BY ANY OTHER NAME?: ON BEING "REGARDED AS" BLACK, AND WHY TITLE VII SHOULD APPLY EVEN IF LAKISHA AND JAMAL ARE WHITE

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INTRODUCTION

Forty years after the passage of Title VII of the Civil Rights Act of 1964,[1] scholars Marianne Bertrand and Sendhil Mullainathan reported the results of their groundbreaking study, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination.*[2] Their study revealed that simply having an

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1. 42 U.S.C. § 2000e (2000). Title VII makes it illegal for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to . . . privileges of employment, because of such individual's race, color, religion, sex, or national origin" or "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a).

2. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003), *available at* http://www.nber.org/papers/w9873.

African American[3]-sounding name significantly decreased one's opportunity to receive a job interview, regardless of occupation or industry.[4] Based upon an experiment that involved sending identical, fictitious résumés with an African American-sounding name, such as Jamal, and a white-sounding name, such as Greg, to the same employers in Boston and Chicago, Bertrand and Mullainathan found that résumés with white-sounding names received fifty percent more callbacks for interviews.[5] They further found that race affected employers' perceptions of higher-quality résumés,[6] with résumés containing white-sounding names receiving thirty percent more callbacks than those with African American-sounding names.[7]

The results of Bertrand and Mullainathan's investigation raise critical questions about the effectiveness of Title VII as a remedy for and deterrent to race discrimination in the hiring market today,[8] especially as employment discrimination has evolved into different forms. Numerous professors have written articles that criticize current judicial interpretations of race discrimination under Title VII, in particular commenting on the failure of federal courts to evaluate employment cases in a manner that comports with the realities of racism and the shifting faces of employment discrimination.[9] As Professor Lu-in Wang explained, current antidiscrimination law neglects the ways in which "unconscious biases . . . can lead [people] to treat [others] differently based on race, but without intending to or

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3. For the purposes of this Article, the terms "black" and "African American" are used interchangeably. In particular, we use the term "African American" to refer to specific, black-American creations such as names like Lakisha. The words "Black" and "White" are capitalized when used as a noun to identify a racial group.

4. Bertrand & Mullainathan, *supra* note 2, at 1.

5. *Id.* at 1-3, 10.

6. The authors defined higher-quality résumés as those that listed more labor market experience, had fewer holes in employment history, included some completion of a certification degree, identified foreign language skills and awards, and had a higher likelihood of including an e-mail address. *Id.* at 2.

7. *Id.* at 3, 11-12.

8. *See* Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 468-69 (1995) (highlighting how complaints to the EEOC alleging discrimination in hiring have significantly decreased since the 1980s because of evidentiary difficulties in proving discrimination).

9. *See, e.g.*, Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 719-29 (2001); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1174 (1995); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1166-71, 1194-99 (2004).

even being aware that [they] are doing so."[10] Although blatant forms of racial discrimination still occur in our post-Title VII world, discrimination on the job market is generally more subtle.[11] It simply is not as common for an employer to explicitly inform a job applicant that he or she did not receive an interview or job because of his or her race, national origin, sex, religion, or age.[12] At the very least, employers recognize that such open discrimination may present the threat of employment litigation for their businesses.[13]

This reduction in blatant forms of bigotry, however, has not signified an end to discrimination in the workplace.[14] For example, in

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10. Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1017 (2004); *see also* Frank Rudy Cooper, *Against Bipolar Black Masculinity*, 38 U.C. DAVIS L. REV. (forthcoming 2005) (manuscript at 16, on file with authors) (quoting IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 124 (1990) ("Forms of subordination 'have gone underground, dwelling in everyday habits and cultural meanings of which people are for the most part unaware.'")); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1498-1528 (2005) (analyzing cognitive psychology studies that demonstrated that study subjects perform tasks with an unconscious bias based on race).

11. Wang, *supra* note 10, at 1017.

12. Dais v. Lane Bryant, Inc., 168 F. Supp. 2d 62, 70 (S.D.N.Y. 2001), *aff'd*, 113 F. App'x 417 (2d Cir. 2004) ("Indeed, because an employer who discriminates is unlikely to leave a 'smoking gun' attesting to its discriminatory intent, a victim of discrimination is seldom ahle to prove his claim by direct evidence and is usually constrained to rely solely on circumstantial evidence."); *see also* Angela P. Harris, *Foreword: The Unbearable Lightness of Identity*, 11 BERKELEY WOMEN'S L.J. 207, 208 (1996) ("[T]he open espousal of racist ideology is now taboo."); Wang, *supra* note 10, at 1035 ("To be sure, the discrimination of today is less likely to be as blatant or crude as the racism of the (not so) distant past . . . ."); *cf.* Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 151 (1992) ("We all know it is wrong to refuse to hire women as truck drivers, to refuse to let blacks practice law, to bar Moslems from basketball teams, or to refuse to sit next to Rastafarians at lunch counters.").

