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Derivative Racial Discrimination

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DERIVATIVE RACIAL DISCRIMINATION

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This Article introduces the concept of derivative racial discrimination, a process of institutional discrimination in which certain social and cultural dynamics impede the careers of minority workers in predominantly white firms even in the absence of racial biases and stereotypes. Derivative racial discrimination is a manifestation of cultural homophily, the universal tendency of people to gravitate toward others with similar cultural interests and backgrounds. Although not intrinsically racial, cultural homophily disadvantages minority workers in predominantly white work settings due to various race-related social and cultural differences. Seemingly inconsequential in isolation, these differences produce racial disparities in the accrual of valuable workplace social capital, thereby denying many minority workers equal access to career-enhancing opportunities, support, and protection. After demonstrating the adverse consequences of derivative racial discrimination through empirical evidence from interviews of black workers who have worked in predominantly white firms, this Article considers whether and how derivative racial discrimination might be addressed within the contours of Title VII of the 1964 Civil Rights Act. It concludes by explaining that although derivative racial discrimination violates the core normative commitments of employment discrimination law, it can only be addressed—and even then, only partially—through ambitious reformulations of Title VII.

INTRODUCTION 336
I. CULTURAL HOMOPHILY AT WORK 340
A. The Homophily Principle 342
B. Culture as a Basis of Homophily 343
C. The Relational Workplace 346
II. DERIVATIVE RACIAL DISCRIMINATION 348
A. Racial Separateness as a Source of Cultural Difference 349

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B. Black Workers' First-Hand Accounts 352
1. Intermediate Employment Harms 355
2. Determinative Personnel Decisions 359
III. BEYOND RACIAL BIAS 363
A. The Bias Paradigm 363
B. Disentangling Cultural Homophily from Racial Bias 367
IV. DERIVATIVE RACIAL DISCRIMINATION AND TITLE VII 371
A. Homophily and the Normative Concerns of Title VII 371
B. Problems Posed by Current Doctrinal Requirements 374
1. Disparate Treatment Claims 374
2. Disparate Impact Claims 378
C. A Duty-of-Care Approach to Title VII 381
CONCLUSION 386

INTRODUCTION

The success of the Civil Rights Era in eliminating barriers that once categorically excluded minority workers from many employment positions has brought a new set of concerns to the forefront of antidiscrimination scholarship. Over the past twenty years, legal scholars have increasingly attended to the subtler, more complex problems that prevent minority workers from advancing in their careers at predominantly white firms after they have been hired.[1] Much of this scholarship has focused on the manner in which certain employment practices and structural conditions prevalent in the contemporary workplace potentially transmit the racial biases of white workers,[2] thereby subjecting minority workers to unequal treatment.[3] Such conditions and practices as the

1. *See e.g.*, Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (discussing the possible impact of racial conduct discrimination on minority workers); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2029 (1995) (calling attention to "[t]ransparently white decisionmaking" which "consists of the unconscious use of criteria of decision that are more strongly associated with whites than nonwhites"); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 659 (2003) (discussing the problem of "subtle, often unconscious, bias creeping into everyday social interactions and judgments on the job"); Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 643-53 (2005) (explaining that female and minority workers may be disadvantaged by subtle racial biases embedded in the work cultures of their firms).

2. For elaboration of the meaning of the term racial bias, see *infra* notes 136-139 and accompanying text.

3. *See, e.g.*, Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 96-99 (2003) (explaining how subtle forms of racial bias may disadvantage minority workers); Green, *Targeting Workplace Context*, *supra* note 1, at 659 ("Discrimination in the workplace today is increasingly . . . a problem of subtle, often unconscious, bias creeping into everyday social interactions and judgments on the job."); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 857 (2007)

underrepresentation of minority workers in positions of power, discretionary assignment practices, and subjective performance reviews, are deemed problematic because they "facilitate,"[4] "enable,"[5] and "entrench"[6] the racial biases and stereotypes of individual workers to derail the careers of minority workers.[7]

This Article complicates this conventional wisdom. It looks beyond this rather narrow focus on racial bias by calling attention to an additional form of institutional discrimination that disadvantages black workers in predominantly white workplaces. Incorporating insights from decades of social science research and drawing qualitative empirical evidence from 120 personal interviews of black employees in predominantly-white firms,[8] this Article introduces the conceptual framework of derivative racial discrimination. Derivative racial discrimination encompasses a variety of processes through which certain universal interactional dynamics can disadvantage underrepresented minority employees independently of racial bias because of patterns of cultural and social differences between workers of different racial groups.

This Article focuses on the processes of derivative racial discrimination that arise from the principle of cultural homophily, the tendency of people to gravitate toward others who possess similar cultural capital,[9] which include

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(describing discrimination as "a problem of the workplace structures and environments that facilitate racial bias in the workplace on a day-to-day basis"); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis*, 84 CALIF. L. REV. 493, 560 (1996) (positing that law firm partners discriminate against black associates on the basis of racial biases).

4. Green, *Discrimination in Workplace Dynamics*, *supra* note 3, at 104.

5. *Id.* at 93.

6. Susan Sturm, *Second Generation Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 467-68 (2001).

7. *See, e.g.*, Green, *Targeting Workplace Context*, *supra* note 1, at 659 ("Individuals discriminate, but they do so in situated context. Their discriminatory decisions take place as part of a complex web of interrelated social expectancies and taken-for-granted institutionalized practices . . . ."). Similarly, scholars have referred to the "interaction" or "interplay" between organizational structure and individual biases. *See* Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 3, at 507, 511 (emphasizing "the persistent myth of black intellectual inferiority" and "the interplay between . . . structural factors and background assumptions about race and merit").

8. For information about the methodological approaches used in developing this sample and conducting these interviews, see *infra* notes 90-95 and accompanying text.

9. *See* Kevin Woodson, *Race and Rapport: Homophily and Racial Disadvantage in Large Law Firms*, 83 FORDHAM L. REV. 2557, 2562, 2569 n.70 (2015). *See generally* Miller McPherson et al., *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. SOC. 415 (2001) (providing an overview of the existing social science research on homophily). This Article uses the term homophily specifically to describe the manner in which trait similarity plays a causal role in relationship formation. Other authors have in some instances used the term more expansively. *See* McPherson, *supra* note 9, at 416.

"cultural knowledge, tastes, practices, attitudes, and goods."[10] Such cultural traits "provide bases for cohesion and exclusion,"[11] and therefore facilitate or impede relationship formation.[12] Cultural homophily is not intrinsically or directly racial; its impact on the careers of individual workers is not contingent upon their racial identity. Yet it functions as a powerful source of derivative discrimination for many minority workers nonetheless because the social backgrounds and cultural repertoires of individual workers are informed by, and often vary by, race.[13]

The conceptual framework of derivative racial discrimination emphasizes the linkages between macro-level societal stratification and micro-level interactions by contextualizing employment inequalities not only within the practices and conditions of particular work settings but also within the broader societal arrangements that structure the American race relations. Although cultural homophily may disproportionately disadvantage members of all racial and ethnic minority groups—and likely also disadvantages workers on the basis of other social identity traits including gender, sexual orientation, and even age—derivative racial discrimination is a particularly acute problem for black workers in predominantly white work settings.[14] The legacy of racial segregation in America has produced conspicuous differences between black and white Americans across a wide variety of cultural attributes.[15] Because of homophily, these racial differences often hinder workers from forming rapport and relationships with colleagues of other races.[16] Because a disproportionate number of work settings remain predominantly white, particularly in positions of power,[17] homophily limits the access of many black workers to all-important social capital,[18] which in turn derivatively yields a host of racially disparate

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10. David Purcell, *Baseball, Beer, and Bulgari: Examining Cultural Capital and Gender Inequality in a Retail Fashion Corporation*, J. CONTEMP. ETHNOGRAPHY 291, 294 (2012).

11. Noah P. Mark, *Culture and Competition: Homophily and Distancing Explanations for Cultural Niches*, 68 AM. SOC. REV. 319, 320 (2003).

12. *Id.* ("Empirical research shows that individuals who are culturally similar are more likely to be associates than are individuals who are culturally different.").

13. For a discussion of cultural homophily as a source of disadvantage for black associates working in large, predominantly white law firms, see Woodson, *Race and Rapport*, *supra* note 9.

14. This Article focuses specifically on the occupational difficulties of black workers, the subject of most legal scholarship on racial employment discrimination. Although members of other underrepresented groups likely also experience derivative discrimination problems, its effects are perhaps most evident with respect to black workers.

15. *See infra* notes 68-79 and accompanying text.

16. *See infra* notes 128-132 and accompanying text.

17. *See generally* Ryan A. Smith, *Race, Gender, and Authority in the Workplace: Theory and Research*, 28 ANN. REV. SOC. 509 (2002) (discussing the underrepresentation of minorities in positions with job authority).

18. In the context of employment, social capital generally encompasses the informal

career outcomes.[19] This derivative racial discrimination occurs because in a stratified society where social networks and cultural repertoires remain differentiated by race, even behaviors that are not driven by race-specific feelings or attitudes can reinforce and exacerbate racial inequality.[20] Both apart from, and in conjunction with, racial bias, cultural homophily plays a major role in limiting and jeopardizing the careers of black workers in predominantly white firms. Although perhaps not as morally objectionable as the more direct forms of discrimination driven by racial biases and stereotypes, derivative discrimination can pose just as formidable a barrier to equal opportunity.[21]

Although minority workers may be disadvantaged by both derivative and direct (racial bias-based) forms of discrimination, the problems are distinct and can occur independently of each other. Even if it were possible for employers to completely neutralize the effects of racial stereotypes and prejudices within their workplaces, the cultural and social dynamics at the heart of derivative discrimination would still deprive many black workers of equal access to vital

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relationships and bonds of rapport and goodwill that workers share with colleagues, supervisors, mentors, and clients. The importance of these relationships in structuring workers' career trajectories has been established in a large body of empirical research spanning several decades. *See, e.g.*, ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS (1988); ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION (1977); ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? (1964); Scott E. Seibert et al., *A Social Capital Theory of Career Success*, 44 ACAD. MGMT. J. 219, 232 (2001) (finding that social capital improved important career outcomes pertaining to salary, promotions, and career satisfaction through "access to information, resources, and career sponsorship").

19. Racial disparities in workplace social capital have been well documented in previous empirical research on high-status occupations. *See, e.g.*, Jeffrey H. Greenhaus et al., *Effects of Race on Organizational Experiences, Job Performance Evaluations, and Career Outcomes*, 33 ACAD. MGMT. J. 64, 67-68 (1990) (explaining that black corporate managers reported feeling less social acceptance at work); Erika Hayes James, *Race-Related Differences in Promotions and Support: Underlying Effects of Human and Social Capital*, 11 ORG. SCI. 493 (2000) (explaining that black managers at financial services firm reported receiving less psychosocial support than white managers); Monique R. Payne-Pikus et al., *Experiencing Discrimination: Race and Retention in America's Largest Law Firms*, 44 L. & SOC'Y REV. 553, 567-72 (2010) (finding racial disparities in law firm associates' social contact with partners and their desire for better mentorship relationships).

20. Another, more familiar form of racial disadvantage in employment—the racial disparities that are produced by referral-based hiring practices—also fits within the rubric of derivative racial discrimination. Referral-based hiring practices produce racial disparities, regardless of individual workers' racial attitudes when a universal tendency (to help friends and acquaintances) occurs in the context of the continued racial segregation and social separation of black and white Americans. *See generally* NANCY DITOMASO, THE AMERICAN NON-DILEMMA: RACIAL INEQUALITY WITHOUT RACISM (2013) (explaining how racial differences in social networks produce racial disparities in employment).

21. Indeed, the derivative racial consequences of cultural homophily may be responsible for much of the discriminatory impact that the existing scholarship largely attributes to racial bias.

relational resources and career opportunities.[22] For this reason, it is critical that employers, policy-makers, scholars, and advocates of racial justice acknowledge and address these derivative forms of employment discrimination as important problems in their own right.

In developing the terminology of derivative racial discrimination, this Article aims to make clear that seemingly innocuous and idiosyncratic social and cultural behaviors produce consistent, predictable patterns of racial inequality and exclusion for many minority workers in predominantly white workplaces. The framework of derivative racial discrimination offers new insights into the pressing, ongoing problems of employment inequality. It also calls further attention to the consequences of certain doctrinal developments that limit the potential of employment discrimination law as a vehicle of racial equality. As this Article explains below, although certain comprehensive doctrinal reforms may make possible some amount of headway against derivative racial discrimination, Title VII and the existing employment discrimination law cannot adequately address this problem.

This Article proceeds in four parts. Part I introduces cultural homophily and describes how it affects the career trajectories of workers of all races. Part II draws from primary interview data and a wide body of social science research to explain why and how cultural homophily functions as a source of derivative racial discrimination for many black workers in predominantly white firms. Part III clarifies some of the important conceptual and practical distinctions between derivative racial discrimination and the more familiar direct forms of racial discrimination that have been the traditional focus of legal scholarship on racial inequality in employment. Part IV addresses the implications of derivative racial discrimination for employment discrimination law. In particular, it discusses the doctrinal and normative issues that limit the viability of antidiscrimination law as a vehicle for addressing these problems. The Article concludes by explaining that the theory of derivative racial discrimination adds further support for recent scholarly proposals to transform employment discrimination law to a regulatory employer duty of care regime from its current focus on righting specific individual wrongs.

I. CULTURAL HOMOPHILY AT WORK

Each year, the fates of many jobseekers are determined in part by their

22. Although my empirical research focuses specifically on the difficulties of black workers in relatively high-status positions, the homophily disadvantage discussed in this Article likely also applies to other groups in other employment contexts. It is my hope that future research projects will explore the consequences of cultural homophily in other contexts involving other culturally dissimilar non-dominant groups (for example, women and other racial and ethnic minority groups) in occupational settings involving some of the institutional features addressed here.

ability to pass some variation of "the airport test."[23] The airport test does not measure professional competence—in fact, it often has no substantive work-related questions at all. Instead, a jobseeker's performance on the airport test simply reflects her interviewer's subjective assessment of whether she might enjoy spending a lot of time closely interacting with her, for example, if they were both stuck at an airport together on work travel.[24]

Success on this test often reflects the extent to which an interviewee's social background and cultural interests match those of her interviewers. In her meticulously researched book, *Pedigree*,[25] business school professor Lauren Rivera documents the importance of such shared social and cultural traits through evidence from the first-hand accounts of management consultants, investment bankers, and attorneys involved in the hiring processes at their firms. Rivera provides example after example of hiring interviewers at elite professional service firms describing their own tendencies to bestow favorable treatment upon job applicants who share "[s]imilarities in leisure interests, backgrounds, and play styles."[26] In a reflection consistent with those of several other workers interviewed, one management consultant explains, "You are trying to pick candidates from a very, very qualified group of people, and what separates them ends up being some of your preferences and if you have shared experiences."[27] The fates of jobseekers in these firms were in some instances determined by seemingly immaterial cultural criteria, such as their past involvement in lacrosse or love for deep-sea diving.

The tendency of individual workers to bestow such non-meritocratic preferences upon each other is not difficult to understand. For although firms themselves have strong financial incentives to hire and promote the most competent, capable workers available, the individual workers within these firms have conflicting interests. Specifically, these workers have personal incentives to make their work lives as enjoyable as possible, and many do so in part by bestowing preferential treatment upon the applicants with whom they have had the most enjoyable interactions. As one of Rivera's interviewees explained, "when I'm interviewing, I look for people . . . I'd want to get to know and want to spend time with, even outside of work. . . . People I can be

23. *See, e.g.*, LAUREN A. RIVERA, PEDIGREE: HOW ELITE STUDENTS GET ELITE JOBS 140 (2015) (quoting an investment banking director who used the "stranded in the airport test," described as "Would I want to be stuck in an airport in Minneapolis in a snowstorm with them? And if I'm on a business trip for two days and I have to have dinner with them, is it the kind of person I enjoy hanging with?"); Meredith Pepin, *The Airport Test: The Interview Assessment You Did Not Know You Were Getting*, NEWSWEEK (Oct. 5, 2004 10:46 AM), http://www.newsweek.com/career/airport-test-interview-assessment-you-didnt-know-you-were-getting.

24. Pepin, *supra* note 23.

25. Rivera, *supra* note 235.

26. *Id.* at 136-38.

27. *Id.* at 83.

buddies with."[28]

This tendency affects not only initial hiring decisions, but also the subsequent opportunities and treatment that workers receive on the job, after they have been hired. In this manner, cultural homophily strongly influences the career trajectories of many workers.

A. The Homophily Principle

Human relationships do not develop and flourish at random. People form bonds of mutual affinity with each other more easily when they share common tastes, life experiences, preferences, and values. The reason for this is not mysterious or insidious: it is simply less effort and more enjoyable to communicate and interact with people when we have much in common with them.[29] Small talk—whether with neighbors, roommates, officemates, romantic partners, or potential employers—flows more easily and is more likely to lead to (and sustain) deeper rapport when interactants share common interests and frames of reference.

