The ideal of a color-blind society has long been promoted as a panacea for the blight of both institutional and private racism. For the sake of neutrality and objectivity, we are told, we must do everything in our power to ignore—or better still, to avoid even noticing—each other’s race. Consciously thinking about racial identity in decision making is perceived as likely to lead to either discrimination against the stereotyped group or reverse discrimination in its favor. Attorneys who represent minorities, in particular, have been denounced for urging jurors to reexamine their stereotypical reactions to their clients. Detractors accuse these attorneys of “playing the race card” or “playing to the prejudices of the jury.”

A dramatic cinematic depiction of this type of the color-blind perspective, or color-blind formalism, appears in several court-
room scenes in the movie *Philadelphia.* The film—inspired by a true story—concerns a successful gay attorney, Andrew Beckett, who is wrongfully discharged by his law firm because of his sexual orientation. In the following scene, Beckett’s attorney is cross-examining a firm employee who was involved in the conspiracy to discharge Beckett wrongfully:

**PLAINT. ATTY:** Are you a homosexual?

**WITNESS:** What?

**PLAINT. ATTY:** Are you a homosexual? Answer the question. Are you a homo? Are you a faggot? . . . fairy . . . booty snatcher . . . rump-roaster. Are you gay?

**DEF. ATTY:** Where did this come from? [The witness’s] sexual orientation has nothing to do with this case.

**PLAINT. ATTY:** Your honor, everybody in this courtroom is thinking about sexual orientation, you know, sexual preference, whatever you want to call it. Who does what to whom, and how they do it. I mean, they’re looking at Andrew Beckett [plaint.], they’re thinking about it. They’re looking at Mr. Wheeler [senior partner], Ms. Cornini [defense counsel], even you, your honor. They’re wondering about it. I mean, hey, trust me, I know that they are looking at me and thinking about it. So let’s just get it out in the open, let’s, let’s get it out of the closet, because this case is not just about AIDS, is it? So let’s talk about what this case is really all about, the general public’s hatred, our loathing, our fear of homosexuals, and how that climate of hatred and fear translated into the firing of this particular homosexual, my client Andrew Beckett.

**JUDGE:** In this courtroom, justice is blind to matters of race, creed, color, religion, and sexual orientation.
PLAINT. ATTY: With all due respect your honor, we don’t live in this courtroom though, do we?

JUDGE: No, we don’t. However, as regards this witness, I’m going to sustain the defense’s objection.

Unfortunately, the “color-blind” formalism exemplified by this fictional judge’s reaction to references to sexual orientation reflects real-life judicial resistance to attorneys’ attempts to bring the issue of prejudice into the open at trial. (“Color-blind” shall be used throughout this chapter as a shorthand expression for efforts to ignore or pretend not to notice that another person belongs to a stereotyped group, regardless whether the basis of the stereotype is race, gender, sexual orientation, or the like.) For example, in Jackson v. Chicago Transit Authority, a Black plaintiff brought a negligence action against a municipal corporation for personal injuries sustained when the bus he boarded collided with a truck. During his closing argument, the plaintiff’s counsel “alluded to the fact that his client was Negro, as contrasted to the jurors, the attorneys and the court itself, who were all Caucasians.” The jury returned a verdict for the plaintiff, but the appellate court granted the defendants a new trial on the ground that such a racial reference “should not be made before any tribunal. It is an unmitigated appeal to prejudice and its effect could only be destructive of the proper administration of justice.”

In characterizing the reference by the plaintiff’s counsel to his client’s racial identity as a case of playing to the prejudices of the jury, the Jackson court ignores a critical distinction between racial references that subvert the rationality of the fact-finding process and racial references that actually enhance the rationality and fairness of the fact-finding process. Worse still, this court’s superficial analysis has gained legitimacy and wide currency through