a darker-skinned Puerto Rican man filed a suit against Mr. Gattuso, a lighter-skinned Puerto Rican man for housing discrimination.⁷⁹ Mr. Rodriguez, a prospective tenant, had spoken with Mr. Gattuso over the phone about one of his vacant units.⁸⁰ Upon arriving, Mr. Rodriguez was informed by Mr. Gattuso that the apartment had already been leased.. In analyzing the case, the court observed that Mr.

⁷⁶ *Al-Khazraji v. St. Francis Coll. Et al.*, 1985 WL 9627 *1, *1 (W.D. Penn., 1985).

⁷⁷ *Id.* at *2.

⁷⁸ *St. Francis Coll. Et. al., v. Al-Khazraji* 481 U.S. 604, 613 (1987).

⁷⁹ *Rodriguez v. Gattuso*, 795 F. Supp. 860 (N.D. Ill. 1992).

⁸⁰ *Id.* at 861.

Gattuso had only leased his apartments to white Latino people.⁸¹ The court ultimately held that Mr. Gattuso violated the Fair Housing Act by discriminating against Mr. Rodriguez on account of his color, and awarded Mr. Rodriguez \$17,500.⁸²

In *Walker v. Secretary of Treasury*, a light-skinned black woman brought a suit against her employer for discrimination, alleging that her supervisor, a dark-skinned black woman, discriminated against her because of her skin color.⁸³ The lower court held that Walker did not have a discrimination claim noting that:

While discrimination based on skin color may occur among members of the same race, such discrimination is not the basis for a cause of action under Title VII.

....

Although Title VII includes ‘color’ as one of the basis for prohibited discrimination, that term has generally been interpreted to mean the same thing as race.⁸⁴

The court of appeals held that intra-racial color discrimination was a valid cause of action, but that Ms. Walker had failed to present evidence that would conclude that she had been discriminated against.⁸⁵

⁸¹ *Id.* at 862.

⁸² *Id.* at 866.

⁸³ *Walker v. Sec’y of Treasury*, I.R.S., 742 F. Supp. 670 (N.D. Ga. 1990).

⁸⁴ *Id.* at 670-71.

⁸⁵ *Id.*

There are not many cases on intra-racial color discrimination, and considering the magnitude of colorist practices used in minority communities, especially by African-American institutions, it is fair to conclude that numerous plausible claims have arisen but have gone unaddressed. This is likely because the people who would bring such claims have faced systemic subjugation. The people most affected by colorist practices were disenfranchised and marginalized to such an extreme degree that they likely lacked the knowledge that these protections existed or the resources to bring forth these claims.

IV. CONCLUSIONS

The pain of darker-skinned people of color goes unnoticed and unchecked. The fight for progression has historically been a fight for the most privileged of people of color. Meanwhile the stories of darker-skinned blacks who were discriminated against by black institutions go unheard, the struggles of darker-skinned Asians are silenced, and the existence of darker-skinned Hispanics is denied. To say one does not see color is to choose neither to see, nor to understand the disparity in the quality of life that is directly associated with the darkness of one's skin. It is a disservice to progression and freedom.

The Civil Rights Act sought to hold people accountable for discriminating against and oppressing people of color. This accountability

should not rest solely on the shoulders of white people, but rather should be placed on anyone who chooses to oppress and discriminate against vulnerable populations, especially those who are the most marginalized in those communities. Advocates and scholars must do more to understand the existence of the institution of colorism, so that one day this system of oppression can be completely dismantled. This will not and cannot occur unless we examine the role of intra-racial color discrimination in the economic and social disparities in communities of color.