

## Book Reviews

### The Law and Economics of Critical Race Theory

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*Crossroads, Directions, and a New Critical Race Theory*. Edited by Francisco Valdes,<sup>\*</sup> Jerome McCristal Culp,<sup>\*\*</sup> and Angela P. Harris.<sup>\*\*\*</sup> Philadelphia: Temple University Press, 2002. Pp. 528. \$79.50 (cloth), \$29.95 (paper).

#### I. INTRODUCTION: TOWARDS A MICRODYNAMICS OF RACE

Legal academics often perceive law and economics (L&E) and critical race theory (CRT) as oppositional discourses. Part of this has to do with the currency of the following caricatures:

*L&E is the methodological means by which conservative law professors advance their ideological interests. The approach is status-quo-oriented and indifferent (if not hostile) to the concerns of people of color and the poor. Because L&E is centered on notions of economic efficiency, it does not accommodate inquiries*

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*into social justice and fairness. Because the models underlying L&E proposals are characterized by assumptions about rational actors and perfect markets, L&E policy prescriptions endorse market-based solutions to social problems and argue against government intervention. L&E scholarship is more concerned with protecting institutions from legal and governmental surveillance than with protecting people of color from racism. The political effect of L&E is to entrench and obfuscate racial and class hierarchies.*

*CRT is the methodological means by which radical faculty of color (and especially black faculty) advance their ideological interests. The approach is invested in finding discrimination and characterizes even the most progressive institutional practices as racist. Much of this literature takes the form of storytelling, and almost all of this storytelling is bad. CRT scholars believe neither in merit nor in truth. For them, everything—including (and perhaps especially) scholarship—is and should be about race and politics. Central to CRT is the notion that racism is endemic to American society. Thus, CRT fails to take seriously notions of agency and social responsibility. CRT is, for example, more concerned with protecting criminals from punishment than with protecting society from crime. The models underlying CRT's policy prescriptions are characterized by assumptions about racial actors and racial markets. Consequently, these proposals endorse governmental regulation of the market and argue against free-market mechanisms to ameliorate social problems. The political effect of CRT is preferential treatment and social welfare programs for people of color—particularly black people.*

It would be neither difficult nor interesting to disprove either caricature. Yet both have considerable intellectual and institutional purchase, so much so that they have helped to balkanize L&E and CRT scholarship. L&E and CRT scholars rarely pool their insights to work collaboratively. This was frustrating to the late David Charny, who felt that the inquiry into the racial dynamics of the modern workplace could benefit from combining insights from both fields.<sup>1</sup>

Both sides are at fault. A deficiency on the L&E side is the failure of its proponents to conceptualize racial discrimination in the workplace as a dialectical process within which race both shapes, and is shaped by, workplace culture. For the most part, L&E scholars view race as an independent variable—something that is fixed, static, and easily

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1. For an indication of the extent to which our work builds on some of David's insights, see generally Devon W. Carbado & Mitu Gulati, *Interactions at Work: Remembering David Charny*, 17 HARV. BLACKLETTER L.J. 13, 17-20 (2002).

measurable—and they pay little attention to the internal dynamics of the workplace as a determinant of race.<sup>2</sup> L&E scholarship on discrimination has focused more on the market—a focus, which, as David saw it, obscured the fact that much discrimination was taking place *in the workplace*. Central to David's thinking was the idea that in order to understand the operation of discrimination, one has to understand not only market forces as market forces, but also how those forces interact with the internal operation of the workplace. Workplaces are not structurally monolithic, and certain institutional arrangements within the workplace are more likely to produce problematic racial outcomes than others. For example, racial stereotypes may have different racial effects in a workplace where compensation is tied to output than in a workplace where compensation is based on peer or supervisor evaluations.

Nor are workplace cultures static. Like the market, they change. They evolve in response to, among other things, changing commitments to, and conceptions of, race. If, for example, certain workplace structures are less conducive to the inclusion of racial minorities (and assuming that employers want diverse workforces), those structures likely will give way to institutional arrangements that are more conducive to integration. In turn, these institutional changes will shape how the employer and the employees understand race and practice racial interactions. Because L&E scholars largely treat race as preexisting and fixed, and because they focus more on markets than on workplaces, L&E scholarship does not reflect an understanding of the dialectic between racial identity and workplace culture. As we will show, understanding this relationship is critical to grappling with the complexities of contemporary workplace discrimination.

On CRT's side, the deficiency is twofold. First, while CRT is committed to the idea of race as a social construction—that is, the idea that race evolves as a function of historical, social, political, and economic contexts<sup>3</sup>—the literature has paid little attention to the workplace as a site of racial construction. In part, this is because much of CRT's effort to combat racial discrimination in the workplace has focused on eliminating formal and informal racial barriers to entry. Given the particular history of race discrimination in America, this is not surprising. Blacks experienced the politics of racial segregation as a “closed door” to much of the labor market (and especially the professional labor market). Thus, civil rights efforts—in both practice and theory—focused on opening that door. There

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2. Laura Gómez makes a similar argument with respect to how early law-and-society scholars conceptualized race. See Laura E. Gómez, *A Tale of Two Genres: On the Real and Ideal Links Between Law & Society and Critical Race Theory*, in *A COMPANION TO LAW AND SOCIETY* (Austin Sarat ed., forthcoming 2003).

3. See generally Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

was no need to think about the operation of race *within* professional workplaces because so few nonwhites had access to professional jobs.

Things have changed. As a matter of formal law, blacks and other people of color are no longer barred from professional jobs. Evolving laws and social norms have opened the door, particularly for “qualified people of color.”<sup>4</sup> How widely this door has opened is the subject of debate. But for present purposes, it is enough to observe that, over the past thirty years, changes in our laws and norms have increased the representation of people of color in professional workplaces. Central to our Review is the idea that the diversification of the professional workplace renders these workplaces important “social contexts” for thinking about racial formation—that is to say, the social construction of race.

A second deficiency is that CRT articulates its conception of race as a social construction at the macro level, focusing primarily on legal and sociopolitical processes.<sup>5</sup> It has not paid attention to the interpersonal ways in which race is produced.<sup>6</sup> That is, CRT often ignores the racial productivity of the “choices” people of color make about how to present themselves as racialized persons.<sup>7</sup> As a general matter, CRT’s race-as-a-social-construction thesis does not include an analysis of the race-producing practices reflected in the daily negotiations people of color perform in an attempt to shape how (especially white) people interpret their nonwhite identities.<sup>8</sup> For example, a Latina may decide not to speak Spanish at work, she may decide to “hold her tongue,” or she may refrain from socializing with other Latina workers.<sup>9</sup> These are all race-constructing choices: How a

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4. We recognize that the term “qualified people of color” is problematic. It is often used to explain why people of color are underrepresented in professional jobs—they are not “qualified.”

5. Laura E. Gómez, *Race Mattered: Racial Formation and the Politics of Crime in Territorial New Mexico*, 49 UCLA L. REV. 1395 (2002) (illustrating how racial formation and specific “racial projects” structured the legal, political, and social terrain of late nineteenth-century New Mexico); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (explaining the role law played in the social construction of whiteness as property).

6. Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002) (demonstrating the ways in which race is produced in the context of police interactions with nonwhite persons).

7. “Choices” appears in quotation marks to convey the idea that we recognize that they are exercised under constraints. See generally Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossberg eds., 1988) (exploring whether and to what extent subordinated communities have agency “to speak”). We take our cue from Paulo Freire, who suggests that even the subordinated have some agency. See generally PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (1970).

8. For an earlier and more complete articulation of this idea, see Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

9. See JAMES CRAWFORD, *HOLD YOUR TONGUE: BILINGUALISM AND THE POLITICS OF “ENGLISH ONLY”* (1992); Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321 (1987); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992). Significantly, the problem of race and language manifests itself not only with respect to different languages but also with respect to different accents. See Mari J. Matsuda, *Voices of America: Accent*,

Latina exercises them will inform how her employer and fellow employees experience her as a Latina.

A CRT/L&E engagement helps to cure some of the deficiencies in both fields. For example, CRT's notion of race as a social construction can help L&E scholars move to a dynamic conception of race, and L&E's focus on the incentive effects of legal and institutional (norm-based) constraints can help CRT scholars analyze the ways in which the pressures and constraints of the workplace shape both employer and employee behavior. In short, a CRT/L&E joint venture could advance our thinking about how, in the shadow of law, workplace structures and norms affect racial identity—and vice versa.

The argument for a collaboration between economics and CRT (and feminist theory and gay and lesbian legal studies) was made with force in a 1996 essay by Ed Rubin.<sup>10</sup> Rubin argued that the common critical approach to institutional analysis shared by L&E and CRT—both fields reject claims about the neutrality and objectivity of legal rules, albeit for different reasons—would, if combined, produce not only an exciting new methodology for legal inquiry, but one with potential to succeed the Legal Process school as a unifying discourse in legal academia. In the six years since the piece was published, however, there has been little collaborative work between CRT and L&E.<sup>11</sup> If anything, there has been increased antagonism.<sup>12</sup>

This makes little sense. Like Rubin, we believe that L&E and CRT should engage each other and that the results of this engagement would be fruitful. Rubin demonstrated the benefits of an L&E/CRT collaboration by

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*Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

10. Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996) [hereinafter Rubin, *New Legal Process*]; see also Edward L. Rubin, *Institutional Analysis and the New Legal Process*, 1995 WIS. L. REV. 463 (book review); cf. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 114 (1987) (noting that, although CLS and L&E are often seen as oppositional, the link between them is quite close); NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM 157-70 (1997) (discussing CLS in their book on L&E and implying a close link between the fields).

11. For an exception, see Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595, 629-34 (1999) (using theories of screening, adapted from financial economics, to examine English-only policies).

12. Most of the antagonism takes the form of an unwillingness by members of either camp to engage each other. The most prominent and open attack on CRT (and critical theory generally) has come from two more mainstream or "traditional" legal academics, Daniel Farber and Suzanna Sherry. DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997). The Farber and Sherry attack was preceded by one by Jeffrey Rosen (another legal scholar, but once again not an L&E one). Jeffrey Rosen, *The Bloods and the Crits*, NEW REPUBLIC, Dec. 9, 1996, at 27. The prominent L&E attack on CRT was Richard Posner's review of the Farber and Sherry book. Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40.

performing a meta-synthesis of the theoretical commitments and intellectual histories of both schools of thought.<sup>13</sup> We take a different tack, identifying a specific problem that can function as a site for L&E/CRT collaboration. Articulated in the form of a question, the problem is this: How are modern employers and employees likely to “manage” workplace racial diversity? Part of the answer has to do with assimilation, a central theme in CRT; and part of the answer has to do with efficiency, a central theme in L&E. Both ideas—assimilation and efficiency—combine to tell a story about workplace discrimination that derives from what we call “the homogeneity incentive.” To make a long story short: In order to increase efficiency, employers have incentives to screen prospective employees for homogeneity, and, in order to counter racial stereotypes, nonwhite employees have incentives to demonstrate a willingness and capacity to assimilate.

Central to our story is the idea that, due to evolving antidiscrimination law and changing social norms concerning equality, an employer’s response to the homogeneity incentive will include some diversity hiring. We assume, in other words, that exclusively white institutions are perceived as illegitimate, even if those institutions have not engaged (or, at least, there is no evidence to suggest that they have engaged) in intentional racial discrimination. We conceptualize this legitimacy problem as a diversity-imposed constraint—that is, as a limit on an employer’s ability to realize the efficiency gains from homogeneity by hiring only whites. We claim that, notwithstanding this constraint, gaps in both antidiscrimination law and current societal conceptions of racial discrimination allow employers to make race-based employment decisions. Put another way, under current antidiscrimination law and the dominant paradigms for understanding racism, it is both legal and normatively desirable for employers to pursue workplace homogeneity by *engaging in* racial discrimination.

Our point of departure for developing this argument is the recent publication of a collection of essays entitled *Crossroads, Directions, and a New Critical Race Theory*.<sup>14</sup> The majority of the essays in this volume were delivered at the last major CRT conference, which was held at Yale in 1997. Selected by Frank Valdes, Jerome Culp, and Angela Harris, the

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13. Although Rubin does not use it, the methodology he proposes for the CRT/L&E joint venture is microanalysis. See generally Rubin, *New Legal Process*, *supra* note 10. Rubin’s other work suggests that the type of microanalysis in which he would have the collaborative venture engage would be based on a detailed and experiential examination of interpersonal workplace dynamics. See Edward L. Rubin, *Putting Rational Actors in Their Place: Economics and Phenomenology*, 51 VAND. L. REV. 1705 (1998).

14. CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002) [hereinafter A NEW CRITICAL RACE THEORY].

essays represent the past, present, and future of CRT.<sup>15</sup> The book is a must-read for those who are interested in the genesis of CRT, in how CRT positions itself against other legal discourses, and in the current debates within the CRT literature. Of most interest to us are the “new” and “directions” aspects of the collection. While there are new ideas in the book (for example, the notion of racism as a form of sadomasochistic pleasure for both whites and blacks<sup>16</sup>), and the essays do take CRT in new directions (for example, to an explicit engagement of globalization<sup>17</sup>), the methodologies reflected in the essays—postmodern theory, deconstruction, and narrative—are, for the most part, not new. Except for a contribution by Elizabeth Iglesias, which demonstrates the international racial effects of neoliberal economics,<sup>18</sup> there is little indication in *A New Critical Race Theory* that critical race theorists are interested in using different tools, like statistical analysis, traditional economics, or behavioral law and economics.

Nonetheless, there are new developments in economics that support at least some of CRT’s central tenets. Early iterations of L&E argued that because discrimination is inefficient, market forces would penalize those who engaged in it. Under that view, there is no need for legal intervention because the market can both identify and clear discrimination.<sup>19</sup> CRT has been skeptical of this claim, in part because the employment market continues to be characterized by stark racial outcomes.<sup>20</sup> Significantly, some L&E scholars have become skeptical of this claim as well. They argue that economic models stressing the market’s antidiscrimination potential are often overly simplistic and based on unrealistic assumptions about the behavior of individuals, institutions, and markets.<sup>21</sup> To complicate

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15. The fact that the essays arose out of a conference, and that the conference took place in 1997, limits the representative capacity of the book.

16. Anthony Paul Farley, *The Poetics of Colorlined Space*, in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 97.

17. Celina Romany, *Critical Race Theory in Global Context*, in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 303; Elizabeth M. Iglesias, *Global Markets, Racial Spaces, and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 310; Isabelle R. Gunning, *Global Feminism at the Local Level: The Criminalization of Female Genital Surgeries*, in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 337; Berta Esperanza Hernández-Truyol, *Breaking Cycles of Inequality: Critical Theory, Human Rights, and Family Injustice*, in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 345; Enrique R. Carrasco, *Critical Race Theory and Post-Colonial Development: Radically Monitoring the World Bank and the IMF*, in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 366.

18. Iglesias, *supra* note 17.

19. For a recent description of, and empirical challenge to, this literature, see Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 *TEX. L. REV.* 1249 (2003).

20. See, e.g., Richard Delgado, *Rodrigo’s Second Chronicle: The Economics and Politics of Race*, 91 *MICH. L. REV.* 1183 (1993) (book review).

21. Among the earliest pieces in this vein was Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 *HARV. L. REV.* 1003, 1033-82 (1995). See also ERIC A. POSNER, *LAW AND SOCIAL NORMS* 133-47 (2000).

the picture, many current generation L&E scholars engage literatures in organizational behavior, psychology, management, sociology, and biology to illustrate problems of cognition, asymmetric information, and market failure. This broader interdisciplinary approach is intended to provide a more contextual (and less stylized) picture of people and institutions. More particularly, the approach attempts to capture how people and institutions *really* act and to identify what motivates people and institutions to act in the way that they do. With respect to employers, the approach suggests that race-based employment decisions will not necessarily be motivated by racial animus but by an employer's interest in realizing the efficiency gains of homogeneity. To the extent that this is the case, employers will racially integrate their workplaces only to the extent that doing so does not significantly undermine their ability to realize those efficiency gains.

This observation helps legitimize CRT's concept of interest convergence—the idea that nonwhites achieve meaningful progress in America only to the extent that a particular nonwhite interest (for example, ending slavery) converges with an important white interest (for example, saving the Union).<sup>22</sup> With respect to workplace discrimination, the interest convergence story holds that the state will require employers to hire nonwhites only when doing so converges with the institutional interests of the employer. This occurs when diversity hiring provides the employer with institutional legitimacy without compromising the efficiency gains attendant to homogeneous workplace cultures.

There is an irony in the suggestion that a “new” direction for CRT scholarship to take may be to construct second-generation L&E models that look for insights and evidence in fields like psychology and organizational behavior. One of the classic pieces of interdisciplinary scholarship on the operation of unconscious racism is Charles Lawrence's *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*.<sup>23</sup> The article has a foundational status in CRT's canon,<sup>24</sup> and Lawrence is considered a

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22. See DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 45 (1972). Bell argues that “the major liberating events in black history have, in fact, been motivated less by black suffering than by the pragmatic advantage they offered white society.” *Id.* Bell explains the idea of interest convergence by way of the following two formulas: White Racism v. Justice = White Racism. White Racism v. White Self-Interest = Justice. *Id.* at 46; see also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (explaining *Brown* in terms of interest convergence); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (examining various historical documents to demonstrate that interest convergence—specifically, concerns about American democracy abroad—provides at least a partial explanation for *Brown*).

23. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

24. It is one of the articles that helped “form the movement.” See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 235 (Kimberlé Crenshaw et al. eds., 1995) (reprinting an edited version of Lawrence's article).

“founding member”<sup>25</sup> of the movement. Both facts help to explain why Lawrence was invited to deliver the opening remarks at the Yale conference and why those comments open *A New Critical Race Theory*. And yet, with few exceptions, critical race theorists have not pushed CRT further in the direction suggested by Lawrence’s article.<sup>26</sup> To be sure, the article is well cited in the literature.<sup>27</sup> But Lawrence’s approach has not been significantly developed. This Review begins a dialogue about how one might do so. We proceed as follows.

Rather than forming the core of a traditional “Book Review,” Part II engages *A New Critical Race Theory* in order to identify and explain the key concepts in CRT that help to elucidate the complex ways in which race operates in workplaces: race as social construction, race as performative identity, essentialism, identity privilege, multiracialism, and narrative. We suggest that while each of these concepts is important, none provides (or at least CRT scholars have not enlisted any of them to provide) a structural/institutional critique of the workplace. We argue that one can perform such a critique by turning to literatures to which economists have begun to look—literatures suggesting that efficiency concerns (and not necessarily racial animosity) create incentives for employers to maintain racially homogeneous workplaces. We refer to these incentives collectively as “the homogeneity incentive,” and in Part III, we articulate the precise nature of this incentive and employ it as a basis for the institutional discrimination story we develop in Part IV. Central to this story is the fact that employers respond to the homogeneity incentive by using a variety of selection mechanisms to pick the most racially homogenized outsiders—that is, outsiders whose performance of their racial identity suggests that they will fit comfortably within a workplace that is homogenized by the overwhelming presence of insiders. Drawing on CRT, we articulate the racial costs of these mechanisms. In Part V, we raise the question of

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25. Derrick A. Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 898 n.16.

26. An exception is JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 14, 72-77, 154-55 (1997). In legal academia more broadly, there are a number of scholars who have pushed in the direction of Lawrence’s piece. See, e.g., Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001); Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between “Different” Minorities*, 85 CORNELL L. REV. 313, 338-39 (2000); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Michelle A. Travis, *Perceived Disabilities, Social Cognition, and “Innocent Mistakes,”* 55 VAND. L. REV. 481 (2002). None of these articles, however, links its examination of cognitive biases and other psychological processes to the internal dynamics of the workplace.

27. A search run in Westlaw’s JLR database on December 3, 2002, yielded 1117 articles that cite Lawrence’s piece. A search run in Social Science Citation Index through Web of Science on December 3, 2002, yielded 466 articles that cite Lawrence’s piece.

whether antidiscrimination law can identify and ameliorate these costs. We conclude in Part VI by highlighting two macro implications of our argument. The first is that, in effect, the homogeneity incentive creates a market for the demand and the supply of racial palatability. It is a market within which racial identities are being mass-produced and cloned—one body at a time.<sup>28</sup> The second implication is that law—by creating incentives for employee behavior—is part of the cloning apparatus. More specifically, we claim, in the course of adjudicating antidiscrimination cases, the law constructs prototypical racial victims (assimilationist outsiders) who function as models for how outsiders should perform their racial identities in order to be able to present cognizable discrimination claims. We conclude by suggesting that CRT should be interested in this incentive structure because it helps to demonstrate the racially productive capacity of law.<sup>29</sup>

## II. CENTRAL THEMES IN CRITICAL RACE THEORY

The essays in *A New Critical Race Theory* span a vast range of both subjects and disciplines, going from Julie Su and Eric Yamamoto's discussion of activist and grass-roots work with Thai garment workers in California sweatshops<sup>30</sup> to Patricia Monture-Angus's story of a tenure denial at a university in northern Canada.<sup>31</sup> What the essays have in common is that they all purport to be *doing* CRT. That raises the definitional question: What is CRT? Put another way, how do we know that these essays actually *do* CRT? Part of the answer lies in the anthology's introduction. There, its editors describe CRT by articulating CRT's opposition to "at least three entrenched, mainstream beliefs about racial injustice. The first—and still the most powerful despite more than a decade of challenge from critical scholars—is that 'blindness' to race will eliminate racism."<sup>32</sup> The second is "that racism is a matter of individuals, not

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28. See generally Philomena Essed & David Theo Goldberg, *Cloning Cultures: The Social Injustices of Sameness*, 25 *ETHNIC & RACIAL STUD.* 1066 (2002) (exploring the ways in which society is organized to reproduce sameness, and identifying the discriminatory distributive consequences of that reproduction). We do not mean to suggest that only outsider identities are being produced. Law creates incentives that affect both insider and outsider behavior. In this sense, insider identities are being mass-produced as well.