13. *See* Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 860 (1994) ("Most employers know better than to discriminate overtly."); *see also* Douglas S. Massey & Garvey Lundy, *Use of Black English and Racial Discrimination in Urban Housing Markets: New Methods and Findings*, 36 URB. AFF. REV. 452, 452 (2001) (noting that after the Fair Housing Act was passed, "outright refusals to rent to African-Americans became rare, given that overt discrimination might lead to prosecution").

14. Emily M.S. Houh, *Critical Race Realism: Re-claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455, 463-64 (2005) ("But, while civil rights laws have removed some barriers and impacted some decision-making practices in some hiring and promotion contexts, they have done little to address de facto discrimination."). In addition to Bertrand and Mullainathan's work, another recent study, where black and white college students posed as job applicant testers for 350 employers in the Milwaukee area, found that Whites who admitted to having served eighteen months in prison for a drug

many instances, employers rely on proxies for race, national origin, sex, religion, or age to exclude an applicant as a job contender or to discriminate against an employee in another manner. Indeed, numerous plaintiffs over the age of forty have filed age discrimination lawsuits under the Age Discrimination in Employment Act of 1967 (ADEA),[15] alleging that they were terminated from their jobs because of the potential value of their pensions if vested and their employers' desire to avoid the costs of honoring such pensions, a factor that correlates highly with age.[16] As a general matter, federal courts have denied these claims, reasoning that such discrimination is not based on an impermissible factor under the ADEA. According to these courts, discrimination based on pensions or other like factors is just that, discrimination based on those factors, and not illegal discrimination based on a forbidden trait.[17] Indeed, although race discrimination

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possession conviction received callbacks seventeen percent of the time, whereas crime-free Blacks received callbacks only fourteen percent of the time. *See* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOC. 937, 950-51, 955-57 (2003); *see also* David Wessel, *Racial Discrimination: Still at Work*, WALL ST. J., Sept. 4, 2003, at A2, *available at* http://www.careerjounal.com/myc/diverse/20030916-wessel.html (discussing Pager's study and the Bertrand and Mullainathan study and contrasting their results with Gallup poll results showing that fifty-five percent of Whites, but only seventeen percent of Blacks, believe minorities have the same job opportunities as Whites). In an earlier study, scholars Marc Bendick, Charles Jackson, and Victor Reinoso compiled data from the Fair Employment Council ("FEC") of Greater Washington, Inc., the University of Colorado, and the Urban Institute ("UI"), which each sent testers of different races but with nearly identical résumés to apply for jobs in markets in Chicago, Denver, San Diego, and Washington, D.C. Marc Bendick, Jr. et al., *Measuring Employment Discrimination Through Controlled Experiments*, 23 REV. BLACK POL. ECON. 25, 27-29 (1994). The study found that discrimination—described to exist where the minority was treated worse than the white partner in the testing pair—negatively affected African American testers twenty-four percent of the time, and Latinos twenty-two percent of the time (for FEC testers) and twenty percent of the time (for UI testers). *Id.* at 29-31 tbls.1 & 2. One very significant result was that for the Latino and white tester pairs in the UI data—where Latinos were negatively affected by discrimination twenty percent of the time—the study used either résumés or phone calls, rather than live inquiries, to apply for positions in San Diego and Chicago. *See id.* at 30 tbl.1.

15. 29 U.S.C. § 623(a)(1) (2000) (providing that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age"). Significantly, like Title VII with regard to race, color, sex, religion, or national origin, the ADEA seeks to prevent discrimination "because of" an individual's age. *Id.*

16. *See, e.g.*, Hazen Paper Co. v. Biggins, 507 U.S. 604, 606-07 (1993); *cf.* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 590-600 (2004) (rejecting "reverse" age discrimination claims of younger workers who asserted that changes to a company's health and retirement benefits plans favored older workers over younger workers).

