

**BEYOND SUPREME COURT ANTI-  
DISCRIMINATION:  
AN ESSAY ON RACIAL SUBORDINATIONS, RACIAL  
PLEASURES AND COMMODIFIED RACE**

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*In recent years, the Supreme Court has narrowed its examination of racial subordinations to focus upon three doctrinal approaches: disparate treatment racial discrimination, the intent theory of racial discrimination, and suspect category strict scrutiny. Taken together, these three doctrines mutually reinforce racial discrimination as the only available legal understanding of racial subordination. Faced with the Court's ever contracting list of issues available for discussion, some scholars have chosen to investigate outside the Court's constricted understanding of race. This Essay begins by noting that racial subordinations—social subordinations premised on a schema of body types—are multiple and not limited to a single, narrow understanding. After introducing the Supreme Court's restrictive approach in Section I, I examine in Section II recent scholarship on racial subordination that has pressed beyond the doctrinal confines created by the Supreme Court. I review authors discussing Title VII, common law contract, racial tropes, implicit bias, patent law, and trademark. Section III examines Professor Anthony Farley's concept of racial pleasure—the idea that racial subordination gives pleasure to its participants. Racial pleasure is a form of racial subordination that falls outside of the Supreme Court's understanding of racial subordination as racial discrimination. Through the examination of race in computer games, I suggest two distinctions. I observe a legal*

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*distinction between racial pleasures and commodified racial pleasures, and a normative legal distinction between permitted racial pleasures and illicit racial pleasures. Section III ends with a proposed standard for constitutional review of state regulation of illicit racial pleasures. As another interpretation of racial subordination, Section IV proposes a theorization of commodified race through Marx' theory of commodity circulation.*

*[R]ace is not an objective biological fact but rather social and political constructions which establish and perpetuate hierarchies of power.*

-Historian Lucy Salyer, reviewing Ariela Gross'  
*What Blood Won't Tell*<sup>1</sup>

## INTRODUCTION

### A. Racial Subordination

Lucy Salyer's comment extends the observation that "race is socially constructed."<sup>2</sup> Salyer notes that race is not a single, scientific fact. Instead, there exist multiple forms of socially and politically constructed race. Further, she challenges the traditional legal notion that racism is fundamentally racial discrimination of individuals. Instead of individual discrimination or discriminatory intent, she situates racial constructions within social hierarchies of power. This Essay builds upon this idea and examines and theorizes multiple forms of racial subordination. Within legal studies, there is tension between the Supreme Court's ever narrowing range of racial issues acceptable for Court review and efforts by legal scholars to examine racial subordinations that go beyond a narrow treatment of racial discrimination.

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<sup>1</sup> Lucy Salyer, *What Blood Won't Tell*, 60 J. LEGAL EDUC. 179 (2010) (reviewing ARIELA GROSS, *WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* (1st ed. 2008)) (emphasis added).

<sup>2</sup> Current discussions of race have moved away from race as biology but instead look to social, political, and economic analyses. Perhaps the most influential work in legal studies addressing race as constructed through law and not based in biology is Ian Haney Lopez' *White By Law: The Legal Construction of Race* (1996). Haney-Lopez examined the "racial prerequisite cases" that interpreted the 1790 federal statute limiting naturalization to become a U.S. citizen to "white persons." Haney-Lopez traces the evolution of "white" under the statute.

## B. The Supreme Court's Narrow Anti-Discrimination Treatment of Race

In recent years, the Supreme Court's treatment of race has devolved into three dimensions: disparate treatment discrimination, the intent theory of discrimination, and suspect category strict scrutiny. While initially developed in related but different areas of constitutional and statutory civil rights law, they have grown together so that each influences and supports the other. Implicit in all three is the use of neutral, formal racial categories.

Under Title VII's prohibition on discrimination on the basis of race in employment, the Court formulated a clear version of disparate treatment discrimination in *McDonnell-Douglas v. Green*.<sup>3</sup> Differential treatment of employees of different races when the employees are similarly situated shifts the burden to the employer to provide a non-racial explanation. Failure to provide an adequate justification for the differential treatment leads to a legal conclusion of racial discrimination. This basic approach was expanded in *Griggs v. Duke Power* to encompass statistically-based demonstrations of differential treatment of groups of employees.<sup>4</sup> This structure has been maintained in the Court's subsequent treatments of employment discrimination.

The intent theory of discrimination was explicitly articulated in *Washington v. Davis*.<sup>5</sup> Under the Equal Protection Clause of the Fourteenth Amendment, the Court rejected Title VII's statistically-based employment discrimination methodology it had accepted in *Griggs v. Duke Power*. Under the *Washington v. Davis* approach, only a conclusion of subjective intent to discriminate could be the basis for a violation of Fourteenth Amendment Equal Protection.

The third of these racial treatments, strict scrutiny review of government use of race, was consolidated in the Court's line of affirmative action cases beginning with its decision in *Richmond v. Croson*.<sup>6</sup> The line of cases following *Richmond* have been the Court's

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<sup>3</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), established the basic framework for the prima facie case for employment discrimination: 1) the plaintiff must be a racial minority; 2) the plaintiff must have applied for and was qualified for a job; 3) although qualified, the plaintiff must have been rejected; and 4) the employer must have continued to fill the position. Upon a prima facie showing by plaintiff, the burden shifts to the employer.

<sup>4</sup> 401 U.S. 424 (1971).

<sup>5</sup> 426 U.S. 229 (1976).

<sup>6</sup> 488 U.S. 469 (1989)

principal examinations of race.<sup>7</sup> All apply the rigid strict scrutiny analysis with almost no social interests recognized as meeting the “compelling governmental interest” standard.

In the Court’s treatment, these three understandings of racial discrimination have become not simply available theories of discrimination, but the Court’s entire discussion of race. Instead of being a list of three possible legal treatments of the social issue of race, the Court’s continuing focus upon these three treatments has limited implicitly the boundaries of the discussion of race in the law. In each of these, the court relies upon the racial label of an individual party claiming racial discrimination to be a formal-race category.<sup>8</sup> That is, the racial label assigning race is a neutral label. There are no social presumptions attached to the racial label of any party. The social meaning attached to someone being “white” or “black” or “Asian” are matters to be proven by plaintiffs for each individual charged with discrimination either as a proof that the individuals are “similarly situated” for purposes of disparate treatment discrimination, or proof that there is subjective intent in the mind of the person charged with discrimination. All government efforts to address questions of race directly now face almost certain rejection under strict scrutiny. The Court simply does not recognize any social concerns as meeting the “compelling governmental interest” requirement under strict scrutiny.