29. One of the central ideas of CRT is that law not only reflects particular conceptions of race, but produces race as well. See generally Carbado, *supra* note 6 (demonstrating the racial productivity of Fourth Amendment law).

30. Julie A. Su & Eric K. Yamamoto, *Critical Coalitions: Theory and Praxis*, in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 379.

31. Patricia Monture-Angus, *On Being Homeless: One Aboriginal Woman's "Conquest" of Canadian Universities, 1989-98*, in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 274.

32. Francisco Valdes et al., *Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium*, in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 1, 1.

systems.”<sup>33</sup> And the third is “that one can fight racism without paying attention to sexism, homophobia, economic exploitation, and other forms of oppression or injustice.”<sup>34</sup> One can think of these “three oppositional stances”<sup>35</sup> as minimal commitments, commitments that *every* CRT project reflects. According to the editors, these commitments “give . . . CRT much of its discursive edge and transformative potential.”<sup>36</sup>

Yet the “transformative potential” of CRT’s oppositional stances might not be apparent from *A New Critical Race Theory*’s introduction. The editors do not explicate this potential, presumably because their project is to introduce us to works that do.<sup>37</sup> But the works that constitute the anthology are enormously different in style, subject matter, and methodology. While this is a plus—reflecting what Kimberlé Crenshaw refers to as CRT’s “big tent”<sup>38</sup> approach, and providing an indication of the extent to which CRT can speak across and to a range of issues—such a broad-ranging approach makes CRT appear to be substantively and theoretically diffuse and, as Rachel Moran puts it, “unruly.”<sup>39</sup> In short, the disparate body of work that occupies space in CRT’s tent renders CRT difficult to manage and articulate as a positive theory.<sup>40</sup>

Part of the reason for the size of CRT’s tent, and the room it has created for diverse approaches, is that CRT is not just a constellation of ideas. It is also a community, a safe space, and a platform from which to engage in

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33. *Id.* at 1-2.

34. *Id.* at 2.

35. *Id.*

36. *Id.* For other articulations of what CRT is, see the introductions in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, *supra* note 24, at xiii, and *CRITICAL RACE THEORY: THE CUTTING EDGE*, at xiii (Richard Delgado ed., 1995).

37. They write that the “three oppositional stances . . . are embraced and advanced by the works collected here.” Valdes et al., *supra* note 32, at 2.

38. Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or “A Foot in the Closing Door,”* in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 9, 20. Here, Crenshaw provides an indication as to why the term CRT was chosen. A determination was made to “signify the specific . . . and intellectual location of the project through ‘critical,’ the substantive focus through ‘race,’ and the desire to develop a coherent account of race and law through the term ‘theory.’” *Id.* at 19.

39. Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 *STAN. L. REV.* (forthcoming 2003).

40. John Calmore explains:

Critical race theory has become sort of a moving target, as it and scholarly allies change various landscapes. This scholarship is now quite broad-based. As it has evolved, it has attracted a motley crew, and its body of scholarship is actually improvisationally incoherent, diffuse, and stunningly eclectic in both method and message. Critical race theory primarily investigates how the law contributes to and diminishes racial subordination. Beyond that, it is harder to identify and, like rain, its fallout varies in impact.

John O. Calmore, *Random Notes of an Integration Warrior—Part 2: A Critical Response to the Hegemonic “Truth” of Daniel Farber and Suzanna Sherry*, 83 *MINN. L. REV.* 1589, 1592 (1999) (footnote omitted).

racial struggle.<sup>41</sup> Historically, critical race theorists have thus been careful about creating insider/outsider dynamics.<sup>42</sup> While our view is not that CRT needs to be disciplined, or that critical race theorists need to police CRT's intellectual border rigorously, we agree with Chuck Lawrence that "it is . . . important . . . to define clearly who we [critical race theorists] are and what we stand for."<sup>43</sup> The editors of *A New Critical Race Theory* attempt to do so by bringing together a range of ideas from a number of different contexts. We build on that synthesis to provide a more situated indication of the "transformative potential" of CRT. Concretely, our examination of *A New Critical Race Theory* is geared towards answering the question of whether the essays in the collection can be employed to broaden our understanding of a specific problem of racial inequality: workplace discrimination. We answer that question in the affirmative by using the essays in *A New Critical Race Theory* to draw out key ideas in CRT. We then apply these ideas to the workplace.

The constraints of space and our substantive focus prevent us from engaging all of the essays, though we engage most. For example, we do not discuss the globalization section of the book.<sup>44</sup> This is not because globalization is irrelevant to understanding the racial dynamics of the workplace. Among other things, globalization affects both the structure and demographics of employment markets—abroad and at home. But except for Elizabeth Iglesias's contribution,<sup>45</sup> the globalization section of the anthology does not discuss these aspects of globalization. Instead, it addresses how CRT might respond to such important and complicated

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41. Kimberlé Crenshaw notes that, from its inception, CRT has had to negotiate concerns about safe space with concerns about substantive political vision. She writes:

[T]he organizational goal of "safe space" served as the provisional justification for the initial inclusion of people of color only. One might frame the issue as safe-space values having trumped substantive content: Identity rather than substantive criteria won out as a defining factor in determining participation in the workshop. However, this, too, could be reframed as competing substantive perspectives. Was CRT a product of people of color, or was CRT a product of any scholar engaged in a critical reflection of race? Because I subscribe to the latter proposition, I regard the traditional exclusion of whites from our workshops as an unfortunate development.

Crenshaw, *supra* note 38, at 21.

42. Concerns about insider/outsider dynamics provide at least a partial explanation for the emergence of "Latcrit Theory." For an introduction to Latcrit Theory as well as a discussion of some of the challenges facing Latcrit, see Elizabeth M. Iglesias & Francisco Valdes, *LatCrit at Five: Institutionalizing a Post-Subordination Future*, 78 DENV. U. L. REV. 1249 (2001).

43. Charles R. Lawrence III, *Foreword: Who Are We? And Why Are We Here? Doing Critical Race Theory in Hard Times*, in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at xi, xvii.

44. See sources cited *supra* note 17.

45. Iglesias, *supra* note 17.

topics as female genital surgeries;<sup>46</sup> race, gender, and human rights;<sup>47</sup> and postcolonial developments.<sup>48</sup>

Caveats out of the way, we now discuss the following central, though not exhaustive, concepts in CRT: race as social construction, race as a performative identity, essentialism, identity privilege, multiracialism, and narrative. In addition to articulating the ideas behind each concept, we discuss how these concepts can help us better understand racial dynamics in the workplace.

#### A. *Race as Social Construction*

Robert Chang observes that the articulation of race as a social construction is “a mantra”<sup>49</sup> in CRT. “[F]or fun,” Professor Chang sometimes has his “students say it out loud . . . . Nothing happens. They are not enlightened, and the world has not changed . . . . So why the mantra?”<sup>50</sup> CRT’s answer is that the conceptualization of race as a social construction helps to explain not only the intelligibility and currency of race as a social category (that is, the existence of race) but also the negative and positive social meanings associated with specific racial identities (that is, the existence of racial hierarchy). Several of the essays in *A New Critical Race Theory* illustrate this point.

Consider Robert Hayman and Nancy Levit’s contribution to the volume.<sup>51</sup> Their essay performs a periodizational analysis of the social construction of race to advance the claim that race was never simply “out there” to be identified and discovered. Rather, they argue, race was invented “in a quite literal sense.”<sup>52</sup> Their analysis begins in the seventeenth century, between 1619 and 1662. They argue that, during this period, the idea of race had not yet crystallized. While European colonists were mindful of bodily differences between themselves and Africans, those differences were not a basis for the establishment of a social hierarchy. Instead, “whatever ‘race’-ism may have characterized the early colonies was vague, incomplete, and far from universal.”<sup>53</sup> We are somewhat skeptical of the claim that the colonists saw bodily differences between themselves and the Africans as differences without social or hierarchical

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46. Gunning, *supra* note 17.

47. Hernández-Truyol, *supra* note 17.

48. Carrasco, *supra* note 17.

49. Robert S. Chang, *Critiquing “Race” and Its Uses: Critical Race Theory’s Uncompleted Argument*, in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 87, 87.

50. *Id.* at 87-88.

51. Robert L. Hayman, Jr. & Nancy Levit, *Un-natural Things: Constructions of Race, Gender, and Disability*, in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 159.

52. *Id.* at 162.

53. *Id.* at 163.

significance. At the very least, Europeans perceived Africans to be primitive.<sup>54</sup> Nor are we convinced that the concept of race did not exist before this period. One can argue that many of the clashes between ethnically different groups in China, Egypt, and India—among other regions—were informed by what we would today articulate as racial discourses.<sup>55</sup> Still, the general point that Hayman and Levit make—that race evolved and that that evolution was a function of societal needs, politics, and economics—is well-taken.<sup>56</sup>

According to Hayman and Levit, between 1662 and 1776, the idea of race—an idea that developed to require both racial categorization and racial hierarchy—was instantiated. During this period, a variety of discourses articulated the African/European differences as differences in worth and entitlement. It is in this context that “[r]ace emerged . . . as a determinant of legal status . . . . [T]he ‘negro’ was a slave and the ‘white’ person was free.”<sup>57</sup> Between 1776 and 1835, the material realities of race were further entrenched by political rationalization. Hayman and Levit reason that this rationalization was needed “to resolve the contradiction between the ideology of the revolutionary generation and the fact of chattel slavery.”<sup>58</sup> The final period Hayman and Levit identify is “1835-?”, presumably suggesting that we are still in this period. Here, politicians, academics, and scientists enlisted the rhetoric of science, and the results of “scientific studies,” to prove the “truths” about race.<sup>59</sup>

Hayman and Levit’s essay demonstrates that race does not exist a priori, but is instead produced by discourses. These discourses—in politics, law, and science—create, give meaning to, and organize race.<sup>60</sup> And this process of racial formation is unstable. The definition of race has changed, the list of racial categories has changed, and the social meaning of specific racial identities has changed. Race thus is, and historically has been, mutable<sup>61</sup>—or, to put the point in slightly different terms, race did not have to exist,<sup>62</sup> and it certainly did not have to exist in the forms it has throughout American history.

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54. DENYS W.T. SHROPSHIRE, *THE CHURCH AND PRIMITIVE PEOPLES*, at xiii (1938).

55. See Norah Carlin, *Was There Racism in Ancient Society?*, 36 INT’L SOCIALISM 90 (1987).

56. The standard citation is to MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2d ed. 1994).

57. Hayman & Levit, *supra* note 51, at 163.

58. *Id.*

59. *Id.* at 164. For a discussion of how the concept of race is deployed in science, see *THE CONCEPT OF “RACE” IN NATURAL AND SOCIAL SCIENCE* (E. Nathaniel Gates ed., 1997).

60. See Carbado, *supra* note 6, at 978.

61. Devon W. Carbado, *Afterword: (E)Racing Education*, 35 EQUITY & EXCELLENCE EDUC. 181, 184 (2002).

62. This observation has led some left-leaning scholars to be “against race.” See, e.g., PAUL GILROY, *AGAINST RACE* (2000). For a critique of this argument as it is manifested in the work of legal academics, see Darren Lenard Hutchinson, *Progressive Race Blindness? Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455 (2002).

CRT can broaden its understanding of race as a social construction by considering the workplace as a context within which race evolves and is produced. A simple way of thinking about the racial productivity of the workplace is to examine how workplace racial demographics—which evolve over time—help convey various social meanings about race. In the context of Jim Crow, blacks were barred from certain workplaces and professions. The image of race that context produces (that blacks are too inferior to associate with whites at work) is not the same as the social meaning of race conveyed by a workplace within which blacks are present only as support staff (which conveys the notion that blacks are competent only at low-level service work). Finally, neither of those workplaces conveys the same social meaning about race as a workplace with black professionals but not black managers, directors, or partners (sending the signal that blacks can sometimes perform professional work but can rarely provide professional leadership). This suggests that employees do not come to the workplace racially formed in a once-and-for-all sense. Their racial identities will shape, and be shaped by, the racial culture and demographics of, and their institutional position within, the workplace. In sum, workplaces do not exist outside the social construction of race: They are part of it.

#### B. *Race as a Performative Identity*

A concrete application of the concept of race as a social construct is the idea of race as a performative identity. The claim is that the social meaning of, for example, a black person's racial identity is a function of the way in which that person performs (presents) her blackness.<sup>63</sup> At the core of this conception is the notion that race is not just a structural or macro dynamic. It is a micro and interpersonal dynamic as well; racial identities are formed in, and produced by, social encounters. In the context of everyday interactions, people construct—that is, they project and interpret particular images of—race. This means that the intelligibility of a black person's racial identity derives at least in part from (1) the “picture” of blackness she projects and (2) how that racial projection is seen. This implies that there is more than one way to be, and be interpreted as, black. Blackness, in other words, is not monolithic.

On one side of the spectrum are “conventional” black people. They are black prototypes—that is, people who are perceived to be stereotypically

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63. We develop this idea more fully in Carbado & Gulati, *supra* note 8. Cf. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 77 (1959) (“[O]ne finds that service personnel, whether in profession, bureaucracy, business, or craft, enliven their manner with movements which express proficiency and integrity, but, whatever this manner conveys about them, often its major purpose is to establish a favorable definition of their service or product.”).

black. Their performance of blackness is consistent with society's understanding of who black people *really* are. On the other side are "unconventional" black people—people who are not stereotypically black. Their performance of blackness is outside of what society perceives to be conventional black behavior. A black person's vulnerability to discrimination is shaped in part by her racial position on this spectrum. The less stereotypically black she is, the more palatable her identity is. The more palatable her identity is, the less vulnerable she is to discrimination. The relationship among black unconventionality, racial palatability, and vulnerability to discrimination creates an incentive for black people to signal—through identity performances—that they are unconventionally black.<sup>64</sup> These signals convey the idea that the sender is black in a phenotypic but not a social sense. Put another way, the signals function as a marketing device. They brand the black person so as to make clear that she is not a black prototype.<sup>65</sup>

The concept of race as performative suggests that people of color are not simply acted on. They have *some* agency to structure the terms upon which they are experienced.<sup>66</sup> For example, how a law firm treats a black woman may depend on whether her hair is straightened, "natural" and short, Afroed, or dreadlocked. In other words, the choices a black woman makes about how to groom her hair will inform how their employers racialize her. But how? "Hair seems to be such a little thing."<sup>67</sup> Paulette Caldwell has provided a wonderful articulation of the racializing potential of black women's hair.<sup>68</sup> Her article on the subject begins this way:

*I want to know my hair again, to own it, to delight in it again, to recall my earliest mirrored reflection when there was no beginning and I first knew that the person who laughed at me and cried with me and stuck out her tongue at me was me. I want to know my hair again, the way I knew it before I knew that my hair is me, before I lost the right to me, before I knew that the burden of beauty—or lack of it—for an entire race of people could be tied up with my hair and me.*

*I want to know my hair again, the way I knew it before I knew Sambo and Dick, Buckwheat and Jane, Prissy and Miz Scarlett.*

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64. For a discussion of how this concept of identity performance differs from Judith Butler's conception of the performativity of gender, see Carbado & Gulati, *supra* note 8, at 1265 n.11.

65. One could also say that the black person is "unbranded" as a black prototype.

66. For a useful discussion of the problematic ways in which the law has responded to the agency of subordinated groups, see Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1999); and Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

67. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 370.

68. *Id.*

*Before I knew that my hair could be wrong—the wrong color, the wrong texture, the wrong amount of curl or straight. Before hot combs and thick grease and smelly-burning lye, all guaranteed to transform me, to silken the coarse, resistant wool that represents me.*<sup>69</sup>

Caldwell's quotation suggests that hair is racially representative: It brands. A black woman can be perceived as "silken" or "coarse" or "resistant" depending on what *she does* with her hair, a signifier of her racial identity. Caldwell herself discusses how her colleagues differentially racialize her—quite literally from day to day—based on her hair.<sup>70</sup> To some, this observation may suggest that black women have agency to mitigate their vulnerability to discrimination by making "better" choices about, among other aspects of their identity, their hair. Recognizing that this agency exists is important. It is a necessary condition for understanding that people can shape how others racialize them. The normative and more difficult issue, however, is whether an employer should be able to condition a black woman's employment opportunities on her willingness to present herself ("my hair and me") as a straight-haired black woman. Asked differently, should employers be permitted to clone blackness in this way?

The essay in *A New Critical Race Theory* that tackles racial presentation and performance is Anthony Farley's discussion of the objectification of the black body by white society.<sup>71</sup> Although Farley only once employs the language of performance, his argument is about the choices people make about *how to be raced*. His thesis is this: "Race is a form of pleasure. For whites, it is a *sadistic* pleasure in decorating black bodies with disdain. For blacks—in today's non-revolutionary situation—it has become a *masochistic* pleasure in being so decorated."<sup>72</sup>

Fundamental to Farley's claim, then, is that while whites and blacks are not similarly situated with respect to the color line,<sup>73</sup> both groups derive pleasure from the sociopolitical processes that constitute it. Farley spends considerable time explaining why whites would be invested in employing the black body as a "fetish object," but little explaining why blacks would make themselves available for, and derive pleasure from, racial objectification. One might posit that the answer is constraint—black agency is so constrained as to make participation inexorable. Farley's answer seems to be seduction—the seduction of a colorblind future or of a

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69. *Id.* at 365.

70. *Id.* at 370-71.

71. Farley, *supra* note 16, at 97, 99.

72. *Id.*

73. See generally WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812 (1968).

depoliticized understanding of Martin Luther King's dream.<sup>74</sup> Farley is critical of this seduction and conceptualizes it as a performance that acquiesces in, reproduces, and legitimizes racial hierarchy. He writes:

The black body is a vast writing project. It is a twice-haunted, twice-scripted body. The good Negro and the bad Negro are animating spirits that emerge, like the Madonna and the Whore, depending on the performance desired. White pre-Civil Rights Movement desire for abject black bodies required, at times, the *good Negro of minstrelsy* and, at other times, the *bad Negro of lynchings*. Pity and contempt were the twin emotions that accompanied the race pleasure rituals . . . .<sup>75</sup>

Farley's suggestion seems to be that the racial quality of black identity performances (the good negro versus the bad negro) makes the color line more or less a pleasurable thing for whites—and for blacks.

The concept of race as performative provides a vehicle for thinking about how race figures in employment decisions that are not driven by explicit racial animus. The question here is: Do employers look for racially performative evidence—that is, evidence not simply of whether a prospective employee is, for example, Asian American, but also evidence of how *Asian American* (or *Asian American*) the person appears to be? If the answer is yes—that employers do indeed look for racially performative evidence—how is that likely to influence the behavior of Asian American employees seeking a job with that employer? Further, assuming that an Asian American employee decides to alter the performance of identity so that, from her employer's perspective, she appears to be Asian American only in phenotype, what are the costs of that performance? These questions are not easy to answer. But the important thing, for purposes of this Review, is that a performative conception of race invites us to ask them and to engage in an explicit discussion of incentives, choices, constraints, and costs—in other words, an economic analysis.

### C. *Essentialism*

To essentialize about race is to assume that a particular racial identity has a certain essence. An example helps illustrate how essentialism can undermine our ability to identify and ameliorate workplace discrimination.

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74. For a discussion of the extent to which conservatives have appropriated and deradicalized the politics of Martin Luther King, see Ronald Turner, *The Dangers of Misappropriation: Misusing Martin Luther King, Jr.'s Legacy To Prove the Colorblind Thesis*, 2 MICH. J. RACE & L. 101 (1996). For an example, see TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE (1997).

75. Farley, *supra* note 71, at 119 (emphasis added).

Imagine that a firm interviews three people for a job—a white woman, a black woman, and a black man. It hires the white woman and the black man, but not the black woman. She brings a discrimination suit. Due to prevailing essentialist notions, it used to be that the black woman's chances of winning this suit were slim. Courts approached such cases from a "single axis" framework, looking for racism (which they concluded was not present because a black man was hired) or sexism (which they concluded was not present because a white woman was hired).<sup>76</sup> Courts rarely considered the possibility that racism and sexism interact—that is, that racism is sexed and that sexism is racialized. Instead, they essentialized racism, assuming that, if racism exists, it affects black women and black men in the same way, and they essentialized sexism, assuming that, if sexism exists, it affects black women and white women in the same way.<sup>77</sup>

CRT rejects this essentialized approach to discrimination and is committed to what Kimberlé Crenshaw refers to as intersectionality, a concept that conveys at least the following two ideas: (1) that our identities are intersectional—that is, raced, gendered, sexually oriented, etc.—and (2) that our vulnerability to discrimination is a function of our specific intersectional identities.<sup>78</sup> Because black men and black women have different intersectional identities, the nature of their vulnerability to, and their experiences of, discrimination are likely to be different as well. On the other side, CRT also embraces essentialism in asserting that there is something different and special about race. To take anti-essentialism to its logical conclusion would mean rejecting the concept of race altogether,<sup>79</sup> which is something that CRT avowedly does not do.<sup>80</sup> This tension is the basis of the debate between Catharine MacKinnon and Angela Harris, a debate that enters *A New Critical Race Theory* through MacKinnon's contribution.<sup>81</sup>

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76. The best articulation of this problem remains Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

77. Today, at least some courts recognize so-called "compound" discrimination claims—i.e., claims based on more than one aspect of a person's identity (such as race and sex). See Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 710-14 (2001) (discussing how courts have responded to the idea of intersectionality).