17. *See, e.g.*, *Hazen Paper Co.*, 507 U.S. at 608-11.

differs from age discrimination in several significant ways,[18] federal courts have also held, in the very few cases addressing the issue, that proxy discrimination based on factors that correlate highly with race cannot be remedied under Title VII.[19]

Outside of the context of age discrimination and, to some extent, national origin discrimination, very few scholars have examined the problem of proxy discrimination.[20] Although some scholars have

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18. *See* Rhonda M. Reaves, *One of These Things Is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*, 38 U. RICH. L. REV. 839, 842-51 (2003) (describing some of the dissimilarities between discrimination against people of color and discrimination against older workers); *see also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000). The *Kimel* Court raised a difference between age and race discrimination when it remarked "[o]lder persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment.'" *Kimel*, 528 U.S. at 83 (citing Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313-14 (1976)); *see also* Smith v. City of Jackson, 351 F.3d 183, 193 (5th Cir. 2003), *aff'd*, 125 S. Ct. 1536 (2005) (citing U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 2, 6 (1965), *reprinted in* EEOC, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 16 (1981) (detailing how age discrimination differs from race discrimination, including the fact that age prejudice, unlike race prejudice, is distinct "because the process of aging 'is inescapable, affecting everyone who lives long enough,' regardless of distinct social and economic environments")).

19. *See, e.g.*, McBride v. Lawstaf, Inc., No. 1:96-cv-0196-cc, 1996 WL 755779, at *2-3 (N.D. Ga. Sept. 19, 1996); *cf.* Hernandez v. New York, 500 U.S. 352, 375 (1991) (O'Connor, J., concurring in the judgment) ("No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race."). Outside the context of Title VII cases, courts have recognized that names are unlawfully used as a proxy for national origin and race. *See* Orhorhaghe v. INS, 38 F.3d 488, 491, 499-503 (9th Cir. 1994) (finding that the conduct of INS agents was without a rational basis and violative of the Fourth Amendment where the agents' only basis for investigation and seizure of the petitioner was his "Nigerian-sounding name"); Ill. Migrant Council v. Pilliod, 540 F.2d 1062, 1070 (7th Cir. 1976), *modified en banc on other grounds*, 548 F.2d 715 (7th Cir. 1977) (restating the rule that INS officers may stop suspects only when there is a "reasonable suspicion based on specific articulable facts" and declaring that "Spanish surnames and appearance of Mexican ancestry" are not sufficient justifications).

20. *See* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 371-81, 390-91 (analyzing discrimination against black women based on hairstyle); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1279-1308 (2000) (describing how women and people of color attempt to alter their racial identities in order to prevent discrimination and preempt stereotyping in the workplace); *see also* Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 HARV. C.R.-C.L. L. REV. 155, 155-60 (1996) (arguing that landlords use entitlement to Section 8—a federal subsidized housing program—as a proxy for "other legally prohibited kinds of discrimination, such as that based on race, ethnicity, [and] national origin;" and proposing "an amendment to the Fair Housing Act that would prohibit private landlords from discriminating against prospective tenants because of their status as rental subsidy

explored the dangers in using race as a proxy for work-related criteria,[21] only a few have examined how the performance of one's racial identity may affect employment and promotion prospects.[22] None have examined when outside factors such as names are used as proxies for determining the race of an applicant in order to exclude him or her at a business' point of entry. Additionally, none have analyzed how to address individual proxy discrimination in hiring as it relates to race in light of theories regarding the social construction of race,[23] in particular what it means to be correctly or incorrectly perceived as belonging to a certain racial group on the hiring market.[24] Here, the real disease of racial discrimination is the social construct of race as disabling for certain racial groups, meaning that the pathology of racism results in presumptions of disability that are viewed as flowing from a certain

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holders"); Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 CAL. L. REV. 315, 316-19 (1998) (arguing that the Supreme Court's theory of wrongful discrimination under the Equal Protection doctrine is flawed in its failure to recognize the distinction between proxy discrimination, which involves persons using traits as a tool—a means to an end—to identify or target a class of persons, and nonproxy discrimination, where the classification is its own end); Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1247-63 (2000) (analyzing discrimination against people of Mexican descent in California through the use of language in Proposition 227).

21. *See* Reaves, *supra* note 18, at 851-52; *cf.* Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2059 (1996) (arguing that if race can be used as a proxy for a person's "experiences, outlooks, and ideas" within the context of measuring diversity for affirmative action purposes, then it might also be appropriate to use race as such a proxy in other contexts like employment).