Also common to all three treatments of racial discrimination is locating the normative wrong of racial subordination in the mind of a single perpetrator—or, for strict scrutiny—a government actor. For disparate treatment, if the parties are deemed equal or similarly situated, then the wrong of racial discrimination is within the party charged with discrimination. The intent theory goes further and says that only evil racial animus, located in the party charged with discrimination, violates equal protection of the laws with respect to race. These elements—disparate treatment of neutral, formal race categories and racial animus located in the party charged with racial discrimination—have structured the Court’s narrow understanding: race discrimination and only race discrimination embodies racial subordination.

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<sup>7</sup> See generally *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007).

<sup>8</sup> See generally Neil Gotanda, *A Critique of Our Constitution is Colorblind*, 44 STAN. L. REV. 1 (1991) (arguing that the Supreme Court’s use of colorblind constitutionalism fosters white supremacy).

Since the Court controls the cases that it chooses to review, its non-acceptance of questions of racial subordination beyond this very narrow doctrinal range have resulted in legal scholarship similarly narrow in scope. Legal writers must either make strenuous efforts to push the boundaries of “disparate treatment” discrimination, racial “intent” or “compelling government interest” or simply abandon any pretense to working within the Supreme Court’s doctrinal guidelines. This narrowing by the Court has been a continuing source of frustration for those seeking racial justice in the legal arena.

In this Essay, I argue that there have been significant efforts in disparate areas of the legal scholarship to address race beyond disparate treatment, the intent theory, and suspect category strict scrutiny. Scholars have pushed the boundaries of existing doctrine through racial analysis in doctrinal areas not traditionally thought to encompass race, or they have developed new understandings of racial subordination and the law. Besides observing racial subordination in structural or institutional frameworks, these authors note the importance of social and cultural dimensions to racial subordination.

Section I reviews authors working in diverse doctrinal areas: Title VII, common law contract, racial profiling and intellectual property. Section II develops Anthony Farley’s work on racial pleasure—the idea that racial subordination gives pleasure to the participants. Section III develops the idea that certain forms of racial subordination are commodified and may be theorized as commodified race within Marx’ theory of capitalist commodity circulation.

## **I. BEYOND ANTI-DISCRIMINATION—NEW PERSPECTIVES ON RACIAL SUBORDINATIONS**

### **A. Pushing Doctrinal Limitations**

In this section, we review seven articles that examine racial subordinations outside of the narrow confines established by the Supreme Court. We begin with two articles that explicitly seek to expand the doctrinal limits of antidiscrimination doctrine. The first article addresses Title VII of the Civil Rights Act of 1964 barring discrimination in employment. The second examines the common law doctrine of good faith in contract law.

1. *Racial Performance in the Workplace—Performing Employment Discrimination.*

In their 2000 article, “Working Identity,” Devon Carbado and Mitu Gulati begin by stating that “working within an organization necessarily entails negotiating and performing identity.”<sup>9</sup> Besides an individual’s own sense of identity, Carbado and Gulati argue that for minority employees, there may well be negative stereotypes attributed to them. To succeed, therefore, a minority employee must perform extra identity work to counter those stereotypes. They give the examples of “signaling” hard work by mentioning in a casual conversation how tired one is because of having to work late the previous nights. Or after working late, sending an email to a supervisor before leaving signals late working hours. While this kind of signaling and identity performance is commonplace, for a minority employee faced with a racial stereotype of being lazy or passive at work, the performance and signaling become an additional workplace obligation. They argue that employment discrimination law should recognize “racial conduct discrimination” as legally actionable.<sup>10</sup>

Carbado and Gulati explore at length the example of a black, male law professor teaching criminal procedure. They note a range of possible stereotypes that the professor may encounter: a color conscious “race man,” ideological, weak work ethic, unqualified, anti-institutional, racial group oriented, and subjective. Within his criminal procedure class, he must take into account the presence of these stereotypes and how he must “work” to counter their effect on his teaching, in addition to considerations of teaching the material. If a case involves a black defendant, he must factor into his teaching his own racial identity. He must make choices about how to negotiate his identity in relation to the case, his students, and perceptions of his colleagues. Carbado and Gulati argue that this “racial conduct” is additional work that should be taken into account.<sup>11</sup> They observe that:

Current antidiscrimination regimes focus almost entirely on the employer. Lost in this focus are the costs borne by victims who do identity work to prevent employment discrimination and preempt stereotyping. Further, to

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<sup>9</sup> Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1260 (2000).

<sup>10</sup> *Id.* at 1262.

<sup>11</sup> *Id.* at 1279-85.

the extent that antidiscrimination law ignores identity work, it will not be able to address “racial conduct” discrimination. Racial conduct discrimination derives, not simply from the fact that an employee is, for example, phenotypically Asian American (i.e., her racial status) but also from how she performs her Asian American identity in the workplace (i.e., her racial conduct).”<sup>12</sup>

Carbado and Gulati describe identity performance in the workplace as including negotiations—a relationship of power and authority. The metaphor of performance and negotiation describes actors, audience, and scripts (acting scenarios) within a set of power relationships.<sup>13</sup> Together, they comprise a setting for racial subordination where the crucial activities are not the disparate treatment of a particular category of employee by an employer, but a complex hierarchy of power and authority in which important activities are based upon social expectations and social stereotypes. Carbado and Gulati’s expansion of employment discrimination doctrine goes beyond employer conduct and interrogates the social and cultural racial meanings attached to all participants in the workplace. To address this mode of performative racial subordination, they seek an extension of Title VII beyond the boundaries currently imposed by the Supreme Court.

## 2. *Good Faith Doctrine in Contract Law*

In Emily Houh’s article, “Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law,”<sup>14</sup> Houh completes a trilogy of articles that critique the doctrine of good faith in contract law. In “Critical Race Realism,” she argues that:

[A]s a normative matter and due to the inadequacies of civil rights remedies, good faith should be used to prohibit discriminatory conduct based on race, gender, sexual identity, age and/or other categories of identity in the contractual context”<sup>15</sup>

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<sup>12</sup> *Id.* at 1262-63.

<sup>13</sup> *Id.* 1267-1278

<sup>14</sup> Emily Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455 (2005).

<sup>15</sup> *Id.* at 455.

Houh proposes:

[A] common law antidiscrimination claim that, first, incorporates contemporary re-conceptualizations of antidiscrimination jurisprudence, and second, grounds itself doctrinally not in civil rights law but in the contractually implied obligation of good faith . . . . Moreover, it seeks, through its proposal of the common law claim, to explicitly re-conceive the private law doctrine of good faith as one that might assist in effecting a public law norm of equality.”<sup>16</sup>

Houh uses employees in the workplace as an example of her thesis. She states, “The good faith discrimination claim proposed in this Article focuses on what constitutes ‘reasonable expectations’ with respect to racial or gender subordination in the workplace.”<sup>17</sup> Drawing upon Carbado and Muti’s work on performance in the workplace, Houh argues that “employees may reasonably expect *not* to have to perform to a set of scripted identities in the workplace . . . . [A]ny ‘scripted’ expectation that an employer has of a particular employee related to his race would be deemed unreasonable.”<sup>18</sup> She then explores several actual reported decisions under federal civil rights laws where claims were denied. She argues that a common law claim for breach of good faith could have been available to address their treatment.<sup>19</sup>

As with the proposals of Carbado and Muti, Houh’s project seeks to address the shortcomings of the Supreme Court’s narrow understanding of racial discrimination. Houh’s project points toward the possibilities of imaginative re-conceptualizations of common law doctrines and anti-discrimination theory.