This basic observation lies at the heart of the sociological concept of homophily, the tendency of similar people to gravitate toward and associate with one another.[30] The term itself, derived from the Greek roots for love (phily) and same (homo), is encapsulated in the ancient truism that "birds of a feather flock together."[31] Since its introduction in an essay by two of the preeminent sociologists of the twentieth century, Paul Lazarsfeld and Robert Merton,[32] homophily has become firmly established as a powerful determinant of relationship formation.[33] As organizational researchers Guerogi Kossinets

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28. *Id.* at 138 (alterations in original).

29. McPherson et al., *supra* note 99, at 416. Of course, people find rapport with dissimilar others too. It is not impossible, just more difficult. People who are extroverted and gregarious, in particular, may find that their social skills regularly offer them entrée into networks and bonds with people with whom they have virtually nothing in common. To the extent that outsiders are not excluded because of bias or animosity, but disadvantaged by homophily instead, they can often attain inclusion by mobilizing the right social and cultural skills and resources.

30. *Id.*

31. In the words of Aristotle, "Some define [friendship] as a matter of similarity; they say that we love those who are like ourselves: whence the proverbs 'Like finds his like,' 'Birds of a feather flock together,' and so on." ARISTOTLE, THE NICOMACHEAN ETHICS bk. VIII, at 6 (H. Rackham trans., Wordsworth Editions Ltd., rev. ed. 1996) (c. 384 B.C.E.).

32. *See* Paul F. Lazarsfeld & Robert Merton, *Friendship as a Social Process: A Substantive and Methodological Analysis*, *in* FREEDOM AND CONTROL IN MODERN SOCIETY 18 (Morroe Berger & Theodore Abel eds., 1954).

33. *See* Thomas A. DiPrete et al., *Segregation in Social Networks Based on Acquaintanceship and Trust*, 116 AM. J. SOC. 1234, 1236 (2011) ("The homophily principle is so powerful that its existence is taken as a given in the social capital literature."). *See generally* McPherson et al., *supra* note 99.

and Duncan Watts explain, "[t]he 'homophily principle'—the observed tendency of 'like to associate with like'—is one of the most striking and robust empirical regularities of social life."[34] Patterns consistent with homophily have been uncovered across a wide range of social contexts.[35]

When given the choice, we prefer to spend time around people with whom we "get along" and as the theory of homophily reveals, we tend to get along especially well with those with whom we share things in common.[36] Shared interests, values, experiences, and tastes make for more satisfying social encounters and interactions,[37] which in turn make us more inclined to seek each other out for additional sociable interactions.[38] These repeat interactions in some instances eventually develop into friendships and other enduring relationships.[39] Hence, workers consistently privilege others who share common characteristics not as a covert means of invidious discrimination or group supremacy, but quite simply because they have greater rapport with them. Few sources of this similarity-based rapport are as prevalent or powerful as cultural capital.

B. Culture as a Basis of Homophily

It would be difficult to overstate the centrality of culture to our personal identities and relationships. Our cultural repertoires encompass many aspects of our lifestyles, including the content and style of our consumption and recreational practices.[40] They affect and reflect everything from the music we listen to (and how we listen to it), to the food we choose to consume, the television shows and movies that we watch, the sports that we play and follow,[41] the clothes that we wear, the books and magazines that we read, the

34. Gueorgi Kossinets & Duncan J. Watts, *Origins of Homophily in an Evolving Social Network*, 115 AM. J. SOC. 405, 405 (2009).

35. *See generally* Denise B. Kandel, *Homophily, Selection, and Socialization in Adolescent Friendships*, 84 AM. J. SOC. 427 (1978) (finding homophily patterns in friendship according to behavior); McPherson et al., *supra* note 99; J. Miller McPherson & Lynn Smith-Lovin, *Homophily in Voluntary Organizations: Status Distance and the Composition of Face-to-Face Groups*, 52 AM. SOC. REV. 370 (1987); Lois M. Verbrugge, *The Structure of Adult Friendship Choices*, 56 SOC. FORCES 576 (1977) (finding homophily patterns in adult friendships). *See also* Aaron Retica, *Homophily*, N.Y. TIMES (Dec. 10, 2006), http://www.nytimes.com/2006/12/10/magazine/10Section2a.t-4.html?_r=0.

36. Lazarsfeld & Merton, *supra* note 322.

37. *Id.* at 30.

38. *See* Paul DiMaggio, *Classification in Art*, 52 AM. SOC. REV. 440, 443 (1987).

39. *Id.*

40. *See, e.g.*, Douglas B. Holt, *Distinction in America? Recovering Bourdieu's Theory of Tastes from Its Critics*, 25 POETICS 93, 101 (1997) (listing sports, pop culture, dining, and travel as important culture-related activities).

41. Sports knowledge and participation are particularly important forms of cultural capital in many occupational settings. *See* Purcell, *supra* note 100, at 295.

alcoholic beverages that we drink (and the venues where we choose to drink them), and the places that we visit on vacation. Our cultural repertoires shape not just our choice of activities but our dispositions toward those activities. People with different types of cultural capital may consume the same cultural goods or partake in the same cultural activities yet understand and discuss those endeavors in very different terms.[42] In some form or another, we exhibit, partake in, and act in accordance with our cultural repertoires every day; they shape our thoughts and our behavior. Our cultural repertoires reflect various aspects of our social identities (including race, gender, age, and social class)[43] and our social networks (particularly the cultural attributes of our friends and family).[44]

It should come as no surprise then that cultural similarity is a particularly important source of rapport and interactional ease.[45] Though often taken for granted, these cultural traits play a profound role in shaping our interactions and relationships, in the workplace and beyond. As cultural sociologist Paul DiMaggio has explained, shared cultural interests are "common contents of sociable talk."[46] They "give[] strangers something to talk about" and "facilitate[] the sociable intercourse necessary for acquaintanceships to ripen into friendships."[47]

This also holds true for workplace relationships and interactions. Workers who have similar cultural frames of reference have easier, more enjoyable interactions and are better able to develop mutually beneficial social capital

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42. *See* Richard A. Peterson & Roger M. Kern, *Changing Highbrow Taste: From Snob to Omnivore*, 61 AM. SOC. REV. 900, 904 (1996) (explaining that cultural preferences are manifested not only in "*what* one consumes but on the *way* items of consumption are understood") (emphasis in original).

43. *See* John R. Hall, *The Capital(s) of Cultures: A Nonholistic Approach to Status Situations, Class, Gender, and Ethnicity*, *in* CULTIVATING DIFFERENCES: SYMBOLIC BOUNDARIES AND THE MAKING OF INEQUALITY 257, 257 (Michele Lamont & Marcel Fournier eds., 1992).

44. *See generally* PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE: REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE (1984) (emphasizing the manner in which cultural capital is instilled through interactions with family members).

45. *See, e.g.*, Thomas J. Berndt, *The Features and Effects of Friendship in Early Adolescence*, 53 CHILD DEV. 1447, 1454 (1982) ("[F]riends are similar in their orientation toward contemporary teen culture. They like the same kind of music, have similar tastes in clothes, and enjoy the same kinds of leisure-time activities.") (citation omitted); Mark, *supra* note 11, at 320; Andreas Wimmer & Kevin Lewis, *Beyond and Below Racial Homophily: ERG Models of a Friendship Network Documented on Facebook*, 116 AM. J. SOC. 583, 607 n.20 (2010) (finding that "students display a significant preference for culturally similar [others]").

46. *See* DiMaggio, *Classification in Art*, *supra* note 388, at 443.

47. *Id.*; *see also* Omar Lizardo, *How Cultural Tastes Shape Personal Networks*, 71 AM. SOC. REV. 778, 781 (2006) (noting that culture "can serve as a bridge not only to sustain current network connections but also to gain and cement new ones").

with each other.[48] Several of the classic qualitative studies of corporate careers found that sharing certain cultural and social traits with senior colleagues often enhanced workers' professional experiences and career prospects.[49] These findings have been confirmed and clarified in several recent studies. Lauren Rivera found that workers provided greater advocacy and more generous appraisals to jobseekers who shared cultural and experiential traits.[50] Catherine Turco and David Purcell have each found that workers who lacked cultural common ground with their senior colleagues suffered career-limiting marginalization and alienation.[51]

To serve as professional currency in the workplace, cultural traits need not be "high brow" or elite;[52] all manner of cultural preferences and experiences can function as sources of homophilic attraction. In fact, as sociologist Dave Purcell observed, "valued cultural capital at work tends to be comprised of popular culture and work-related knowledge."[53] With respect to homophily, the value of a given cultural trait is purely a function of the number and status of the other workers who share it,[54] and therefore varies according to the demographics and hierarchies of power within a given work group, office, or firm. Those traits that are more widely embraced in a particular occupational setting—for example, interest in a popular television program or a local sports team—are more likely to help workers fit in and forge informal relationships

48. The importance of this common ground is evident in the advice offered in career self-help literature. *See, e.g.*, CARLA A. HARRIS, EXPECT TO WIN: 10 PROVEN STRATEGIES FOR THRIVING IN THE WORKPLACE 69 (2009) ("In your first ninety days, you *must* find a common bridge of things to talk about if you are going to fit into the fabric of the group and the organization.") (emphasis in original).

49. *See* JACKALL, *supra* note 188, at 42-43 (explaining that corporate managers develop valuable professional alliances through shared involvement in various leisure time activities); KANTER, *supra* note 188 (offering examples of female managers who gained inclusion by participating in the preferred social activities of their male counterparts).

50. *See supra* notes 255-288 and accompanying text.

51. *See* Purcell, *supra* note 100, at 310; Catherine J. Turco, *Cultural Foundations of Tokenism: Evidence from the Leveraged Buyout Industry*, 75 AM. SOC. REV. 894, 901 (2010).

52. Although many formulations of cultural capital have limited the term to prestigious or high-status cultural attributes, any cultural attribute may serve as valuable cultural capital, depending upon the context. *See* Holt, *supra* note 400, at 101 (observing that conceptions of cultural capital that focus on the fine arts and high arts exclusively only capture "a small fraction of the universe of consumption fields that can be leveraged for social reproduction"); *see also* Peterson & Kern, *supra* note 422 (noting that elites appreciate both high- and low-brow music styles). *See generally* PRUDENCE L. CARTER, KEEPIN' IT REAL: SCHOOL SUCCESS BEYOND BLACK AND WHITE 52 (2005) (discussing the value of less prestigious non-dominant cultural capital forms, such as urban "speech codes, dress styles, musical preferences, and gestures" for black students).

53. Purcell, *supra* note 100, at 295.

54. *See generally* Prudence L. Carter, *"Black" Cultural Capital, Status Positioning, and Schooling Conflicts for Low-Income African American Youth*, 50 SOC. PROBS. 136 (2003) (demonstrating the contingent value of cultural capital by calling attention to the importance of certain "black" and "non-dominant" cultural traits in urban settings).

with colleagues, employers, and mentors. Those that are less prevalent or well understood are far less useful.

C. The Relational Workplace

These workplace relationships are so pivotal in part because of the vast discretion that many employers wield in making personnel decisions.[55] For example, in many occupational settings, senior workers enjoy considerable autonomy in allocating specific tasks and opportunities to junior colleagues.[56] Although the decision to provide a desirable assignment to one worker instead of her counterparts may not carry immediately observable professional consequences, cumulatively these decisions can shape workers' careers decisively, as some assignments provide greater opportunities to develop career-enhancing skills and reputational capital.[57]

Similarly, senior workers act with broad discretion both in completing formal work evaluations for and in providing informal feedback to their junior colleagues. Although employers have been able to rein in some of this discretion by adopting more formalized personnel practices,[58] some significant

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55. *See* Flagg, *supra* note 1, at 2029 (discussing subjective decision-making as a source of racial disadvantage for minority workers); Green, *Targeting Workplace Context*, *supra* note 1, at 692 (explaining that subjective employment practices in white-male-dominated firms may facilitate racial discrimination); Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 3, at 560 ("[L]awyers who are predisposed to believe that blacks are less likely to be superstars than whites can justify looking beyond the usual signals to reach a more subjective evaluation of the candidate's quality. Anecdotal evidence suggests that this occurs with some frequency.").

56. *See* Luis J. Diaz & Patrick C. Dunican Jr., *Ending the Revolving Door Syndrome in Law*, 41 SETON HALL L. REV. 947, 975-76 (2011) (describing the informal assignment processes at certain law firms, wherein partners allocate assignments on the basis of their relationships with associates). Although many firms formally designate assignment coordinators to staff cases and allocate assignments on the basis of workers' skills, developmental needs, and availability, in practice more senior workers often go outside their firms' formally prescribed processes in staffing their matters. *See* HARRIS, *supra* note 4818, at 71-72 (discussing an "unspoken process" common in investment banking, wherein assignment coordinators often ignore associates' skills and needs, contrary to their firms' formal assignment rules).

57. *See* David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1608-13 (1998) (noting the huge disparity between the impact of "training work" and "paper work" on the career development of law firm associates). These disparities can also harm workers psychologically. Supervisors also exercise considerable discretion when deciding whether to provide information and encouragement to their favorite subordinates. Although the effects of these decisions are also often not readily apparent, they too can yield highly disparate employment outcomes for similarly qualified workers.

58. This is evident, for example, in the efforts of several companies that have redesigned their personnel practices pursuant to class action settlements. *See* Green, *Targeting Workplace Context*, *supra* note 1, at 682-87 (discussing the reform efforts of

amount of subjectivity remains practically unavoidable in most occupational settings. There are relatively few jobs in which supervisors can determine the quality of a employee's work performance and other work-relevant characteristics comprehensively and accurately on the basis of objective measurements and calculations.[59] Instead, the imprecise task of evaluating the past performances and future potential of their workers often requires evaluators to rely heavily on their subjective impressions.[60] When a worker performs sub-optimally on an assignment, her supervisor must determine whether to interpret it as a pardonable slip-up or as evidence that the worker is incompetent and unreliable. She must decide whether and how to memorialize the worker's blunder in her formal review or to alert other senior workers through informal word-of-mouth criticism. Although even seemingly objective measures of performance and productivity are subject to bias,[61] this subjectivity renders many personnel decisions especially vulnerable to such non-meritocratic distortions.[62] In these conditions, it is all but inevitable that some workers unfairly will receive better treatment than others, even in the absence of group-based biases.

Not surprisingly, workers who have strong relationships with mentors, colleagues, and supervisors are more likely to benefit from these subjective

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corporations that have been sued for permitting excessive subjective decision-making). One such company, Home Depot, has worked to minimize the role of managerial discretion in staffing decisions by creating an automated program that enables employees to register their job preferences, new training and informational programs, and numerical benchmarks. Sturm, *supra* note 6, at 509-19.

59. Even in "bottom line" jobs, like sales and stock-trading, supervisors must also make subjective decisions how much of a given worker's performance was attributable to environmental factors outside of the workers' control, such as the state of the economy, or the ease (or difficulty) of her accounts.

60. For example, other than the number of hours they have worked or the revenue raised by any clients they have brought to the firm, the performance of law firm associates cannot be quantified or measured by reliable, objective criteria. *See* Carbado & Gulati, *Working Identity*, *supra* note 1, at 1275-76; Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 3, at 524-28; *see also* William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, Symposium, 29 CONTEMP. SOC. 120, 122 (2000) (noting that "it is often true for . . . high-level jobs" that "an employee's qualifications and contributions are impossible to measure systematically").

61. *See* LOUISE MARIE ROTH, SELLING WOMEN SHORT: GENDER INEQUALITY ON WALL STREET 183-84 (2006); William T. Bielby, *Minority Vulnerability in Privileged Occupations: Why Do African American Financial Advisers Earn Less than Whites in a Large Financial Services Firm?*, 639 ANNALS AM. ACAD. POL. & SOC. SCI. 13, 28 (2012) (noting that ostensibly "meritocratic procedures" can serve to conceal and obscure "ongoing ascriptive bias").

62. *See* Barbara F. Reskin & Debra Branch McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 AM. SOC. REV. 210, 214 (2000) (citing research suggesting that informal, subjective personnel practices increase the risk of reliance on stereotyping). It should be noted, however, that "objective" measures of performance are also subject to manipulation and discriminatory outcomes.

employment practices. Compared to their less-connected counterparts, they enjoy greater access to any number of important resources, including high-quality work opportunities, advice, advocacy, and generous performance reviews.[63]

Workers who are unable to develop these relationships face longer odds of career success.[64] Although this is true for workers of all races, black workers are especially likely to suffer such social capital deficits. The following Part will explain that racial differences in cultural attributes limits the access of many black workers to these crucial career-enhancing relationships. This relationship gap places many black workers at a stark competitive disadvantage, thereby contributing to the stark racial disparities that remain prevalent in American workplaces.