78. See *id.*

79. This is precisely the postmodern position on race (or at least one postmodern position on race)—that the category race be jettisoned. For a useful discussion of how CRT straddles the line between postmodernism and modernism, see Angela Harris, *The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994).

80. Gayatri Spivak famously coined the phrase "strategic essentialism" to explain the need for racial minorities to essentialize in order to fight discrimination (and, in some sense, essentialism itself). GAYATRI CHAKRAVORTY SPIVAK, *Subaltern Studies: Deconstructing Historiography*, in *IN OTHER WORLDS* 197 (1988); see also Gayatri Spivak, *In a Word*, DIFFERENCES, Summer 1989, at 124 (interview).

81. Catharine A. MacKinnon, *Keeping It Real: On Anti-"Essentialism,"* in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 71.

MacKinnon is not convinced that CRT's anti-essentialist critique of feminism is accurate. Her analysis focuses on Angela Harris's 1990 article, *Race and Essentialism in Feminist Legal Theory*.<sup>82</sup> Focusing on essentialism vis-à-vis women, Harris defined essentialism as "the notion that a unitary 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience."<sup>83</sup> She argued that this idea is manifested—sometimes implicitly, sometimes explicitly—in feminism generally, and in the work of MacKinnon in particular.

MacKinnon's response is to raise the question of whether "it is racist to speak of 'women at all'"<sup>84</sup>—that is, whether it is necessarily essentialistic to analyze women "as women."<sup>85</sup> Her answer to both questions is no, that "[i]t all depends on *how* you analyze [women] as women."<sup>86</sup> On a theoretical level, few critical race theorists would quarrel with that idea. Undergirding CRT's critique of feminism is an empirical claim that "women's experiences" in feminism have most often meant *white* women's experiences. CRT's anti-essentialist critique is not, then, that the category "women" necessarily lacks the representational capacity to capture the experiences of all women. (Thus, few critical race theorists would argue that it is necessarily problematic to structure antipatriarchal intellectual or political work around the category "women.") Instead, it is that an unmodified articulation of the category "women"—the conceptualization of women as women—has historically peripheralized the social realities of women *of color*.

It bears mentioning that the consequences of this peripheralization are not just theoretical. As the hypothetical beginning this Section (in which a firm hires a white woman and a black man, but not a black woman) demonstrates, an unmodified conception of gender—by which we mean a conception that does not grapple with differences among women—can instantiate a modern-day iteration of the cult of true womanhood where the question of gender discrimination at work turns on whether the employment practice or decision burdens white women. One of the goals of CRT, then, is to keep a keen eye on generalizations—even when the generalizations are directed towards a particular group, such as women. This critical posture helps to prevent the interest and experiences of the dominant members of

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82. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

83. *Id.* at 585.

84. MacKinnon, *supra* note 81, at 72.

85. *Id.* at 73.

86. *Id.*

that group from overdetermining the efforts of the group to pursue equality.<sup>87</sup>

#### D. *Identity Privilege*

##### 1. *Race*

Many white people challenge the idea that they are privileged because they are white. They might agree that discrimination is not a thing of the past, but would not go so far as to conclude that the existence of discrimination renders them privileged. But CRT's claim about identity privilege is nothing more than a claim about the existence of discrimination. The notion is this: To the extent that race discrimination is a current social problem, there will be victims and beneficiaries of this discrimination. The former are disadvantaged; the latter are privileged. Supporting this claim is the idea that "[t]here is no disadvantage without a corresponding advantage, no marginalized group without the powerfully elite, no subordinate identity without a dominant identity. Power and privilege are relational; so, too, are our identities."<sup>88</sup>

Yet the concept of relational privilege has had little political traction. As Thomas Ross's contribution to *A New Critical Race Theory* argues, even "right-thinking" white people are unlikely to see themselves as benefited by their whiteness.<sup>89</sup> Ross attributes this to the fact that many whites accept the narrative of white victimology, a narrative that constructs white people as innocent victims of affirmative action and political correctness.<sup>90</sup> He reasons that the difference between "right-thinking [w]hites" and other whites is that the former "are likely to accept their [white] burden as an appropriate self-sacrifice,"<sup>91</sup> in effect as the new White Man's Burden.

The concept of white privilege helps us understand contemporary discrimination in the workplace. Part of the privilege of whiteness is its foundational status. Whiteness functions as the identity against which all other identities are measured.<sup>92</sup> When combined with male privilege and

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87. See generally Devon W. Carbado, *Introduction: Where and When Black Men Enter*, in *BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER 1* (Devon W. Carbado ed., 1999) (exploring whether and to what extent heterosexual black men have a privileged victim status in antiracist discourse and politics).

88. Devon W. Carbado, *Straight out of the Closet: Race, Gender, and Sexual Orientation*, in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 221, 227.

89. Thomas Ross, *The Unbearable Whiteness of Being*, in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 251, 254.

90. *Id.*

91. *Id.*

92. As Barbara Flagg has argued, few people see the foundational status of whiteness precisely because this status is so entrenched. See generally BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE* (1998).

heterosexual privilege (the latter of which we explore more fully below), the point can be articulated this way: “He (the white heterosexual man) is the norm. The baseline. He is our reference. We are all defined with Him in mind. We are all the same as or different from him.”<sup>93</sup>

In the context of workplaces that are structured around cooperative work, whites do not have to, in terms of race, think about being the same. They have a limited need to strategize about how and when to signal an integrational capacity to work within teams without causing grit. Whiteness is presumptively grease.<sup>94</sup> Racial minorities, even if they are allowed into the workplace, still have to perform their race in ways that negate the presumptions that their race will engender discomfort and cause disruptions. The privilege of whiteness lies in not having to do the work to negate these, and other, racial presumptions.<sup>95</sup>

## 2. *Sexual Orientation*

To the extent that identity privileges are a function of, and help to entrench, discrimination, the question is how to dismantle them. None of the essays in *A New Critical Race Theory* articulates an answer. The contribution that one of us makes to the volume suggests that the starting point might be to identify privileges.<sup>96</sup> In constructing an identity privilege list, one should have two broad categories in mind.

One category is “an invisible package of unearned assets which I can count on cashing in each day, but about which I was ‘meant’ to remain oblivious.”<sup>97</sup> A second category is constituted by a set of disadvantages that, without effort, one escapes precisely because of one’s identity.<sup>98</sup> Consider what a list of heterosexual privileges might look like:

- The children of a heterosexual couple do not have to explain why their parents have different genders.

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93. Carbado, *supra* note 6, at 228.

94. The grease and grit conceptions are borrowed from Donald C. Langevoort, *Diversity and Discrimination from a Corporate Perspective: Grease, Grit and the Personality Types of Tournament Survivors* 20-21 (Nov. 1, 2002) (unpublished manuscript, on file with authors).

95. *Cf.* IAN HANEY-LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 42-44 (1996) (discussing how whiteness functioned as a prerequisite for naturalization—that is, immigrants interested in becoming American had to demonstrate that they were white); *see also* John Tehranian, Note, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 *YALE L.J.* 817, 820 (2000) (suggesting that determination of who was white for purposes of naturalization was based in part on evidence of performance).

96. Carbado, *supra* note 88.

97. Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming To See Correspondences Through Work in Women’s Studies*, in *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* 291, 291 (Richard Delgado & Jean Stefancic eds., 1997).

98. Carbado, *supra* note 88, at 229.

- Heterosexuals do not have to worry about people trying to “cure” their sexual orientation.
- Heterosexuals can join the military without concealing their sexual identity.
- Heterosexuals do not have to worry about “coming out” or worry about being “outed.”

The list could go on. And the social cost of each item can be considerable, as Victoria Ortiz and Jennifer Elrod’s contribution to *A New Critical Race Theory* attests.<sup>99</sup> Ortiz and Elrod are lesbians. The point of departure for their essay is a prologue focusing on the first privilege bulleted above. It describes an interaction between their son, Camilo, and his best friend in which the friend insists that Ortiz and Elrod could not be lesbians because, among other reasons, Ortiz is a Mexican.<sup>100</sup> The essentialized conception of Mexican families as heterosexual, heterosexist, and patriarchal does not allow for the possibility that Elrod could exist within a lesbian family context.<sup>101</sup> Ortiz and Elrod’s narrative provides an indication of how, in a single moment, this essentialism can destabilize and delegitimize a family. The event, which likely was neither the first nor the last, required Ortiz and Elrod to “reassure” their son and to affirm their family existence and legitimacy:

*Yes, his mom really was a lesbian. Yes, he really had two moms. Yes, he had been right to stand fast upon the truth that was his and ours. Yes, the reality of his life experience was that he was the son of two lesbians, and that we were a family.*

*And: Yes, there were always going to be people who would deny his and our existence, sometimes out of ignorance, sometimes out of fear, sometimes out of malice. But that didn’t change the fact of our being three valuable individuals or our being a legitimate family.*<sup>102</sup>

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99. Victoria Ortiz & Jennifer Elrod, *Construction Project: Color Me Queer + Color Me Family = Camilo’s Story*, in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 258.

100. *Id.*

101. See generally CHICANA LESBIANS: THE GIRLS OUR MOTHERS WARNED US ABOUT (Carla Trujillo ed., 1991) (exploring the complexities of Chicana lesbian experiences); Elvia R. Arriola, *Faeries, Marimachas, Queens, and Lezzies: The Construction of Homosexuality Before the 1969 Stonewall Riots*, 5 COLUM. J. GENDER & L. 33 (1995) (discussing the ways in which black and Latina/o gays and lesbians have played an important role in shaping gay and lesbian identity and political culture).

102. Ortiz & Elrod, *supra* note 99, at 258-59.

The narrative reveals that there is agency to challenge the extent to which identities are overdetermined by stereotypes. Ortiz and Elrod's reassurance to their son is an act of family identity formation. That is to say, their assurance socially (re)constructs their social arrangement as a "legitimate family." This reconstruction is necessary (we imagine on an ongoing basis) because of the socialization costs that accompany departures from heterosexual normalcy.<sup>103</sup>

This socialization "tax" extends to the workplace. It can range from requiring gays and lesbians to remain in the closet, to requiring them to be in the closet with the door partially open, to requiring them to be "but for homosexuals"—people who but for their sexual orientation are just like everybody else (namely, heterosexuals). Put another way, depending on the institutional culture of the workplace, gays and lesbians may have to employ a variety of performative strategies to contain, if not hide, their sexual orientation. The U.S. military makes this performative obligation explicit through its "don't ask, don't tell" policy, which provides that one can be gay in the military so long as one does not perform an explicitly gay identity.<sup>104</sup> The normalcy and naturalness of heterosexuality—heterosexual privilege—exempt heterosexuals from engaging in this identity-based work, work that can be both dignity-destroying and identity-compromising.

#### E. *Multiracialism*

##### 1. *Critique of the Black/White Paradigm*

A fundamental tenet of CRT is that racism is a multiracial phenomenon.<sup>105</sup> This is not to say that each minority racial group experiences discrimination in the same way or to the same extent. The point is that the effects of racism transcend any single racial group. In this respect, it might be more accurate to say that American society is characterized not simply by racism but by multiracialism.<sup>106</sup>

In CRT, the dominant expression of the idea is the critique of the black/white paradigm. Informing this critique is the notion that, for the most part, legal and political discussions about racism focus on black and

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103. Cf. ADRIENNE RICH, *COMPULSORY HETEROSEXUALITY AND LESBIAN EXISTENCE* (1981) (demonstrating the variety of ways in which heterosexuality is enforced and normalized).

104. See Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 *UCLA L. REV.* 1467 (2000) (exploring black antiracist and white gay rights responses to this policy).

105. See generally Neil Gotanda, *Multiculturalism and Racial Stratification*, in *MAPPING MULTICULTURALISM* 238 (Avery F. Gordon & Christopher Newfield eds., 1996).

106. Devon W. Carbado, *Race, Law & Citizenship: Black Civil Rights Responses to Japanese American Internment* (Mar. 15, 2003) (unpublished manuscript, on file with authors) (exploring the idea of multiracialism as an explanation for black civil rights responses to Japanese American internment).

white experiences, ignoring or marginalizing the experiences of nonblack people of color.<sup>107</sup> Kevin Johnson's contribution to *A New Critical Race Theory* articulates a version of this argument.

According to Johnson, CRT's failure to address the relationship between race and immigration, or the racialization of immigration law, derives "in part from the longstanding assumption that race relations in the United States exclusively concern African Americans and whites."<sup>108</sup> Johnson's argument is not simply that the black/white paradigm elides nonblack racial subordination: It is also that "[s]uch a binary perspective . . . obscures the relationship between the subordination of various minority groups."<sup>109</sup> His thinking is that one cannot "appreciate fully the treatment of any particular racial group without understanding the interrelated and intertwined oppression of all racial minorities."<sup>110</sup>

Johnson employs the concepts of "transference" and "displacement" to explain the multiracial way in which racial subordination is interconnected. Both transference and displacement are sociopolitical processes: The former occurs when racial antipathy towards one group is redirected onto another; the latter operates as "a defense mechanism" that results in the shifting of negative racial attention from one group to a substitute group based on the idea that the substitute group "is psychologically more available."<sup>111</sup> One example of transference is Justice Harlan's famous dissent in *Plessy v. Ferguson*. Here, Johnson notes, Justice Harlan argues vociferously against black racial segregation and simultaneously legitimizes racial discrimination against people of Chinese ancestry, people of "a race so different from our own that we do not permit those belonging to it to become citizens of the United States."<sup>112</sup> According to Johnson, Harlan's dissent evidences transference in the sense that "[l]egal punishment of the Chinese replaced that previously reserved for African Americans."<sup>113</sup>

Paying attention to multiracialism is relevant to understanding workplace discrimination. Different minority groups exist as outsiders vis-à-vis a predominantly white workplace culture for different reasons. Blacks are vulnerable to employment discrimination in part because of stereotypes about race, crime, intellectual capacity, and work ethic. Asian Americans

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107. The standard cite is to Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997). For critiques of the argument, see Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53 (1999); and Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283 (2002).

108. Kevin R. Johnson, *Race and the Immigration Laws: The Need for Critical Inquiry*, in A NEW CRITICAL RACE THEORY, *supra* note 14, at 187, 187.

109. *Id.*

110. *Id.*

111. *Id.* at 188.

112. *Id.* at 189 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting)).

113. *Id.*

are vulnerable to discrimination in part because of stereotypes about race, loyalty, and national identity. Put differently, blacks have to manage the racial impression that they are criminally inclined, intellectually challenged, and lazy; Asian Americans have to manage the racial impression that they are untrustworthy and foreign. This means that nonwhite employees face race-specific pressures to show a willingness and capacity to fit within predominantly white workplace cultures. From an employer's perspective, then, racial fit varies across race. While these ideas are consistent with Johnson's critique of the black/white paradigm, they suggest that the discourse about the paradigm should not only open up space within antidiscrimination theorizing for nonwhite experiences, but also that the discourse should open up the category of race itself to include an understanding of the performative ways in which nonwhites racialize or (re)present themselves to manage the fact that they are "different" and to diminish their vulnerability to negative stereotype attribution.

## 2. *A Critique of the Critique of the Black/White Paradigm*

While it is important to recognize that racism is multiracial, that recognition should not obscure the pivotal role that blackness has played in structuring American race relations. Mari Matsuda makes this point in her essay. She argues that before CRT moves beyond the black/white paradigm, it should consider the extent to which the specter of blackness racializes all people of color, not just black people. According to Matsuda, "We cannot understand American racism unless we understand African American history as American history."<sup>114</sup> Blackness, Matsuda explains, has a multiracial representational capacity:

When the Los Angeles Police Department gunned down a Korean American traffic violator; when police in Northern California murdered an unarmed Chinese American man who was drunk on his own front lawn; when a Louisiana jury acquitted a Louisiana homeowner who had shot a Japanese teenager who came to the door to ask for directions—these are real instances, not metaphors, of fear of Blackness killing somebody. This is not to say that xenophobic, yellow-peril, Asian-specific forms of racism are absent in these cases. Rather, I submit that the quick finger on the trigger traces back in history to a whispered name, Nat Turner, and a legacy of terror inflicted by the terrified.<sup>115</sup>

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114. Mari Matsuda, *Beyond, and Not Beyond, Black and White: Deconstruction Has a Politics*, in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 393, 394.

115. *Id.* at 395 (footnotes omitted).

Matsuda's project is not about privileging the black experience: She points out that CRT needs to engage how genocide and nativism structure American race relations as well. Instead, her aim is to problematize the ease with which people express the ideological commitment to "move beyond Black and white"<sup>116</sup>—a move that can mean: "Thank goodness we can get off that paradigm, because those Black people made me so uncomfortable. I know all about Blacks, but I really don't know anything about Asians . . . and thank God I don't have to take those angry Black people seriously anymore."<sup>117</sup> Matsuda's claim seems to be that the critique of the black/white paradigm can function as a racial comfort strategy by which nonblack people of color distance themselves from, and disidentify with, black people. She worries that such a strategy is inconsistent with the realization that the struggle against racial oppression is a common one for all people of color. For some people of color to distance themselves from others further subordinates those others and fractures the people-of-color community. This plays into the hands of oppressors and makes the struggle for racial equality more difficult.<sup>118</sup>

Matsuda's concerns are relevant to workplace racial dynamics. An Asian American, for example, may believe that due to negative assumptions about race, she has to "comfort" her colleagues about her racial identity—that is, signal that, notwithstanding her race, she can fit comfortably within, and be loyal to, the institution.<sup>119</sup> Disidentifying with other Asian Americans and/or with other people of color is one mechanism for doing so. Both disidentifications convey the idea that, for the Asian American employee, racial group association is less important than workplace group association.<sup>120</sup>

#### F. *Narrative*

Narrative occupies a central space in CRT, and a number of the essays in *A New Critical Race Theory* use it. One critique of CRT is that the literature reflects too much narrative and too little doctrinal or analytical argumentation. Often implicit in this critique is a notion that narrative is easy, but doctrinal analysis takes effort and skill, and that CRT scholars,

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116. *Id.*

117. *Id.*

118. See Caldwell, *supra* note 107, at 63 (suggesting that a "competitive model [of antiracism] leads inevitably to a zero-sum framework which overshadows commonalities and emphasizes and reinscribes differences, hostilities, and ultimately, continued subordination").

119. We develop the idea of racial comfort more fully in Carbado & Gulati, *supra* note 8, at 1301-04.

120. For a comprehensive and historical look at the relationship among interracial associations in the context of marriage, racial subordination, and racial social meaning, see RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* (2001).

because they are either lazy or lack skill, choose the easy route.<sup>121</sup> But if one moves beyond assumptions of intellectual inferiority, the question becomes interesting: Why do we see so much narrative in CRT? It is not favored by the elites in legal academia—elites who decide tenure and promotion. One might expect, then, the “weak” or the overly pragmatic—the ones who are worried about preexisting negative stereotypes about their capabilities—to be wary of using techniques that activate those stereotypes. Add to this the fact that most CRT scholars are not trained in the use of narrative—for the most part, they have had the same legal training as their non-CRT colleagues. Yet, CRT scholars, across institutions, use narrative. Richard Delgado, a prominent and prolific CRT scholar, and one who was careful to avoid writing about race in his pre-tenure scholarship,<sup>122</sup> has made an explicit “plea for narrative.”<sup>123</sup> This suggests that there is something about narrative that makes it particularly useful to CRT. But what?

As a threshold matter, a problem with CRT responses to the critique of narrative (and, for that matter, the critique itself) is the absence of a coherent conceptualization of narrative scholarship.<sup>124</sup> Implicit in at least some CRT is the notion that to the extent that one is engaged in narrative, one is liberated from the regulatory effects of conventionality. However, because narratives are themselves discursive conventions, there is no such liberation. Narrative simply offers CRT a set of methodologies—“autobiographies, self-portraits, allegories, fables, and fictive narratives”<sup>125</sup>—to articulate concerns about race and equality. Each of these methodologies has its own rhetorical or literary conventions, conventions that regulate and constrain expression.

If to engage in narrative is merely to enact less traditional forms of—but not to escape—conventionalism, the question becomes: What are the payoffs for doing so? There are at least four:

First, narrative performs an epistemological function. It provides knowledge about the nature of discrimination from the perspective of those who experience it. But why narrative and why not statistical analysis? After

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121. See, e.g., Posner, *supra* note 12, at 43 (“[C]ritical race theorists teach by example that the role of a member of a minority group is to be paid a comfortable professional salary to write childish stories about how awful it is to be a member of such a group.”).

122. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

123. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

124. This is not to suggest that there has been no theorizing on the question. See *id.*; Leslie G. Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878 (1990). For an indication of the scholarship contesting the legitimacy of narrative, see Carbado, *supra* note 104, at 1284 n.2.