22. *See, e.g.*, Carbado & Gulati, *supra* note 20, at 1279-1308; Rich, *supra* note 9, at 1140.

23. By social construction, we mean that identity categories such as race are not biologically determined, but instead gain their power and meaning from social relations. Certainly, sociologist Erving Goffman's work on social stigma is instructive in this area. *See* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 2 (1963) (explaining that society places people into categories with attendant ascribed attributes that effectively constitute a social identity). The ascribed identity provides a tool to negatively differentiate, so that a person can be "reduced in our minds from a whole and usual person to a tainted, discounted one." *Id.* at 3; *see also* Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27 (1994) (asserting that race is a category of no biological significance, but it "is constructed along cultural, political, and economic lines" and affects most aspects of our lives).

24. We limit our arguments solely to hiring discrimination cases in which proxies are used to determine race, but we recognize that our arguments may extend to other areas, such as gender and other types of discrimination claims.

racial status, for example, blackness, which is not just about skin color but the social meaning attached to it.[25]

Applying theories concerning the social construction of race, this Article borrows from the definition of disability under tbe Americans with Disabilities Act of 1990 (ADA)[26] and the courts' analyses of disability discrimination cases under the "regarded as" disabled provision of the ADA, which allows a plaintiff to bring a claim against an employer who regards the plaintiff as having an impairment that substantially limits a major life activity.[27] Using the "regarded as" provision as a model, this Article proposes a new method for recognizing discrimination claims based on the use of proxies for race—even when those proxies have been used in a way that mistakenly identifies someone as belonging to a certain race. In other words, we recognize that it is not physical race but the presumptions of "disability," or rather the constructed social meanings of race, that trigger both conscious and unconscious forms of discrimination. This Article argues that to redress discrimination in the workplace, courts must recognize employment discrimination claims where one is, for example, "regarded as" black, with all of the socially ascribed negative stereotypes of the group.[28]

Part I of this Article examines and exposes the ways in which race is socially constructed and analyzes several studies, including that of Bertrand and Mullainathan, to demonstrate how the construction of race by cultural and social factors can have damaging effects on the job market and in general society for those perceived as belonging to certain racial groups. Part II analyzes the current framework for evaluating individual disparate treatment cases based on race, describes how federal courts have mostly failed to recognize the way in which characteristics such as race are socially constructed and carry socially significant racial meanings, and details such courts' general treatment of proxy discrimination claims brought under various antidiscrimination

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25. *See* Michele Goodwin, *Race As Proxy: An Introduction*, 53 DEPAUL L. REV. 931, 933 (2004) ("Color is linked with laziness, incompetence, and hostility, as well as disfavored political viewpoints, such as a lack of patriotism and disloyalty to the United States."). We want to make clear that we are not claiming that being black in itself is disabling, but rather negative stereotypes that are often attached to or imposed upon Blacks in the employment context have a disabling effect on employment conditions and opportunities.

26. 42 U.S.C. § 12101 *et seq.* (2000). The ADA defines disability as (1) having a physical or mental impairment that substantially limits a major life activity; (2) having a record of such a physical or mental impairment; or (3) being "regarded as" having an impairment that substantially limits a major life activity. 42 U.S.C. § 12102(2) (2000); 29 C.F.R. § 1630.2(g) (1996).

27. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g).

28. Goodwin, *supra* note 25, at 932.

statutes.[29] Part III of the Article argues that current case law ignores the fact that this form of decision-making based on proxies for race is a form of racial stereotyping and is actually disparate treatment based on race. It then borrows from a framework used in proving disability discrimination under the ADA to recommend a novel approach for courts to use in evaluating cases where a proxy for race was used to discriminate against a person—that is, where a plaintiff is "regarded as" belonging to a certain racial group, with all of the attendant socially ascribed negative stereotypes of the group. Finally, this Article concludes by explaining the importance of maintaining the effectiveness of Title VII by judicially interpreting such legislation in a manner that comports with the realities of racism and race discrimination.