II. DERIVATIVE RACIAL DISCRIMINATION

I can't say that I've seen racial obstacles. I haven't seen anything. But cultural obstacles? Yeah. If you don't fit in with the clients or with the firm, that would be a significant barrier.[65]

In recent years, a number of legal scholars have called attention to the social and interactional dimensions of racial inequality in the workplace.[66] But while these scholars have analyzed these issues almost exclusively as problems of racial bias,[67] this Part will explain the manner in which derivative racial discrimination contributes to and reinforces workplace inequality. It will begin

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63. *See, e.g.*, Tammy D. Allen et al., *Career Benefits Associated with Mentoring for Protégés: A Meta-Analysis*, 89 J. APPLIED PSYCHOL. 127, 130 (2004) (conducting meta-analysis of mentorship research and finding higher compensation, career satisfaction, job satisfaction, perceived promotion prospects, and intent to remain in one's firm); Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 577, at 1617-19 (discussing the importance of partners' advocating for their preferred protégés during the partnership promotion process at corporate law firms).

64. *See* Payne-Pikus et al., *supra* note 1919, at 560 ("Partner contact and mentoring is increasingly recognized as a key process and source of dissatisfaction and departures from law firms.").

65. Interview with Attorney (Feb. 12, 2010).

66. In discussing the subtle processes through which differences in access to social capital and career support cumulatively produce substantial disparities in career outcomes, law professor Susan Sturm describes discrimination as "increasingly . . . a byproduct of ongoing interactions shaped by the structures of day-to-day decision-making and workplace relationships." Sturm, *supra* note 6, at 469; *see id.* at 460 (describing second generation discrimination as encompassing "social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups"); *see also* Payne-Pikus et al., *supra* note 19, at 572 ("Partner contact and mentoring are clearly salient factors in explaining associates' thoughts about seeking alternative employment and in the more frequent plans of African American associates to do so.").

67. *See infra* notes 1477-49149 and accompanying text.

by explaining how cultural homophily produces racially disparate treatment and outcomes as a result of the racial segregation that shapes the lives of Americans outside the workplace.

A. Racial Separateness as a Source of Cultural Difference

Cultural homophily consistently produces racialized relationship patterns[68] because of the vast cultural differences that emerged between black and white Americans over the course of centuries of racial stratification and separation.[69] Decades after the civil rights revolution brought an end to de jure segregation, Americans remain largely separated by race, structurally and socially. By and large, black and white Americans grow up in different neighborhoods,[70] attend different schools,[71] and develop different social networks.[72] These patterns occur across the socioeconomic spectrum; even the most affluent black and

68. *See* James Moody, *Race, School Integration, and Friendship Segregation in America*, 107 AM. J. SOC. 679, 698 (2001) (finding that "much of the observed [racial] friendship segregation in schools is due to factors such as belonging to the same clubs, having similar behaviors, and maintaining social balance"); Wimmer & Lewis, *supra* note 45, at 586 ("[H]omophily based on other attributes—including . . . shared cultural taste—may intersect with racial homophily if there is significant overlap in category membership.").

69. *See generally* LAWRENCE W. LEVINE, BLACK CULTURE AND CONSCIOUSNESS: AFRO-AMERICAN FOLK THOUGHT FROM SLAVERY TO FREEDOM (1977) (tracing the development of black American cultural traditions from slavery through the twentieth century).

70. *See* JOHN R. LOGAN, US 010 PROJECT, SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS, HISPANICS AND ASIANS IN METROPOLITAN AMERICA, 3 (2011), http://www.s4.brown.edu/us2010/Data/Report/report0727.pdf (noting substantial residential segregation and isolation for black Americans, including the most affluent black households); *see also* Emily Badger, *Obama Administration to Unveil Major New Rules Targeting Segregation Across U.S.*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/07/08/obama-administration-to-unveil-major-new-rules-targeting-segregation-across-u-s (discussing the failure of fair housing laws to end racial discrimination and segregation in housing)

71. *See* GARY ORFIELD ET AL., E PLURIBUS . . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE AND MORE STUDENTS 18 (2012) ("Four of every five Latino students, and three-fourths of black students, were attending majority minority schools in 2001. In the same year, fully 42% of Latinos and 28% of blacks were in intensely segregated schools."); Robert Balfanz, *Can the American High School Become an Avenue of Advancement for All?*, 19 FUTURE OF CHILD. 17, 17 (2009) (finding that "[f]orty percent of white students attend high schools that are 90 percent or more white").

72. *See* Elizabeth Flock, *Poll: White Americans Far Less Likely to Have Friends of Another Race*, U.S. NEWS & WORLD REP. (Aug. 8, 2013, 11:53 AM), http://www.usnews.com/news/articles/2013/08/08/poll-white-americans-far-less-likely-to-have-friends-of-another-race (discussing results of Reuters/Ipsos poll finding that 40% of white Americans had no non-white friends); GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 95-104 (2002) (discussing ongoing patterns of social separation as "discrimination in contact").

white Americans lead separate, racially-defined social and institutional lives.[73]

This separation has fostered racially distinct cultural milieus.[74] Although cultural traits are not completely correlated with racial boundaries—considerable intra-racial cultural diversity and interracial commonality exist—there are widely-recognized patterns of cultural differentiation amongst various racial and ethnic groups. Distinctive patterns in black Americans' cultural practices and preferences are evident, for example, in areas ranging from language use to tastes in music,[75] movies,[76] television programs,[77] games,[78]

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73. *See* SHERYL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 17-26 (2004) (noting that many middle-class black families purposefully seek out black middle-class residential enclaves); LAWRENCE OTIS GRAHAM, OUR KIND OF PEOPLE: INSIDE AMERICA'S BLACK UPPER CLASS xvii (1999) (explaining that affluent back families socialize with each other through involvement in black fraternities and sororities, social organizations, civic groups, and vacation rituals); Kathryn M. Neckerman et al., *Segmented Assimilation and Minority Cultures of Mobility*, 22 ETHNIC & RACIAL STUD. 945, 952 (1999) (describing a case study of middle-class black Americans that found that "few in the black middle class socialize with white colleagues outside of the workplace").

74. *See* RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 39 (2005) ("In the popular anthropology of group difference there are types of food, music, hairstyles, sports, clothing, television and radio programming, magazines, and intoxicating liquors (or lack of them) appropriate to the various canonical identity groups.").

75. *See* Paul DiMaggio & Francie Ostrower, *Participation in the Arts by Black and White Americans*, 68 SOC. FORCES 753, 765-68 (1990) (finding that white people are more likely to report enjoying classical music and opera, while blacks were more likely to report liking jazz, soul music, and the blues). *See generally* MARK ANTHONY NEAL, WHAT THE MUSIC SAID: BLACK POPULAR MUSIC AND BLACK PUBLIC CULTURE (1999).

76. *See* Stuart Fischoff et al., *Favorite Films and Film Genres as a Function of Race, Age, and Gender*, 3 J. MEDIA PSYCHOL. 1, 19 (1998) (finding "surprisingly robust" racial congruence in black moviegoers' movie preferences); Nicole Sperling, *Best Man Holiday: Does Its Success Change the Future of Black Film?*, ENT. WKLY. (Nov. 18, 2013, 9:04 PM EST), http://www.ew.com/article/2013/11/18/best-man-holiday-black-film (observing that African-American viewers constituted the vast majority of the audience of *Best Man Holiday*, a film with a predominantly black cast).

77. *See* Jane D. Brown & Carol J. Pardun, *Little in Common: Racial and Gender Differences in Adolescents' Television Diets*, 48 J. BROAD. & & ELECTRONIC MEDIA 266, 272-73 (2004) (finding that black teenagers primarily and overwhelmingly watched television programs with predominantly black casts); Rob Golum, *U.S. Broadcast Television Ratings for the Week Ended April 28*, BLOOMBERG, (Apr. 30, 2013), http://www.bloomberg.com/news/2013-04-30/u-s-broadcast-television-ratings-for-the-week-ended-april-28.html (finding that *Scandal* was only the 23rd most highly-watched show in all households); Tanzina Vega, *A Show Makes Friends and History: 'Scandal' on ABC Is Breaking Barriers*, N.Y. TIMES (Jan. 16, 2013), http://www.nytimes.com/2013/01/17/arts/television/scandal-on-abc-is-breaking-barriers.html (explaining that *Scandal*, the first network drama starring a lead black actress in nearly four decades, is the highest rated scripted drama among black audiences).

78. *See* Alex M. Johnson, Jr., *Bid Whist, Tonk, and* United States v. Fordice*: Why Integrationism Fails African-Americans Again*, 81 CALIF. L. REV. 1401, 1446-52 (1993) (discussing black cultural and social traditions involving the card games of bid whist and tonk).

humor, fashion, and art.[79] These differences, which begin to take shape in childhood, are reinforced through the same-race friendship circles prevalent during students' formative adolescent and college years.[80]

This intensely same-race social behavior occurs even at exclusive prep schools,[81] Ivy League colleges, and other predominantly white universities.[82] Students, university administrators, academics, journalists, and government investigators all have expressed concern over the behavior of college students in immersing themselves in same-race social networks and student activities.[83] The racial segregation of campus life is not terribly surprising. Most students who attend these schools hail from racially segregated backgrounds,[84] and this

79. *See generally* DiMaggio & Ostrower, *supra* note 755, at 766-67 (finding differences in the art consumption practices of black and white Americans).

80. *See* Moody, *supra* note 688, at 698 (finding that friendships among adolescent students are "highly segregated by race"); Kevin Woodson, *Diversity Without Integration*, 120 PENN STATE L. REV. (forthcoming 2016) (describing several empirical studies that found patterns of racial segregation on college campuses).

81. *See* Carla Murphy, *Another American Promise*, COLORLINES (Feb. 6, 2014, 7:00 AM EST), http://www.colorlines.com/articles/another-american-promise (discussing the social isolation experienced by certain black students at a prestigious New York City private school).

82. *See, e.g.*, MAYA A. BEASLEY, OPTING OUT: LOSING THE POTENTIAL OF AMERICA'S YOUNG BLACK ELITE 103-04 (2011) (observing that many black college students at elite majority white colleges immerse themselves in their school's black communities and have limited social contact with white students); JIM SIDANIUS ET AL., THE DIVERSITY CHALLENGE: SOCIAL IDENTITY AND INTERGROUP RELATIONS ON THE COLLEGE CAMPUS 185 (2008) (finding that black and white students engage in disproportionately same-race social behavior); Nathan D. Martin et al., *Interracial Friendships Across the College Years: Evidence from a Longitudinal Case Study*, 55 J.C. STUD. DEV. 720, 720 (2014) (observing increasing self-segregation among college students).

83. *See, e.g.*, BEASLEY, *supra* note 82, at 104 (finding that racial segregation on campus deprives black students of access to desirable employment opportunities and high-status career paths); *Cornell Dorms Based on Race Are the Focus of an Inquiry*, N.Y. TIMES, (Mar. 16, 1995), http://www.nytimes.com/1995/03/16/nyregion/cornell-dorms-based-on-race-are-the-focus-of-an-inquiry.html; The Dartmouth Editorial Board, *Self-Segregation at Dartmouth*, DARTMOUTH, (Jan. 20, 2006), http://www.thedartmouth.com/2006/01/20/self-segregation-at-dartmouth (calling upon Dartmouth College administration to implement policies conducive of greater interracial interaction); *For Berkeley, Diversity Means Many Splinters*, N.Y. TIMES, (Oct. 3, 1990), http://www.nytimes.com/1990/10/03/us/education-for-berkeley-diversity-means-many-splinters.html (discussing Berkeley faculty task force convened by the chancellor to investigate widespread racial balkanization on campus); Clarence Page, *Students Who Shun Campus Diversity Cheat Themselves*, CHI. TRIB. (Sept. 29, 1993), http://articles.chicagotribune.com/1993-09-29/news/9309290014_1_campus-student-centers-dorms (opposing black-themed student housing and bemoaning the state of racial segregation on American campuses).

84. *See, e.g.*, Patricia Gurin, *Expert Report of Patricia Gurin*, 5 MICH. J. RACE & L. 363, 372 (1999) (observing that "[v]ast numbers of white students (about 92 percent) and about half (52 percent) of the African American students come to the University of Michigan from segregated backgrounds"); Kimberly C. Torres & Camille Z. Charles, *Metastereotypes and the Black-White Divide: A Qualitative View of Race on an Elite College Campus*, 1 DU

lack of prior interracial acclimation limits students' ability (and in some instances, their inclination) to develop racially diverse friendships once on campus.[85]

But while black students can thrive academically and socially at predominantly white universities without engaging in in-depth interracial interactions,[86] doing so can have adverse consequences in their subsequent work careers. Because white workers are overrepresented in many employment contexts, particularly in positions of influence and authority,[87] cultural homophily functions as a critical source of institutional disadvantage for the many black workers who lack acculturation and acclimation to the cultural practices and preferences of their counterparts.

The following section of this Article will flesh out these problems further by presenting findings from interviews of a sample of high-status black workers concerning their careers in predominantly white firms.[88]

B. Black Workers' First-Hand Accounts

"There's just no substitute for commonalities."[89]

The first-hand accounts presented in this Part come from interviews of a sample of 120 black workers who had worked as attorneys, bankers, corporate managers, management consultants, or public relations professionals in large, predominantly white corporate firms during the first decade of the twenty-first century.[90] I conducted these interviews as part of my dissertation research on

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BOIS REV. 115, 121 (2004) (finings that of the University of Pennsylvania students participating in the study, "White students report coming from extremely segregated, predominantly White neighborhoods and high schools. More than two-thirds of Whites attended high schools where less than 10% of the students were Black . . . .").

85. Mary J. Fischer, *Does Campus Diversity Promote Friendship Diversity? A Look at Interracial Friendships in College*, 89 SOC. SCI. Q. 631, 651 (2008) (finding that students who begin college with weaker feelings of closeness to members of other racial groups are less likely to form interracial friendships).

86. Several interviewees reported that they had maintained almost exclusively same-race social relationships in college. *See* Meera E. Deo, *The Promise of* Grutter*: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63, 83 (2011) (noting that the presence of racial diversity in a school's student population does not necessarily entail meaningful inter-racial interactions).

87. *See* Purcell, *supra* note 100, at 295 ("[V]alued cultural capital in professional workplaces tends to be controlled by white men managers.").

88. For a discussion of the value of non-fiction narratives for providing concrete and vivid details to demonstrate complicated workplace racial dynamics, see Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 879 (2002).

89. Interview with Attorney (Jan. 29, 2010).

90. These interviewees had begun their professional careers in the years between 1999 and 2009, with the greatest number having begun between 2003 and 2006. They ranged in age from twenty to forty; the vast majority of them were between twenty-seven and thirty-

the significance of race for black professionals in high-status jobs.[91] Interviewees were gathered through chain referral (or "snowball") sampling, a commonly used method that provides greater access to otherwise unidentifiable or unavailable members of the target population.[92] For these reasons, this type of sampling has been widely used in studies of elites, including the vast majority of qualitative research on black workers in high-status occupations.[93]

I conducted these interviews in a semi-structured life history format,[94] an approach that yields rich data unhindered by the restrictions of pre-designed survey instruments, thus allowing for a more precise, nuanced analysis of complex social phenomena.[95] The interviews ranged in time from approximately forty-five minutes to three hours, with most lasting approximately sixty to seventy-five minutes.

In total, nearly half (fifty-eight) of all interviewees reported problems consistent with derivative racial discrimination, instances in which cultural and social disconnects deprived black workers of equal access to workplace social capital and its benefits.[96] These interviewees identified a wide variety of cultural traits and preferences that operated as bases of inclusion and derivative

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two. All interviews were completed between 2009 and 2011.

91. Kevin Woodson, Fairness and Opportunity in the Twenty-First Century Corporate Workplace: The Perspectives of Young Black Professionals (2011) (unpublished Ph.D. dissertation, Princeton University) (on file with author).

92. *See* Patrick Biernacki & Dan Waldorf, *Snowball Sampling: Problems and Techniques of Chain Referral Sampling*, 10 SOC. METHODS & RES. 141, 141 (1981) (explaining that this method is well-suited for research on sensitive topics); Oisín Tansey, *Process Tracing and Elite Interviewing: A Case for Non-probability Sampling*, 40 PS 765, 770 (2007) (snowball sampling is "particularly suitable when the population of interest is not fully visible").

93. *See, e.g.*, LOIS BENJAMIN, THE BLACK ELITE xix (1991); Sharon M. Collins, *Black Mobility in White Corporations: Up the Corporate Ladder but Out on a Limb*, 44 SOC. PROBS. 55, 57 (1997); Turco, *supra* note 511, at 898.

94. *See* TOM WENGRAF, QUALITATIVE RESEARCH INTERVIEWING: BIOGRAPHIC NARRATIVE AND SEMI-STRUCTURED METHODS 5 (2001). At the beginning of each interview, I asked that they begin by telling me about their personal circumstances and educational experiences during their childhoods, and I explained that I would be asking them clarifying and follow-up questions according to their comments. Interviewees were asked to discuss the racial and socioeconomic demographics of their schools and communities, and their encounters with racial mistreatment. Interviewees were then asked to discuss their college and professional experiences and to explain what led them to pursue employment in large corporate law firms. I asked them to discuss their career experiences at their firms, and to discuss any ways in which they believed that they or other black workers there were affected by race.