## B. Racial Tropes and Stereotypes

### 1. *Racial Politics of Asian American Foreignness*

In my 2001 article, “Citizenship Nullification: The Impossibility of Asian American Politics,” I argue that racialization of Chinese Americans in the nineteenth century included the key

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<sup>16</sup> *Id.* at 456.

<sup>17</sup> *Id.* at 495-96.

<sup>18</sup> *Id.* at 496 (emphasis added).

<sup>19</sup> *Id.* at 494-96.



element of foreignness.<sup>20</sup> Foreignness here refers to the general racial stereotype or racial trope of being a “permanent foreigner”—that a person who looks like her ancestry can be traced to Asia is presumed to be an immigrant. That racial trope can be used to undermine that person’s “Americanness.”

Foreignness as an Asian American racial trope has been widely discussed.<sup>21</sup> I use the examples from electoral politics to show how the use of racial tropes can be a hindrance and even a barrier to full political participation. The article discusses the campaign finance scandals from the 1996 presidential elections involving Chinese Americans. After revelations that some campaign donations had been from Chinese non-citizens and exceeded campaign limits, there was a flurry of newspaper and media accounts suggesting the donations were bribes by Asians who did not understand the democratic process or were efforts by China to influence the election.<sup>22</sup> The Democratic Party then compiled a list of donors with Asian surnames and called them, asking for proof of their citizenship.<sup>23</sup> The reaction among Asian Americans was immediate and vocal and the Democratic Party apologized.<sup>24</sup>

A more recent example of permanent foreignness was the 2010 campaign of Nikki Haley for governor of South Carolina. Haley, born Nimrata Nikki Randhawa of Sikh immigrant parents, converted to Christianity as an adult. She made frequent public statements about her faith and included a place within her campaign website that directly addressed her religion. Nevertheless, her campaign faced constant charges that she was untruthful about her religion, including rumors that she was a Buddhist.<sup>25</sup>

In these examples, Asian Americans who wished to participate in the electoral process through campaign donations or political candidacy faced significant difficulties when confronted by

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<sup>20</sup> Neil Gotanda, *Citizenship Nullification: The Impossibility of Asian American Politics*, in *ASIAN AMERICANS AND POLITICS: PERSPECTIVES, EXPERIENCES, PROSPECTS* 79 (Gordon Chang ed., 2001) [hereinafter Gotanda, *Citizenship Nullification*].

<sup>21</sup> See Neil Gotanda, *New Directions in Asian American Jurisprudence*, 17 *ASIAN AM. L.J.* 5 (2010), for a discussion of this concept and the articles cited therein illustrating the same [hereinafter Gotanda, *New Directions*].

<sup>22</sup> Gotanda, *Citizenship Nullification*, *supra* note 20, at 94.

<sup>23</sup> *Id.* at 94-95.

<sup>24</sup> *Id.* at 95.

<sup>25</sup> Peter Wallsten & Valerie Bauerlein, *Haley Keeps Taking the Southern Test*, *WALL ST. J.*, June 22, 2010, available at <http://online.wsj.com/article/SB10001424052748704256304575321350649162856.html>.

the permanent foreignness trope. The nature of this stereotype is racial—the foreignness trope is linked to the Asian body. The trope of foreignness can be deployed by any person against any Asian American political candidate. Further, racial tropes are embedded and available within popular and mainstream culture. Widespread stereotypes and tropes become a part of “common sense” and popular understanding. Because of its pervasive availability, the foreignness trope is not a form of malicious racial animus. The trope is not the kind of race hatred or racial disparagement, located within the person invoking the racial trope, that is the basis for a finding of racial animus. Nor is there any disparate treatment, since an inquiry into the legal requirements for campaign donations or a person’s religious background is not based upon racial categories. These practices fall outside of the Supreme Court’s narrow understanding of racial discrimination.

## 2. *Driving While Black and Flying While Brown Racial Profiling*

The scenario of an African American driver being stopped on a pretext by a police officer is now well-known—“driving while Black.”<sup>26</sup> The straightforward discrimination critique is that the police stop involved disparate treatment—a similarly situated white driver would not have been stopped. Besides this discriminatory dimension, there are racial stereotypes and tropes in play. “Driving while black” is often described as “racial profiling.” The racial profile is itself a constructed understanding, built from significant social and cultural elements—racial stereotypes and racial tropes. Thus, in addition to disparate treatment, an essential element of racial profiling is the inclusion of stereotypes and tropes. The police traffic stop is an assertion of police power and racial authority based upon the “common-sense” validity of the racial profile. If it could be shown that the stop for “driving while Black” was based on racial animus or primarily because of the race of the driver, then there is a claim for racial discrimination. Proving such a claim is extremely difficult. Police have great latitude and discretion in initiating a simple traffic stop. Proof of racial animus is difficult, since beyond the office and the driver, there are usually few witnesses. The availability of stereotypes and tropes of criminality associated with black bodies, supports the reasonableness of any such traffic stop.

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<sup>26</sup> The literature on “driving while black” and racial profiling is extensive. See, e.g., the work of David A. Harris, including David A. Harris, *The Stories, The Statistics and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999).

The practice therefore eludes legal remedy under narrow theories of racial discrimination.

The role of the racial profile is clarified in the use of “flying while brown”—racial profiling against those who “look like a terrorist” at airports.<sup>27</sup> Different bodies, racial categories, and racial stereotypes are involved when the racial profiling is an airport stop of someone who “looks like a Muslim terrorist.”<sup>28</sup> The key element is the racial stereotype of the “Muslim terrorist” applied to a Brown body. These stops and interrogations take place in very public settings—airports and aboard airplanes—so there are often many witnesses. The airport stop, since it so often involves someone who looks “Middle-Eastern” or South-Asian, could be susceptible to a claim of disparate racial treatment. The difficulty in showing discrimination, however, grows out of the response that the stop was reasonable. That is, the application of the racial terrorist trope—someone who looks brown can be a terrorist—is regarded as reasonable and not malicious racial animus. Thus, any claim of disparate treatment is dismissed as justified, and any claim of racial animus is unavailable given the reasonableness of the racial stereotype. The availability and pervasive nature of the racial trope gives airport racial profiling its legitimacy.