125. Margaret E. Montoya, *Celebrating Racialized Legal Narratives*, in A NEW CRITICAL RACE THEORY, *supra* note 14, at 243, 243.

all, statistical analysis (assuming a large enough data set) has the benefits of identifying a general phenomenon that is verifiable by third parties.<sup>126</sup> And certainly there is nothing about the use of narrative in CRT that precludes critical race theorists from also using statistics. So why not the epistemology of statistics rather than (or in addition to) the epistemology of narrative? The answer may be that narrative does something that statistical analysis does not: It focuses on the specific and provides detail. Statistical analyses do the reverse. When an outsider is trying to describe an experience to someone who cannot readily relate to it, an insider, narrative provides the detail that can help the insider empathize and relate to the experience. To employ the language of Clifford Geertz, “We see the lives of others through lenses of our own grinding.”<sup>127</sup> Narrative helps to situate whites in the “grinding” of racial subordination.

As Julie Su and Eric Yamamoto’s contribution to *A New Critical Race Theory* attests, the epistemological function of narrative has implications for political lawyering. A challenge facing political lawyers is to have the voices of one’s clients shape and be reflected in the litigation. One problem Su encountered when she represented Thai and Latina garment workers in litigation over labor conditions was the way the press covered narratives about the workers:

Some media portrayed the workers only as hapless victims, and that generated the false impression that they were not human agents engaged in a struggle to improve their lives. Those portrayals suggested, and sometimes explicitly stated, that heroes—lawyers and government agents, usually straight, white men—were the ones working to save the downtrodden.<sup>128</sup>

Su and Yamamoto argue that part of the project of political lawyering is to move client experiences to the foreground and facilitate client participation in their lawsuit. Enabling client narratives helps accomplish both. In this sense, narrative is not just about the personal experience of a particular critical race theorist: It is also about the personal story of the client.<sup>129</sup> As Su and Yamamoto put it, “One measure of the quality of critical race scholarship is the response by the academy. Another, equally

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126. See, e.g., IAN AYRES, *PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* (2001) (using statistical analysis to demonstrate the existence of discrimination).

127. Clifford Geertz, *Anti Anti-Relativism*, 86 AM. ANTHROPOLOGY 263, 275 (1984).

128. Su & Yamamoto, *supra* note 30, at 383-84.

129. For discussion of the importance of client-centered lawyering, see generally GERALD P. LÓPEZ, *REBELLIOUS LAWYERING* (1992); Derrick A. Bell, Jr., *Serving Two Masters*, 85 YALE L.J. 470 (1976); and Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

important measure is whether garment workers in some fashion know that critical race theory is talking about their liberation, their justice, too.”<sup>130</sup>

A second payoff from using narrative relates to the idea of truth. Narrative is a means by which one can challenge “the perfectibility, externality, or objectivity of truth.”<sup>131</sup> Through narrative, critical race theorists can demonstrate the contingency and situatedness of truth. For example, the first two essays in *A New Critical Race Theory*—Kimberlé Crenshaw’s contribution<sup>132</sup> and the contribution of Sumi Cho and Robert Westley<sup>133</sup>—are in dialogue about the “true” genesis of CRT. Of course, Cho and Westley would not say that the history they excavate—which focuses on student activism as a form of social movement that helped to form the “theory”—is true and that the account provided by, among others, Crenshaw (which they argue focuses on the “writings that ‘formed the movement’”<sup>134</sup>) is false. Nor are Cho and Westley invested in “proliferate[ing] competing genesis stories.”<sup>135</sup> But they do mean to suggest that the truth about the genesis of CRT is bigger than Crenshaw’s “super-agency” approach, an approach that they say “emphasize[s] the agency of individual scholars.”<sup>136</sup> The juxtaposition of Crenshaw’s essay against Cho and Westley’s reminds us that while most of the controversy about “truth” and CRT arises in the context of contestations between critical race theorists and their detractors, the question of what is true—as well as the question of how truth should be theorized—is contested (sometimes only implicitly) within CRT as well.

A third benefit of narrative is that it can serve as a counterhegemonic device. Through narrative, people of color can counter the dominant representations of their identities and their experiences; they can engage in what Margaret Montoya refers to as “discursive subversions.”<sup>137</sup> This is the project in which Henry Richardson engages. He constructs a conversation between an African president and an African American law professor. The exchange constitutes a form of discursive subversion in that whiteness occupies a background and marginal space in the discussion. Put differently, the conversation is not mediated by concerns about whiteness or black respectability. The professor and the African president speak about international politics, domestic sovereignty, and tribal conflicts. The conversation is unconstrained by racial surveillance. They appear to be

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130. Su & Yamamoto, *supra* note 30, at 391.

131. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880 (1990).

132. Crenshaw, *supra* note 38.

133. Sumi Cho & Robert Westley, *Historicizing Critical Race Theory’s Cutting Edge*, in A NEW CRITICAL RACE THEORY, *supra* note 14, at 32.

134. *Id.* at 33.

135. *Id.*

136. *Id.* at 32.

137. Montoya, *supra* note 125, at 243.

speaking not as subalterns, but as fully formed (or, at least, not overly determined) subjects. Presumably, one of the reasons Richardson confers this sense of freedom on the professor and the president is to raise a question about power: What happens when black people have it? His answer seems to be that problems of division and social conflict do not necessarily disappear. Michel Foucault's descriptive claim—that we have an ambivalent relationship to power—becomes, in Richardson's essay, a normative one.

A fourth payoff from using narrative is that it can function as a rhetorical strategy to rearticulate the ideological content of various legal regimes to demonstrate that, as Enrique Carrasco puts it, "law is essentially a story that reflects and legitimates the (racial) viewpoints and interests of those in power."<sup>138</sup> Consider Sherene Razack's contribution to *A New Critical Race Theory*. She employs narrative to uncover the national story behind Canadian immigration law: "Canada is besieged. Every Tom, Dick, and Harry wants to get in. They will stop at nothing. They do not respect us. They will return our generosity with betrayal. We have no choice but to become strict and to monitor more closely who is coming in."<sup>139</sup> Razack demonstrates how this story is employed to give political and legal traction to a variety of mechanisms (for example, the requirement that border crossers carry certain identity documents) to police the Canadian border and its national identity.

At bottom, narrative is a methodology. It can be done well or poorly, and it is valuable and worth using where it either provides better or previously discounted evidence or more effectively persuades than other methodologies. In Parts IV and V, we attempt to demonstrate how narrative can be utilized to articulate the operation of workplace discrimination.

### G. Summary

The purpose of the foregoing was to articulate some basic ideas around which CRT is organized and to reveal how these ideas are manifested in *A New Critical Race Theory*. The discussion also highlights the ways in which each of these ideas can be enlisted to further an understanding of workplace discrimination.

Yet, what we have thus far posited about workplace discrimination is limited. None of the CRT ideas we discussed performs a structural/institutional critique of the workplace. Further, there is little in CRT more broadly that engages in such an analysis. This is not to say that

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138. Carrasco, *supra* note 17, at 367.

139. Sherene H. Razack, "Simple Logic": *Race, the Identity Documents Rule, and the Story of a Nation Besieged and Betrayed*, in *A NEW CRITICAL RACE THEORY*, *supra* note 14, at 199, 200.

CRT is unconcerned with the workplace as a racial institution.<sup>140</sup> The point is that much of that concern manifests itself in the context of critiques about specific employment practices that are either explicitly racially coded or that have a disparate impact on people of color.

The scant attention that CRT has paid to the workplace as a cultural institution is surprising given CRT's notion that racism is endemic, operating at both an individual and a cultural/institutional level. In other words, while CRT is committed to the concept of institutional discrimination, there is little in the literature that articulates what this means—and even less that reveals how institutional racism is manifested in the context of the workplace. We address this gap in Part III.

### III. HOMOGENEITY

This Part provides a structural critique of the workplace by drawing on bodies of literature that economists and behavioral L&E scholars have begun to incorporate into their analytical toolbox—organizational behavior, management science, and psychology (the “behavioral management literature”). Cumulatively, this body of work advances a standard economic argument about transaction costs: Employment decisions will be structured to reduce them.<sup>141</sup> As we show, pursuing homogeneity is one way for employers to do so. In short, greater employee homogeneity decreases the transaction costs of managing a workforce.

There is a relationship between the transaction costs associated with heterogeneity and CRT's critique of colorblindness. According to CRT, colorblindness encourages (and sometimes coerces) nonwhites to assimilate. Colorblindness norms require Asian Americans, for example, to identify as individuals (which ostensibly renders them the same as everybody else) and to disidentify as members of a racial group (since racial group identification renders them different). Seen in this way, colorblindness, like transaction costs, functions as a mechanism for encouraging homogeneity. An employer motivated by either concern would want her nonwhite employees to be assimilated, not differentiated. In this sense, even to the extent that employers are not explicitly invested in, or consciously driven by, colorblindness, their concerns about the transaction costs of heterogeneity motivate them to make employment decisions that are consistent with colorblind norms. Our aim in this Part is to employ the

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140. See Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395 (1993); see also Crenshaw, *supra* note 76.

141. Analysis of transaction costs is widespread in legal scholarship. For a recent example, see Yochoi Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369 (2002).

link between homogeneity, transaction costs, and colorblindness to develop a theory of institutional discrimination. We first articulate this theory, which assumes that there is an incentive for employers to pursue homogeneity, and then discuss the theoretical basis for, and empirical evidence of, the existence of this incentive.

#### A. *A Theory of Institutional Discrimination*

A starting point for thinking about workplace discrimination is to raise the question of whether today's workplace is buttressed by institutionalized racial norms. With respect to explicit racial norms, the answer is no: That would violate antidiscrimination law. But do implicit racial norms structure today's workplace culture? CRT answers this question affirmatively, pointing to workplace practices like English-only rules and grooming regulations (e.g., rules prohibiting employees from braiding their hair) that restrict the expression of particular identities and, in so doing, marginalize them.<sup>142</sup>

There is, however, a subtle form of institutional discrimination to which CRT scholars have not paid attention. This discrimination derives from a commitment on the part of many employers, particularly employers who use teams to manage their workplace culture to achieve trust, fairness, and loyalty (TFL). Why? TFL reduces transaction costs. Empirical evidence suggests that the effectiveness of teams is enhanced when employers engender TFL among their employees.<sup>143</sup> Employees who perceive that they are a part of a "TFL community" work hard, cooperate, police each other, and share valuable information.<sup>144</sup> Based on this evidence, scholars have argued that law should be structured to facilitate the creation of TFL

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142. See, e.g., Caldwell, *supra* note 67, at 366-67 (discussing two companies' anti-braiding policies).

143. The legal scholarship in this vein has largely focused on boards of directors—that is, the team at the top of the corporate hierarchy. Hopefully, however, there will be a trickle down effect vis-à-vis scholarship that considers the larger organizational context. For articles both applying the team conception and drawing from the organizational dynamics literature for insights into group behavior, see, for example, Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1 (2002); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307 (2003); and Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797 (2001).

144. Scholars who study organizational effectiveness have long recognized that trust, fairness, and loyalty are crucial and essential elements in effective organizations. See generally Kenneth L. Bettenhausen, *Five Years of Groups Research: What We Have Learned and What Needs To Be Addressed*, 17 J. MGMT. 345 (1991); Susan G. Cohen & Diane E. Bailey, *What Makes Teams Work: Group Effectiveness Research from the Shop Floor to the Executive Suite*, 23 J. MGMT. 239 (1997); Carole V. Wells & David Kipnis, *Trust, Dependency, and Control in the Contemporary Organization*, 15 J. BUS. & PSYCHOL. 593 (2001).

workplaces.<sup>145</sup> In addition to its efficiency gains, TFL values seem normatively appealing.<sup>146</sup>

TFL's normative surface appeal helps to explain why the institutional discrimination story we articulate below has not yet been told. Central to our story is not the fact that employers are invested in TFL but rather *how* they go about realizing that investment—by aggressively promoting homogeneity. Evidence suggests that, at least in the short term, a manager with a demographically homogeneous work team has a better chance of producing TFL than one with a diverse team. If, as is often suggested, managers focus primarily on short-term results,<sup>147</sup> there is an incentive for managers to seek demographically homogeneous teams.

The relationship between the pursuit of demographic homogeneity and racial discrimination is direct. In short, workplaces organized to achieve homogeneity are likely to discriminate because homogeneity norms, by their very nature, reflect a commitment to sameness (favoring people perceived to be members of the in-group (“insiders”)) and a rejection of difference (disfavoring people perceived to be members of the out-group (“outsiders”)). Coupled with the fact that, within most professional settings, whites are insiders and nonwhites are outsiders, the relationship between discrimination and homogeneity becomes clear.

The foregoing suggests that race-neutral workplace norms institutionalize insider racial preference. Is this a reason for concern? The answer is not obviously yes. One might argue that, even to the extent that there are incentives for employers to create and maintain homogeneous workplaces, the threat of antidiscrimination sanctions undermines that incentive. Richard Epstein famously worried about exactly this effect of antidiscrimination law. According to Epstein, part of the problem with antidiscrimination law is that it compromises workplace efficiency by preventing employers from establishing homogeneous workplace cultures.<sup>148</sup> One might conclude, then, that given the threat of legal

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145. See generally LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY* (2001); Kent Greenfield, *Using Behavioral Economics To Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581 (2002). Legal scholars engaged in this inquiry have noted the important role that perceptions of trust, fairness, and loyalty play in corporate governance. See, e.g., Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001); Robert Cooter & Melvin A. Eisenberg, *Fairness, Character, and Efficiency in Firms*, 149 U. PA. L. REV. 1717 (2001).

146. Lawrence E. Mitchell, *Trust, Contract, Process*, in PROGRESSIVE CORPORATE LAW 185, 199 (Lawrence E. Mitchell ed., 1995).

147. See, e.g., MITCHELL, *supra* note 145 (using, as a building block for his argument, the claim that managers focus excessively on short-term results).

148. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS* 59-87 (1992). The inconsistency between the goal of enhancing trust levels in organizations that many progressive scholars espouse and the goal of enhanced ethnic diversity in the workplace that progressives also presumably favor has been pointed out by Steve Bainbridge in his critiques of the progressive corporate law scholarship.

sanctions, the institutionalized racism problem we have identified is theoretical—not real.

Moreover, there are institutional legitimacy concerns that militate against the establishment of homogenous workplaces. White-only work forces can create public relations problems. Perhaps not surprisingly, there is no employer-driven movement afoot to have antidiscrimination laws repealed because they prohibit employers from establishing demographically homogenous workplaces. To the contrary, even a cursory examination of the management and organizational behavior literature reveals (at least rhetorically) an institutional commitment to manage, and not to eliminate, heterogeneity.<sup>149</sup> Thus, all seems well: Law prevents institutions from privileging homogeneity, and institutions perceive the pursuit of homogeneity to be problematic.

Our claim, however, is that all is not well. Neither antidiscrimination law nor the affirmative pursuit of diversity operates as a meaningful barrier to, or substantially undermines the incentives for employers to achieve, workplace homogeneity. Epstein need not worry.<sup>150</sup> To be sure, the law prohibits blatant racial animus in hiring and promotion. But that is a minimal barrier to the managerial pursuit of racial homogeneity. To move from a phenotypic conception of race to a performative conception is to find that, to a significant extent, judges can (and, we surmise, do) apply

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His argument is based on the observation that trust is most likely to be present in organizations that are ethnically homogenous. Stephen M. Bainbridge, *Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Natural Law*, 43 VILL. L. REV. 741, 799 (1998). Structuring law to promote trust, Bainbridge argues, therefore means enabling the creation of homogenous workforces, something that is presumably inconsistent with the progressive agenda. See Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 885 (1997) (book review).

The observation that ethnically homogenous communities may have reduced transaction costs has also been made in the nonfirm (or market) context. At least some such communities appear able to police wrongdoing (such as contractual opportunism) even in the absence of court systems—a valuable trait in contexts where court systems are either too expensive to use or are unavailable. For a recent examination, see Kevin Davis et al., *Ethnically Homogeneous Commercial Elites in Developing Countries*, 32 LAW & POL'Y INT'L BUS. 331 (2001).

149. See, e.g., Jacqueline A. Gilbert & John M. Ivancevich, *Effects of Diversity Management on Attachment*, 31 J. APPLIED SOC. PSYCHOL. 1331 (2001); Orlando C. Richard & Nancy Brown Johnson, *Understanding the Impact of Human Resource Diversity Practices on Firm Performance*, 13 J. MANAGERIAL ISSUES 177 (2001); Mark John Somers & Dee Birnbaum, *Racial Differences in Work Attitudes: What You See Depends on What You Study*, 15 J. BUS. & PSYCHOL. 579 (2001); Tom R. Tyler & Maura A. Belliveau, *Managing Work Force Diversity: Ethical Concerns and Intergroup Relations*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 171 (David M. Messick & Ann E. Tenbrunsel eds., 1996).

150. Consistent with the caricature of L&E, for Epstein, the problem is that there is too much governmental interference in the labor market—specifically, regulation that causes inefficiencies by not allowing employers to set up racially homogenous teams. See EPSTEIN, *supra* note 148, at 66-67. Our claim, consistent with the caricature of CRT, albeit employing literature that is becoming a part of the behavioral L&E canon, is the reverse: Law does not do enough to prevent employers from setting up racially homogenous teams.

antidiscrimination law to actually *protect* the pursuit of racial homogeneity.<sup>151</sup> They do so by failing to capture employment discrimination based on *intra*racial distinctions—distinctions employers make among people within a particular racial group.

Driving these distinctions is a question about racial stereotypes and racial salience. Other things being equal, employers prefer nonwhites whose racial identity is not salient and whose identity performance is inconsistent with stereotypes about their racial group.<sup>152</sup> In other words, employers screen for racial palatability. With respect to Asian Americans, for example, employers determine whether, notwithstanding phenotypic difference, a particular Asian American is (based on how she performs her identity) sufficiently like insiders to be successfully assimilated into a homogenized workplace.

To date, there are no Title VII cases that render a racial palatability discrimination claim cognizable. Thus, employers can make these kinds of *intra*racial distinctions with legal impunity. And to the extent employers engage in this practice, their associated institutional legitimacy remains intact because the practice anticipates and produces at least some workplace

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151. In a work in progress, we are exploring the assimilationist orientation of Title VII law, an orientation that is structured around protecting homogeneity.

152. Recent scholarship has described this point in terms of multiple identity theory or “identity comprehension” theory. The starting point is the observation that all of us have a multiplicity of identities. But there are some identities that are more important to us than others. For example, just because a person is Indian does not mean that his Indian identity is important to him. To the contrary, it may be that his identity as an engineer is so important to him that he may consciously choose to avoid associating too much with other Indians. More important, depending on context, we choose (whether consciously or unconsciously) to emphasize certain identities and deemphasize others. Hence, to continue the Indian example, he may keep his Indianness at home (where he eats Indian food, watches Indian movies, talks about Indian politics, and hangs out with his Indian friends in his Indian neighborhood), while being a team player with his white American colleagues at work. Given the necessity of picking some racial outsiders, managers will likely pick those outsiders who deemphasize their outsider identities (at least at work). On identity comprehension theory, see Sherry M.B. Thatcher, *Does It Really Matter if You Know Me? The Implications of Identity Comprehension Theory on Individuals in Organizational Teams* (May 2000) (unpublished manuscript, on file with authors). The building blocks of this theory are the observations: (1) that people have a multiplicity of identities that they “negotiate”; (2) that these identities can be changed or maintained as increased amounts of information are communicated; and (3) that people’s initial judgments about others can change over time. On the building blocks, see Blake E. Ashforth & Fred Mael, *Social Identity Theory and the Organization*, 14 *ACAD. MGMT. REV.* 20 (1989) (arguing that people have a multiplicity of identities that they carry with them at all times); Myron Rothbart & Bernadette Park, *On the Confirmability and Disconfirmability of Trait Concepts*, 50 *J. PERSONALITY & SOC. PSYCHOL.* 131 (1986) (explaining that identities can be changed or maintained as increased amounts of information are received); and William B. Swann, Jr. et al., *Should We Create a Niche or Fall in Line? Identity Negotiation and Small Group Effectiveness*, 79 *J. PERSONALITY & SOC. PSYCHOL.* 238 (2000) (describing identity negotiation as one of the mechanisms that determines how identities evolve in diverse workgroups and whether stereotypes are negated or reinforced). For a study of the huge variety of verbal, nonverbal, and proxemic cues that people use to negotiate identity in the workplace, see Sherry M.B. Thatcher et al., *Subjective Identities and Identity Communication Processes in Information Technology Teams*, in 5 *RESEARCH IN MANAGING GROUPS AND TEAMS* 53 (Margaret A. Neale et al. eds., forthcoming 2003).

racial integration. Finally, because the racial diversity employers achieve by making intraracial distinctions is literally skin deep, it comfortably coexists with their commitment to homogeneity.

The foregoing sets forth a theory of institutional racism—that it is a function of an investment on the part of employers to realize the efficiency gains of homogeneity. Because many institutions operate under what we call a *diversity constraint*—a constraint that requires the firm to hire at least some nonwhites—employers will determine which nonwhites to hire on evidence of racial palatability. The more racially palatable employers perceive a potential employee to be, the less concerned they will be over the possibility that that potential employee will (racially) disrupt workplace homogeneity.