95. *See* Henry E. Brady et al., *Refocusing the Discussion of Methodology*, *in* RETHINKING SOCIAL INQUIRY 25 (Henry E. Brady & David Collier eds., 2d ed. 2010) (discussing the value of such in-depth knowledge in "directly contribut[ing] to more valid descriptive and causal inference").

96. Although several of these interviewees indicated that white workers were also disadvantaged by these homophily processes, all agreed that this dynamic disadvantaged black workers disproportionately.

racial exclusion in their firms, ranging from such relatively exclusive forms of cultural capital as international travel and knowledge of the fine arts to such relatively low-brow traits as their enthusiasm toward particular television shows and drinking games. Although these cultural dynamics were not directly racial, they culminated in a number of occupational disadvantages for interviewees and their fellow black professionals, depriving them of equal access to social support, opportunities, and career advocacy and protection.[97] These inequalities left them vulnerable to a host of negative career outcomes ranging from job dissatisfaction to career stagnation to early termination.[98]

Their experiences and observations were consistent with patterns observed in past studies of black professionals in white employment settings. In one of the earliest studies of black workers in large corporations, writers George Davis and Glegg Watson shared the accounts of several interviewees who perceived that various race-based cultural traits placed black workers at risk of adverse professional consequences from their white colleagues.[99] In his ethnographic research on black professionals working in a Philadelphia firm, sociologist Elijah Anderson found that black workers who were culturally and socially alienated from their white colleagues were professionally marginalized in their firm while those black workers who had cultivated the same cultural preferences and engaged in the same social activities as their white counterparts enjoyed more successful careers.[100]

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97. During their interviews, workers discussed this process as leading to a number of problems and difficulties that existing scholarship has discussed solely in the context of racial bias and stereotypes. These include: feelings of social alienation and isolation (25); reduced access to work and premium assignments (14), less information, advice, and feedback (7); less generous performance reviews, less sponsorship and access to promotions (6); and greater risk of job loss (13).

98. These interviewees perceived this problem as an unfair source of disadvantage for black workers. Hence, their perspectives cannot be attributed to "just world" beliefs or other systems justifying ideologies that some psychologists and law professors theorize may lead people to understate their exposure to group-based discrimination. These scholars have posited that people from lower-status groups—for example black workers—may deny the existence of racial unfairness in their workplaces in order to preserve their self-esteem, optimism, and the sense that they still have agency in shaping their own destinies. *See* Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1142-51 (offering the findings of system justification research to explain why black people may in some instances under-report racial discrimination).

99. GEORGE DAVIS & GLEGG WATSON, BLACK LIFE IN CORPORATE AMERICA: SWIMMING IN THE MAINSTREAM 38-40 (1982) (black professionals describing risks of failing to suppress culturally-infused preferences concerning, for example, clothing fashion and choice in automobiles).

100. Elijah Anderson, *The Social Situation of the Black Executive: Black and White Identities in the Corporate World*, *in* THE CULTURAL TERRITORIES OF RACE: BLACK AND WHITE BOUNDARIES 13 (Michèle Lamont ed., 1999) (explaining that the more successful "peripheral" black workers participated in "such activities as golf and tennis as well as occasional evenings at the symphony, the opera, or the theater, at times in the company of white coworkers and friends").

The following subsections will draw from these interviewees' reflections on their careers to illuminate the workings and impact of these derivative processes of institutional discrimination in real world employment contexts.

1. Intermediate Employment Harms

The most common problems relating to derivative racial discrimination involved intermediate, non-determinative career experiences. Numerous interviewees reported, for example, that race-related cultural dynamics impeded their full social and professional integration into their firms.[101] They explained that interactions and informal social gatherings in their work groups often took place on cultural terms that were foreign or undesirable to black workers.[102] While many white workers seemed to enjoy informal interactions with colleagues in the office and elsewhere, even seemingly casual and light-hearted gatherings and activities were on balance far more burdensome for black workers. As outsiders who lacked the cultural vocabulary to "speak the language" taken for granted and privileged by their colleagues, many experienced these interactions as uncomfortable, challenging ordeals that reinforced their feelings of alienation.

The accounts of two interviewees, "Lori,"[103] an attorney, and "Greta," a financial industry professional, provide insight into the impact of derivative racial discrimination on the careers of many black workers. But for her racial identity, Lori's background should have made her a natural fit at her white-shoe firm. Lori hailed from a multi-generational professional family, had grown up in a fairly affluent neighborhood, and had attended a prestigious private high school. Her social and cultural experiences, however, were strongly informed by her racial identity and therefore diverged sharply from those of her white colleagues. During her childhood, Lori had socialized almost exclusively with other black students and immersed herself in black culture. After attending a prestigious predominantly white college where offensive conduct by some of the school's white students made her feel unwelcome,[104] Lori chose to attend

101. *See supra* notes 966-988 and accompanying text.

102. This problem may also lead many qualified black workers to decide against pursuing careers in these firms altogether. In their research on the career experiences of a cohort of recent law school graduates, professors Ronit Dinovitzer and Bryant Garth shared a telling anecdote of one black attorney who ultimately chose not to apply for work at corporate law firms because of her social discomfort and lack of familiarity with the culturally informed conversations concerning "golf and similar subjects" at an informational reception hosted by one firm. Ronit Dinovitzer & Bryant G. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 L. & SOC'Y REV. 1, 42 (2007).

103. The names used in this section are pseudonyms designed to protect the confidentiality of these interviews.

104. She described her encounters with racial insensitivity and indifference at this school as having "beat [her] down, racially." Interview with Attorney (Jan. 27, 2010).

law school at a historically black university ("HBCU"). After excelling there socially and academically, she accepted a job offer at one of the largest law firms in the country.

Despite her lifelong exposure to privilege, Lori arrived at her firm with very little acclimation to the cultural tastes and social practices of her white counterparts. This disconnect brought adverse career consequences as she felt alienated from her colleagues and often found her interactions with them strained and difficult. She explained that even when some of her white colleagues made efforts to initiate friendly small talk or banter with her, she often still felt uncomfortable and out of her element, in part because of the cultural underpinnings of these conversations.

During our interview, Lori described a number of race-related cultural and experiential differences that encumbered these interactions. She explained, for example, that she did not understand many of her colleagues' frequent references to television programs, including *Friends* and *Seinfeld*, which they had watched in high school and college while Lori had tuned in to *Martin* and *Living Single*, programs that were far more popular with black audiences.[105] While the white associates on her primary case seemed to enjoy working together in their team's document review room, engaging in so much banter and small talk that it slowed down their work substantially, Lori felt more comfortable burying her face in her work and finishing up her assigned documents as quickly and quietly as possible. While they developed camaraderie and rapport, Lori felt alienated and isolated.

Another interviewee, Greta, faced a similar set of challenges while working at a large Wall Street investment bank in a department where workers regularly socialized with each other outside of the office. Like Lori, Greta had attended high school and college at prestigious, predominantly white institutions while socializing almost exclusively with the "core groups of black students on campus,"[106] with whom she felt social and cultural solidarity. After graduating from college and joining her bank, Greta came to realize that her cultural tastes and frame of reference (and those of several of her black colleagues) diverged sharply from those of her white counterparts. These differences became most conspicuous during her department's frequent informal gatherings at nearby

105. *See* Greg Braxton, *For Many Black Viewers, 'Seinfeld's' End Is Nonevent*, L.A. TIMES (May 12, 1998), http://articles.latimes.com/1998/may/12/entertainment/ca-48714 (reporting that the television program *Seinfeld* was the most popular show among all viewers but only ranked 50th among black viewers); David Zurawik, *Races Diverging in Viewing Habits: Study Finds Little Correlation Between Blacks' and Whites' Favorite Shows*, BALT. SUN (May 02, 1996), http://articles.baltimoresun.com/1996-05-02/features/1996123149_1_black-viewers-blacks-and-whites-blacks-and-whites (noting that none of the highest-rated prime time shows amongst black viewers—*New York Undercover*, *Living Single*, and *The Crew*—were ranked within the 100 most popular shows among white viewers).

106. Interview with Finance Industry Professional (Aug. 5, 2009).

bars. While her white colleagues appeared to enjoy this social ritual,[107] every one of her black colleagues preferred to spend their leisure time in predominantly black social spaces with very different styles of music, drinking, and conversational topics.[108]

> One of the challenges that I had . . . is that everybody goes for drinks on Thursday. Our white counterparts—they go to the bar. Thursdays and Fridays; it's just a given. That's where a lot of socializing happens, that's where a lot of conversations happen. . . . And that is not something that we're [black workers] always socialized to do. That's not something we do in college. We don't play beer pong and beer games and "flippy-cup" and all these other things in college. . . . [Y]ou go into the corporate setting where there's people that already have something familiar happening and the cliques start happening, just naturally, and you get excluded from things and you have to encourage yourself to go. . . . Our [non-black] peers that might rise faster have been socialized in that way. . . . We don't socialize in that way so we miss out.[109]

In this manner, even cultural traits that are not intrinsically or directly linked to racial identity can still contribute to adverse professional outcomes for black workers. Although perhaps seemingly trivial, these cultural differences reinforced black workers' self-perceptions of themselves as outsiders nonetheless. This frustration eventually led many to minimize their social interactions with colleagues in the group.[110] Greta explained that she and some of her black colleagues grew tired of struggling in vain to bridge this social disconnect because the considerable psychological costs and effort seemed to outweigh the tenuous potential benefits. "[W]e know there's a game and we just don't want to play it. And the game is harder for us."[111] The decision to give up on their efforts to develop camaraderie and rapport with colleagues was costly, as it deprived them of critical opportunities to develop valuable, career-

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107. Of course, Greta's perceptions about the internal motivations and mindsets of her white counterparts may have been inaccurate. It is quite possible that some of them also found these work outings laborious or uncomfortable but were simply better able to feign enjoyment. Like many black workers, Greta possessed far closer relationships with her black colleagues than her white ones, and therefore had a stronger empirical basis to offer her assessments about their feelings toward these events.

108. Several other interviewees made similar observations and complaints about work-related social gatherings at local bars and restaurants. Although they did not report feeling excluded or unwelcome at these gatherings, they found them to be awkward and unenjoyable nonetheless. *See generally* REUBEN A. BUFORD MAY, URBAN NIGHTLIFE: ENTERTAINING RACE, CLASS, AND CULTURE IN PUBLIC SPACE (2014) (describing cultural differences in the social practices and preferences of black and white young adults).

109. Interview with Finance Industry Professional, *supra* note 106.

110. Even those interviewees who regularly participated in such office social outings commonly described themselves as outliers during our interviews and indicated that very few of their black colleagues attended.

111. Interview with Finance Industry Professional, *supra* note 1066.

enhancing social capital. That these ambitious, high-achieving workers eventually opted not to undertake such additional effort despite its consequences for their careers underscores the magnitude of the psychological and dignitary harms and burdens that can attend efforts of minority workers to subordinate their own cultural repertoires to those of their white colleagues.[112]

These cultural and social difficulties, and the protective adaptations that many black workers use to minimize their exposure to them,[113] contribute to the well-documented racial disparities in workplace social capital.[114] As such, they carry potentially disastrous professional consequences, the magnitude of which only becomes evident upon examining the arc of these workers' career trajectories. Without solid rapport with the other attorneys in her group, Lori had greater difficulty finding work assignments than her better-connected counterparts. She also belatedly discovered that her reticence during team meetings and informal interactions led others in her group to question her engagement in her work and her commitment to her career at the firm. When the effects of the recent economic downturn reached her department, she ultimately found herself out of a job. Lori left the firm (and the world of corporate law altogether) shortly after our interview without having secured the type of in-house position to which she had originally aspired.

Greta's career at her bank followed a similar trajectory: her alienation and isolation limited her access to work opportunities and ultimately led to early departure.[115]

The frustrated careers of these women illuminate some of the complications and ambiguities of derivative racial discrimination. Although

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112. *See* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 720 (2001) (explaining that "[t]o the extent the employee's continued existence and success in the workplace is contingent upon her behaving in ways that operate as a denial of self, there is a continual harm to that employee's dignity"); Green, *Work Culture and Discrimination*, *supra* note 1, at 633 (discussing the "harms in time and energy devoted to engaging in appropriate work culture behavior and harms in devaluation and transformation of identity").

113. Black Americans utilize these kinds of self-protective avoidance strategies outside of the workplace as well. *See, e.g.*, SAM FULWOOD III, WAKING FROM THE DREAM: MY LIFE IN THE BLACK MIDDLE CLASS 4 (1996) (explaining that middle-income black families seek out black suburban enclaves to minimize their exposure to the difficult interracial interactions they experience at work); Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261, 262 (discussing her young niece's refusal to enter an all-white swimming pool as "an act of self-protection and self-definition"). These adaptations, though completely understandable, further contribute to the racial separateness that disadvantages black workers in predominantly white institutions.

114. *See supra* note 1919 and accompanying text.

115. During our interview, less than three years into her career at the bank, she reported that she had been overlooked for desirable assignments, lateral staffing opportunities, and promotions that would have advanced her career. Shortly after our interview, she left Wall Street altogether to take a position at a more racially diverse non-profit organization.

they both found their colleagues welcoming and collegial, they nonetheless lacked equal access to crucial relational and professional resources in their firms. Neither felt that they had been singled out for unfair treatment or subject to racial discrimination—Greta even explained that she "never felt an experience with someone against [her] because of [her] race"[116]—but both understood that their careers had been derailed by subtle, difficult-to-describe racial dynamics. Although it is possible that each of them eventually would have grown discontent at their firms and left anyway, the derivatively discriminatory cultural and social conditions that they encountered encumbered their professional development and career advancement, and hastened their departures.

2. Determinative Personnel Decisions

Although most of the derivative discrimination problems discussed by interviewees pertained to intermediate forms of professional disadvantage,[117] several interviewees also linked cultural homophily to racial disparities in more determinative career outcomes, including promotions and firings. Their accounts provide plausible, compelling descriptions of the processes through which derivative racial discrimination contributes to disparities that scholars traditionally have analyzed solely through the conceptual lens of racial bias.

Jevan, a trader at a Wall Street investment bank, recalled a period earlier in his career when white male senior colleagues and supervisors had passed him over for multiple high-paying positions that instead went to less competent white male candidates.[118] He had been outraged by these decisions, which he considered unfair and racially discriminatory. But by the time of our interview, Jevan had grown convinced that these personnel decisions, and many others that disadvantaged black workers on Wall Street, reflected the cultural and social preferences of his white colleagues more so than racial biases.[119] In a description consistent with those offered by several of the hiring interviewers in Lauren Rivera's study,[120] he explained that the workers in his group weighed considerations of common ground and rapport heavily when staffing some of the more highly sought after and lucrative positions:

> You're going to sit next to somebody for 10 to 15 hours of your day for every day of the week for a couple years . . . and you want to make sure the person

116. Interview with Finance Industry Professional, *supra* note 106.

117. *See supra* notes 1011-116 and accompanying text.

118. Interview with Trader (May 5, 2009).

119. *Id.* He explained, "When I was 22 years old, to me it was race. Looking back on it now, I want to say it was culture." *Id.* It should be noted, of course, that Jevan may be mistaken in attributing his problems to culture and not race. However, this possibility does not undermine the plausibility or coherence of his explanation.

120. *See supra* notes 255-288 and accompanying text.

> you're sitting next to is . . . someone you can connect with and feel comfortable next to. And I think that translates into, "What are your shared experiences? . . . Who do I feel comfortable working next to because of that shared experience? So that when I make a joke, they get that joke. So that when I'm working late at night and go to drinks with them, they understand where I'm coming from."[121]

Jevan perceived that many black workers were unable to advance on Wall Street in part because they lacked "shared experiences" with the white higher-ups in their firms.[122] He noticed that the relatively few black workers who were able to establish cultural common ground with higher-ups in some instances seemed to receive the same kind of preferential treatment as their well-connected white counterparts.[123] Jevan used this observation to further his own career. Determined to advance to a higher paying position at his bank, Jevan made a concerted effort to better acclimate himself to his colleagues by socializing with them away from the office far more regularly and by strategically acculturating himself to some of their cultural preferences, which included luxury vacations and world travel, meals at top-rated restaurants, and expensive clothing and accessories.[124] Cultivating these tastes and experiences was costly and risky for Jevan, who explained that he felt forced to live beyond his means for a period in his career.[125] These efforts proved worthwhile for Jevan though, as he credited this strategic cosmopolitanism with allowing him to cultivate stronger relationships with some of the decision-makers in his group. He credited this social and cultural labor with helping him succeed in his career and advance to higher paying positions.[126]

His experience was echoed in the accounts of several other interviewees who observed that black workers with cultural interests and backgrounds aligned with those of their colleagues in some instances benefited from the very same cultural and social dynamics that disadvantaged other black workers.[127] It should be noted though that even though Jevan eventually succeeded in landing one of the higher-paying positions that he had long coveted, the delay brought about by the social and cultural dynamics of his work group deprived him of

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121. Interview with Trader, *supra* note 1188.