### C. Regulated Culture—Racial Subordinations in Intellectual Property

#### 1. *Implicit Bias and the FCC Public Interest Doctrine*

In “Trojan Horses of Race,” Jerry Kang surveyed the emerging body of work on “implicit bias.”<sup>29</sup> Kang describes this research in the field of social cognition as elaborating on “‘racial mechanics’—the ways in which race alters intrapersonal, interpersonal, and intergroup interactions.”<sup>30</sup> Kang argues that “[t]his research demonstrates that most of us have implicit biases in the form of negative beliefs (stereotypes) and attitudes (prejudice) against racial minorities.”<sup>31</sup>

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<sup>27</sup> See generally Neil Gotanda, *The Racialization of Islam in American Law*, ANNALS AM. ACAD. POL. & SOC. SCI., September 2011, at 184-195, and the articles cited therein.

<sup>28</sup> Gotanda, *New Directions*, *supra* note 21.

<sup>29</sup> Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

<sup>30</sup> *Id.* at 1493.

<sup>31</sup> *Id.* at 1493-94.

Kang then goes on to show how the work on “implicit bias” and his description of “racial mechanics” offers more than engaging theoretical analysis. He examines federal communications policy, specifically the application of the “public interest” standard in the Federal Communications Commission’s (FCC) policies on media ownership.<sup>32</sup> Kang argues that the ownership rules that were justified as encouraging local news would not necessarily advance “diversity” and “localism.”<sup>33</sup> Instead, the disproportionate emphasis in local news on portrayals of racial minorities as violent criminals would exacerbate the implicit biases against racial minorities.<sup>34</sup>

Kang argues that these images, transmitted with great effectiveness in local news broadcasts, are “Trojan Horse viruses” that infiltrate our world view and affect our understandings and actions in relation to racial minorities.<sup>35</sup> Kang proposes that the FCC “re-code the ‘Public Interest’ standard” in its media ownership policy.<sup>36</sup> In particular, he argues that the FCC should not limit its diversity analysis to news and public affairs programming, but should expand its considerations to entertainment programming.<sup>37</sup> Acknowledging the difficulty of such a project, Kang argues that programs could be reviewed for explicit and implicit bias under an expanded FCC approach to the “public interest.”<sup>38</sup>

Kang’s work on implicit bias demonstrates the presence of racial subordination that is inaccessible to the Supreme Court’s narrow understanding of racial discrimination. By definition, implicit bias does not meet the requirements for intentional racial animus, since such discriminatory intent must be conscious and proven. Further, Kang’s example of the use of the FCC’s Public Interest standard as supporting racial bias simply does not fit within the Court’s understanding of similarly situated individuals treated in disparate fashion.

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<sup>32</sup> *Id.* at 1545.

<sup>33</sup> *Id.* at 1546-47.

<sup>34</sup> *Id.* at 1551-52.

<sup>35</sup> Kang, *supra* note 29, at 1553-54.

<sup>36</sup> *Id.* at 1572.

<sup>37</sup> *Id.* at 1568.

<sup>38</sup> *Id.* at 1569-70.

2. *Encouraging Innovation While Avoiding Harm to Racial Minorities in Patent Law*

In “Race Specific Patents, Commercialization, and Intellectual Property Policy,” Shubha Ghosh examines the phenomenon of “‘race specific patents’—patents that cover inventions tailored to certain racially or ethnically defined groups.”<sup>39</sup> Ghosh notes that while scholars have examined racial issues in trademark and copyright, race in patent law has been largely overlooked.<sup>40</sup> Motivated by the grant of a 2002 patent for a hypertension drug designed for use by “black patients,”<sup>41</sup> Ghosh reviewed over a thousand patents that claimed or used racial categories. Ghosh observes:

At one level, the identification of racial categories in patents arguably reflects deep social hierarchies . . . . But racial categories in patent law are not simply mirrors of social realities. Arguably, the use of racial categories in patent law may serve to create differences. If patents do crudely incentivize inventive activities or more subtly structure the market within which inventive activity occurs, then the use of racial categories in patent law arguably creates racialized boundaries, perhaps not as invidious as “WHITES ONLY” signs on bathroom doors or drinking fountains, but at least as problematic.<sup>42</sup>

Ghosh’ review of these patents notes that the use of racial categories could stigmatize as well as promote racial inclusion. Ghosh makes three policy recommendations: (1) race-specific claims should not be enforced, (2) race should not be a consideration in the nonobviousness analysis, and (3) race can be a limited factor in the beneficial utility analysis.<sup>43</sup> In formulating a normative framework for his proposals for patent law, Ghosh seeks to maintain the broad intellectual property goal of encouraging innovation while avoiding harm to racial minorities and encouraging pluralism and affirmative empowerment within civil society.<sup>44</sup>

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<sup>39</sup> Shubha Ghosh, *Race Specific Patents, Commercialization, and Intellectual Property Policy*, 56 BUFF. L. REV. 409, 410 (2008).

<sup>40</sup> *Id.* at 416.

<sup>41</sup> *Id.* at 411.

<sup>42</sup> *Id.* at 414.

<sup>43</sup> *Id.* at 410.

<sup>44</sup> *Id.* at 466-67.

### 3. *Blackness and Identity in Trademark and Copyright*

Another study of intellectual property and race, although very different in theme is David Dante Troutt's 2005 article, "Portrait of the Trademark as a Black Man: Intellectual Property, Commodification and Redescription."<sup>45</sup> In the article, MarCus, a fictitious black man, seeks to be the proprietor of himself as property by becoming the first federally-registered human trademark. Examples of celebrities whose marketing suggest trademark status are Martha Stewart, Tiger Woods, Michael Jordan, or Michael Jackson.<sup>46</sup> Through the trademark mechanism, MarCus seeks "to redescribe the social meanings associated with his black male identity in market terms, terms over which he would have strict and valuable control."<sup>47</sup> Troutt's article is a broad-ranging examination of the complexities posed by the commodification of race.

In the first section, Troutt uses the device of a first-person narrative. MarCus is an enormously successful black advertising executive who decides that a means to advance himself is to become his own trademark. He is clear, however, that if he were to describe himself as a black man, his application would likely be denied. His application for a trademark therefore describes his trademark-self as "colorblind." Here is the language from his trademark application:

A trademark including the name, image, voice and public persona of "MarCus," majority owner of MarCus, LLP, a person exclusive of race, gender, national origin or religious affiliation, engaged in the interstate sale of advertising and market promotion services in sponsorship with product manufacturers and service providers and described as visually assertive, uncompromising, independent amoral, cool and colorblind.<sup>48</sup>

The crucial language is the self-description of "visually assertive, uncompromising, independent, amoral, cool" posed against "colorblind."<sup>49</sup> Troutt is setting up the internal confrontation

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<sup>45</sup> David Dante Troutt, *Portrait of the Trademark as a Black Man: Intellectual Property, Commodification and Redescription*, 38 U.C. DAVIS L. REV. 1141 (2005).

<sup>46</sup> *Id.* at 1146.