In order for our theory to have traction, we need to provide evidence suggesting that employers are, in fact, motivated to pursue homogeneity. We do so below, fleshing out the theories and empirical evidence suggesting that homogenous workplaces are more efficient and effective than heterogeneous workplaces. Before turning to this literature, however, four caveats are in order. First, this literature focuses largely on team-oriented workplace cultures. It has little to say about workplaces within which employees work in isolation from each other. Second, the efficiency gains that employers experience from homogeneous work teams are largely short term. There is evidence (which is by no means definitive) to suggest that, in the long run, heterogeneous teams are better problem solvers and more creative than homogenous teams. Even to the extent that this evidence is right, it does not significantly undermine the story we are telling, because, by and large, managers—who hire and promote—need to demonstrate results in the short term.

Nor is our story undermined by the dangers of “groupthink,” where the absence of dissent in the face of too much group cohesion and identification can cause organizations to ignore important information.<sup>153</sup> At first blush, this groupthink dynamic may seem to undermine employer incentives to pursue homogeneity: Racial diversity might promote the kind of dissent necessary for teams to operate creatively and productively.<sup>154</sup> But employer concerns about groupthink are not likely to be nearly as powerful as their concerns about lowering transaction costs and achieving the psychological

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153. The classic work on the subject is IRVING L. JANIS, *GROUPTHINK* (2d ed. 1982). Janis writes that “members of any small cohesive group tend to maintain esprit de corps by unconsciously developing a number of shared illusions and related norms that interfere with critical thinking and reality testing.” *Id.* at 35.

154. For an extensive discussion of the costs of conformity and the value of dissent, see CASS SUNSTEIN, *CONFORMITY AND DISSENT* (forthcoming 2003).

benefits that come with conformity.<sup>155</sup> Further, there is reason to question the idea that *racial diversity* is the type of diversity that managers would look to in order to counter the groupthink dynamic. First, as we have said, managers are likely motivated primarily by short-run results. Thus, they tend to ignore institutional strategies, like enhancing racial diversity, the value of which shows up only in the long term. Second, while racial diversity undoubtedly increases tension levels within a group, it is not clear that this tension will necessarily lead to a productive exchange of ideas. Some researchers have suggested that there are two broad categories of conflict—one based on personal dislike (unproductive conflict) and the other based on a difference in perspective (productive conflict)—and that race and gender differences are more likely to produce the former while differences in tenure and educational background are more likely to produce the latter.<sup>156</sup> Third, there is evidence to suggest that, even if they disagree, members of lower-status groups are less likely to speak out within heterogeneous groups.<sup>157</sup> This is perhaps because the homogeneity incentive discourages outsiders from engaging in conflict that could entrench or reignite the notion that they are different.

Our third caveat is that, although the literature on the effectiveness of homogeneity is broad, the subset that focuses specifically on racial dynamics is small. Generalization from studies addressing invisible demographic variables, such as education and background, to visible attributes, such as race and gender, is necessarily controversial.<sup>158</sup> And finally, our treatment of this literature is preliminary, inexpert, and

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155. Cf. Donald C. Langevoort, *Taking Myths Seriously: An Essay for Lawyers*, 74 CHI.-KENT L. REV. 1569, 1578 (2000) (“The stress reduction leads to better focus, concentration, and persistence.”).

156. In the context of studying the positive and negative effects of conflict, Karen Jehn distinguishes between “relationship conflicts” (where disagreements are about personal issues) and “task conflicts” (where disagreements are about ideas and opinions relating to the task). Jehn explains that relationship conflicts are more likely to occur with race and gender diversity and be destructive to the team’s functioning, while task conflicts are more likely to occur with education and job tenure diversity and are likely to be productive. See Karen A. Jehn, *A Qualitative Analysis of Conflict Types and Dimensions in Organizational Groups*, 42 ADMIN. SCI. Q. 530 (1997); Karen A. Jehn et al., *To Agree or Not To Agree: The Effects of Value Congruence, Individual Demographic Dissimilarity, and Conflict on Workgroup Outcomes*, 8 INT’L J. CONFLICT MGMT. 287 (1997).

157. See Rod Bond & Peter B. Smith, *Culture and Conformity: A Meta-Analysis of Studies Using Asch’s Line Judgment Task*, 119 PSYCHOL. BULL. 111 (1996) (finding that women are more likely to conform than men); Caryn Christenson & Ann S. Abbott, *Team Medical Decision Making*, in DECISION MAKING IN HEALTH CARE 267, 273-76 (Gretchen B. Chapman & Frank A. Sonnenberg eds., 2000).

158. See Karen A. Jehn et al., *To Agree or Not To Agree: The Effects of Value Congruence, Member Diversity, and Conflict on Workgroup Outcomes*, 13 INT’L J. CONFLICT MGMT. (forthcoming 2003); Melenie J. Lankau & Terri A. Sandura, *An Examination of Job Attitudes of White, Black, and Hispanic Nurses in a Public Hospital*, 19 INT’L J. PUB. ADMIN. 377 (1996); Lisa Hope Pelled, *Demographic Diversity, Conflict, and Work Group Outcomes: An Intervening Process Theory*, 7 ORG. SCI. 615 (1996); Somers & Birnbaum, *supra* note 149.

incomplete. The literature is vast, and the scholars who have produced it might take issue with some of what we say. Our sense, however, is that the basic idea we employ this literature to support—that there is an incentive for employers to pursue homogeneity—is uncontroversial within the literature. We hope that our analysis will invite other legal scholars, particularly critical race theorists, who are interested in both workplace discrimination and racial diversity management to engage this largely unexplored body of work.

### B. *The Incentive for Employers To Pursue Homogeneity*

Below we discuss the incentives for employers to seek workplace homogeneity. First, we provide a theoretical account regarding the nature of, and basis for, these incentives. Second, we discuss the empirical evidence suggesting that employers are invested in homogeneity. In both discussions, we assume that employers operate under a diversity constraint. That is, we assume that a firm's interest in homogeneity will, for legal and institutional legitimacy reasons, be constrained by the need to achieve some degree of workplace racial diversity.

#### 1. *Theories*

There are at least three theories suggesting that employers are motivated to pursue homogeneity: social identity theory, similarity-attraction theory, and statistical judgments theory.

Social identity theory suggests that people have an affinity for those they perceive to be part of their in-group.<sup>159</sup> In concrete terms, people are more likely to demonstrate TFL (which, again, is shorthand for trust, fairness, and loyalty) to those they perceive to be members of their in-group.<sup>160</sup> Conversely, they are more likely to discriminate against those they perceive to be members of an out-group.<sup>161</sup> Race, being both socially

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159. On social categorization and social identification theory, see MICHAEL A. HOGG & DOMINIC ABRAMS, *SOCIAL IDENTIFICATIONS* (1988); HENRI TAJFEL, *HUMAN GROUPS AND SOCIAL CATEGORIES: STUDIES IN SOCIAL PSYCHOLOGY* (1981); JOHN C. TURNER, *REDISCOVERING THE SOCIAL GROUP: A SELF-CATEGORIZATION THEORY* (1987); and John C. Turner, *Towards a Cognitive Redefinition of the Social Group*, in *SOCIAL IDENTITY AND INTERGROUP RELATIONS* 15 (Henri Tajfel ed., 1982).

160. See Marilyn B. Brewer, *In-Group Bias in the Minimal Intergroup Situation: A Cognitive-Motivational Analysis*, 86 *PSYCHOL. BULL.* 307 (1979).

161. The result of a perception of otherness has been demonstrated to lead to prejudice and stereotyping, and that, in turn, can significantly hurt the effectiveness of the work team. See Jennifer Crocker & Brenda Major, *Social Stigma and Self-Esteem: The Self-Protective Properties of Stigma*, 96 *PSYCHOL. REV.* 608 (1989); Harry C. Triandis et al., *Workplace Diversity*, in 4 *HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY* 769 (Harry C. Triandis et al. eds., 1994).

salient and facially visible, is one of the primary categories along which people make initial in-group and out-group categorizations.<sup>162</sup> One explanation is that people assume that those of a similar race are likely to share similar values and to have had similar experiences. As a result, racial outsiders are vulnerable to discrimination from their racial insider colleagues.<sup>163</sup> To avoid this distrust and dislike (which will likely undermine workplace efficiency by increasing transaction costs), employers will want to hire people who are similar to insiders.

The similarity-attraction theory is largely analogous. It posits that people are attracted to those who are similar.<sup>164</sup> The theory is that race is one of the primary categories used to determine similarity and that this similarity, in turn, translates into attraction. Once again, as with social identity theory, those who appear facially similar are assumed to share the same values and norms of communication.<sup>165</sup> Under this paradigm, racial minorities are presumptively dissimilar and unattractive,<sup>166</sup> characteristics

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162. Race and gender categories are used so often in categorizing others that these categorizations likely occur automatically, without active thought or effort. See Charles Stangor et al., *Categorization of Individuals on the Basis of Multiple Social Features*, 62 J. PERSONALITY & SOC. PSYCHOL. 207 (1992). Whether stereotype activation is always automatic or can be inhibited by other factors (such as cognitive overload and self-image threat) has been a topic of debate. See Steven J. Spencer et al., *Automatic Activation of Stereotypes: The Role of Self-Image Threat*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 1139 (1998).

163. See Jennifer A. Chatman et al., *Being Different yet Feeling Similar: The Influence of Demographic Composition and Organizational Culture on Work Processes and Outcomes*, 43 ADMIN. SCI. Q. 749, 750 (1998); see also Jeffrey Pfeffer, *Organizational Demography*, in 5 RESEARCH IN ORGANIZATIONAL BEHAVIOR 299 (L.L. Cummings & Barry M. Straw eds., 1983).

164. The standard reference is DONN BYRNE, *THE ATTRACTION PARADIGM* (1971). See also Donn Byrne, *An Overview (and Underview) of Research and Theory Within the Attraction Paradigm*, 14 J. SOC. & PERS. RELATIONSHIPS 417 (1997). The need for individuals to feel similar has been linked by scholars to the need to belong to a group (hence, linking similarity theory to social identity theory). See Roy F. Baumeister & Mark R. Leary, *The Need To Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497 (1995); Marilyn B. Brewer, *Social Identity, Distinctiveness, and In-Group Homogeneity*, 11 SOC. COGNITION 150 (1993).

165. See Katherine Y. Williams & Charles A. O'Reilly, III, *Demography and Diversity in Organizations: A Review of 40 Years of Research*, 20 RES. ORGANIZATIONAL BEHAV. 77, 85 (1998).

166. While there is a significant body of research demonstrating the affiliative preferences people have for others who are similar, there is also research suggesting that people value others who allow for trait expression. In other words, there may be a preference for those who are complementary (which often will translate to similarity, but not always). For example, a dominant person may prefer to affiliate with someone who is subservient rather than similar. While we found little research exploring complementarity in the race and diversity context, it strikes us that it might be important. For example, white male workers may prefer other white male workers who are similar, while simultaneously preferring black or women workers who are subservient. All of this is in the way of saying that the similarity hypothesis strikes us as overly simplistic as applied to race. For an examination of similarity and complementarity in the workplace context, see Robert P. Tett & Patrick J. Murphy, *Personality and Situations in Co-Worker Preference: Similarity and Complementarity in Worker Compatibility*, 17 J. BUS. & PSYCHOL. 223 (2002).

that, from an insider-employer perspective, have the potential to create workplace conflict and division, not cooperation and cohesion.<sup>167</sup>

The final theory suggesting that employers are motivated to pursue homogeneity is statistical judgments theory. Most often attributed to economics (though also central to psychology), this theory claims that racial differences often activate *statistical judgments* about likely behavioral tendencies. These statistical judgments are a type of mental shortcut, a resource-saving device. For example, white workers may see a new black colleague as likely to be lazy, untrustworthy, disloyal (especially to her white colleagues), frequently angry (perhaps as a result of oversensitivity about race), and difficult to communicate with (due to her likely having different values, different interests, and different cultural and experiential points of reference).<sup>168</sup> Under this theory, whether an insider-employer will hire a black person turns on the currency of the foregoing statistical judgments. The stronger the statistical judgment, the stronger the employer's perception that a prospective black employee will not fit into the institution.

These theories suggest that there is a disincentive for employers to hire outsiders and a corresponding incentive for employers to hire insiders. Difference engenders distrust, dislike, disconnection, disidentification, and disassociation. Each of these characteristics (and certainly all of them together) undermines a necessary condition for the effective operation of teams—cooperative behavior—and therefore increases the transaction costs of managing the workplace.

## 2. *Empirical Evidence*

### a. *The Basic Story*

In addition to the theoretical literature, there is empirical evidence predicting that racially heterogeneous teams are likely to be less effective than homogenous ones. Studies consistently show what the above theories suggest: Racial heterogeneity undermines trust and cooperation.<sup>169</sup> Team

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167. The operation of this paradigm can result in the attrition of those outsiders who are hired. This dynamic is referred to as the Attraction-Selection-Attrition hypothesis. See Benjamin Schneider, *The People Make the Place*, 40 PERSONNEL PSYCHOL. 437 (1987).

168. See, e.g., Stephen Coate & Glenn C. Loury, *Will Affirmative-Action Policies Eliminate Negative Stereotypes?*, 83 AM. ECON. REV. 1220 (1993); Craig McGarty et al., *Social, Cultural and Cognitive Factors in Stereotype Formation*, in STEREOTYPES AS EXPLANATIONS 1 (Craig McGarty et al. eds., 2002); Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 (1972).

169. On the flip side, there are studies, most of which were conducted in laboratories, that suggest that heterogeneous teams are better at coming up with creative solutions to problems than homogenous teams. See, e.g., Taylor H. Cox et al., *Effects of Ethnic Group Cultural Differences on Cooperative and Competitive Behavior on a Group Task*, 4 ACAD. MGMT. J. 827 (1991)

members in heterogeneous teams tend not to communicate as well as team members in homogeneous teams. Turnover rates in heterogeneous teams are higher.<sup>170</sup> And managerial attempts to spur innovation by diversifying their teams have “met with mixed success.”<sup>171</sup>

b. *The More Complicated Account*

Recent scholarship on diversity management suggests that the empirical story about workplace homogeneity may be more complicated than we have thus far described. The complication is that heterogeneity can operate as a double-edged sword.<sup>172</sup> To appreciate how this is so, it is helpful to conceptualize heterogeneity/diversity as operating in a two-stage process.<sup>173</sup>

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(finding positive effects from ethnic heterogeneity). On the claim that diversity (and particularly racial diversity) has the potential to provide firms with a competitive advantage through increased creativity and enhanced problem-solving capabilities, see TAYLOR COX, JR., *CULTURAL DIVERSITY IN ORGANIZATIONS: THEORY, RESEARCH AND PRACTICE* (1994); and Taylor H. Cox & Stacy Blake, *Managing Cultural Diversity: Implications for Organizational Competitiveness*, 5 *ACAD. MGMT. EXECUTIVE* 45 (1991). More generally, on the “value in diversity” claim, see Anne Donnellon, *Crossfunctional Teams in Product Development: Accommodating the Structure to the Process*, 10 *J. PRODUCT INNOVATION MGMT.* 377 (1993); Kathleen M. Eisenhart & Claudia Bird Schoonhoven, *Organizational Growth: Linking Founding Team, Strategy, Environment, and Growth Among U.S. Semiconductor Ventures, 1978-1988*, 35 *ADMIN. SCI. Q.* 504 (1990); L. Richard Hoffman & Norman R.F. Maier, *Quality and Acceptance of Problem Solutions by Members of Homogeneous and Heterogeneous Groups*, 62 *J. ABNORMAL & SOC. PSYCHOL.* 401 (1961); and Michael L. Tushman, *Special Boundary Roles in the Innovation Process*, 22 *ADMIN. SCI. Q.* 587 (1977).

170. For articles that synthesize the literature on diversity on teams (including the limited research on racial diversity), see S.E. Jackson et al., *Understanding the Dynamics of Diversity, in TEAM DECISION MAKING EFFECTIVENESS IN ORGANIZATIONS* 204 (Richard A. Guzzo et al. eds., 1995); Frances J. Milliken & Luis L. Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 *ACAD. MGMT. REV.* 402 (1996); Orlando C. Richard et al., *The Impact of Visible Diversity on Organizational Effectiveness: Disclosing the Contents in Pandora’s Black Box*, 8 *J. BUS. & MGMT.* 1 (2002); and Williams & O’Reilly, *supra* note 165. For the most part, these articles all talk about the basic issues with teams—communication, attachment, trust, and conflicts. On the effects of diversity on supervisor-worker relations and issues such as receptivity to feedback from a supervisor who is perceived to be from a different group, see Heather J. Smith et al., *The Self-Relevant Implications of the Group-Value Model: Group Membership, Self-Worth, and Treatment Quality*, 34 *J. EXPERIMENTAL SOC. PSYCHOL.* 470 (1998).

171. See Chatman et al., *supra* note 163. More generally, on the point that attempts to capitalize on the various forms of diversity have led to ambiguous results in practice, see Richard A. Guzzo & Marcus W. Dickson, *Teams in Organizations: Recent Research on Performance and Effectiveness*, 47 *ANN. REV. PSYCHOL.* 307 (1996); and Madeline E. Heilman, *Affirmative Action: Some Unintended Consequences for Working Women*, in 16 *RESEARCH IN ORGANIZATIONAL BEHAVIOR* 125 (Barry M. Straw & L.L. Cummings eds., 1994).

172. Milliken & Martins, *supra* note 170, at 403; Richard et al., *supra* note 170; Williams & O’Reilly, *supra* note 165, at 79.

173. Our division of the interaction process into stages one and two is a product of the observation by numerous scholars in the area that diversity, while likely to cause initial problems in group functioning, has the potential to bring benefits in the longer term. See, e.g., Richard et al., *supra* note 170, at 18. The most often cited research on this point is a laboratory study of culturally homogenous and diverse groups for seventeen weeks, where the homogenous groups initially performed better but the heterogeneous groups improved and eventually outperformed the

At stage one, superficial differences in terms of variables like race cause distrust, difficulties in communication, and a reluctance to cooperate. However, under the right conditions of intergroup contact—equal status, opportunities for self-revelation, egalitarian norms, and tasks that require cooperative interdependence—diverse team members can, at stage two, gain each other's trust, begin to see commonalities, work cooperatively, and realize the benefits of working as a diverse team.<sup>174</sup> Central to this theory is the notion that there are meaningful things an employer can do at stage one—the initial contact stage—to facilitate cooperative behavior at stage two.<sup>175</sup>

Broadly speaking, employers can use both individual and organizational strategies to manage heterogeneity in order to achieve the short-term efficiency gains of cooperative behavior (and the long-term gains of creative problem solving). Organizational strategies, however, are expensive and, from neither an insider nor an outsider perspective, have had much success. Individual strategies are cheaper and relatively successful from an institutional-insider perspective, but raise normative questions about (intra)racial selectivity. The problems with these two categories of strategies, upon which we elaborate below, strengthen the argument that employer incentives to pursue homogeneity are strong.

#### i. *Organizational Strategies*

Scholars have found that heterogeneous teams fare better in organizations that have a collectivistic, as opposed to an individualistic, orientation.<sup>176</sup> Such organizations emphasize the importance of

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homogenous groups on certain measures. Warren E. Watson et al., *Cultural Diversity's Impact on Interaction Process and Performance: Comparing Homogeneous and Diverse Task Groups*, 36 ACAD. MGMT. J. 590 (1993); see also Katherine Xin, *The Secret of Success*, HKUST BUS. SCH. NEWSL., Summer 2000, at <http://www.bm.ust.hk/newsletter/summer2000/summer00-10.html> (describing studies reporting that while initial impressions that were formed on the basis of visible characteristics such as race, age, and gender caused tensions, these tensions can disappear over time (under certain conditions)).

174. For reviews of this literature, see ROBERT E. SLAVIN, *COOPERATIVE LEARNING* (1983); and David W. Johnson et al., *Goal Interdependence and Interpersonal Attraction in Heterogeneous Classrooms: A Meta Analysis*, in *GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION* 156 (Norman Miller & Marilyn B. Brewer eds., 1984).

175. Increased contact, however, does not always lead to improvements in the effectiveness of the team. Sometimes, the initial dysfunction that results from prejudices and stereotyping at stage one can worsen over time. Joel V. Merkwand & Timothy B. Smith, *Tolerance and Racial Identity Among Foreign Sojourners: Testing the Contact Hypothesis*, 85 PSYCHOL. REP. 170 (1999); Belle Rose Ragins & Terri A. Scandura, *Antecedents and Work-Related Correlates of Reported Sexual Harassment: An Empirical Investigation of Competing Hypotheses*, 32 SEX ROLES 429 (1995); Paola Villano, *Anti-Semitic Prejudice in Adolescence: An Italian Study on Shared Beliefs*, 84 PSYCHOL. REP. 1372 (1999).

176. See Chatman et al., *supra* note 163; see also Jennifer A. Chatman & Francis J. Flynn, *The Influence of Demographic Heterogeneity on the Emergence and Consequences of Cooperative Norms in Work Teams*, 44 ACAD. MGMT. J. 956 (2001).

organizational identity, an emphasis that helps reduce the salience of outsider distinctiveness (such as race).<sup>177</sup> For example, one's identity as a McKinsey consultant might be so important that it makes one feel a special bond with other McKinsey consultants (regardless of their outsider racial identity).<sup>178</sup> The problem is that such group-based institutional identities are difficult to establish.