122. *Id.*

123. *Id.* Jevan recalled witnessing one less-than-stellar black intern leverage his love for golf into rapport with a partner who ultimately gave him an offer of employment contrary to the recommendations of other workers in their group (including Jevan).

124. *Id.*

125. *Id.*

126. *Id.*

127. Several interviewees provided individual examples of black professionals, including in some instances themselves, benefitting from cultural homophily. One interviewee, a law firm associate, spoke of forming high-quality relationships with her associate peers and partners in her department through her love for theater and the fine arts. *See* Woodson, *Race and Rapport*, *supra* note 9, at 2574-75.

hundreds of thousands of dollars in career earnings that he will never be able to recoup. Therefore, even where workers are able to overcome derivative racial discrimination, it can still contribute to lasting wealth and status inequalities.

Other interviewees discussed derivative racial discrimination as a source of racial disparities in job loss and attrition rates at their firms. Brandon, an attorney, reported that there was "definitely a difference" between the mentorship received by black and white associates at his former law firm.[128] These racial disparities in social capital led to greater attrition rates for black associates at his firm. He explained that this lack of mentorship became especially consequential when black associates made mistakes on assignments.

> [I]t's a death spiral and there's no person there to pull you out of it. And that's when you suffer from lack of mentorship. For example, I watched people who had guidance make all sorts of mistakes. But at the end of the day everyone knew that some important partner was their mentor, and they always get chances and the opportunities to rehabilitate damage done to one's reputation. But I noticed with the black associates that folks started to whisper negatively about you, and say "so and so's not that good, or so and so doesn't pay attention to detail." Before you know it, you'd start to feel isolated. Then you'd start getting the sense that nobody trusts you with anything, and that everyone's looking over your shoulder for everything that you do, and that's really a bad place to find one's self as an associate. And once the trust is gone, then it's only a matter of time before the sharks start feeding. Then you get a less than stellar review and then you get a negative review, and before you know it they're telling you that you ought to start looking.[129]

Upon first impression, this narrative seems completely consistent with the patterns of racial mistreatment discussed in the traditional antidiscrimination scholarship. To the extent that black attorneys in his firm disproportionately were denied mentorship and treated more punitively for their mistakes, it would seem intuitively plausible to attribute these problems to racial biases and stereotypes on the part of the firm's predominantly white partners. Brandon, however, offered a very different assessment. Insisting that the firm was "a fair place,"[130] he attributed the social capital gap to the lack of cultural common ground between the firm's (mainly first-generation professional) black

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128. Interview with Attorney (Jan. 29, 2010). He explained during our interview that the partners of his group "sort of had their favorites and I [was] sort of on the outside." *Id.*

129. *Id.*

130. *Id.* He explained, "I got the assignments that I was supposed to get. I didn't feel that people were getting plum assignments and I was getting stuck with the leftovers. . . . I didn't feel that the law firm valued me any less [than the white associates]." When asked whether other black associates shared his perception, he replied that he had "never really heard anybody accuse [the firm] of overt racism." *Id.* Of course, his assessment of these conditions as "fair" is subjective and highly contestable.

associates and its affluent predominantly white partners. He explained that this lack of "commonality" inhibited interactions and reduced rapport.

> Being introduced to a law firm environment, you go to places and there's a wine list and they sit down and pick wines, and I didn't know much about that—[my family] didn't even drink wine. . . . They ask, "Where did you summer?" I didn't summer anywhere—I'm from a middle-class family. My folks stayed in [my hometown] so I went home when I had breaks. I think that's the sort of commonality of experience that there's just no substitute for. I didn't come from that world; I didn't have a whole lot in common with them. I didn't appreciate the same sorts of things. . . . I think that's part of what keeps you from developing the mentoring relationships.[131]

The difficulties, as Brandon explained, were not race-specific or unique to black workers, but instead reflected broader cultural and class-based characteristics.[132] Nonetheless, he observed that these dynamics disadvantaged black workers disproportionately. Brandon's description of cultural and social dynamics at his firm touches on all the core components of derivative racial discrimination: seemingly inconsequential cultural differences, produced by racial segregation outside of the workplace, shaped professional interactions and relationships in ways that subtly but powerfully undermined the careers of black workers.

The empirical findings presented in this Article are by no means conclusive evidence of the magnitude of the problem of derivative racial discrimination. It is of course possible that Brandon and the interviewees who described similar processes of derivative disadvantage were mistaken in their interpretations of their experiences at their firms. They may have, in some instances, misinterpreted evidence of racially biased behavior as only indirectly race-related cultural homophily. After all, individuals' reports of their racial experiences are by no means infallible. Interpreting the possible racial motives of other people is a difficult, imprecise undertaking. It requires people to make inferences about ambiguous behavior, often on the basis of incomplete information and highly circumstantial evidence, a process that requires them to draw upon past experiences and presumptions about the significance of race.

Nonetheless, acknowledging these potential concerns, these interviews provide valuable, first-hand insights into the experiences of high-status black workers in predominantly white employment settings. Their accounts describe plausible, potentially important forms of racial disadvantage that have seldom been contemplated by scholars, employers, courts, or policymakers. As such, the problem of derivative racial discrimination demands greater public

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131. *Id.*

132. Non-black workers from lower-socioeconomic backgrounds may also begin their careers lacking some of the social experiences and cultural repertoires that other attorneys at the firm take for granted.

awareness and scholarly research.

The following Part will situate this theory of derivative racial disadvantage alongside the forms of discrimination that have been addressed in recent antidiscrimination scholarship while emphasizing critical conceptual distinctions between them.

III. BEYOND RACIAL BIAS

To date, the rich body of legal scholarship on racial inequality in the workplace has focused almost exclusively on the role of racial bias-driven behavior. Despite the frequent use of organizational—and institutional—sounding terminology that would appear to be consistent with any number of forms of racial disadvantage,[133] including derivative racial discrimination, this scholarship has largely attributed the problems of minority workers to the racial biases of their employers and colleagues.[134] Acknowledging the continued impact of racial bias on the careers of many black workers, this Part aims to differentiate cultural homophily as a distinct form of racial disadvantage.

A. The Bias Paradigm

That racial bias has been the predominant focus of the existing legal scholarship on institutional discrimination should come as no surprise to readers familiar with America's racial history, civil rights legal regime, or recent trends in social science research. The racial bias-driven mistreatment of black Americans was the central sin targeted by civil rights laws in the Reconstruction and Civil Rights Eras. Bias-driven behavior indisputably violates the proscriptions of employment discrimination law and runs afoul of widely embraced societal norms.[135] Hence, there are substantial strategic

133. *See, e.g.*, Flagg, *supra* note 1, at 2013 n.12 ("institutional racism"); Suzanne B. Goldberg, *Discrimination by Comparison*, 120 Yale L.J. 728, 770-72 (2011) ("structural discrimination"); Green, *Discrimination in Workplace Dynamics*, *supra* note 3, at 92 ("workplace dynamics"); Payne-Pikus et al., *supra* note 19, at 559-62 ("institutional discrimination"); Sturm, *supra* note 6, at 462 ("structural forms of bias"); *id.* at 460 ("structural, relational, and situational" and "manifestations of workplace bias"). *See generally* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 2 (2006) (discussing this body of work as "the structural turn in antidiscrimination scholarship").

134. *See infra* notes 1477-1533 and accompanying text.

135. *See generally* PAUL BURSTEIN, DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL (1985) (describing the public sentiment against employment discrimination and in favor of antidiscrimination laws that emerged during the mid-to-late twentieth century). Even today, when many people deny the continued relevance of racial disadvantage and essentially blame black Americans for their own misfortunes, few contest the normative consensus against racial discrimination. *See* Brakkton Booker, *How Equal Is American*

reasons for emphasizing the potential role of bias as an ongoing source of workplace inequality and racial disparities. For scholars and advocates interested in mobilizing resources to address racial inequality, connecting ambiguous, complex racial problems to subtle forms of racial bias offers potentially substantial payoffs. Conversely, acknowledging that some amount of these racial disparities and disadvantages stem instead from homophily-based practices may undermine the normative force of doctrinal and policy efforts to address them.

Though most of our biases—the systematic variation in how we tend to react to particular attributes or stimuli[136]—are innocuous and legally inconsequential, those that are based on certain social identity traits, such as race, take on important normative and legal implications. Racial bias, a complex of intergroup orientations, includes both cognitive beliefs (stereotypes) and affective and attitudinal reactions (prejudices) about racial groups and their individual members.[137] Racial bias can take the form of negative reactions to other racial groups or positive orientation to one's own.[138] Racial bias may be manifested in our most fervently held beliefs or in subtle, automatic reactions driven by subconscious impulses of which we may not be aware.[139] In all of these iterations, racial bias contributes to discrimination when it leads people to treat others either more or less favorably according to

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Opportunity? Survey Shows Attitudes Vary by Race, NPR (Sept. 21, 2015), http://www.npr.org/sections/thetwo-way/2015/09/21/442068004/how-equal-is-american-opportunity-survey-shows-attitudes-vary-by-race (reporting that 61% of white Americans believe that black workers have equal opportunities to earn equal pay); Michael A. Fletcher, *Whites Think Discrimination Against Whites is a Bigger Problem than Bias Against Blacks*, WASH. POST (Oct. 8, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/10/08/white-people-think-racial-discrimination-in-america-is-basically-over/; Catherine E. Schoichet, *How Big of a Problem is Racism in Our Society*, CNN (Nov. 24, 2015), http://www.cnn.com/2015/11/24/us/racism-problem-cnn-kff-poll/ (reviewing survey data demonstrating that fewer than 50% of Americans regard racism as a "big problem"). *But see* Schoichet, *supra* note 1355. (demonstrating that recognition of the significance of racism has increased dramatically since 2011).

136. Gregory Mitchell & Phillip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1035 (2006).

137. John F. Dovidio et al., *Prejudice, Stereotyping and Discrimination: Theoretical and Empirical Overview*, *in* THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 5-7 (Dovidio et al. eds., 2010) (describing stereotypes as cognitive schemas that include such information as "beliefs about the traits characterizing typical group members" and prejudice as an attitude reflecting a positive or negative affective evaluation of a group); Miles Hewstone et al., *Intergroup Bias*, 2002 ANN. REV. PSYCHOL. 575, 576 (2002).

138. *See generally* Marilynn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. SOC. ISSUES 429 (1999).

139. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1508 (2005) (explaining that "implicit mental processes may draw on racial meanings that, upon conscious consideration, we would expressly disavow").

their racial group identity. This bias paradigm stands as a leading default explanation for racial inequality in employment.

This presumption attributing employment inequality to racial bias reflects the extraordinary influence in legal academia of the large and growing body of experimental research on implicit racial bias,[140] subtle racial attitudes, and reactions that may drive human behavior automatically in certain conditions.[141] Once the domain of a fairly insular group of academic psychologists, this research has over the past two decades been covered extensively in national newspapers, periodicals, and other news sites as authoritative evidence that automatic, possibly unconscious, racial biases are widespread and responsible for many enduring social problems and racial inequalities.[142] The most popular test of implicit bias, the implicit association test (IAT), requires test-takers to match words pertaining to racial groups or their members with words expressing positive or negative attributes.[143] "Response latency," the time taken in responding to the test prompt, is taken to reflect the strength of association between the target category and the evaluative concept.[144] Though the precise applicability of this research to real world employment situations remains an open question[145] and the source of contentious scholarly debate,[146] this research

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140. Implicit bias research has been discussed at length and applied to employment discrimination and other legal problems in dozens of law review articles. *See, e.g.*, Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 952-53, 965-66 (2006); Christine Jolls & Cass R. Sunstein, *The Law of* Implicit Bias, 94 CALIF. L. REV. 969 (2006); L. Song Richardson & Phillip Atiba Goff, *Implicit Bias in Public Defender Triage*,122 YALE L.J. 2626 (2103); *see also* IMPLICIT BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012).

141. Hewstone et al., *supra* note 1377, at 577 (explaining that "[i]mplicit measures of bias are evaluations and beliefs that are automatically activated by the mere presence of the attitude object").

142. *See, e.g.*, Chris Mooney, *Whites Are Biased and They Don't Even Know It*, WASH. POST (Dec. 8, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/12/08/across-america-whites-are-biased-and-they-dont-even-know-it (positing, on the basis of implicit bias test results, that "[m]ost white Americans demonstrate bias against blacks, even if they're not aware of or able to control it"); Chris Mooney, *The Science of Why Cops Shoot Young Black Men: And How to Reform Our Bigoted Brains*, MOTHER JONES (Dec. 1, 2014), http://www.motherjones.com/politics/2014/11/science-of-racism-prejudice (providing extensive overview of implicit bias research findings); Sendhil Mullainathan, *Racial Bias, Even When We Have Good Intentions*, N.Y. TIMES (Jan. 3, 2015), http://www.nytimes.com/2015/01/04/upshot/the-measuring-sticks-of-racial-bias-.html (summarizing findings from implicit bias studies and concluding that "[t]he key to 'fast thinking' discrimination is that we all share it").

143. *See* Mitchell & Tetlock, *supra* note 136, at 1044-47 (describing the methodology of the most popular methods of measuring implicit stereotypes and prejudices).

144. *Id.* at 1045. For example, test-takers who are slower to match the word "black" than the word "white" with positive concepts, or quicker in matching it with negative ones, are considered to have revealed implicit, anti-black racial biases. *Id.* at 1046.

145. *See* Bielby, *Minimizing Workplace Gender and Racial Bias*, *supra* note 600, at

stands as a dominant conceptual lens through which legal scholars analyze and interpret workplace inequality. In this context, scholars have used bias-centric theories to explain many of the disadvantages affecting black workers including the manner in which informal workplace norms privilege the cultural sensibilities of white workers,[147] mentorship disparities,[148] and the racially disparate outcomes associated with employers' use of subjective personnel practices.[149]

In light of this scholarship, the following section will distinguish homophily-driven cultural disadvantage (derivative racial discrimination) from seemingly similar forms of cultural discrimination driven by racial biases and

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122 ("[D]ecision-making contexts in laboratory settings have no history, and subjects rarely have any personal stake in the outcomes they generate. . . . [T]hey are abstracted from the cultural and institutional environments of employment decisions in the real world."); Devon Carbado et al., *After Inclusion*, 4 ANN. REV. L. SOC. SCI. 83, 91 (2008) (observing that "link[ing] evidence of pervasive bias drawn from the IAT and other types of psychological tests with evidence of pervasive racial inequality in employment" is a "difficult methodological problem"); Mitchell & Tetlock, *supra* note 136, at 1108-10 (identifying twelve ways in which the contexts of implicit bias experiments differ from the conditions in which employers make real world employment decisions).

146. *See, e.g.*, Philip E. Tetlock & Gregory Mitchell, *Calibrating Prejudice in Milliseconds*, 71 SOC. PSYCHOL. Q. 12, 13 (2008) (discussing the "low test-retest reliability of the IAT"); John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 42 (2009) (criticizing Tetlock and Mitchell's critique and insisting that implicit bias has been linked definitively to real world behavior); Hart Blanton et al., *Strong Claims and Weak Evidence: Reassessing the Predictive Validity of the IAT*, 94 J. APPLIED PSYCHOL. 567, 567-68 (2009) (countering that although "the perception exists that the relationship between IAT scores and behavior has been much studied and well established[,] . . . the evidence is surprisingly weak"); *id.* at 571-73 (offering blistering critique of a study that McConnell and Leibold had credited with linking implicit biases to actual discrimination, by raising questions about the study's design, data quality, findings, and interpretations); Allen R. McConnell & Jill M. Leibold, *Weak Criticisms and Selective Evidence: Reply to Blanton et al.*, 94 J. APPLIED PSYCHOL. 583 (2009) (countering these criticisms).

147. *See, e.g.*, Carbado & Gulati, *Working Identity*, *supra* note 1, at 1268-69; Green, *Work Culture and Discrimination*, *supra* note 1, at 645.

148. *See, e.g.*, Wilkins & Gulati, *Why Are There so Few Black Lawyers*, *supra* note 3, at 569 (describing the presumed biases of white partners in favor of white associates as the "chief" cause of black associates' mentorship difficulties).