<sup>47</sup> *Id.* at 1143.

<sup>48</sup> *Id.* at 1155.

<sup>49</sup> *Id.*

between MarCus' blackness as giving him his market authority, yet claiming through his assertion of "colorblind" that these traits do not "really" involve blackness. Troutt has MarCus explain his strategy:

Unlike my parents' generation of blacks, I would trademark instead of being stereotyped, turning chronic commercial disadvantage into its opposite. Second, as a technical matter, perpetrating the fraud of nonraciality would assuage an examiner's instinctive reaction against a racialized mark. (A "black man" trademark would be rejected out of hand.)<sup>50</sup>

Troutt elaborates on this strategy.

[A]s a black man, [MarCus] believes that his chances of success would be substantially greater if he were to disclaim the racial aspect of his identity. That is, he accepts that his culture, like most cultures, emphasizes race in its code of social meanings. These social meanings are composed of . . . spoken and unspoken social ambivalence about race . . . . [Marcus] believes that his legal project requires social *de*-construction of such codes. This task lies at the heart of his redescription through commercial symbolization. Therefore, his colorblind claim must somehow refigure consumer expectations.<sup>51</sup>

Troutt carries forward his analysis of MarCus' quest to become the first human trademark, concluding that as a strategy for freedom, this quest for ultimate commodification will fail because of the inability to maintain a private racial persona—his blackness—and a public, fraudulent colorblind identity.<sup>52</sup>

These authors are illustrative of the efforts by scholars to explore the issues of racial subordination beyond the limits of the Supreme Court's narrow understanding of anti-discrimination. In the next section, I examine a mode of racial subordination that is not framed as discrimination.

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<sup>50</sup> *Id.* at 1154.

<sup>51</sup> Troutt, *supra* note 45, at 1179.

<sup>52</sup> *Id.* at 1193-1207.

## II. RACIAL PLEASURE—RACIAL SUBORDINATION WITHOUT RACIAL DISCRIMINATION

### A. Racial Pleasure

In this section, I examine the notion of racial pleasure as a form of racial subordination. Unlike the earlier examinations that seek to extend the established boundaries of racial subordination as discriminatory treatment, racial pleasure is a different form of subordination. Rather than the disparate treatment of neutral racial categories, the idea that racial pleasure is subordination is grounded in the difference in position between the subject and the object of pleasure derived from raced bodies. Within racial pleasures, I suggest two divisions. There is a legal normative distinction between permitted racial pleasures and illicit racial pleasures. Second, there is a legal distinction between racial pleasures and commodified racial pleasures.

One can see permitted racial pleasures, or simply racial pleasures, in such well-discussed areas as sports, music, and dance. Illicit racial pleasures include activities now regarded as unlawful—slavery and lynching—as well as such questionable practices as racial cross-burnings. Illicit racial pleasures are subject to direct regulation—criminal prohibitions and anti-discrimination laws. Permitted racial pleasures may be subject to legal review under First Amendment standards. Further, if racial pleasures are commodified, or property, then such commodified racial pleasures are subject to commercial regulation and intellectual property regulation.

#### 1. *The Black Body as Fetish Object*

Anthony Farley explores the concept of racial pleasure in a legal context in his 1997 article, “The Black Body as Fetish Object.”<sup>53</sup> While Farley’s presentation is complex, his core notion of racial pleasure is deceptively simple—racial subordination gives pleasure. Farley states: “In this Article, I describe ‘race’ as a form of sadomasochistic pleasure . . . . I argue that whiteness is a sadistic pleasure and that the black body is a fetish object and that law participates in producing these themes . . . .”<sup>54</sup> Farley’s extension of sadomasochistic theory—that race relations involve constitutive dimensions of power and pleasure—is a compelling interpretation

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<sup>53</sup> Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457 (1997).

<sup>54</sup> *Id.* at 461.



with significant implications. Unlike the previous examples of racial subordination, there is no comparable notion in race discrimination. Power and pleasure are not a part of the anti-discrimination framework for racial subordination.

## 2. *Race in Computer Games*

My examination of racial pleasure grew out of research into race in computer games.<sup>55</sup> In computer gaming, a study of race immediately raises several problems. First, there are no real bodies, only representations in virtual space. Whether as avatars operated by players or as enemy representations to be defeated, there are no real bodies. Second, the non-human representations are problematic. Human representations are easy to recognize. A large, menacing African American gangster clearly includes a racial component. But the racial content of a wizard or an elf is less than obvious. Third, computer gaming as a recreational activity is not a recognized area for the legal study of race. While there is a rich literature on race in sport, especially professional sports, legal studies usually address race within the traditional discrimination framework.<sup>56</sup>

My research into computer gaming as a recreational activity led to the literature on “autoletic activities” that involve “formal and extensive energy output on the part of the actor, yet provide few if any conventional rewards.”<sup>57</sup> Computer games involve extensive activity without any monetary compensation or other traditional returns. Its rewards come in the form of personal enjoyment in the gaming activity itself. In the most popular forms of computer gaming, combat and conquest provide the greatest rewards to participants. The conquest and defeat of virtual enemies provides moments of intense personal pleasure. When the conquered and defeated object images have racial content, it is possible to posit a connection between the pleasures of virtual conquest and the

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<sup>55</sup> See generally THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS (Jack M. Balkin & Beth Simone Noveck eds., 2006).

<sup>56</sup> For a popular treatment by a law professor, see N. JEREMI DURU, ADVANCING THE BALL: RACE, REFORMATION, AND THE QUEST FOR EQUAL COACHING OPPORTUNITY IN THE NFL (2011). For a brief survey of the topic, see Timothy Davis, *Race and Sports in America: An Historical Overview*, 7 VA. SPORTS & ENT. L.J. 291 (2008).

<sup>57</sup> MIHALY CSIKSZENTMIHALYI, BEYOND BOREDOM AND ANXIETY: THE EXPERIENCE OF PLAY IN WORK AND GAMES (1975).

racialized images.<sup>58</sup> Thus, when the images are racialized, the pleasures of gaming include racialized pleasures. Virtual conquest of racialized images is a means of using and consuming those racial images. The player thus derives racial pleasure in the consumption of the virtual racialized images.<sup>59</sup>

In “The Black Body as Fetish Object,” Farley explains:

[N]ot all bodily pleasures are sexual. People can create pleasures out of very peculiar things, even out of suffering or inflicting pain. Race is such a pleasure . . . . The colorline, like love, is a many-splendored thing, and its definition is elusive. The colorline, in one aspect, is comprised of the rules of the sadomasochistic game also known to us as race relations . . . . In other aspects the colorline appears as a form of economic or political exploitation . . . . [Thus,] race is the preeminent pleasure of our time. Whiteness is not a color; it is a way of feeling pleasure in and about one’s body . . . . [T]he black body is needed to fulfill this desire for race-pleasure. In our colorlined world, the white body is a form of desire and the black body is a form of pleasure.<sup>60</sup>

The concept of racial pleasure—that racial practices lead to distinct enjoyment and pleasure as part of the practice of racial subordination—has an intuitive resonance. When a white person exercises authority over a non-white person, that assertion of power is linked to the pleasure of dominance. That pleasure also is linked to the humiliation suffered by the victim. As Farley suggests, pleasure can be created in peculiar forms. Carrying the idea of pleasure and pain into computer games, the pleasures of computer gaming—when the combat and conquest are of racialized characters—include racial pleasure. The game experience, while not “real,” is powerful. The pleasures of racial conquest in the game world are potent surrogates for racial pleasure in the “real world.” The autoletic activity of computer gaming—activity without any conventional rewards—creates its own forms of pleasure. If the white body is a form of desire and the black body is a form of

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<sup>58</sup> See generally Neil Gotanda, *Computer Games, Racial Pleasure and Discursive Racial Space*, 72 ALB. L. REV. 929 (2009).