There is also support for the proposition that heterogeneity functions better in "multicultural" environments than it does in "assimilationist" environments. That is, organizations that emphasize the importance of diversity manage heterogeneity better than those that stress conformity and assimilation.<sup>179</sup> But to say that multicultural environments manage diversity better than assimilationist environments does not answer the question of how well the former perform on other measures of efficiency (such as cost minimization). It is one thing for an employer to establish a workplace culture that tolerates diversity; it is likely to be far more complex and expensive for that employer to establish a workplace culture that values and respects diversity.<sup>180</sup>

A final organizational strategy available to manage heterogeneity is diversity training.<sup>181</sup> It is not clear, however, that these programs work, and they are expensive to institutionalize.<sup>182</sup>

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177. See Chatman et al., *supra* note 163.

178. The dynamic is also relevant to how we experience our identities as Americans. In other words, there are certain moments where, at least on the surface, we experience ourselves as one nation. Some have argued that this has happened in the wake of 9/11. *But see* Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (arguing that the post-9/11 consolidation of American identity was achieved by an insider/outsider dynamic in which some people were disidentified as citizens and reidentified as terrorists).

179. See Charles A. O'Reilly, III et al., *Group Demography and Innovation: Does Diversity Help?*, in 1 RESEARCH ON MANAGING GROUPS AND TEAMS 183 (Deborah H. Gruenfeld ed., 1998) (reporting that an organizational culture supporting ethnic diversity has positive effects on performance); David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept.-Oct. 1996, at 79 (finding that organizational cultures where diversity is seen as an opportunity to learn as opposed to a legal requirement are more effective).

180. For a discussion of the complexities involved in creating such cultures, see Richard & Johnson, *supra* note 149, at 181-84. *See also* Richard et al., *supra* note 170, at 17 (discussing the value of a pro-diversity orientation in terms of enabling a group to tackle effectively the complications that diversity brings with it).

181. For a description of the research on training strategies, see Karen Jehn & Katerina Bezrukova, *A Field Study of Group Diversity, Group Context, and Performance* (July 1, 2002) (unpublished manuscript, on file with authors) (discussing these training strategies under the rubric of "human resources practices" to manage diversity).

182. For a review of the evidence on the effectiveness of diversity training programs, see *id.* *Cf.* Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 T. JEFFERSON L. REV. 125 (2002) (describing the ineffectiveness of diversity training programs in tackling sexual harassment).

ii. *Individual Managerial Strategies*

Assuming that organizational strategies are likely to be ineffectual at managing diversity, the question is whether there are individual strategies that supervisors “on the ground” can employ to manage the institutional difficulties heterogeneity creates. Strategies implemented at the organizational level—such as taking steps to alter a firm’s culture or hiring diversity consultants—are generally in the hands of those at the top of the institutional hierarchy. Most managers—the ones who directly supervise work teams—have little say over such matters.

Managers do, however, have say over the terms upon which employees interact with each other. A manager interested in heterogeneity could socialize people of different backgrounds—insiders and outsiders—to work together. And this socialization effort *could* focus on both groups in an attempt to get members from each to internalize a norm of cooperative behavior across difference.<sup>183</sup>

Are managerial socialization efforts in fact so focused? While there is no empirical evidence on this question, there is reason to believe that managerial efforts do not focus equally on insiders and outsiders. The fact that there are inevitably fewer minority workers means that it is likely to be cheaper to socialize them into the majority in-group than it is to socialize the in-group to respect and value difference. In addition, there is evidence suggesting that minority workers are (presumably out of necessity) more willing to deal with heterogeneity than are white workers.<sup>184</sup> That is to say, although whites, for instance, have not been socialized to accommodate nonwhites, nonwhites have been socialized to accommodate whites. As a result, it has come to be expected that nonwhites, but not whites, will give up their differences.

C. *Summary*

There is theoretical and empirical evidence suggesting that employers are motivated to pursue homogeneity: Put simply, homogeneous

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183. See generally Cynthia L. Estlund, *The Changing Workplace as a Locus of Integration in a Diverse Society*, 2000 COLUM. BUS. L. REV. 331; Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1 (2000) [hereinafter Estlund, *Working Together*].

184. See Lisa Hope Pelled et al., *Demographic Dissimilarity and Workplace Inclusion*, 36 J. MGMT. STUD. 1013 (1999); Anne S. Tsui et al., *Being Different: Relational Demography and Organizational Attachment*, 37 ADMIN. SCI. Q. 549 (1992). The result that racial outsiders are generally better at dealing with the effects of heterogeneity appears to hold for sex as well (males have more negative reactions to gender dissimilarity than females). See Prithviraj Chattopadhyay, *Beyond Direct and Symmetrical Effects: The Influence of Demographic Dissimilarity on Organizational Citizenship Behaviors*, 42 ACAD. MGMT. J. 273, 282-84 (1999); Tsui et al., *supra*, at 570-71.

workplaces facilitate trust, loyalty, and cooperative behavior. The story with respect to heterogeneous work teams is different. First, at an institutional level, heterogeneity is difficult and costly to manage. Second, the most cost-effective way for individual supervisors to manage heterogeneity is to “socialize away” outsider difference. Thus, it is more accurate to characterize this strategy as eliminating, rather than managing, heterogeneity. Third, even assuming that heterogeneity can be effectively managed, the benefits of a heterogeneous workplace are speculative, and they are realized primarily over the long term.

Acknowledging the homogeneity incentive is helpful to CRT in at least two ways. First, it provides critical race theorists with a different perspective on colorblindness. The homogeneity incentive exists because of the transaction costs of heterogeneity.<sup>185</sup> Like colorblindness, then, the homogeneity incentive requires the submersion of racial difference. Second, the existence of the homogeneity incentive supports CRT’s claim that an employer’s preference for racial sameness won’t always be motivated by racial animus. One of the most important ideas in CRT is that racism is not just a function of individual bad actors.<sup>186</sup> From here, CRT advances one of two arguments: (1) that discrimination is unconscious and (2) that discrimination is institutional. The homogeneity incentive provides an additional base from which to theorize about the latter. It demonstrates that institutional discrimination can exist in the absence of racial animosity. Part IV strengthens this claim by broadening the discussion to include an indication of how employers respond to the homogeneity incentive.

#### IV. HOW EMPLOYERS RESPOND TO THE HOMOGENEITY INCENTIVE

Given antidiscrimination laws and social norms disfavoring racial exclusivity, institutions are unlikely to respond to the homogeneity incentive by hiring only insiders. They will hire outsiders as well. The

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185. Scholars have begun to explore the question of whether there is some normative basis upon which it is legitimate to impose these costs on employers. See Estlund, *Working Together*, *supra* note 183 (arguing that the workplace is a site for the development of social capital, and that the law, at least to some extent, should increase outsiders’ access to this social capital); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 648 (2001) (observing that disparate treatment law can be conceptualized as a form of accommodation to the extent that it “requires employers to incur special costs in response to the distinctive needs . . . of particular, identifiable demographic groups of employees, such as individuals with (observable) disabilities, and imposes this requirement in circumstances in which the employer has no intention of treating the group in question differently on the basis of group membership”); Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 850-52 (2001) (suggesting that because of the weight of values of inclusion and integration, it is not necessarily problematic for antidiscrimination law to impose the cost of accommodation on employers).

186. The classic articulation of this idea is Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

claim we advance is that employers will use specific mechanisms to screen outsiders for evidence of racial palatability. These mechanisms select “but for outsiders”—outsiders who, but for their racial phenotype, are very similar to the insiders—and they select against “essential outsiders”—outsiders whose personal characteristics are consistent with the image of the prototypical outsider. This Part argues that these selection mechanisms are produced by employer commitments to homogeneity. They allow employers to determine which outsiders to hire—a determination that focuses on which outsiders can fit within the workplace without unduly compromising its homogeneity. The argument develops in two parts. First, we elaborate on the functions of selection mechanisms and articulate their connection to a related mechanism—socialization. Then we identify four selection mechanisms and illustrate how they operate. We conclude by explicitly engaging CRT to demonstrate the racial costs of each mechanism.

A. *The “Race-Neutral” Response to the Homogeneity Incentive*

1. *The Basic Idea: Selection and Socialization*

Broadly speaking, there are two mechanisms employers can use to respond to the homogeneity incentive: “selection” and “socializing” mechanisms.<sup>187</sup> Selection mechanisms operate at the hiring and the promotion stages. Here, an employer screens individuals for particular characteristics that function as proxies for determining whether a given individual (1) is willing to be homogenized into the workplace culture *and* (2) has the capacity to do so. Socializing mechanisms, in turn, are used to initiate and integrate the individual into the workplace. In other words, socializing mechanisms are the rites of passage that structure a new employee’s experiential travels through the workplace after selection mechanisms are used to bring her into the firm. Constituting this passage are numerous rituals through which the individual is expected to demonstrate her commitment to homogeneity. More particularly, she must effectively prove that the employer made the right selection decision. Due to space constraints, we do not elaborate further on socialization

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187. On the socialization and selection processes that organizations use, see Jennifer A. Chatman, *Matching People and Organizations: Selection and Socialization in Public Accounting Firms*, 36 ADMIN. SCI. Q. 459 (1991); Gary Alan Fine & Lori Holyfield, *Secrecy, Trust, and Dangerous Leisure: Generating Group Cohesion in Voluntary Organizations*, 59 SOC. PSYCHOL. Q. 22 (1996); Roderick M. Kramer, *Trust and Distrust in Organizations: Emerging Perspectives, Enduring Questions*, 50 ANN. REV. PSYCHOL. 569 (1999); Charles O’Reilly, *Corporations, Culture, and Commitment: Motivation and Social Control in Organizations*, 31 CAL. MGMT. REV. 9 (1989); Edgar H. Schein, *Organizational Socialization and the Profession of Management*, 30 SLOAN MGMT. REV. 53 (1988); John F. Tomer, *Organizational Capital and Joining-Up: Linking the Individual to the Organization and to Society*, 51 HUM. REL. 825 (1998); and Bruna Nota, *The Socialization Process at High-Commitment Organizations*, PERSONNEL, Aug. 1988, at 20.

mechanisms.<sup>188</sup> We focus on selection, identifying four selection mechanisms employers can use to screen potential employees for evidence of performative (and not simply phenotypic) homogeneity.

## 2. *The Selection Mechanisms*

Four interrelated selection mechanisms that we draw out of the theory and evidence on homogeneity are: similarity, comfort, differentiation, and respectable exoticism.

### a. *Similarity*

This mechanism is intuitive. The question is whether the individual exhibits personal characteristics suggesting she is similar to employees already at the firm. The more an individual appears to be similar to existing employees, the more likely an employer is to conclude that the individual has the potential to be assimilated. The potential employee's response to standard interview questions can signal her potential for assimilation to employers. Consider, for example, Johnny, who is being considered for a mid-level associate position at an elite corporate law firm. A senior partner has asked Johnny to "tell us a little bit about yourself." Johnny's response includes the following:

*I enjoy tennis and golf, though I confess that both need improvement. I like a good Gore Vidal novel; in fact, I'm in the process of rereading Julian, which, by the way, I highly recommend. I'm not a huge sports fan, but I try to make time to watch a good basketball game—usually with colleagues and friends. I wasn't always fond of theater, but two years ago my wife took me to see The Tin Man, and I've been sold on theater—both high and low—ever since. I enjoy Italian cinema, the old Fellini stuff as well as some of the more contemporary productions. And every so often, I truly enjoy a good B movie—not a B movie masquerading as an A movie, but a B movie that knows it's a B movie. I love going to the museum with my kids. We try to go twice a month. You'd be surprised at the interpretational skills of a six-year old.*

This response provides the employer with signals about Johnny's socialized identity, information that the employer can use to make a determination as to whether Johnny is sufficiently like the firm's existing employees. Johnny plays tennis and golf, the preferred sports of corporate

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188. Another reason we focus on socialization mechanisms is that employers are less likely to be sued for failing to hire than they are for failing to promote.

America. The fact that both need improvement suggests that he is available to play both sports with his colleagues and not likely to be unduly competitive when he does so. In this way, both games can function as sites for socialization. Johnny's response also indicates that he is not an avid sports fan, but that he enjoys a good basketball game. Here, Johnny signals respectable (but not hyper-) masculinity and a willingness to participate in group-based spectator sport rituals. Johnny is married with kids, which reveals his heterosexuality and possibly a certain traditionalism. He appears to be cultured (he reads Gore Vidal, watches Italian cinema, attends the theater, and visits museums), but he is not overly elitist or pompous (he enjoys the occasional B movie and attends low-brow (and just barely high-brow) theater). Finally, the fact that Johnny's wife successfully socialized him into the theater, an experience that he was not predisposed to enjoy, suggests that he will likely not resist the firm's socialization efforts.

Not every institution will select for the foregoing qualities: Similarity selection mechanisms will vary from institution to institution. The point here is twofold: (1) Most employers will have a set of characteristics that they perceive to define their workplace, and (2) without much difficulty, employers can screen for these qualities in interviews.

b. *Comfort*

Related to similarity is comfort. Here, employers want to know whether incumbent employees will be comfortable working with the prospective hire. Again, they can select for comfort (or at least select against discomfort) by considering a prospective employee's response to standard interview questions. Stipulate once more that Johnny is interviewing for a job with an elite corporate law firm. The partner asks Johnny: "Tell us what kind of firm you're looking for." Johnny responds:

*I am looking for a firm doing high-level, sophisticated corporate work. Quite frankly, most of the firms I am interviewing with seem to fall in that category—certainly your firm does. What becomes important for me, then, is firm culture. I am looking for a firm that values and respects difference. I guess I believe that people shouldn't have to lose themselves at work. They should be permitted to be who they are. I was happy to learn that your firm recently adopted a casual Friday policy.*

*I am also looking for a firm within which junior associates have a voice—that is, an opportunity to comment on the institutional governance of the firm, for example, the firm's billing, hiring, and pro bono policies. That sort of participation helps to make junior associates invested in the firm.*

Employers could interpret Johnny's response in a number of ways. But if they are screening for comfort, a given employer may have concerns about whether Johnny "fits." Johnny's view is that individuals should be permitted to be themselves and that a firm should value difference. However, difference can be uncomfortable or discomfoting. To employ what many would consider an extreme example, the firm would likely be uncomfortable with Johnny coming to work as a cross-dresser. If Johnny does cross-dress, the firm would expect him to do so (if at all) outside of the workplace.

Recall that Johnny wants a voice in institutional governance and provides an indication of the kinds of issues he hopes to engage. Johnny's representations here might send a positive signal—specifically, that he wants to become a part of the firm. To the extent the employer is selecting for comfort, however, the employer could interpret Johnny's comments to suggest that he will likely make the firm uncomfortable about its hiring, pro bono, and billing practices, among other institutional governance matters.

c. *Differentiation*

Employers are most likely to utilize the differentiation mechanism when they perceive themselves to be making a "risky hire." Here, prospective employees are in a *category* that is presumed to be incapable of homogenization (or that is disinterested in socialization). Imagine that Johnny is seeking an entry-level job with a law firm. He is a third-year law student at State Law School, which is a third-tier law school.<sup>189</sup> He is on law review and has an A- grade point average. His letters of recommendation are effusive; his writing sample is strong.

The firm has never hired a law student from State Law School, in part because the school is insufficiently elite and because most of the students at State Law School are from working-class backgrounds. The firm therefore assumes that these students are likely to have difficulty fitting into an elite corporate law firm. The firm might not be right for them (read: they might not be right for the firm). Given this concern, whether the employer hires Johnny will be a function of whether Johnny can differentiate himself from the category within which he is situated—that is, State law students. Consider the following exchange between Johnny and a senior partner.

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189. *U.S. News & World Report* explains its use of tiers to rank law schools as follows:

In its ranking of law schools beyond the top 50 institutions, U.S. News lists schools in three tiers. Law schools within each tier should be considered broadly similar in quality . . . . To be ranked, a law school must be accredited and fully approved by the American Bar Association and must draw most of its students from the United States.

U.S. NEWS & WORLD REP., Apr. 15, 2002, at 66.

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*Partner: Good of you to stop by. Come in and have a seat. It seems that I've left your resume elsewhere in the office. You wouldn't happen to have an extra copy, would you?*

*Johnny: Yes, in fact I do.*

*Partner: Oh yes . . . I am beginning to remember this resume. I see that you went to Harvard undergrad and that you rowed crew. How did we do this year? I graduated Harvard in '75.*

*Johnny: We lost to Yale, second year in a row, no pun intended. I suppose if we're going to lose to any school, it ought to be Yale. Their heavyweight eight was selected to represent the country at the World Championships in London.*

*Partner: So you did really well at Harvard—Magna in history, 3.7 GPA, member of the debating team. I suspect that you had a lot of options when you applied to law school.*

*Johnny: I was fortunate to have a few. In addition to State, NYU, Columbia, and Michigan said yes. Harvard and Stanford placed me on a waiting list. Yale said no.*

*Partner: I didn't get into Yale, either. What's more, I've lived to tell the tale. You will, too. But, seriously, you had all these options. I'm curious as to how you made your decision.*

*Johnny: Well, to a considerable extent my decision was a financial one. I couldn't afford to attend any of the other schools. And I didn't want to burden my parents anymore than I had to. Besides, I hoped that if I distinguished myself at State, I would have many of the same opportunities as if I had attended, say, Michigan.*

*Partner: So, Johnny, tell me about how you're thinking about law firms. Big law firms are not for everyone, and as you know, we're a pretty big law firm.*

*Johnny: I had the good fortune of clerking for two summers at Brnton, Stevely & Kellog in Chicago.*

*Partner: Yes, yes, an excellent firm.*

*Johnny: I had a good time there. People got along well. They had interests similar to mine. I got the sense that the attorneys there felt that they were part of a larger community. Your firm describes itself in precisely that way. Most of my classmates run away from big firms. Why go through that haze, some ask?*

*Partner: They consider big firms a haze?*

*Johnny: Some do. Most simply believe that big firms treat individuals as fungible commodities. That's not my assumption but it is the predominant assumption on campus.*

*Partner: What's your view, then? Let me guess: You love big firms?*

*Johnny: Of course. Kidding aside, I'd say that, whether it's a big firm or a small firm, the question is really twofold: whether the individual is committed to becoming a part of a team and whether the firm provides him with the opportunity to play ball.*

The foregoing reflects enough differentiation on Johnny's part to effectively remove him from, or at least situate him on the periphery of, the outsider group (again, students at State Law School). Presumably, few law students at State attended Harvard. Johnny's Harvard education is significant in at least three respects. First, it signifies Johnny's intellectual capacity. Second, the fact that Johnny graduated from Harvard (and rowed crew) suggests that he has the potential for socialization. Finally, Johnny's Harvard education places Johnny and the partner in a community that has significant cultural capital—the community of Harvard alumni. That the partner recognizes this shared community is evident in his question: “How did *we* do this year?”

Nor would many students at State have had the opportunity to attend NYU, Michigan, and Columbia or to clerk at an elite corporate law firm. Here, too, Johnny is different. Finally, Johnny is also different in terms of his strong academic performance and the fact that he does not have a bias against big-firm practice. In short, after completing the interview with Johnny, the partner could tell himself that, although, as a formal matter, Johnny belongs to the group of State Law students, in a substantive sense, he is different. It is this kind of information that the differentiation selection mechanism is designed to ascertain.

#### d. *Respectable Exoticism*

Certain differences do not threaten firm homogeneity. To the extent that a given difference is both exotic (not an awful lot of people are likely to have it) and respectable (the difference is not overdetermined by a negative social meaning), firms can commodify this difference to their advantage. Thus, while hiring too many immigrants might compromise a firm's commitment to homogeneity, hiring an immigrant of royal lineage might not produce that effect. Immigrant difference that is located in the context

of royal identity can be marketed—for example, to employees who might feel special because they have a royal coworker.<sup>190</sup>

Another example of respectable exoticism might be an ex-NBA player in a corporate context. Note, however, that while a firm's homogeneity might tolerate one such individual, it may not be able to tolerate several. The incentive for the employer to utilize the exotic difference selection perhaps is not as strong as the employer's incentive to utilize similarity, comfort, or differentiation. In this respect, it might be more accurate to say that a firm will not select against respectable exoticism than it would be to say that the firm will actively select for that characteristic.<sup>191</sup>

### B. *Explicitly Racializing the Discussion: Combining CRT Insights*

The preceding discussion does not identify the racial effects of selection mechanisms. These effects can be demonstrated by adopting CRT's methodology of racializing the analysis. To borrow from Jerome Culp, we "raise . . . the *race question*"<sup>192</sup> and, in the process, make a number of empirical assumptions about race. While we think the assumptions are plausible, the analysis is necessarily tentative and meant only to be illustrative of the type of analysis that might be performed.

#### 1. *How Likely Is It That Johnny Will Be a Racial Minority?*

How likely is it that "Johnny" will be a racial minority? Consider, for example, the Johnny who is a student at State Law School. Recall that this Johnny attended Harvard College and rowed crew. Rowing crew often means that one attended an elite East Coast prep school, and the number of minorities who fit in this category will be small. Further, although Johnny is at State Law School, he had the option of attending first-tier law schools. Not many students of color at a third-tier law school will have had that

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190. Note that respectable exoticism is consistent with the client-driven focus of firms. Firms quite literally market their associates to clients.