149. Green, *Targeting Workplace Contexts*, *supra* note 1, at 669 (explaining that informal personnel practices "facilitate discrimination" by "increas[ing] the likelihood that decision makers will rely on stereotypes in evaluating candidates."); Wilkins & Gulati, *Why Are There so Few Black Lawyers*, *supra* note 3, at 500 (noting that the subjectivity inherent in law firms' hiring processes provides cover for biased attorneys to discount black attorneys' objective credentials); *see also* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 744 (2005) ("[T]he potential for unconscious stereotypes and biases to intrude into the evaluation process is greatest when subjective judgments are involved." (citing Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in* Price Waterhouse v. Hopkins, 46 AM. PSYCHOLOGIST 1049, 1056 (1991))).

stereotypes

B. Disentangling Cultural Homophily from Racial Bias

Given the traditional emphasis on racial bias, it is little wonder that homophily-based racial disadvantage has gone unacknowledged thus far. After all, the racial consequences of derivative discrimination—the unequal access to work opportunities, inadequate mentorship, harsher performance reviews, and reduced promotion prospects discussed by the workers interviewed for this study—are precisely the type that scholars and commentators frequently discuss in the context of racial bias. In recent years, a number of antidiscrimination scholars working within this bias-centric analytical framework have advanced theories of cultural discrimination.[150] This approach posits that employers consider minority workers who possess characteristics associated with minority racial identity[151] racially "unpalatable" and therefore subject them to discriminatory mistreatment.[152] Although these specific theories of employer behavior have not yet been substantiated empirically,[153] they offer

150. *See, e.g.*, Carbado & Gulati, *The Fifth Black Woman*, *supra* note 1122, at 717-18 (arguing, by way of hypothetical example, that black workers who exhibit certain traditionally black cultural and social traits may be subject to stereotype-based racial discrimination); Tristin K. Green, *Work Culture and Discrimination*, *supra* note 1, at 643-48 (positing the existence of workplace cultural rules that reflect the "cognitive and motivational biases" of individual majority-group workers); Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 381 (2008) (explaining that the cultural rules and expectations of these workplaces function as a subtle mechanism "in which discriminatory biases can translate into subordination and exclusion of women and people of color . . . ."); Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument about Assimilation*, 74 GEO. WASH. L. REV. 365, 365-66 (2006) ("Discrimination today . . . may be driven, not by status per se, but by traits and attributes that are culturally or statistically associated with race."); *see also* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1159-60 (2004) (positing that discriminatory culture-based employment rules and practices are driven by "the special stigma attached to race/ethnicity-associated practices").

151. Carbado et al., *After Inclusion*, *supra* note 1455, at 97 ("[T]he question is . . . whether the prospective employee is . . . black in terms of social behavior. Crudely, the question is whether, from the employer's perspective, she acts black.").

152. For example, law professors Devon Carbado and Mitu Gulati allege that black workers who possess characteristics associated with a racial minority are subject to "racial conduct discrimination" that renders them vulnerable to adverse employment outcomes. Carbado & Gulati, *Working Identity*, *supra* note 1, at 1262-63. In another article, Carbado and Gulati present the hypothetical case of a black woman who was denied a promotion in part because of her distinctively black self-presentation and grooming styles, recreational preferences, religious practices, involvement in workplace affinity groups and diversity efforts, residential choice, and membership in particular civic and social organizations. Carbado & Gulati, *The Fifth Black Woman*, *supra* note 1122, at 717-19.

153. To my knowledge, the cultural discrimination theories theorized in these articles have not yet been corroborated or confirmed empirically. This of course does not at all

plausible accounts of ways in which certain culture-based disadvantages may stem from racial biases.

But beneath this apparent consistency between derivative racial discrimination and the more familiar direct forms of discrimination lay a number of fundamental differences. Most fundamentally, derivative racial discrimination theoretically can disadvantage black workers independently of racial biases or stigma. Under cultural homophily, any and all cultural traits potentially present comparative advantages (or relative disadvantages), regardless of whether they are closely associated with racial identity. This is evident in the diversity of the cultural interests and preferences that interviewees described as being instrumentally valuable at their firms. Cultural traits and practices such as heavy beer consumption,[154] golf,[155] knowledge about wine,[156] and various conspicuous consumption practices[157] lack any intrinsic associations with racial identity but can still derivatively disadvantage black workers because of cultural homophily. As a practical matter, it is virtually impossible to rule out racial bias in the misfortunes and mistreatment of particular black workers, as the theory that employers and other workers who marginalize black workers do so under the influence of implicit bias is essentially non-disprovable. It is always possible that the exclusionary consequences of the cultural practices and preferences predominant within a given workplace are not merely incidental. In other words, white workers may be particularly inclined to embrace and partake in certain practices precisely because of their status-reinforcing effects. But just as it is important to keep in mind this potential intersection between bias and homophily, it is also important to heed the core insight of homophily: that people universally gravitate toward similar others even in the absence of status inequality or group bias.[158] It follows, then, that even if it were somehow possible to eliminate all racial biases and stereotypes from a given workplace, the cultural and social differences that present difficulties for many black workers would remain.

Homophily does not disadvantage black workers as punishment for their failure to conceal cultural attributes that are associated with black racial identity. To the contrary, the theory of cultural homophily suggests that even those black workers who exhibit many of the race-associated traits that cultural

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render them unpersuasive or unworthy of further analysis and elaboration.

154. *See supra* note 10909 and accompanying text.

155. *See* Woodson, *Race and Rapport*, *supra* note 99, at 2569 (explaining that a black law firm associate reported that his lack of familiarity with golf in some instances impeded him from developing rapport with colleagues).

156. *Supra* notes 131-1322 and accompanying text.

157. *Supra* notes 11919-1266 and accompanying text.

158. *See* McPherson et al., *supra* note 9, at 433 (discussing evidence of homophily on the basis of sex, age, and occupational prestige in volunteer organization members); *id.* at 429 (noting "considerable tendency for adults to associate with those of their own political orientations").

discrimination scholars presume to be potentially "racially unpalatable,"[159] may thrive so long as they also possess other attributes that enable them to establish common ground and forge rapport with colleagues.[160] Therefore, cultural homophily is a form of in-group preference, not out-group derogation.

Critically, this in-group preference is different than racial in-group favoritism, a common expression of racial bias. In-group favoritism, the "extension of trust, positive regard, cooperation, and empathy to in-group, but not out-group, members,"[161] can occur on the basis of virtually any trait.[162] Racial in-group favoritism occurs when individuals treat racial identity itself as the relevant basis of inclusion or exclusion.[163] By contrast, with respect to cultural homophily, cultural traits serve as the salient axis for in-group/out-group differentiation. Though the tendency to favor people because they share the same racial group identity (racial in-group favoritism) may in many instances produce the same outcomes as the tendencies to favor people who share common cultural characteristics (cultural homophily), this is not always so. Sometimes, racial in-group behavior and cultural homophily will produce opposite outcomes. For example, a black worker who shares his white colleagues' tastes in music and television shows may encounter very different treatment depending upon whether those colleagues act in accordance with racial in-group bias (and therefore treat him worse) or are more strongly influenced by cultural homophily (and therefore treat him more favorably). Hence, the outcomes of cultural homophily are far more situational and diverse, varying according to the cultural traits and preferences valued and possessed by workers in a given employment context.

This distinction carries potentially important practical implications. For

159. Carbado & Gulati, *Working Identity*, *supra* note 1, at 1262-63.

160. This is consistent with qualitative empirical data from these several interviewees. Several of the interviewees who were most successful and satisfied with their career experiences at their firms explained that they made no attempts to conceal their race-associated cultural interests and activities. For example, several were prominently involved in racial justice community service projects and black Greek letter organizations. Some even wore distinctively black fashion styles and adorned their offices with art from black artists and pictures of black historical figures. None reported feeling disadvantaged by these cultural traits and activities.

161. Hewstone et al., *supra* note 1377, at 578.

162. *See* Marilynn B. Brewer & Madelyn Silver, *Ingroup Bias as a Function of Task Characteristics*, 8 EUR. J. SOC. PSYCHOL. 393, 399 (1978) ("The finding that bias in favour of the ingroup . . . was unaffected by the arbitrariness of classification into groups."). *See generally* John W. Howard & Myron Rothbart, *Social Categorization and Memory for In-Group and Out-Group Behavior*, 38 J. PERSONALITY & SOC. PSYCHOL. 301 (1980) (finding that experiment participants displayed in-group preferences with respect to arbitrarily assigned groups).

163. *See* Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice Toward None and Charity for Some: Ingroup Favoritism Enables Discrimination*, 69 AM. PSYCHOLOGIST 669, 672 (2014) (describing evidence of racial in-group favoritism among black and white study participants who perceived their racial groups as in-groups).

example, antidiscrimination scholars have proposed various culture-based doctrinal reforms in which courts would extend the protections of Title VII to cover cultural traits that constitute minority workers' racial identities.[164] Though these proposals may help workers who have been subjected to identity-based cultural discrimination, they would not offer much relief to many of the workers who have been disadvantaged by derivative racial discrimination. These reforms have targeted employers' uses of rules that forbid or penalize cultural traits that are either most widely held by or most substantively meaningful for minority workers.[165] The cultural traits that disadvantage black workers via derivative racial discrimination often lack the racial significance and expressiveness required for protection under these new cultural rights-based proposals.[166] Though cultural differences reflect lifelong patterns of racially-informed socialization,[167] they are nonetheless often only incidentally related to race per se.[168] Therefore, the subtle racial differences that yield cultural homophily-based disadvantages—for example, the racial differences in television shows and topics of conversation or preferred nightlife venues[169]—often are simply not obviously or deeply enough associated with race to draw protection under even this broader reading of Title VII.[170]

The conceptual framework of derivative discrimination helps explain many of the racial disparities that the existing legal scholarship treats solely as manifestations of racial bias.[171] So long as patterns of racial differences in

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164. *See* FORD, RACIAL CULTURE, *supra* note 744, at 60 (discussing several such proposals).

165. *See* Carbado & Gulati, *The Fifth Black Woman*, *supra* note 1122, at 720-29 (proposing that workplace rules penalizing minority cultural traits may violate employment discrimination law by constituting racially disparate terms of employment, "race-plus" discrimination, or impermissible racial stereotyping); Flagg, *supra* note 1, at 2038-51 (arguing that employment discrimination law should forbid any and all assimilationist cultural rules that foreseeably could tend to disadvantage minority workers disproportionately); Green, *Discomfort at Work*, *supra* note 1500, at 418 (proposing that employers "be required to provide accommodation for appearance traits that an employee (or applicant) claims signal identification with a subgroup recognized by Title VII, such as race, sex, or national origin").

166. *See supra* notes 106-1111 and accompanying text; *see also* FORD, RACIAL CULTURE, *supra* note 744, at 182 (discussing potentially difficult evidentiary issues inherent in establishing that particular cultural traits merit protection under antidiscrimination law).

167. *See supra* notes 700-866 and accompanying text.

168. *See supra* notes 1033-1099 and accompanying text.

169. *Id.*

170. Furthermore, derivative racial discrimination primarily occurs outside of the formal employment decisions that might directly penalize particular cultural traits, thus rendering it even more difficult to reach with these proposed doctrinal reforms. *Cf.* Carbado & Gulati, *The Fifth Black Woman*, *supra* note 112, at 717-19 (presenting a hypothetical promotion review in which a worker's colleagues discriminate against her on the basis of her cultural and social traits).

171. *See supra* notes 1477-49149.

workers' cultural and social traits exist, white workers disproportionately will grant preferential treatment to other white workers on the basis of cultural homophily to the relative disadvantage of many black workers.[172] As whites are overrepresented in positions of power in a disproportionate number of employment contexts, this dynamic predictably and consistently produces racial disparities in access to important career resources. Though this process does not entail the categorical mistreatment typically associated with racial discrimination, it subjects many black workers to non-merit-based professional setbacks nonetheless, thereby reproducing racial inequality all the same.

Given its distinctive characteristics, derivative racial discrimination presents new practical complications, normative questions, and doctrinal challenges for efforts to address racial inequality in employment. The following Part will examine these issues in the context of the cornerstone employment discrimination statute, Title VII of the 1964 Civil Rights Act.[173] It will explain that, although derivative racial discrimination implicates some of the core normative commitments of Title VII, employment discrimination law does not present a viable solution to this problem. After discussing some of the key normative and practical difficulties of addressing derivative discrimination through Title VII, this Part will consider the potential promise of an ambitious reconceptualization of employment discrimination law—the employer duty of care model.

IV. DERIVATIVE RACIAL DISCRIMINATION AND TITLE VII

A. Homophily and the Normative Concerns of Title VII

The analytical framework of derivative racial discrimination makes clear that even seemingly innocuous cultural practices and interactional dynamics can have profound racial consequences. It recasts as racially discriminatory the everyday social tendencies and interaction practices that serve to marginalize many black workers, regardless of the intent or mindsets of the people involved. By allowing, and in some instances even encouraging, such workplace dynamics, employers are acting in ways that naturally and foreseeably reinforce and reproduce patterns of racial inequality in their firms. Even though the cultural traits involved in this process are not necessarily constitutive or expressive of racial identity, they reflect the lived experience of race in America and the continued social separation and cultural distinctiveness

172. The benefits of this treatment are in some instances zero-sum, as the advantages secured by some workers effectively deprive other workers of access to necessary resources. Particularly in work settings where opportunities for advancement are scarce, even the subtlest of interactional advantages and disadvantages can make all the difference, separating the few winners from the masses of highly talented also-rans.

173. 42 U.S.C. § 2000e-2 (2014).

of black and white Americans. Hence, this form of disadvantage is not a race-neutral process but instead predictably and disproportionately burdens black workers due to the historic and present conditions of American race relations.

As such, the process of derivative racial discrimination arguably implicates some of the core normative concerns of Title VII of the Civil Rights Act of 1964, America's cornerstone racial discrimination statute. Title VII prohibits covered employers from discriminating on the basis of race with respect to specified personnel practices and the overall terms and conditions of employment.[174] When the federal government set out to eradicate racial discrimination and stratification from the American workplace through this statute,[175] it targeted not only practices and behaviors that subject individual workers to mistreatment (or preferential treatment) on the basis of race but also those that unnecessarily preserve and compound racial hierarchy and inequality in American workplaces.[176] Although derivative racial discrimination is in tension with these objectives, its legitimacy as a source of potential employer liability is admittedly more contestable than those of more direct forms of race-based discrimination. Derivative discrimination does not involve express or categorical uses of racial classifications to deny minority workers equal employment opportunity and does not disadvantage them on the basis of immutable traits;[177] therefore, it is neither unavoidable nor insurmountable.[178] Workers who are otherwise at risk of derivative racial discrimination may be able to mitigate its effects by undertaking strategies of acculturation and assimilation that will enable them to better maneuver the social and cultural terrain of their firms,[179] either prior to entering the workforce or in some instances even on the job.[180] For these reasons, the difficulties of workers who

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174. *Id.* § 2000e-2(a)(1).

175. *See* HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA (1990) (describing in depth the formulation and passage of the landmark 1964 Civil Rights Act); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (explaining that the legislation requires "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification").

176. *See Griggs*, 401 U.S. at 432 ("Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.") (emphasis in original); *see also id.* at 431 ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.").

177. *But see* Rich, *supra* note 1500, at 1203-06 (challenging the utility of assessments of racial mutability).

178. *See supra* notes 1222-1277 and accompanying text.

179. *See* Woodson, *Race and Rapport*, *supra* note 99, at 2573-75 (explaining that some black workers can overcome these homophily-related disadvantages by undertaking strategic social effort to forge common ground and rapport with their white counterparts). Such tactics and strategies have been discussed extensively in the cottage industry of self-help books tailored to minority workers. *See, e.g.*, HARRIS, EXPECT TO WIN, *supra* note 188, at 71-72.

180. Some black workers are far better situated than others to implement such strategies, depending on their prior exposure to sustained, high-quality interracial interactions earlier in life. *See* Woodson, *Race and Rapport*, *supra* note 99, at 2574-75

experience homophily-based disadvantage do not implicate the legal and normative concerns of Title VII as clearly as those who suffer bias-based discrimination

Acknowledging this, derivative racial discrimination still falls within the scope of Title VII's normative commitments to the extent that it reproduces patterns of racial inequality for reasons unrelated to individual merit. Derivative racial discrimination occurs as the result of organizational practices and employment acts that treat equally qualified minority workers differently than their white counterparts, on the basis of traits that correlate with racial identity and are shaped by the lived experience of race in America. While black and white workers alike should in principle bear equal responsibility for adapting to and accommodating the tastes and preferences of their colleagues, due to skewed racial demographics and hierarchies of many employment settings, the burden of doing so falls overwhelmingly upon black workers. Even those black workers who overcome or avoid the harms of derivative racial discrimination through strategic cultural and social labor must endure potential dignitary harms and other costs.[181] Many black workers who fail or refuse to take on these extra burdens face a greater risk of adverse employment outcomes.[182] Though less directly so than traditional forms of racially disparate treatment, these dynamics are still in tension with the racially egalitarian principles that animate Title VII.

Despite these grounds for finding that derivative racial discrimination runs afoul of the normative agenda of Title VII, as a practical matter, employment discrimination law may lack the capacity to prevent and remedy it. Derivative racial discrimination does not fit neatly with the doctrinal requirements of the existing Title VII jurisprudence. This presents considerable practical difficulties for any attempts to use Title VII to seek relief from these disadvantages. The following Subpart will identify several of the key doctrinal barriers and explain how they prevent Title VII from addressing derivative racial discrimination adequately.

(providing examples of black law firm associates who benefited from their prior interracial exposure and relationships). Other black workers likely will find that by the time they have begun their careers, it is already too late for them to acclimate themselves to the unfamiliar social and cultural milieus of their workplaces.

181. See *supra* notes 1188-1277 and accompanying text for a description of the hardships and costs endured by one interviewee who eventually succeeded in overcoming derivative discrimination at his job.