<sup>59</sup> See LISA NAKAMURA, *DIGITIZING RACE: VISUAL CULTURES OF THE INTERNET* (2008) (examining race in virtual space).

<sup>60</sup> Farley, *supra* note 53, at 459-60.

pleasure, then the computer game player is a site of desire and the raced virtual representations are a form of racial pleasure.

### B. Permitted Racial Pleasures and Illicit Racial Pleasures

If one accepts Farley's description of racial pleasure, then a vast array of cultural activities, especially in American popular culture, are open to re-interpretation. Participation in music, sports, and dance include racial pleasures. Commercial activities such as cinema, theater, popular music, and professional sports are significant locales for the consumption of racial pleasures. While the topic is broad, our interest here is relatively narrow—the regulation of these racial pleasures.

Some racial pleasures are now definitively regarded as unlawful and proscribed by both criminal and civil penalties. Racial chattel slavery is the clearest example. Lynching is also now regarded as abhorrent and subject to the most severe criminal penalties. Both of these practices included significant dimensions of sadistic racial pleasures. A practice whose status remains contested is racial cross-burning—the subject of a Clarence Thomas dissent.<sup>61</sup>

At issue in *Virginia v. Black* were the convictions of three men charged with violating a Virginia statute that banned cross burnings intending to intimidate a person or group of persons.<sup>62</sup> The majority overturned the convictions while Thomas vigorously dissented. Thomas begins his dissent with the admonition, “In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, and the profane. I believe that cross burning is the paradigmatic example of the latter.”<sup>63</sup>

Thomas goes on to explain that there are some communications that are so laden with historical meaning that they clearly convey “intimidating and terroristic conduct and racist expression.”<sup>64</sup> For Thomas, cross burning is such a moment, and the activity can be subject to direct government regulation.

For the majority, the practices in question were protected under the First Amendment. A First Amendment expression

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<sup>61</sup> *Virginia v. Black*, 538 U.S. 343, 388-400 (2003) (Thomas, J., dissenting).

<sup>62</sup> *Id.* at 347-51.

<sup>63</sup> *Id.* at 388.

<sup>64</sup> *Id.* at 394.

analysis is the preferred framework for review of regulatory efforts aimed at expressive pleasures. The only area of expressive pleasure where the Court has consistently upheld regulation is its obscenity category.<sup>65</sup> The majority and dissent outline the distinction between permitted racial pleasures and illicit racial pleasures. Permitted racial pleasures are those racial pleasures that the Court regards as protected under freedom of expression. Permitted racial pleasures are not subject to direct forms of legal regulation. If a racial pleasure is sufficiently linked to a practice that is legally proscribed—slavery or lynching—then the pleasure is an illicit racial pleasure and is subject to direct legal regulation.

To further explore practices that involve racial pleasure but are linked to proscribed forms of racial subordination, we can re-examine two practices discussed earlier, racial profiling and racial performance in the workplace.

### 1. *Illicit Racial Pleasures—Profiling and Performance*

A moment of racial pleasure—racial humiliation—can be seen in the process of racial profiling described above. A police stop for driving-while-black includes the key elements of the “somasochistic game” that Farley describes. The officer, witnesses, and those who learn of the account through subsequent communications all can enjoy the pain that the officer inflicted.<sup>66</sup>

That moment of racial pleasure is the moment at which the racial trope—black criminality—is invoked and imposed on a black body. Thus, racial stereotyping corresponds to a moment of racial pleasure. Racial pleasure during the driving-while-black traffic stop can be seen as the “consumption” of the racial trope. To our earlier discrimination analysis, we can add an analysis of racial pleasure. Both forms of racialized treatment are present and both should be described. Racial profiling or racial stereotyping—the invocation of a racial trope and its inscription on a raced body—is not a misunderstanding. It is a moment of racial pleasure as well as racial discrimination.

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<sup>65</sup> See, e.g., *United States v. Stevens*, 130 S. Ct. 1577 (2010) (rejecting an extension of the Court’s obscenity doctrine and child pornography doctrine).

<sup>66</sup> Note that for this racial pleasure, the race of the officer need not be white. Once this particular scenario of racial pleasure is established, the desire may be shared by many races, but the object of pleasure is a black body.

A similar analysis applies to racial performance in the workplace. The very term “racial performance” suggests a scenario for racial pleasures. Any performance includes an audience, who in some form derives pleasure from the actors in the performance. When an employer expects a particular set of stereotyped expectations, racial pleasure can take place in different ways. If the employer knows that the stereotype is at odds with the minority employees personal preferences (e.g., dress or grooming), then the employer can enjoy the humiliation of the minority employee or the paternal pleasure of making the employee perform her success in the workplace. The racial performance may also be directed to please others in the workplace. Co-workers and superiors consume the workplace racial performance for their own racial pleasure.

These examples describe the presence of illicit racial pleasures in unlawful discriminatory practices. There remain the multitude of non-discriminatory practices that include racial pleasures. These permitted racial pleasures are not necessarily entirely free from regulation. In many cases, the racial pleasure is in the form of a commodity or property. As a commodity, racial pleasure is subject to contract and intellectual property regulation. As property, racial pleasure that has been propertized is subject to legal treatment as a form of property.<sup>67</sup> To further examine commodified racial pleasure, we return to our examination of computer games.

### **C. Racial Pleasures and Commodified Racial Pleasures**

Computer gaming is not a simple recreational activity. Computer gaming is technically complex and a very significant commercial activity. The pleasures of computer gaming are packaged and sold. They are commodified pleasures. Therefore, the racial pleasures in computer games are commodified racial pleasures.

If racial pleasures are seen as commodified, then a vast array of racially encoded commercial activities can be re-interpreted as commodified racial pleasures. Various forms of commercial entertainment—music, cinema, sports—include components of racial pleasure alongside other forms of pleasure. In its commodified form, racial pleasure is packaged, sold, and consumed.