191. In terms of social identity theory, this is referred to as out-group favoritism. Research has shown that people are not necessarily hostile to out-group members and that there can even be out-group favoritism. This type of favoritism occurs when the status hierarchy is perceived to be stable and legitimate. For a discussion of the literature on out-group bias, see, for example, Russell Spears et al., *The (Il)legitimacy of Ingroup Bias: From Social Reality to Social Resistance*, in *THE PSYCHOLOGY OF LEGITIMACY* 332 (John T. Jost & Brenda Major eds., 2001).

192. Jerome McCristal Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 *RUTGERS L. REV.* 965, 967 (1993); cf. Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory out of Coalition*, 43 *STAN. L. REV.* 1183, 1189 (1991) (suggesting that communities engaged in antisubordination work "ask the other question").

opportunity. In short, few minorities will have the kind of cultural capital reflected in Johnny's background.<sup>193</sup>

2. *Assuming That the Johnny at State Law School Is Black, Will He Be "Selected"?*

Our hypothetical assumes that an elite corporate firm would select a person like Johnny, notwithstanding the fact that Johnny does not fit the standard profile (that is, a person who has attended a first-tier law school). But if Johnny is black, this issue is far from clear. Few elite corporate firms hire blacks from schools other than those in the first-tier—more specifically, in the top ten. This may be (at least in part) due to two assumptions. The first is an assumption about affirmative action and intellectual competence—namely, that given race-based admission preferences, “smart blacks” should end up at first-tier schools. The second is an assumption about race and class—namely, that a black person at State Law School is likely to be working class and thus may have difficulty fitting into the law firm. While both assumptions can be rebutted, doing so would require an employer to engage in more intensive (read: more costly) screening of Johnny.

3. *As a General Matter, What Kind of Person of Color Is Johnny Likely To Be?*

Except for respectable exoticism, each of the selection mechanisms described above is designed to ascertain the extent to which a prospective employee is different from firm insiders. The outsiders likely to be the least different from the firm's insiders are those on (or who perform their identity as if they are on) the periphery of their outsider group identity. These “most peripheral outsiders” are likely to have grown up in predominantly white neighborhoods and to have attended elite (and predominantly white) high schools, colleges, and law schools. Employers can use these background characteristics as proxies for whether, and to what extent, outsider candidates will fit comfortably into a predominantly white workplace.<sup>194</sup>

But there is a more direct method the employer can use to determine whether an outsider has the capacity to work within a homogenized workplace. There is evidence suggesting that particular types of outsiders

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193. For a general theory of cultural capital, see PIERRE BOURDIEU, *THE FIELD OF CULTURAL PRODUCTION* (Randal Johnson ed., 1993). For a discussion of the relationship between cultural capital and race, see Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 *HASTINGS L.J.* 1353 (1995).

194. See DAVID A. THOMAS & JOHN J. GABARRO, *BREAKING THROUGH: THE MAKING OF MINORITY EXECUTIVES IN CORPORATE AMERICA* 83-94 (1999).

are, from an employer's perspective, likely to cause fewer problems in the operation of a team dominated by insiders than are other types of outsiders.<sup>195</sup> Racial outsiders who are "extroverted" and effective at "self-monitoring" are more likely to succeed than those who are not.<sup>196</sup> Good self-monitors assess how others perceive them and adjust their behavior accordingly; extroverts project a strong and identifiable self-identity.<sup>197</sup> Presumably, the reason these types of outsiders cause minimal disruption is that they actively engage in "impression management."<sup>198</sup> That is, they are constantly interacting with others, sending signals about themselves, and reacting to the impressions that others have of them.<sup>199</sup> An employer's selection decision likely will take account of how well outsiders manage impressions about their racial identity (that is, at least in part, how well they disprove racial stereotypes).

#### 4. *How Do People of Color Signal Racial Differentiation?*

The point of differentiation strategies is to convey one of three ideas—that one does not identify as an outsider, that one is a different kind of outsider, or that what others think of outsiders is wrong. To convey the first idea, that one does not identify as an outsider, an employee would engage in disidentification or disassociation strategies—strategies that signal that the employee does not really identify with his outsider group. Imagine that, in the context of an interview with an elite firm, a partner says this to Johnny: "I have to tell you, Johnny, racial diversity at our firm is not good. We do our best. But the numbers are what they are—not pretty." That statement offers Johnny an "opportunity" to articulate his relationship to his outsider identity. To disidentify and disassociate, Johnny can say: "I appreciate your telling me this, but I am more interested in learning about how your firm cultivates and trains junior associates." Johnny's response could also reflect even stronger evidence of outsider disidentification and disassociation. He might have said: "I appreciate your telling me this, but I just don't believe in identity politics. Diversity is fine and good, but people

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195. For the most part, the legal literature on organizations has paid little or no attention to the research on the personality "types" likely to succeed in organizations. For a recent exception, see Langevoort, *supra* note 94.

196. See Francis J. Flynn et al., *Getting To Know You: The Influence of Personality on Impressions and Performance of Demographically Different People in Organizations*, 46 ADMIN. SCI. Q. 414 (2001); see also Xin, *supra* note 173.

197. See Flynn et al., *supra* note 196; Xin, *supra* note 173.

198. On impression management and its cousin, influence tactics, as applied to the case of Asian American managers, see Katherine R. Xin, *Asian American Managers: An Impression Gap? An Investigation of Impression Management and Supervisor-Subordinate Relationships*, 33 J. APPLIED BEHAV. SCI. 335 (1997); and Katherine R. Xin, *Different Strokes for Different Folks? Influence Tactics for Asian-American Managers and Caucasian-American Managers*, 7 LEADERSHIP Q. 109 (1996).

199. See sources cited *supra* note 196.

are people.” The point is that the earlier response is enough differentiation to suggest to the employer that Johnny is not a “race man.”<sup>200</sup>

To convey the second idea of differentiation, that one is a different kind of outsider, the outsider could adopt an individualized stereotype negation strategy. Here, the outsider would attempt to convey to the employer that stereotypes about his outsider identity do not apply to him. Imagine that the employer asks Johnny what he does with his spare time and Johnny responds: “Fishing, golfing, and catching up on foreign cinema.” The employer could interpret this response to suggest that Johnny is not an ordinary black man (who, based on stereotypes, would have responded: “Watching basketball, playing basketball, and listening to hip-hop.”). To the extent the employer does not perceive Johnny to be a black male prototype, the employer is less likely to attribute negative stereotypes of black men to Johnny.

Johnny can convey the final idea of differentiation—that others’ assumptions about outsiders are wrong—through generalized stereotype negation. Under this strategy, Johnny attempts to persuade the employer that stereotypes about the employee’s outsider group are inaccurate. This strategy is difficult and risky to perform when one is interviewing for a job. For instance, after articulating what he likes to do in his spare time (fishing, golfing, and catching up on foreign cinema), Johnny could add something like: “Not all black men like basketball. Moreover, most of the stereotypes about blacks are simply inaccurate. Consider, for example, crime . . . .” It is unlikely that, in the context of an interview, Johnny would engage the employer in this way: The statement presupposes that the employer harbors stereotypes about blacks, a presupposition that could engender racial discomfort on the part of the employer (“This black guy thinks I am a racist.”). Further, even if Johnny did make such a statement to the employer, it is unlikely that the employer would be persuaded by it. For generalized stereotype negation to work, there needs to be a level of trust, and sustained interaction, between the outsider and the employer.

Performing each of the foregoing differentiation strategies constitutes a form of work—identity work. Among other problems with this work, it can compromise one’s sense of identity.<sup>201</sup>

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200. Cf. HAZEL V. CARBY, RACE MEN (1998) (developing the concept of a “race man” in relation to specific black political and historical figures).

201. See Carbado & Gulati, *supra* note 8, at 1289-90. Note that not all nonwhites are going to be similarly situated with respect to the extent to which they have to perform their work. The more privileged the outsider, the greater her cultural capital and the less likely she is to experience the performative stereotypes we describe as work.

5. *What Are the Racial Community Costs of Differentiation Strategies?*

One of the problems with the first two differentiation strategies (disidentification/disassociation and individual stereotype negation) is that they are individually oriented. To the extent that an employee feels pressured to perform these strategies, he privileges his individual advancement over that of his group. Differentiation strategies are a response to an institutionalized problem—the employer’s investment in homogeneity. So long as the homogeneity incentive drives employment decisions, there is little room for racial diversification. Society ends up with minimal (or token) outsider economic advancement into the workplace. The incentives for the outsider group, therefore, should be to engage in a collective struggle to change the system to tolerate (if not welcome) greater expression and representation of outsider identities. The first two differentiation strategies undermine that goal. They encourage outsiders to disidentify with, and disassociate from, the collective interests of the outsider group. In this sense, the problem with homogeneity is not simply that it drives employers to hire only certain kinds of outsiders, but also that the outsiders whom the employer hires are not likely to lift as they climb.<sup>202</sup>

To summarize, the employer’s pursuit of a homogenous workforce is likely to produce the following effects (subject to the assumptions made):

- Given the negative presumption that applies to the ability and willingness of outsiders to satisfy the homogeneity requirement (and the positive presumptions that apply to whites), the quantum of cultural capital (or the price of entry) that employers require of outsiders is likely to be higher than that for their white counterparts.

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202. The question of what types of minorities and what type of strategies (individual mobility versus collective advancement or some combination) the current employment structure privileges strikes us as one of the most interesting and important areas of research for the immediate future. Initial research findings suggest that there is reason to be concerned because the types of outsiders who are permitted to advance are those who are least likely to help those left behind (this makes sense if the criteria for advancement are that the outsider demonstrate distance from the outsider group and affinity for the insider group). In economic terms, tokenism can easily be an equilibrium solution as opposed to a stage in the move towards equality. For some of the papers in this area, see Naomi Ellemers, *Individual Upward Mobility and the Perceived Legitimacy of Intergroup Relations*, in *THE PSYCHOLOGY OF LEGITIMACY*, *supra* note 191, at 205; Naomi Ellemers et al., *Sticking Together or Falling Apart: In-Group Identification as a Psychological Determinant of Group Commitment Versus Individual Mobility*, 72 *J. PERS. & SOC. PSYCHOL.* 617 (1997); Spears et al., *supra* note 191, at 332; Stephen C. Wright, *Restricted Intergroup Boundaries: Tokenism, Ambiguity, and the Tolerance of Injustice*, in *THE PSYCHOLOGY OF LEGITIMACY*, *supra* note 191, at 223; Stephen C. Wright & Donald M. Taylor, *Responding to Tokenism: Individual Action in the Face of Collective Injustice*, 28 *EUR. J. SOC. PSYCHOL.* 647 (1998); and Stephen C. Wright & Donald M. Taylor, *Success Under Tokenism: Co-option of the Newcomer and the Prevention of Collective Protest*, 38 *BRIT. J. SOC. PSYCHOL.* 369 (1999).

- Within the outsider community, only the elite are likely to possess the quantum of cultural capital necessary to gain entry. Employers seeking to satisfy the diversity constraint will affirmatively pursue this small subset of minorities.
- The strategies that an individual outsider employee is likely to pursue, such as differentiation, may hurt the collective cause of her minority group and compromise her sense of self. The collective cause may be better served by a struggle to reduce and remove barriers, as opposed to a competition among outsiders for a few slots (and which requires outsider homogenization).

Given the foregoing racial implications of selection mechanisms, the question arises as to whether there should be legal intervention. If the answer is yes, still another question is: What form should that legal intervention take? We explore these questions in Part V.

## V. SELECTING THE RIGHT LAW TO REGULATE SELECTION MECHANISMS

### A. *Introduction*

This Part explores whether law can restrict institutions from using the selection mechanisms described above. As a formal doctrinal matter, the answer is unclear. Elsewhere, we have hinted that the answer is probably no, but there are reasons to answer the question in the affirmative as well.<sup>203</sup> This Part articulates two approaches the law could take to negotiate concerns about homogeneity: an assimilationist approach and a difference approach. We employ two hypothetical cases to give content to both approaches. First, we discuss the nature of these cases. As you will see, they present different concerns about the selection mechanisms described earlier. Next, we discuss how each case would be resolved under the competing models of discrimination. Finally, we question which model makes the most sense. Here, we take up not only problems of doctrinal manageability (that is, whether the problems we attribute to selection mechanisms are too complicated for either or both models to manage) but also problems of normativity (that is, assuming that both models can respond to the complexities we describe, which response—the assimilationist response or the difference response—is the most appealing). Central to this latter issue is an engagement of the racial costs of choosing one model over the other.

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203. Carbado & Gulati, *supra* note 77.

*B. Two Cases of Discrimination*

Whether law should be employed to regulate employers' use of selection mechanisms to make intraracial distinctions is likely to be a function of one's normative views about (1) the value of assimilation and (2) the importance of (short-term) workplace efficiency. Under an "assimilationist" approach, employers would be permitted to make intraracial distinctions. Under a "difference" approach, they would not. Further, the more weight one gives to the employer's right to maximize workplace efficiency, the less concerned one will be about selection mechanisms. The hypothetical below helps demonstrate these points.

The Employment Law Center, a progressive employment litigation group in San Francisco, is looking for a test case to illustrate the problems of discrimination in large corporate law firms. The Center's attorneys have narrowed their choice of cases to two. Both involve senior black female associates who work at different elite San Francisco firms. While both associates have high performance ratings, neither made partner. Both allege race discrimination, and the attorneys at the Center are divided on the question of which case to pursue. Because they have had a spot of bad luck with their most recent cases, they are looking for something close to a "smoking gun."

Case one involves Lauren. Lauren is a graduate of Yale College and Harvard Law School. Her parents are academics (one teaches at Tufts and the other at MIT), and she grew up in Concord, Massachusetts. At the firm, she was an active member of the recruiting committee and the training committee, and she could be counted on when emergency projects arose. All in all, Lauren was well-liked at the firm. Her senior colleagues considered her the consummate team player. She had a reputation for professional appearance; both clients and coworkers often admired her understated but elegant Armani suits. Finally, Lauren and her husband Joe, an investment banker at Morgan Stanley, were frequent attendees at the firm's social functions. Most associates and many partners at the firm had assumed that Lauren would make partner. Indeed, five of the firm's partners sent her e-mail messages expressing disappointment with the firm's decision.

Case two involves Taneka. Taneka's parents are immigrants from Trinidad and Tobago. They moved to Queens, New York, when Taneka was twelve. Taneka grew up in Queens, where she spent her weekends helping her parents at their Roti restaurant. After completing her B.A. summa cum laude in Ethnic Studies at Hunter College, Taneka attended Seton Hall Law School. There, she was an editor of the law review and a member of the moot court board. She graduated Seton Hall near the top of her class, and she was the only member of her graduating class to receive

an offer at the firm. With respect to firm activities, Taneka was involved with the firm's diversity committee (on which she was vociferous in urging the firm to hire more women, minorities, and students from lower-ranked schools such as her alma mater). In terms of behavior, Taneka was known for her boisterous personality and exuberance. Her slight Caribbean accent was often commented upon as "cute," and her clothes were considered "funky." Taneka insisted on wearing her hair in braids, despite comments from some senior women that this might be perceived as being unprofessional. She attended few of the firm's social functions, but the partners often commented on how well she got along with the (predominantly colored) support staff.

The attorneys at the Center are divided on which of the two cases to pursue.

### 1. *The Attorneys Who Support Lauren's Case*

The attorneys who support Lauren's case (the Pro-Lauren Attorneys) argue that it constitutes a "perfect example of discrimination." They claim that, but for her race, Lauren was just like the white associates the firm promoted. Indeed, based on her annual evaluations, she outperformed them. Moreover, she had attended the right schools; spoke with the right accent; got along with everyone, including the right partners; dressed in the right manner; and even laughed at the right jokes. The Pro-Lauren Attorneys argue that, given the foregoing, the only explanation for the negative vote on her candidacy is race: A significant number of the firm's partners were simply unwilling to vote for a black woman—any black woman, even a "really likeable" and "really qualified" black woman like Lauren.<sup>204</sup>

The Pro-Lauren Attorneys argue, moreover, that there are difficulties with Taneka's case that derive from the fact that law firm cultures promote assimilation of all, and not just nonwhite, attorneys. That is, firms expect *all* of their associates to fit in, not just the nonwhite ones. Firms harbor this expectation, the Pro-Lauren attorneys argue, to promote efficiency and avoid costs; people with similar cultural/self-presentation practices work better as a group and are more productive than people with dissimilar cultural/self-presentational practices. From this perspective, it makes sense for firms to establish and promote homogeneous workplace cultures.

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204. As this Review was in the editorial stages, we came across a report of a racial discrimination case filed by Patricia Russell Brown, a Harvard-educated lawyer, against the law firm Dorsey & Whitney. The report in the *Washington Post* quoted Brown's lawyer as saying: "My client is a double-Ivy League graduate, a JAG [Judge Advocate General] lawyer . . . [and] a real-life 'Cosby Show' lawyer, married to a medical doctor. If they treat her this way, imagine how they treat other people." James V. Grimaldi, *Well-Credentialed Lawyer Accuses Minneapolis Firm of Racial Discrimination*, WASH. POST, Jan. 13, 2003, at E10 (first alteration in original).

The Pro-Lauren Attorneys reject the claim that cultural homogeneity is a code term for racism. They note the myriad race-neutral ways in which firms typically achieve homogeneity: by requiring their associates—white and nonwhite—to attend firm social events (to encourage collegiality and the building of team spirit) and to dress and comport themselves in particular ways (to encourage professionalism), among other things. They argue that a legal decisionmaker will likely conclude that that is precisely what Taneka’s firm required of her. Framed this way, Taneka’s case is not about discrimination; it is about her refusal to comply with neutral workplace rules that are intended to achieve efficiency, promote professionalism, and encourage community building. Stated differently, the Pro-Lauren Attorneys’ argument is that Taneka’s case presents a behavioral problem, not a racial one: Taneka was not a team player. She *chose* to exist on the outside of the firm’s culture. She *chose* not to fit in. But this argument about “fit” and “cultural homogeneity” cannot be advanced against Lauren. Lauren fit in well, and she both complied with and helped promote the cultural norms of the firm. As a result, the only possible explanation for the firm’s decision to deny Lauren a promotion is her skin color. Accordingly, they urge their colleagues to support Lauren’s case over Taneka’s.

## 2. *The Attorneys Who Support Taneka’s Case*

The attorneys pushing Taneka’s case (the Pro-Taneka Attorneys) argue that Lauren’s case is far from perfect. They agree that Lauren fit in well at the firm. She was one of the boys—that is, that she was practically an insider. The Pro-Taneka Attorneys argue, however, that it is precisely Lauren’s insider status that makes her case a difficult one: Neither a jury nor a judge is going (to want) to believe that Lauren experienced discrimination. To do so, they would have to conclude that, almost fifty years after *Brown v. Board of Education*, an elite San Francisco law firm is engaging in the crudest form of discrimination—one that makes no distinctions amongst black people, that is totalizing, and that is akin to Jim Crow. It conflates “good” (nonstereotypical) and “bad” (stereotypical) blacks, discriminating against both. In this sense, even assimilationist blacks—blacks who work to shed (the negative social meanings of) their racial identities to fit in within particular institutional cultures—are vulnerable.

Rhetorically, the Pro-Taneka Attorneys ask: Why would a major metropolitan law firm practice this form of discrimination? Given the legal community’s concern about the lack of racial and gender diversity at law firms—and especially at the partnership ranks—wasn’t it in the firm’s interest to promote Lauren? The Pro-Taneka Attorneys argue that it will be

difficult to convince a legal decisionmaker that Lauren's case reflects discrimination. An easier (and more palatable) story for a judge or jury to accept is one based on the idea that Lauren just "fell through the cracks."<sup>205</sup> After all, this happens all the time—and to people with strong performance records, and to white people as well. The Pro-Taneka Attorneys buttress this argument with the suggestion that a firm would have to be "racially schizophrenic" to embrace Lauren—and to integrate her into the firm—without regard to, or notwithstanding her race, and subsequently deny her partnership because of it.

Taneka, on the other hand, was not one of the boys. She did not fit in. In many ways, Taneka was an outsider. Through her manner, sartorial practices, accent, hairstyle, and name,<sup>206</sup> Taneka reminded the firm that she was black—and not just descriptively (i.e., in terms of phenotype) but normatively (i.e., in terms of racial stereotypes). The Pro-Taneka Attorneys hypothesize that the firm denied Taneka promotion because they perceived her to be "flaunting" her racial identity—that is, to be "out of the closet" about her nonassimilationist racial identity. In short, Taneka's behavior (even more than her phenotype) signified blackness.

The Pro-Taneka Attorneys are optimistic that a legal decisionmaker could be persuaded that, given pervasive norms of nondiscrimination and colorblindness, it is unlikely that institutions will discriminate based solely on racial phenotype. Today, to the extent that an institution wants to discriminate, it will pay attention to the salience of its employees' racial identity and not simply to the phenotypic "fact" of her race. Such an employer will make judgments about just *how black*, in a social or stereotypical sense, a phenotypically black employee appears to be.

The Pro-Taneka Attorneys argue that, if an employee's race is made salient by the choices the employee makes about (1) how to self-present within an institution or (2) whether to comply with the cultural norms of that institution, employers may conclude that the employee is overly committed to her race. According to these attorneys, an employer's perception that an employee strongly identifies with being black activates negative racial stereotypes about what it means to be black. Their claim is that this happened to Taneka: The firm perceived her to be "really" black, that perception activated negative stereotypes and made the partners uncomfortable, the firm attributed those stereotypes to Taneka, and this attribution trumped Taneka's job performance.