182. Many readers may question whether those black workers—including Greta, discussed above—who voluntarily choose not to put forth the extra effort necessary to adapt and conform to the cultural and social norms of their white colleagues should be regarded as victims of institutional discrimination. This view, though understandable, gives short shrift to the fundamental unfairness of the extra burdens and costs of cultural and social adaptation for many minority workers.

B. Problems Posed by Current Doctrinal Requirements

Although Title VII and other employment discrimination laws and regulations may have largely eradicated many of the more odious, obvious forms of racial mistreatment, they have failed to root out subtler, more complex processes that continue to produce unequal treatment and disparate outcomes for many black workers. The shortcomings of Title VII in preventing and remedying various forms of institutional discrimination in employment are well documented and have been widely discussed in the existing antidiscrimination scholarship.[183] These limitations render Title VII especially ineffectual with respect to the derivative forms of discrimination examined in this Article. For although Title VII provides several doctrinal bases for potential claims—including disparate treatment, disparate impact, and hostile work environment theories of discrimination[184]—each are subject to requirements and limitations that largely undermine the Act's ability to address derivative discrimination.

1. Disparate Treatment Claims

To prevail on claims of disparate treatment under Title VII, plaintiffs must demonstrate that they have been subject to adverse actions that have materially altered the terms or conditions of their employment on the basis of race.[185] Employees may be able to challenge derivative racial discrimination through the burden-shifting framework established by the Court in *McDonnell Douglas Corp. v. Green*.[186] Under that standard, plaintiffs who lack direct evidence of intentional racial discrimination can move forward with employment discrimination claims by producing circumstantial evidence sufficient to establish a prima facie case of discrimination.[187] To do so, a plaintiff must demonstrate that "(1) she is a member of a protected class; (2) she was subjected to adverse employment action; (3) her employer treated similarly situated [white] employees more favorably; and (4) she was qualified to do the job."[188]

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183. *See, e.g.*, Green, *Work Culture and Discrimination*, *supra* note 1, at 655-58 (discussing several obstacles that prevent advocates from bringing successful Title VII claims to address these problems); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) ("[T]he way in which Title VII jurisprudence constructs discrimination, while sufficient to address the deliberate discrimination prevalent in an earlier age, is inadequate to address the subtle, often unconscious forms of bias."); David Wilkins, *On Being Good "and" Black*, 112 HARV. L. REV. 1924, 1948-51 (1999).

184. *See* Green, *Work Culture and Discrimination*, *supra* note 1, at 654-55.

185. 42 U.S.C. § 2000e-2(a)(1).

186. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

187. *Id.* at 800-04.

188. McCann v. Tillman, 526 F.3d 1370, 1373 (11th. Cir. 2008) (citation omitted).

The first of these requirements is easy to meet: black workers are members of a protected class.[189] The second threshold requirement, however, that a worker need have been subjected to an adverse employment action, presents a formidable challenge for many potential litigants. Federal courts have stringently applied this materiality standard in ways that exclude many of the subtle disadvantages that black workers suffer on account of derivative racial discrimination.[190] The unequal access to work assignments, mentorship, and support reported by numerous interviewees,[191] for example, all fail to meet this threshold.

And while certain limited types of adverse career outcomes caused by derivative racial discrimination, such as denied promotions and firings, meet Title VII's materiality requirement, workers seeking to press derivative racial discrimination claims on those grounds will face another difficult, often insurmountable evidentiary challenge: the third threshold requirement that they establish that they have been treated less favorably than situated white workers.[192] In alleging discrimination, plaintiffs must establish that the white workers who received more favorable treatment were similarly situated "in all relevant aspects" including "performance, qualifications and conduct."[193] The often-cumulative nature of derivative discrimination poses a major barrier to black workers seeking to mount such a showing. Some of the disadvantages associated with cultural homophily discussed above—including reduced access to opportunities, mentorship, and advocacy[194]—deprive black workers of the opportunity to develop the same qualifications and to exhibit the same level of performance as their white counterparts. By the time they are up for promotion or being considered for layoffs, their records have long since become less impressive than those of their white counterparts and no finder of fact is likely to find them similarly situated. Even many black plaintiffs who possess qualifications and abilities equivalent to those of their white counterparts may still often find it difficult to prove intentional discrimination, as courts provide

189. *See* 42 U.S.C. § 2000e-2(a)(1) (prohibiting employment discrimination on the basis of race and other protected classes).

190. *See, e.g.*, Kidd v. Mando Am. Corp., 731 F.3d 1196, 1204 n.11 (11th Cir. 2013) (noting that "it's a rare case where a change in employment responsibilities qualifies as an adverse employment action"); Davis v. Lake Park, 245 F.3d 1232, 1243 (11th Cir. 2001) (explaining that a "negative evaluation . . . will rarely, if ever, become actionable merely because the employee comes forward with evidence that his future prospects have been or will be hindered as a result").

191. *See supra* notes 105-1311 and accompanying text.

192. *See* Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

193. Smith v. Stratus Computer, Inc., 40 F.3d 11, 17 (1st Cir. 1994) (citation omitted) (emphasis omitted); *see also McCann*, 526 F.3d at 1373 (explaining that "the quantity and quality of the comparator's misconduct [must] be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges") (citation omitted) (alteration in original).

194. *Supra* notes 105-1311 and accompanying text.

employers some leeway in allocating assignments and opportunities among equally qualified workers, absent convincing evidence of forbidden ulterior motives.[195]

Even employees who are able to meet this prima facie requirement will struggle to meet their ultimate burden in convincing fact-finders that their homophily-based difficulties constitute discrimination on the basis of race. Traditionally, courts have drawn an arbitrary but firm line between race-related characteristics that are immutable and those that reflect some degree of voluntary choice and behavior.[196] The fact that derivative racial discrimination occurs on the basis of behavior that is largely voluntary complicates efforts to confront it under disparate treatment theories of liability. Decades after scholars first began writing about the racially discriminatory implications of particular workplace cultural standards,[197] it remains virtually inconceivable that courts would hold employers liable for the cultural preferences that their workers draw from in their informal and extracurricular interactions with one another. This problem further limits the potential of disparate treatment theory for addressing homophily-based problems directly.

Another disparate treatment approach, systemic disparate treatment (also known as "pattern or practice")[198] liability once held considerable promise for addressing just this type of racial disadvantage. Although the precise showing necessary for a plaintiff to sustain a claim under this cause of action had always been somewhat ambiguous,[199] it was once widely understood that, as a practical matter, statistical evidence of systemic racially disparate outcomes was largely sufficient.[200] Under this understanding, workers in workplaces where significant numbers of black workers were harmed by the interactional

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195. *See* Mungin v. Katten Muchin & Zavis, 116 F.3d 1549, 1556 (D.C. Cir. 1997) ("[s]hort of finding that the employer's stated reason was indeed a pretext . . . the court must respect the employer's unfettered discretion to choose among qualified candidates") (citation omitted); *see also* David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 98 (1998) (explaining that discrimination is "near impossible to prove where the decision involves a large number of similarly qualified individuals and subjective qualifications").

196. *See* Rich, *supra* note 1500, at 1136 (describing the general refusal of federal courts to extend Title VII protections to race-related traits that are voluntarily chosen rather than ascriptive).

197. *See generally* Flagg, *supra* note 1, at 2039 (arguing that employers commonly use covertly white cultural norms that present discriminatory disadvantages for certain black workers).

198. *See* Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After* Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 477, 478 (2011).

199. *See id.* at 478-79 ("The pattern or practice claim is the most potent and least understood of the various Title VII causes of action. . . . [T]here has been a surprising dearth of case law . . . regarding the liability requirements for pattern or practice claims.").

200. *See id.* at 480; Noah D. Zatz, *Introduction: Working Group on the Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 387, 389 (2011).

dynamics of derivative racial discrimination would have been able to avail themselves of the systemic disparate treatment cause of action to challenge the policies and practices that yielded those disparities.

This is in all likelihood no longer the case. The Court's landmark *Wal-Mart v. Dukes*[201] decision now appears to call for evidence of specific top-down, company-wide discriminatory policies for plaintiffs seeking to mount such challenges.[202] Because such blatantly discriminatory policies are now quite rare, and evidence of them highly elusive,[203] the Court's decision in *Dukes* substantially limits the potential reach of systemic disparate treatment theory and effectively eliminates any claims attempting to address problems of derivative discrimination.

Alternatively, derivative racial discrimination plaintiffs might attempt to bring disparate treatment claims under theories of hostile work environment, an offshoot of traditional disparate treatment discrimination.[204] Hostile work environment claims may appear at first blush to hold some potential. Plaintiffs advancing such claims need not establish that they have suffered any specific, individual adverse employment actions. Instead, they need only establish that the cumulative results of work-related mistreatment have substantially disadvantaged them on the basis of race.[205] For this reason, it would seem at first blush that workers who have suffered derivative racial discrimination might have plausible claims under this theory of liability.

The apparent promise of hostile work environment claims, however, is largely illusory. As derivative racial discrimination occurs on the basis of cultural and social traits that arguably are severable from racial identity,[206] courts may be unlikely to find that it occurs on the basis of race.[207] Further, the

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201. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

202. *See* Tristin K. Green, *The Future of Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 397 (2011) (positing that the Supreme Court embraced in *Wal-Mart v. Dukes* a new "policy-required view of systemic disparate treatment theory" in which plaintiffs "must prove that high-level decision makers within the defendant organization adopted a policy of discrimination").

203. *See* Yuracko, *supra* note 1500, at 371 ("The kind of open and categorical status discrimination so prevalent before the passage of Title VII has now virtually disappeared.").

204. *See* Green, *Work Culture and Discrimination*, *supra* note 1, at 658.

205. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002) ("Their very nature involves repeated conduct. . . . Such claims are based on the cumulative effect of individual acts.").

206. Although a number of prominent antidiscrimination scholars have argued that certain types of culturally related behavior are constitutive of racial identity and therefore not severable from race, there is little reason to expect that courts will be receptive to these arguments. Furthermore, the operative cultural traits at issue in many instances of derivative racial discrimination will not be sufficiently expressive of racial identity to trigger employer liability even under this expanded cultural identity-based framework.

207. Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002) ("This court has repeatedly instructed that a plaintiff wishing to establish a hostile work

Supreme Court has set a high bar for the severity of misconduct that warrants judicial action under this doctrine. As the Court explained in *Harris v. Forklift Systems, Inc.*,[208] to advance a hostile work environment claim, plaintiffs must establish that the conduct in question was "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive" to fall within the purview of Title VII.[209] The *Harris* Court provided a non-exhaustive list of factors relevant for determining whether a workplace is unlawfully hostile, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating . . . ; and whether it unreasonably interferes with an employee's work performance."[210] Although not exhaustive, this list of factors makes clear that the types of difficulties associated with homophily differ qualitatively from the types of employment acts and workplace behavior contemplated by the Court in its hostile workplace jurisprudence. However unbearable black workers find the alienation and isolation of derivative racial discrimination, these conditions likely fall far short of the standards established by the existing case law.

2. Disparate Impact Claims

In many respects, disparate impact liability would appear to offer a more fruitful basis for challenging derivative racial discrimination. Disparate impact theory—as interpreted under Title VII by the Supreme Court in *Griggs*[211] and then by Congress[212]—extends to facially race-neutral employment practices that disproportionately harm members of a protected class and cannot be justified by business necessity.[213] As such, disparate impact claims do not require evidence of discriminatory intent or individual bias.[214] Plaintiffs need only establish (usually through statistical evidence) that a specific challenged employment practice has a disproportionate negative effect on the members of

environment claim show . . . that the harassment must have been based on a protected characteristic of the employee.").

208. 510 U.S. 17 (1993).

209. *Id.* at 21.

210. *Id.* at 23; *see also* Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988) (requiring "that the alleged racial harassment constituted an unreasonably abusive or offensive work-related environment or adversely affected the reasonable employee's ability to perform the tasks required by the employer").

211. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

212. *See* 42 U.S.C. § 2000e-2(k) (2014).

213. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (explaining that disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity").

214. *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 52-53 (2003) (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645-46 (1989)).

their racial group.[215]

Nonetheless, several of the requirements of disparate impact law limit its ability to address derivative forms of racial discrimination.[216] For starters, plaintiffs are often unable to amass compelling statistical evidence of disparate impact.[217] In many employment contexts, particularly the high-status professional positions held by the interviewees discussed in this Article, the relatively small number of black employees complicates the task of demonstrating sufficiently persuasive statistical disparities.[218] The fact that cultural homophily actually works to the benefit of some of those black workers who possess some of the same social and cultural characteristics as their colleagues may further impede efforts to develop such statistical evidence.[219]

The requirement that plaintiffs identify the specific employment practices responsible for producing discriminatory outcomes is far easier to meet in cases contesting formal hiring and promotion policies, where plaintiffs can pinpoint the precise disparate impact of specific job requirements. Perhaps the quintessential disparate impact challenges are those involving challenges to employers' uses of formal employment tests.[220] The effects of such personnel practices are readily discernable and easily measured. By contrast, it is far more difficult to isolate the specific practices that produce racial disparities through derivative racial discrimination. To target the complex derivative disadvantages that arise from homophily practices, workers must lodge broader, less precise

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215. Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 1001-02 (1988) ("[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.").

216. Indeed, as a general matter, plaintiffs rarely prevail in disparate impact lawsuits. *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 739 (2006) (conducting an empirical examination of six years worth of disparate impact claims and, after excluding one outlier year, finding that at the district court level, plaintiffs only prevailed in 13% of cases that reached the merits); *see also id.* at 736 n.145 ("There are a surprising number of individual [disparate impact] claims, almost all of which fail.").

217. *See* Elizabeth Tippett, *Robbing a Barren Vault: The Implications of* Dukes v. Wal-Mart *for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433, 443-44 (2012) (discussing the difficulty of plaintiffs in meeting the "evidentiary rigors of a disparate impact claim").

218. *See, e.g.*, Mems v. City of St. Paul, Dep't of Fire & Safety Servs., 224 F.3d 735, 740-41 (8th Cir. 2000), *abrogated on other grounds by* Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011) (finding statistical evidence of racially disparate impact insufficient because the sample sizes of three to seven black workers were too small to be statistically significant).

219. *See supra* notes 1222-1277; *see also* Woodson, *Race and Rapport*, *supra* note 99 (providing examples of black attorneys who benefited from cultural homophily in their workplace by leveraging their common interests and tastes to bond with colleagues).

220. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (invalidating company's implementation of testing and educational employment criteria that operated to exclude black workers from high-paying, previously segregated occupational positions).

challenges to their employers' personnel practices. Instead of identifying specific, discrete employment policies or practices, plaintiffs presumably could challenge their employers' use of subjective personnel practices writ large. This presents yet another obstacle for derivative discrimination plaintiffs, however. Though the discriminatory use of subjective practices can constitute grounds for disparate impact liability[221] and have been closely scrutinized in certain circumstances,[222] such claims face considerable practical and evidentiary difficulties, and so seldom succeed.[223]

But even if courts accept that the subjective personnel practices that give rise to homophily-based disadvantages constitute a specific employment practice, employers still can avoid liability through the affirmative defense that their practices are justified on grounds of business necessity.[224] Federal courts have been deferential to employers' proffered business justification defenses,[225] and consistently stop short of requiring that the challenged personnel practices be truly necessary or essential for business.[226] Courts seldom hold employers liable for their subjective, discretionary staffing, promotions, and evaluation practices.[227] This may be particularly true in work contexts such as those

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221. *See* Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 990 (1988) (emphasizing that "disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests").

222. Courts have scrutinized subjective employment processes particularly closely where they lack formal guidelines to limit discretion or produce results that are inconsistent with available objective measures of performance. *See, e.g.*, Stewart v. Gen. Motors Corp., 542 F.2d 445, 450 (7th Cir. 1976) ("[T]he total lack of objective standards . . . could only reinforce the prejudices, unconscious or not, which Congress in Title VII sought to eradicate as a basis for employment."); Victory v. Hewlett-Packard Co., 34 F. Supp. 2d 809, 822 (E.D.N.Y. 1999) (upholding a disparate impact challenge to an employer's subjective evaluation system, due in part to "the disparity between the specific objective standards in which Plaintiff received high grades and praise, and the more subjective standards in which Plaintiff is criticized").

223. *See* Michael Selmi, *Response to Professor Wax: Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233, 1236 n.8 (1999) ("Although it is theoretically possible to establish a disparate impact claim based on subjective employment practices, such cases are both difficult and rare.").

224. *See Watson*, 487 U.S. at 997-99 (discussing the business necessity defense in the context of disparate impact claims against subjective employment practices).

225. *See, e.g.*, Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1429 (10th Cir. 1993) ("The challenged practice or policy need not be 'essential' or 'indispensable' to the employer's business for it to pass muster.") (citation omitted); *see also* Linda Lye, Comment, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 345-47 (1998) (discussing judicial deference to employers' business justification defenses).

226. *See* Lye, *supra* note 2255, at 350-53 (describing several alternative, more lenient interpretations used by federal courts).