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<sup>67</sup> See generally Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

As a commodity, we participate most fully in racial pleasure at the moment that the racialized commodity is consumed. The moment of celebration or humiliation of a raced body is the moment of racial pleasure and the moment of the consumption of racial pleasure.

Computer games are bought and sold. They are conceived and created as commodities. The racial pleasures associated with the playing of a computer game include the consumption of commodified racial tropes. In contrast, a police stop for driving while Black is not commodified in any traditional sense. While the officer is an employee and is paid, the interactions of police officer and individual citizen or person are not commodified relations. A police officer is not paid for individual actions. Detentions, arrests, and criminal investigations are not separately priced. Thus, the basic relationship of police officer and resident are not separately commodified, although, as argued above, they can include distinct moments of racial pleasure.

Racial performance in the workplace is a more complex context. All of those involved are usually employees, and the racial performance is set within the employment relationship and part of the commodified nature of labor relationships. The racial pleasure components, however, are not traditionally regarded as workplace or job-related and are only indirectly related to the buying and selling of employees' labor.

The commodification of racial pleasure in computer games and the entertainment industry, as well as our earlier examples, suggest that many racial practices involve these commodified racial forms.

#### **D. A Proposal for Illicit Racial Pleasure**

With Justice Thomas' comments in mind, this Essay next examines a proposal that addresses racial subordination in commodified racial pleasures. The starting point is the premise that there are racial representations and racial depictions so laden with "intimidating and terroristic conduct and racist expression"<sup>68</sup> that they deserve to lose some legal protections. Next, we observe that under our current racial practices, the invention, circulation, and reinforcement of intimidating and terrorist racial representations can occur through racial pleasures in their commodified forms. When the racial pleasure crosses over into "intimidating and terrorist"

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<sup>68</sup> *Black*, 538 U.S. at 394.

expression, then that racist representation is deemed an “illicit racial pleasure.” The proposal is that illicit racial pleasures should be “de-commodified.” That is, a depiction of “illicit racial pleasure” should lose all intellectual property rights and protections.

Following the Supreme Court’s approach in obscenity cases, the definition of “illicit racial pleasure” follows the landmark decision in *Miller v. California*.<sup>69</sup> First, regulation of illicit racial pleasure is limited to offensive racial representations specifically defined by state or federal law. Second, such regulation of illicit racial pleasure is limited to specific racial representations: those which the average person, applying contemporary community standards, would find appeal to the prurient interest in racial pleasure; those which portray race in a patently offensive way; and those which do not have serious literary, artistic, political, or scientific value. Third, an illicit racial pleasure shall lose all intellectual property rights and protections.

This proposal is not a criminal prohibition but a civil regulation.<sup>70</sup> Its application can be prospective to avoid any property takings issues. And its ambiguity, as in the case of obscenity, acts as a brake upon the production of illicit racial pleasures. The proposal is intended to focus discussion on the possibilities for government intervention into illicit racial pleasures.<sup>71</sup>

In addition to this proposal for regulation of commodified racial pleasure, there is the additional possibility of theorizing commodified racial practices within more general commodification theories. My own research into commodified race, especially the idea that these commodified forms were consumed to generate racial pleasures, led me to the theories of commodity circulation in Marx’ writings on political economy.

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<sup>69</sup> 413 U.S. 15 (1973).

<sup>70</sup> Recall Catherine MacKinnon and Andrea Dworkin’s efforts on pornography as a form of sexual subordination and therefore the appropriate subject for civil actions. See e.g., *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) striking down an Indianapolis ordinance modeled after the MacKinnon-Dworkin proposal.

<sup>71</sup> Cf. *Stevens*, 130 S. Ct. at 1592 (rejecting a federal statute seeking to criminalize the commercial creation or sale of certain depictions of animal cruelty, especially “crush videos” featuring the torture and killing of helpless animals).

### III. COMMODIFIED RACE IN MARX' CYCLE OF COMMODITY CIRCULATION

This section seeks to situate commodified race within Karl Marx' cycle of capitalist production. In an often-studied passage, Marx describes commodity circulation under capitalism as a cycle with four discernible stages: Production, Distribution, Exchange, and Consumption. After a brief examination of Marx' language, this Essay examines how to place commodified race within this production cycle.

In his Introduction to a *Critique of Political Economy*, Marx wrote:

PRODUCTION creates articles corresponding to requirements; DISTRIBUTION allocates them according to social laws; EXCHANGE in its turn distributes the goods, which have already been allocated, in conformity to individual needs; finally in CONSUMPTION the product leaves this social movement, it becomes the direct object and servant of an individual need, which its use satisfies. PRODUCTION thus appears as the point of departure, consumption as the goal, distribution and exchange as the middle, which has a dual form, since according to the definition, DISTRIBUTION is actuated by society, and EXCHANGE is actuated by individuals. In production persons acquire an objective aspect, and in consumption objects acquire a subjective aspect; in distribution it is society which by means of dominant general rules mediates between production and consumption; in exchange this mediation occurs as a result of random decisions of individuals.<sup>72</sup>

This four part cycle outlines a general system of production. We can describe its application to an ordinary consumer commodity—a chair. Chairs are commodities created in Production. Once chairs are produced, then Distribution is the social decision as to how chairs shall be allocated within society. Some parts of society will get more

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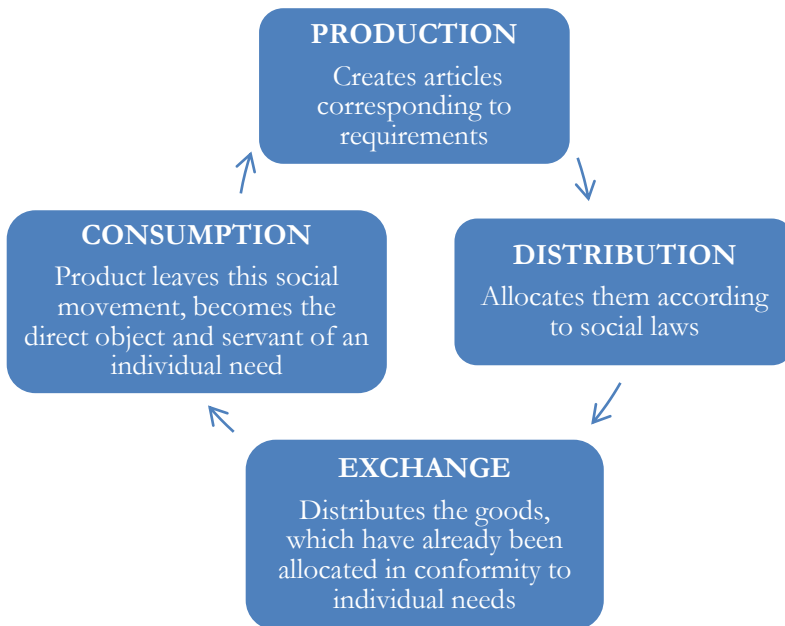
<sup>72</sup> KARL MARX, A CONTRIBUTION TO A CRITIQUE OF POLITICAL ECONOMY (David Fernbach trans., Penguin Classics 1999) (1859), available at <http://www.marxists.org/archive/marx/works/1859/critique-pol-economy/index.htm>.



chairs while some will get less. Exchange is the random process of distribution—the buying and selling of chairs in the market. The final moment is the use of the chair in Consumption.