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205. For an analysis of one such story, see David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924 (1999). See also Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 879-87 (2002).

206. See Alan B. Krueger, *Sticks and Stones Can Break Bones, but the Wrong Name Can Make a Job Hard To Find*, N.Y. TIMES, Dec. 12, 2002, at C2 (reporting results of a study purporting to show that "[a]pplicants with white-sounding names were 50 percent more likely to be called for interviews than were those with black-sounding names").

C. *The Assimilationist vs. the Difference Model*

The debate between the Pro-Lauren and Pro-Taneka Attorneys is a debate about assimilation and homogeneity, on the one hand, and difference and heterogeneity, on the other hand. The Assimilationist Model and the Difference Model conceptualize race differently and offer different answers to the question of whether employers should be permitted to use selection mechanisms to make intraracial distinctions.

1. *The Assimilationist Model*

The Assimilationist Model posits race as phenotype. Under this view, a person's race is no more significant than the color of that person's eyes. This understanding purports to be a descriptive account of what race is, but instead is a normative commitment about what race should be.

The prototypical example of discrimination under the Assimilationist Model is one in which (1) two employees—one white and one nonwhite—are similarly situated not only in terms of job performance but also in terms of institutional identity (i.e., how well they fit in or are assimilated into the workplace culture) and (2) the institution prefers the white employee. In such a scenario, a judge sees that, but for racial phenotype, the two employees are alike. That observation then becomes the basis for inferring that phenotypic difference caused the institution to prefer the white employee. The discrimination problem arises because, under the Assimilationist Model, that difference should not matter. People should not be judged by the color of their skin.

a. *Lauren's Case*

Lauren's case fits the Assimilationist Model. With respect to the schools she attended, her accent, her hair, her clothes, her social practices, and the committees on which she participated, Lauren was "just like" her white colleagues. Lauren did what she was supposed to do. She fit in. This notion of fit requires a nonwhite employee to send signals to the employer about the kind of nonwhite identity she will occupy as an employee. A judge examining Lauren's case under the Assimilationist Model would conclude that Lauren provided that signal. She demonstrated that she was not a stereotypical black person. Through her workplace behavior and interactions, she established that she was unconventionally, and thus only phenotypically, black. Other than the color of her skin, there was no other way in which she was (based on prototypes of blackness) black. Since, under the Assimilationist Model, phenotypic blackness should be irrelevant to institutional decisionmaking, it was wrong for Lauren's law firm to

discriminate against her. In effect, the Assimilationist Model rewards employees because of the distance they create between themselves and the black prototype.

b. *Taneka's Case*

Taneka's case does not fit the Assimilationist Model. Unlike with Lauren, it cannot be said that, but for phenotype, she was just like her white colleagues. Taneka was different, and her workplace behavior manifested this difference. Employing the Assimilationist Model, a judge might observe that, controlling for Taneka's race (that is, her phenotype), there was a lot of difference between Taneka and her white colleagues, that they were not similarly situated, and that Taneka did not demonstrate a willingness to fit in. She never even tried. The judge could conclude that, to the extent that fit is a race-neutral criterion for promotion, it is a legitimate basis for an employment decision.

2. *The Difference Model*

The Difference Model centers on a performative conception of race, a conception that posits that race is signified not only through phenotype but also through performance—that is, behavior and self-presentation. Under this conception, a person's intelligibility as a racial subject turns both on how she is racially marked (e.g., whether she is phenotypically white or black) and on how she performs or presents that racially marked identity (e.g., whether she wears a dashiki or a conventional suit to work). Both Lauren's and Taneka's cases can be challenged under this model, though for different reasons.

a. *Lauren's Case*

The Difference Model's argument that Lauren's case reflects discrimination is not that, but for Lauren's phenotype, she was similarly situated with respect to her white colleagues. Instead, the discrimination problem arises because the employer's commitment to homogeneity creates an incentive for Lauren to demonstrate, among other things, racial palatability. With respect to the promotion, Lauren has to demonstrate that her blackness will not threaten or undermine the homogeneity of the partnership, which presumably would be even more homogenized than the workplace more broadly.<sup>207</sup> Lauren has to demonstrate that she will be

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207. See David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996).

different only in a phenotypic sense. If she fails to do so, she will not be hired or promoted.

Even if Lauren is promoted, there is still, under the Difference Model, a discrimination problem. First, nonwhite racial identity performances engaged in to demonstrate racial palatability are hard work.<sup>208</sup> Second, this work is directly linked to impermissible stereotyping; to the extent that nonwhites deploy identity performances, they do so to negate existing assumptions about their race. Third, because the decision to promote Lauren is based on evidence of racial palatability, it is a race-based decision. Thus, under the Difference Model, the discrimination problem does not disappear with Lauren's promotion, as it would under the Assimilationist Model. There, the discrimination problem arises only if Lauren is not rewarded (i.e., promoted) for demonstrating her racial capacity to fit in. The Difference Model is also concerned with what employees have to do to, and with, their identities to be rewarded with promotion.

b. *Taneka's Case*

Taneka's case illustrates how the phenotypic conception of race that drives the Assimilationist Model is different from a performative conception of race that drives the Difference Model. As previously discussed, one way for an employee to demonstrate discrimination under the Difference Model would be to establish that, unlike her white colleagues, she felt pressured to demonstrate racial palatability. This problem is general and systemic: the employer's use of selection mechanisms that place an additional burden on nonwhites to demonstrate that their nonwhite identity will not undermine workplace homogeneity.

Another way an employee might demonstrate discrimination under the Difference Model resembles a standard disparate treatment claim. Here, the employee would have to establish: (1) nonwhite employee *A* is preferred over a nonwhite employee *B*, and (2) the basis for that preference is that nonwhite employee *A* is assimilationist (or unconventionally/unstereotypically black—not a black prototype) and nonwhite employee *B* is nonassimilationist (or conventionally/stereotypically black—a black prototype). Under this scenario, a judge's finding of discrimination could be based on the theory that by drawing a dichotomy between assimilationist and nonassimilationist blacks, the employer is regulating the terms under which black people may express their racial identity at work.

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208. See generally Carbado & Gulati, *supra* note 8, at 1263-76 (describing the types of costs associated with identity work, including opportunity costs, costs to dignity, and increased risk levels).

### 3. *Implications: Choosing a Model*

The Assimilationist Model dominates antidiscrimination law. We have not located any race discrimination cases that use the Difference Model. Our construction of this model is based primarily on a set of recent Title VII cases at the intersection of gender and sexual orientation discrimination.<sup>209</sup> For the most part, these cases (which we refer to collectively as the “gender performance cases”) involve either transsexuals or gay men. In each of the cases, the court’s finding of discrimination is based on the idea that it is impermissible for the employer to discriminate against male employees because the employer perceives them to be unsterotypical or unconventional men. The normative question is whether the approach reflected in these cases should be extended to racial discrimination claims. As a point of departure for thinking about this question, we identify the costs of both models.

#### a. *The Assimilationist Model: Choosing Lauren’s Case*

- *Racial Skimming.* To choose Lauren’s case is to construct a discrimination theory around the most-privileged members of outsider groups—those with the most economic and cultural capital. It is to engage in racial skimming. If we assume that antidiscrimination is meant to be progressive, protecting those most in need, this outcome is anomalous. The anomaly becomes more apparent if we think of law as correcting for a particular kind of market failure—racial preferences, which derive from what we have been calling the homogeneity incentive. Given this incentive, firms that feel pressured to engage in diversity hiring are likely to be interested in people like Lauren, not Taneka. This is not to say that Lauren is invulnerable to discrimination. The point instead is that her vulnerability, in a market structured by the norm of homogeneity, is decidedly less than Taneka’s. If the point of antidiscrimination law is to counter the market pressures for employers to discriminate, this argues against establishing an antidiscrimination regime in which people like Lauren function as prototypical plaintiffs.

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209. See Carbado & Gulati, *supra* note 77, at 727 (discussing sexual orientation/gender cases that apply the difference model); see also Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN’S L.J. 68, 87-88 (2002). On the predominance of the assimilationist model, see generally Carbado & Gulati, *supra* note 8; and Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption*, 108 YALE L.J. 485 (1998).

- *Racial Cloning.* There are normative reasons why one might not want the Assimilationist Model. The model creates incentives for people to assimilate away “difference.” It requires outsiders to be, like Lauren, homogenized. Understood in this way, the Assimilationist Model is a technology for cloning racially palatable outsiders.<sup>210</sup>
- *Racial Labor.* The Assimilationist Model requires nonwhites to engage in a form of racial labor. It requires outsiders to work their identities to remove performative evidence of racial difference. Only phenotypic difference is allowed. In other words, nonwhites are not expected to change their skin color, only the racial content of their character.<sup>211</sup> The labor of identity work is ongoing and becomes more burdensome as outsiders move up the professional ladder to more homogenized environments.

b. *The Costs of Difference: Choosing Taneka’s Case*

On the other side, choosing the Difference Model is not cost-free.

- *Inefficiencies.* Inefficiencies result from restricting managers from pursuing homogeneity. The literature described in Part III suggests that these inefficiencies are real, even if they are only over the short-run.<sup>212</sup>
- *Racial Determination Problems.* Problems of racial determinacy also caution against the Difference Model. Race as phenotype is easy for judges and juries to understand. Few people, for example, would quarrel with the idea that Michael Jordan is black. But what does it mean to say that a person has a salient black racial identity? How would we know? Is Michael Jordan “really” black, “really, really” black, or “not really” black at all? Do we want judges making these kinds of determinations? A performative conception of race presents racial determination problems that are not presented by a phenotypic conception of race.<sup>213</sup>

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210. See generally Essed & Goldberg, *supra* note 28.

211. Cf. SHELBY STEELE, THE CONTENT OF OUR CHARACTER (1990).

212. One can argue that it is the homogeneity incentive that reduces efficiency because it cuts out real talent, skill, and experience.

213. Of course, judges are already in the business of determining race. Our point is that these determinations are more complicated to the extent that they involve performative evidence. See Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century*

- *Race as Culture*. Does a performative conception of race misconceive race as culture? Does it seek “to defend certain practices and expressions because they are subjectively important to an individual’s or a group’s sense of self?”<sup>214</sup> And doesn’t this defense obscure the profound and consequential ways in which race operates structurally?
- *Authenticity*. There is a danger that a performative understanding of race will entrench particular expressions of identity.<sup>215</sup> These expressions can subsequently become “authentic” with the regulatory capacity to inauthenticate or “chill” other expressions.

The foregoing suggests that the choice between the Assimilationist and Difference Models is difficult. But do we need to choose? Discrimination is not a monolithic experience and race is not a monolithic identity. In this sense, both Lauren and Taneka should have their day in court. Both can be harmed by selection mechanisms that screen for homogeneity. Both carry the burden (including stereotypes) of blackness. Their right to bring a discrimination claim should not necessarily turn on how they choose to negotiate that burden.

#### VI. CONCLUSION: SOME THOUGHTS ON THE PRODUCTION AND CONSUMPTION OF PROTOTYPES

Our story is about the production and consumption of racial prototypes. The regulatory thrust of homogeneity creates both a demand for, and a supply of, specific racial prototypes—outsiders who can fit within predominantly white workplace cultures without “disturb[ing] the equilibrium of familiarity and sameness.”<sup>216</sup> This Review began by suggesting that part of the reason this dynamic is obscured in CRT is because CRT has not paid attention to the interpersonal contexts—the

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*South*, 108 YALE L.J. 109 (1998); see also Carbado & Gulati, *supra* note 8; Tehranian, *supra* note 95.

214. Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803, 1807 (2000). For a useful critique of Ford’s essay, see Leti Volpp, *Righting Wrongs*, 47 UCLA L. REV. 1815 (2000). For a more general discussion of the complex interplay between race and culture, see Leti Volpp, *Talking “Culture”: Gender, Race, Nation and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573 (1996).

215. Ford, *supra* note 214, at 1805 (suggesting that “antiracism’s goal must be to dismantle the practices and institutions that continue to produce and to reinforce racial subordination—not to safeguard (and thereby fix) individuals or groups in their ascribed characteristics”).

216. Essed & Goldberg, *supra* note 28, at 1072. Essed and Goldberg raise the question of whether conformity is a process by which group members demand from each other that no one disturb the equilibrium of familiarity and sameness.

micromarkets (e.g., employer/employee identity transactions)—in which race is produced. This Conclusion returns to the macro to make two points. The first links the micro discussion of prototype production in the workplace to the broader societal context; the second suggests some other areas of interest where the CRT/L&E approach might shed new light.

First, the problem we have described is part of a larger problem that Philomena Essed and David Goldberg refer to as “cloning cultures,” which they define as the “broad social(ly manifest) dispositions to reproduce sameness.”<sup>217</sup> They argue that “a critical account of systems of preference for sameness—from kinship to nation, from aesthetics to production and consuming—can be revealed as contributing to the reproduction of systems of social distinction and privilege.”<sup>218</sup> Our aim has been to provide a concrete indication of how such a system manifests itself in the context of the workplace.

But Essed and Golberg’s paper suggests that there is a more problematic implication of our project: the social manufacturing of racial palatability—one body at a time. Put differently, our argument suggests that racial difference is being commodified and cloned in the workplace. Articulated thus, the homogeneity incentive operates as the driving force for a kind of cloning.<sup>219</sup> Outsider performances of racial palatability are the raw materials from which homogenized outsider identities are manufactured.

Yet there is an important difference between the cloning problem we identify and that upon which Essed and Goldberg focus. For the most part, Essed and Goldberg are concerned with “problematiz[ing] the systemic reproduction of white, masculine homogeneity in high status positions,”<sup>220</sup> a reproduction that causes “exclusion along racial, ethnic, gender, sexual, class and other structural demarcations.”<sup>221</sup> Their analysis does not account for the “diversity constraint”—that is, the need for institutions (and, presumably, the nation) to maintain some degree of difference. With the diversity constraint in mind, the cloning issue is no longer just about reproducing insiders. One has to think about the production and cloning of outsiders as well. Our Review focuses on the incentive for employers to create a market for, and to facilitate the cloning of, racially palatable outsiders. For institutional legitimacy and antidiscrimination reasons, the cloning market cannot produce, or transact in, only white clones.

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217. *Id.*

218. *Id.* at 1071.

219. *Id.* at 1074 (“Fitting the group norm by displaying prototypical behaviour is at once a way of being accepted into a certain race, class, or community and a mechanism of cloning through culture.”).

220. *Id.* at 1068.

221. *Id.* at 1069.

Nor would employers want to do so. One reason why racial palatability is valued is that the racial bodies that produce it remain intelligible as nonwhite. To the extent that racial palatability takes the form of passing, it engenders white racial anxieties. To be valuable, the outsider prototype must be recognizable as a “copy.” It must not pass for, but only approximate, the “real.”<sup>222</sup>

The second macro implication of our thesis relates to the general critique of prototypes. Here, we suggest that analysis of the microdynamics of workplace racial discrimination might be extended to analyze other problems. In this context, one can think of a prototype as a mental shortcut to categorize unfamiliar situations.<sup>223</sup> We all have images in our minds as to prototypical rape victims, sexual harassers, welfare recipients, and so on.<sup>224</sup> To the extent that actors in the legal system use these prototypes to decide cases—for example, prosecutors or juries deciding whether a rape occurred by looking to see whether the victim fit the prototypical image of a rape victim, as opposed to asking whether the facts satisfied the elements of the crime—this can cause systemic errors.<sup>225</sup>

Consider, for example, Martha Chamallas’s critique of the rape prototype. Chamallas explains that, with rape, the prototype is stranger rape, where the perpetrator is often a black male and the victim a white woman.<sup>226</sup> Most rapes, however, occur between acquaintances, between

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222. Judith Butler makes a similar point about homo- and heterosexuality. Judith Butler, *Imitation and Gender Insubordination*, in *INSIDE-OUT: LESBIAN THEORIES, GAY THEORIES* 13 (Diana Fuss ed., 1991). Essed and Goldberg’s notion of productivism includes the possibility that consumers of prototypes will not often be able to differentiate the real from the imitation. Essed & Goldberg, *supra* note 28, at 1075. In the racial market we are describing, this discernment is crucial.

223. See GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987); Stuart P. Green, *Prototype Theory and the Classification of Offenses in a Revised Model Penal Code: A General Approach to the Special Part*, 4 *BUFF. CRIM. L. REV.* 301 (2000); Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 *J. PERS. & SOC. PSYCHOL.* 857 (1991).

224. See, e.g., CAROLINE A. FORELL & DONNA M. MATTHEWS, *A LAW OF HER OWN* 125-35 (2000); Chamallas, *supra* note 26; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 *MICH. L. REV.* 1 (1991); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683, 1686 (1998); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 *S. CAL. REV. L. & WOMEN’S STUD.* 387, 416 (1996); Lu-in Wang, *The Complexities of “Hate,”* 60 *OHIO ST. L.J.* 799, 804 (1999).

225. In social cognition theory, this tendency to attribute behavior to character and not situations is referred to as the “fundamental attribution error.” See SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 67-72 (2d ed. 1991); Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 357, 369-70 (Daniel T. Gilbert et al. eds., 4th ed. 1998). Critical theorists such as Duncan Kennedy often discuss prototypes as “narratives” or “scripts,” where a code in the script explains why the actor behaved in a particular manner, and the complexity of the actor’s motivations is eclipsed by the simplified cultural code. See Chamallas, *supra* note 26, at 781-82; see also DUNCAN KENNEDY, *SEXY DRESSING ETC.* 133 (1993).

226. For this example, we draw on Chamallas, *supra* note 26, at 783-86, and the materials cited therein.

people of the same race and class, and on dates.<sup>227</sup> Reasoning from prototypes, therefore, presents the danger that most rapes will go unpunished because they do not fit the prototype.<sup>228</sup> Further, rapes by black men of white women will be disproportionately punished, whereas rapes by black men and white men of black women will receive less punishment.<sup>229</sup>

Leti Volpp makes a similar point about domestic abuse—more particularly, battered woman syndrome. She argues that this syndrome is based on a “‘model’ battered woman,” in other words, a prototype: a woman who is “passive and helpless.”<sup>230</sup> Volpp demonstrates the extent to which judges refuse to give a battered women’s instruction in cases in which they perceive that the domestic abuse victim is not a model battered woman. She concludes that because “battered women’s syndrome exemplifies a stereotype of passive married middle-class white women, it may be especially difficult for battered women of color and gay men and lesbians to fit the model.”<sup>231</sup>

An L&E-oriented approach to prototypes could elaborate upon Chamallas’s and Volpp’s critique by asking two questions. (1) How do prototypes incentivize behavior? And (2) what are the costs of responding to the incentives that prototypes create? If the protection of rape laws accrues only when women behave in a particular manner (let us say, “modestly”), that means that women who want the protection of the rape laws have an incentive to present themselves in ways that fit the protected prototype. In this sense, the price of receiving legal protection is the cost of acting in a manner that fits the prototype. These costs may be higher for some than others. For example, if modesty is defined in terms of white upper-class behavior, it may be costly and difficult (even if not wholly impossible) for minority women to perform their identity in a manner that fits that prototype.<sup>232</sup> Further, quite apart from shaping how women perform their identities in the real world of social interactions, the existence of prototypes shapes how women present themselves at trials. To access battered woman’s syndrome, for example, there is an incentive for women to highlight their passivity and lack of agency. On the other side, from the usually ignored perpetrator’s perspective, there is an incentive to attack

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227. *Id.* at 783 n.132.

228. *Id.* at 783-84.

229. *Id.* at 784-85 & nn.135-36.

230. Leti Volpp, *(Mis)identifying Culture: Asian Women and the “Cultural Defense,”* 17 HARV. WOMEN’S L.J. 57, 92 (1994). Importantly, Volpp’s concern is not just with battered woman syndrome, but with prototypes created for cultural defenses as well.

231. *Id.* at 92-93.

232. See ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* 175 (1981) (“One of racism’s salient historical features has always been the assumption that white men—especially those who wield economic power—possess an incontestable right of access to Black women’s bodies.”).

women who do not fit the prototype. This is part of what explains black women's historical vulnerability to rape.

Chamallas's and Volpp's papers are part of a larger critical literature that demonstrates the problems of prototypes. What remains to be considered is the regulatory and productive effects these legal prototypes have on the identities in question. For whether the prototype in question implicates sexual harassment, hate speech, rape, or welfare law, identity is being cloned. Heretofore, critical race theorists have not seriously engaged this productive capacity of law.

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This project was a product of our conversations with the late David Charny—conversations that began as early as our first year in law school. Without David's support, encouragement, and inspiration, we probably would not have become legal academics. His passion for ideas, particularly those ideas that were related to social change, was infectious. And his generosity and willingness to talk to students was unbounded.

This project was little more than a glint in David's eye when he died. We do not presume that it lives up to his standards. Nor do we know whether it lives up to what he would have expected of us. What we do know is that he wanted us to perform this collaboration and that his spirit is reflected in it. We confess though, that we did not always believe that this project was possible, or even worth trying. We argued as much to David. We had likely internalized the caricatures with which we began our Review. Yet, here we are—one sentence from the end and grateful, once again to David, that he sent us on this journey. We will continue to miss David, and his memory will continue to shape us.