227. *See* Tippett, *supra* note 2177, at 435 (reporting empirical finding that "cases challenging subjective employment practices were very uncommon" and that an "average employer's litigation risk in connection with such claims was . . . vanishingly small during the 2005-2011 time frame").

discussed in this Article, where personnel flexibility and the use of subjective judgment are undeniably of great importance to the effective functioning of these firms.[228] Therefore, while the insights concerning cultural homophily and derivative racial discrimination presented in this Article help explain why certain seemingly race-neutral employment practices tend to disadvantage minority workers, these problems are not compatible with the actual legal doctrine of disparate impact, as it currently stands.

These limitations of the existing Title VII jurisprudence point toward the need to consider plausible doctrinal reforms that might expand the capacity of Title VII to address derivative racial discrimination. The following subpart discusses one such reform—the duty of care model—and considers its potential promise and limitations in offering black workers greater protection against cultural homophily-based disadvantages.

C. A Duty-of-Care Approach to Title VII

Certain basic doctrinal reforms would provide black workers marginal assistance in challenging homophily disadvantage under Title VII. For example, by relaxing the current materiality requirement used in determining whether particular alleged acts of discrimination are sufficiently adverse to trigger potential employer liability, courts would enable plaintiffs who suffer from unequal access to work opportunities or mentorship support on the basis of homophily to satisfy the prima facie showing requirements of disparate treatment liability. More rigorous scrutiny of employers' business necessity defenses in disparate impact cases[229] requiring that employers demonstrate that challenged employment practices are essential to the functioning of their businesses, could possibly better enable minority employees to challenge

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228. *See* Daniel Gyebi, *The Civil Rights Act of 1991: Favoring Women and Minorities in Disparate Impact Discrimination Cases Involving High-Level Jobs*, 36 HOW. L.J. 97, 126 (1993) ("[F]ew lower court decisions involving upper-level jobs have held that employers must validate subjective selection criteria."); Nancy Levit, *Lawyers Suing Law Firms: The Limits on Attorney Employment Discrimination Claims and the Prospects for Creating Happy Lawyers*, 73 U. PITT. L. REV. 65, 85 (2011) (noting that courts allow law firms broad discretion in defining their own partnership promotion criteria); Wilkins & Gulati, *Why are There so Few Black Lawyers*, *supra* note 3, at 499-500, 518-25 (discussing the inherent subjectivity of assessing associate work quality in large law firms).

229. *See, e.g.*, Lye, *supra* note 22525, at 358 (arguing that "a more stringent interpretation of the business necessity standard is required in order to affirm a social commitment to the elimination of discriminatory practices"); Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479 (1996) (arguing that courts should move toward the stricter absolute necessity standard in evaluating business necessity defenses). *But see* Rosemary Alito, *Disparate Impact Discrimination Under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011, 1029-36 (1993) (defending the lenient approaches used by courts in assessing business necessity as consistent with statutory language and intent).

certain subjective employment practices that are conducive to homophily-based disadvantages. This more exacting business necessity standard might provide incentives to employers to rein in excessive discretion and subjectivity in day-to-day employment practices, which are among the primary mechanisms of homophily-based disadvantages.

However, although these reforms potentially would enable a greater number of black workers to meet some of the doctrinal requirements of Title VII, other requirements would still, as a practical matter, prevent the vast majority of homophily-based claims. Even with a more expansive adverse employment acts doctrine, for example, employees still would shoulder the difficult evidentiary burden of establishing that their outcomes were in fact the result of racial discrimination. Plaintiffs advancing disparate impact claims would still often struggle to link particular employment practices to specific racially disparate outcomes.

For these reasons, addressing derivative racial discrimination through Title VII would require a more transformative reconceptualization, one that shifts the focus away from the experiences and narratives of individual workers to the responsibilities of employers to promote the most racially fair workplaces possible.[230] In a series of recent articles, law professor Richard Ford has called for a complete reconceptualization of employment discrimination law away from the pursuit of individual injustice to an administrative framework that obligates employers to avoid unnecessary racial hierarchy.[231] Specifically, Ford proposes that rather than pursuing the elusive aim of identifying and remedying

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230. *See, e.g.*, Green, *Discrimination in Workplace Dynamics*, *supra* note 3, at 94 (embracing "a structural disparate treatment theory [that] would . . . place an affirmative obligation on employers to manage diversity within their institutions to minimize the operation of discriminatory bias"); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 900 (1993) ("[A]n employer should be found liable under Title VII for negligent discrimination when the employer fails to take all reasonable steps to prevent discrimination that it knows or should know is occurring, or that it expects or should expect to occur."); *see also* Maria L. Ontiveros, *The Fundamental Nature of Title VII*, 75 OHIO ST. L.J. 1165, 1197 (2014) (advancing an interpretative theory of Title VII in which the statute "creates . . . an affirmative duty for employers to provide a workplace with meaningful economic opportunity for all workers").

231. *See* Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1384 (2014) (arguing that antidiscrimination law should embrace the "more concrete goal of requiring employers, [and others] to meet a duty of care to avoid unnecessarily perpetuating social segregation or hierarchy"); Richard Thompson Ford, *Rethinking Rights After the Second Reconstruction*, 123 YALE L.J. 2942, 2959 (2014) ("An employer who fails to meet the duty should be punished in some way—either with liability for individual cases of unfair adverse decisions or perhaps through a more comprehensive administrative system of penalties. Conversely, an employer who meets the duty should not face liability for otherwise lawful adverse decisions."). *See generally* Richard Thompson Ford, *Beyond Good and Evil in Civil Rights Law: The Case of* Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 513, 526 (2011) (positing that Title VII already places an affirmative duty on employers by holding them vicariously liable for discriminatory worker misconduct).

individual instances of discrimination, employment discrimination law as re-envisioned in this manner would decenter the question of whether a specific adverse employment outcome was caused by racial discrimination, in favor of a broader regulatory approach that considers the efforts of the accused employer to avoid unnecessary inequality and unfairness in her workplace.[232]

This new approach to antidiscrimination law would benefit some black workers who suffer derivative racial discrimination. The threat of liability for failure to take reasonable efforts to avoid discriminatory outcomes would incentivize employers to adopt personnel practices that promote greater racial fairness in their firms.[233] Social scientists, industry experts, and designated governmental agencies could make available descriptions of best employment practices designed to promote maximum racial fairness. Such practices could include, for example, efforts to eliminate unnecessary discretion and subjectivity from employment decisions,[234] training on the discriminatory potential of the "airport test" and considerations of interpersonal chemistry in personnel decisions, greater efforts to ensure that work assignments and opportunities are equitably distributed, and more comprehensive formal mentorship efforts.[235] Courts could also review whether employers charged with discrimination have strived to implement better management cultures that place more emphasis on ensuring that junior workers are fully developed, properly utilized, and accurately evaluated.[236] Courts also could require that employers establish the diversity infrastructure necessary to monitor and measure organizational progress toward these goals.[237]

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232. Ford, *Bias in the Air*, *supra* note 231, at 1383-84.

233. I address several such organizational reforms that law firm partners could embrace on a voluntary basis in an earlier article on the racial impact of cultural homophily in corporate law firm settings. *See* Woodson, *Race and Rapport*, *supra* note 99, at 2570-73. Because the organizational dynamics that facilitate homophily in law firms are similar to those present in many other work settings, these reforms are applicable to other contexts as well.

234. *See* Ford, *Beyond Good and Evil*, *supra* note 2311, at 526, 528 (suggesting that a duty of care model could rein in potentially discriminatory subjective employment practices).

235. *See* Alexandra Kalev et al., *Best Practices or Best Guesses?: Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 590 (2006) (finding that formal mentorship produced significant career gains for black and white women); Woodson, *Race and Rapport*, *supra* note 99, at 2572-73 (discussing the potential value of more meaningful, comprehensive mentorship efforts). In implementing these programs, firms should seek to leverage other forms of homophily that may help individual mentees and mentors develop rapport across racial lines.

236. *See* Woodson, *Race and Rapport*, *supra* note 99, at 2571 (endorsing such organizational reforms).

237. *See* NAT'L ASS'N FOR LAW PLACEMENT, DIVERSITY BEST PRACTICES GUIDE 2 (2014) (providing examples to employers on best practices for implementing "diversity strategies and initiatives" based on "industry research and interviews of law firm professionals"); N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, BEST PRACTICES

These employment practices would potentially rein in derivative racial discrimination on a number of fronts. As preventative measures, minimizing the potential opportunities for supervisor discretion would reduce the potential for cultural homophily to distort personnel decisions to the disadvantage of minority workers. Additional training for workers who have input and decision-making power in their firms' hiring and promotion processes could help well-intentioned workers avoid unknowingly contributing to discriminatory outcomes. More comprehensive efforts to ensure that minority employees receive adequate work assignments and suitable mentorship support might address the disparities produced by derivative discrimination before they become irreversible.[238] Though the costs of compliance with such imposed obligations would be non-trivial, it is worth noting that they also provide valuable benefits for employers. In addition to protection from discrimination liability, employers who meet their duties of care also will benefit from meritocratic personnel processes and the reputational rewards of diversity and inclusiveness.[239] To the extent that many large employers already devote extensive resources to the pursuit of greater racial fairness and diversity,[240] their interests are already aligned with goals that this duty-of-care approach seeks to enforce. Although employers are free to undertake such efforts without being compelled by imposed rules, the force of law would offer an important incentive and may help well-meaning employers overcome resistance from

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STANDARDS FOR THE RECRUITMENT, RETENTION, DEVELOPMENT, AND ADVANCEMENT OF RACIAL/ETHNIC MINORITY ATTORNEYS 1 (2006) (espousing the creation of diversity infrastructure and monitoring systems as best practices).

238. Enhanced formal mentorship programs can be a valuable tool in employers' enhanced efforts against institutional discrimination, even though the existing research shows that they may be less effective than mentorship relationships that develop informally. *See* Belle Rose Ragins & John L. Cotton, *Mentor Functions and Outcomes: A Comparison of Men and Women in Formal and Informal Mentoring Relationships*, 84 J. APPLIED PSYCHOL. 529, 540-44 (1999) (finding that workers perceive organic mentorship to be more effective than formal mentoring relationships). This may not be a fair comparison, however, as the ability of individual workers to develop mentors independently of formal programs may in some instances reflect aptitudes and characteristics relevant to work performance and career success. In other words, this may reflect some selection effect, wherein the individuals who found mentors organically would have outperformed their mentorless colleagues even in the absence of their mentorship relationships. *See id.* at 544.

239. *See* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2165 (2013) (discussing several instrumental reasons for mainstream institutions' pursuit of racial diversity).

240. *See* FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY (2009) (tracing the rise of equal employment and diversity management practices in American firms); Bret D. Asbury, *Loyalty, Diversity, and Colorblindness*, 79 TENN. L. REV. 891, 910-11 (2012) (documenting that virtually all major corporations participate in diversity initiatives); Leslie Kwoh, *Firms Hail New Chiefs (of Diversity)*, WALL STREET J. (Jan. 5, 2012), http://www.wsj.com/articles/SB10001424052970203899504577129261732884578 (discussing the creation of diversity-oriented executive positions at corporations and professional service firms).

their potentially recalcitrant workers.

Notwithstanding its potential to promote meaningful racial progress, this duty-of-care approach is still no panacea for derivative racial discrimination. In implementing and enforcing this duty of care standard, courts would need to ensure that the experts involved in formulating the best practices required to comply with this doctrine develop valid, up-to-date standards. They will need to remain flexible enough to incorporate new evidence and industry findings without deferring excessively to the interests of employers and their intermediaries.[241] There are substantial normative and practical limits to how far courts can reasonably force employers to change their personnel practices. It is simply not possible for most employers to fully prevent derivative racial discrimination from occurring in their workplaces. The homophilic behavior at the root of derivative discrimination shapes employment outcomes indirectly through its pervasive influence on personal interactions and social relationships in both occupational and informal contexts. To even attempt to eliminate it in full, employers would need to restructure personal relationships and interactions among colleagues radically, both in and away from the office. Employers would be tasked with monitoring and intervening in their workers' most basic social and interactional behavior,[242] an unrealistic burden that even the most zealous advocates for more robust employment discrimination protections would recognize as untenable. Even if it were possible to regulate informal interactions and relationships in this manner—and it most certainly is not—doing so would entail inordinate, objectionable social costs, both in restricting the autonomy, professional discretion, and expressive and associative interests of employers,[243] and in depriving many workers of the legitimate benefits of rapport and interpersonal closeness among colleagues.[244]

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241. *See* Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1591-92 (2001) (examining the use of diversity rhetoric as an example of how managerial practices shape legal ideals and application); Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 409 (1999) (explaining that courts embraced internal grievance procedures despite the lack of empirical evidence indicating effectiveness).

242. To truly protect black workers from homophily, employers might need to eliminate or forbid informal social gatherings, or require that they be racially diverse. To the extent that this is infeasible, employers would need to impose rules forbidding workers from being more friendly and supportive toward any colleagues with whom they bonded during such social activities and personal interactions. Attempts to administer such implausible rules would likely prove to be both unenforceable and unworkable, as courts would need to conduct case-by-case, factual analyses that offer little guidance to other employers seeking to avoid liability. *See* Green, *Work Culture and Discrimination*, *supra* note 1, at 667-72 (discussing the considerable practical difficulties of regulating informal social relations).

243. *See* Ford, *Bias in the Air*, *supra* note 2311, at 1388.

244. *See* Green, *Work Culture and Discrimination*, *supra* note 1, at 667 (discussing "the benefits of shared styles of interaction, conversation boundaries, and other behavioral signals and expectations to workplace relationships" and explaining that "[s]ignals of group membership provide common ground on which to build social connection" that "turns work

With much justification, employers would object to such demands as impracticable and inappropriate, and it is difficult to imagine that courts would be willing to impose any such requirements upon them. For these reasons, courts would need to recognize the limits of employer autonomy over workplace relations and set reasonable benchmarks for racial progress in workplaces with substantial inequality.[245]

For these reasons, even a paradigmatic shift of discrimination liability from an individual justice to an employer negligence framework would not help all workers who experience derivative discrimination and would not fully address this problem. That even such ambitiously expansive reforms may leave undisturbed many of the racial disparities derivatively produced by homophily further underscores the limits of employment discrimination law and suggests the continued need for alternative strategies for addressing the increasingly complex forms of racial disadvantage prevalent in the contemporary American workplace.[246]

CONCLUSION

In developing the conceptual framework of derivative racial discrimination, this Article has contributed to the body of legal scholarship on the personnel practices and social dynamics that disadvantage black workers in predominantly white work settings. Building upon the theory of cultural homophily, and applying evidence from empirical interviews of black workers, this Article has identified a subtle, complex process of institutional discrimination that disadvantages black workers derivatively, as a result of racial differences in cultural traits and social backgrounds. To make further inroads against the racial disparities prevalent in American employment, scholars, advocates, and other concerned parties ultimately will need to come to terms with and find creative ways to address this source of disadvantage. In this spirit, this Article has suggested an employer duty-of-care approach as a potential doctrinal innovation that might provide some prospects of relief for

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into a much more rewarding experience for individuals and for society").

245. In recognition of these difficulties and the conflicting societal values of employer autonomy and productivity, this Article does not support doctrinal reforms that would render employers strictly liable for their inability to eliminate all sources of informal, culture-based racial disadvantage from their workplaces.

246. This is consistent with calls among legal scholars for antidiscrimination regimes that look beyond traditional rule-based approaches toward problem-solving tactics involving pro-active, preventative efforts on the part of employers and workers. *See, e.g.*, Green, *Work Culture and Discrimination*, *supra* note 1, at 665 (positing that "discriminatory work cultures are too complex and too intertwined with valuable social relations to be easily regulated through judicial pronouncements and direct regulation"); Sturm, *supra* note 6, at 478 (describing second-generation discrimination as "resistant to solution through after-the-fact adjudicative sanctions for rule violations").

black workers disadvantaged by cultural homophily.

The limitations in even this approach, and the fact that there is as of yet no reason to expect that courts are prepared to embrace such a dramatically different understanding of Title VII, the findings of this Article point to the importance of broader societal understanding of derivative racial discrimination, and voluntary effort on the part of employers, workers, and other interested citizens and institutions. Employers who properly understand the dynamics of cultural homophily and derivative racial discrimination can proactively implement workplace reforms of their own. Given the tremendous resources that many large employers already devote to the pursuit of workforce diversity, allocating some of their training and energy to addressing this specific form of racial disadvantage may more plausibly produce actual substantive gains for black workers than the remote possibility of courts embracing a major doctrinal shift. Similarly, understanding this form of disadvantage may equip black students and workers to make more informed decisions about the potential value of engaging in strategically seeking acculturation and social acclimation across racial lines. Finally, it is also possible that as white workers become more attuned to the nature of this problem, they can undertake similar efforts to develop greater social and cultural exposure to cultural and social practices and preferences more common among workers of other racial groups. Though these types of incremental efforts lack the grandeur and potency of new laws and sweeping doctrinal reforms, they likely offer the greatest real potential for improving the work lives and careers of the many black workers who suffer from these culture-based disadvantages.