Here is a visual version of Marx' theory:

### CYCLE OF COMMODITY CIRCULATION



In this passage, Marx summarizes significant parts of his political economy. The very limited purpose of this section is to suggest that after identifying elements of commodification in racial practices, those commodified racial practices can be interpreted within the four stages of production, distribution, exchange, and consumption.

In the example of race in computer games, the making of commodified racial images occurs in the production stage. And, as Marx indicates, “production creates articles corresponding to requirements.”<sup>73</sup> In other words, computer games and the racial

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<sup>73</sup> KARL MARX, *THE GERMAN IDEOLOGY* 129 (C. J. Arthur ed., International Publishers Co., 2004) (1845).

representations in the games are produced with a consumer market in mind. If racial images are popular, then racial representations will be included. If there is a market for the consumption of commodified racial representations, then computer games will be generated for that market. It is at the stage of production in the making of the computer games with racialized images that the creative process operates. Distribution is the social decision as to how computer games are allocated. In general, computer games are located within broad commercial markets and pricing determines allocation of consumer commodities. Exchange is the actual distribution, buying and selling of consumer computer games. Racial pleasure is enjoyed at the final stage of Consumption. When a computer gamer plays the game and enjoys defeating or otherwise consuming a racial representation, that person is enjoying a racial pleasure and participating in a vicarious racial subordination.

As an extension of this examination of commodified racial pleasure, it is possible to examine other forms of the commodification of race.<sup>74</sup> Labor power—both in its commodified form as wages and working conditions, and as the bodies available for labor—can be viewed through this framework. For much of our history, the most important form of racialized labor was chattel slavery. Since the end of the Civil War, racial differentiations in salary and working conditions, with African American workers receiving less than white workers, is a common phenomenon and a clear form of racial subordination. We can group together these racial subordinations in labor and employment as racialized labor power and recognize racialized labor power as commodified racial labor power. As a commodity, racialized labor power traditionally has been subject to legal regulation. Racial subordination in the form of differential conditions for African American labor was the widely accepted until the modern civil rights era.

We can trace the regulation of commodified racial pleasure and commodified racial labor power by identifying the legal topics under which the regulation of these forms of commodified race takes place. Commodified racial pleasure is directly regulated by contract, intellectual property law, and the

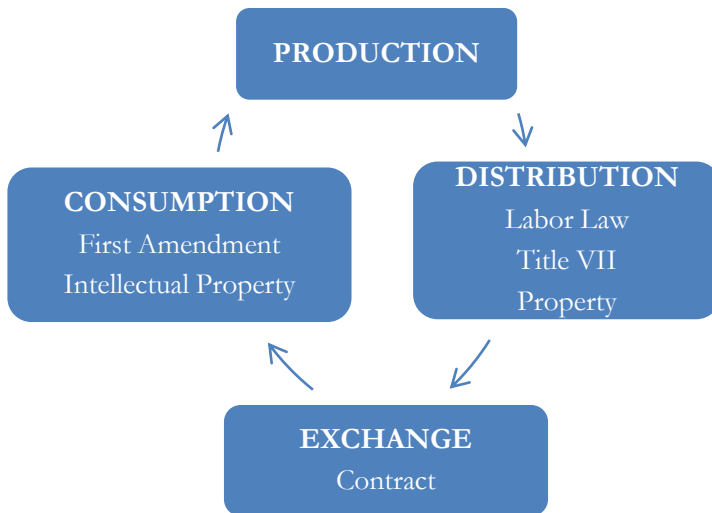
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<sup>74</sup> The literature on race and economics is substantial. For a helpful collection of materials and references, see generally EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *WHEN MARKETS FAIL: RACE AND ECONOMICS* (2005).

First Amendment. Commodified racial labor power is directly regulated through labor law, Title VII, contract law, and property law. We can insert these categories of legal regulation into Marx' production cycle to see how the legal regulation of commodified forms of race have been divided functionally—by where they are in the production cycle—and by legal topic, again depending on where they are in the production cycle.

The following chart suggests how different areas of the law that address commodified race might be interpreted and situated within Marx' Cycle:

**LAWS REGULATING COMMODIFIED RACIAL  
PLEASURE AND COMMODIFIED RACIAL LABOR  
POWER WITHIN MARX' COMMODITY CYCLE**



Grouped together under Distribution are the areas of law that address the workplace. The continuing disparity between white and African American salaries, for example, is part of the social allocation of salaries for workers. The broad allocation of salaries and benefits between capital and labor is regulated in labor law, Title VII, and property. Under Exchange, we see an area of the law that regulates the actual distribution, buying, and selling of commodities: Contract law addresses market exchange. Finally, under Consumption are grouped those areas of law which regulate the

consumption of commodified racial pleasure—the First Amendment and intellectual property law.

This re-interpretation of race is possible once we have recognized that modern racial practices include significant moments of commodified forms as well as non-commodified forms of racial subordination. The growth and visibility of commodified forms of racial subordination open racial practices to further analysis under Marx' commodity cycle.

#### IV. CONCLUSION

The demise of explicit racial segregation, the acceptance of colorblind norms in law and American culture, and the Obama election have led to the popularization of the term “postracial” to describe our present racial climate.<sup>75</sup> This Essay contests the assertion that we have moved beyond race. Instead, our racial practices are shifting and require new descriptions.

The first section describes how—despite the Supreme Court's claims that racial discrimination has disappeared—additional forms of racial subordination are now seen as distinct from racial discrimination. The authors summarized in this section describe and identify complex forms of racial subordination as always present but now becoming more visible.

Racial pleasure is an important concept that needs further exploration. Other examinations of identities in legal studies—notably feminist studies and queer theory—have included pleasure as a dimension within subordination. Legal studies should not overlook this obvious aspect of race in America. The proposal for de-commodification of illicit racial pleasures is an effort to encourage imagination in addressing racial practices.

The insertion of commodified forms of racial subordination into Marxist theory is an effort to provide additional depth and breadth to our studies of race. Marx' theory of commodity circulation offers an alternative to traditional perspectives on multiple areas of racial subordination. Marxist commodity theory opens the possibility of a comparative study of commodification of racial pleasure, commodification in employment discrimination, and commodification of racial subordination in other areas of private law.

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<sup>75</sup> See generally Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009).

These comments outline important alternative perspectives on racial practices in the United States.