I. NAME THAT RACE: ON BEING "REGARDED AS" BLACK AND THE SOCIAL MEANING OF RACE

To win a race discrimination in hiring claim under the disparate treatment theory, an individual plaintiff may either use direct evidence of discriminatory intent or employ the three-step *McDonnell Douglas* burden-shifting framework[30] to establish discrimination with indirect

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29. This Article does not address Title VII claims filed under the disparate impact theory, which addresses employment practices that are facially neutral but cannot he justified by business necessity and disproportionately affect one group. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971). Claims filed under this theory are, in a sense, claims challenging the use of a "proxy" or factor that is not race but is instead an indirect way of excluding or discriminating against persons because of race. Although age, unlike race, had previously not been a legitimate basis for establishing a claim under the disparate impact theory, the Supreme Court recently held that the ADEA also authorized recovery for discrimination under the disparate impact theory in *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005). For an argument that antidiscrimination law should move away from the dichotomous intent-impact distinction and instead focus on how courts reason about discrimination claims brought under either doctrinal label, see Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 HOUS. L. REV. 1469, 1470-71 (2005).

30. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *see also* Angela Onwuachi-Willig, *When Different Means the Same: Applying a Different Standard of Proof to White Plaintiffs Under the* McDonnell Douglas *Prima Facie Case Test*, 50 CASE W. RES. L. REV. 53, 54-55 (1999). A plaintiff may also prove discrimination under the mixed motive theory. Under this theory, he or she may use either direct or circumstantial evidence to prove that his or her protected class was a motivating factor in the employment decision. 42 U.S.C. § 2000e-2(m) (2000); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). If the plaintiff meets this burden, the employer may not escape liability, but may limit the remedies available to the plaintiff by proving that the employer would have made the same decision even without any discrimination. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2000).

evidence.[31] To demonstrate discrimination under this framework, a plaintiff must first establish a prima facie case of race discrimination by proving the following four factors: (1) he or she belongs to a minority group; (2) he or she applied for and was qualified for the position at issue; (3) despite his or her qualifications, he or she was not hired; and (4) after his or her rejection, the position remained open and the employer continued to seek applications from other individuals.[32] If the plaintiff establishes these factors, the court then draws an inference of discrimination. The burden then shifts to the employer, who must articulate a legitimate explanation for rejecting the plaintiff's application.[33] If the employer does not satisfy this minimal burden, the

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31. *McDonnell Douglas*, 411 U.S. at 802; Dais v. Lane Bryant, Inc., 168 F. Supp. 2d 62, 70-71 (S.D.N.Y. 2001). Some scholars argue that the Supreme Court's decision in Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), will revolutionize disparate treatment law in that it will eliminate any distinctions between cases involving proof by direct evidence and indirect evidence. For example, Professor Michael Zimmer argues that,

> Desert Palace may go well beyond its immediate predecessors in the McDonnell Douglas line of cases by creating the basis for a uniform method of proof for individual discrimination cases that focuses on the evidence and the inferences that can be drawn from that evidence, all without regard to differentiated rules regarding proof structures.

Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *Is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1891, 1922-33 (2004).

32. *McDonnell Douglas*, 411 U.S. at 802. If a plaintiff wants to establish his or her disability discrimination claim with indirect evidence, he or she will follow the same basic framework that is utilized in race discrimination cases under the *McDonnell Douglas* burden-shifting analysis. *See* Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1186-87 (6th Cir. 1996). Only then, the factors of the prima facie case will be changed to include: proof that (1) "he or she is disabled"; (2) he or she is "otherwise qualified for the position, with or without reasonable accommodation"; (3) he or she "suffered an adverse employment decision"; (4) "the employer knew or had reason to know of the plaintiff's disability"; and (5) "the position remained open while the employer sought other applicants or the disabled individual was replaced." *See id.* at 1186. Because in some instances the employer may lawfully rely on a plaintiff's disability to reach its adverse employment decision, federal courts analyze these disability discrimination cases under another standard. *Id.* In cases where the plaintiff has direct evidence that the employer relied on his or her disability in making an adverse employment decision, or if the employer admits reliance on the handicap, the framework under which the case is analyzed is as follows: (1) the plaintiff must first establish that he or she is disabled within the meaning of the ADA; (2) the plaintiff must then establish that he or she is "otherwise qualified" for the position despite his or her disability, either without accommodation from the employer or with a proposed reasonable accommodation; and (3) the employer finally must prove that a challenged job criterion is essential, and therefore, a business necessity, or that a proposed accommodation will impose an undue hardship upon the employer. *Id.*

33. *Burdine*, 450 U.S. at 254 (noting that the burden on the defendant is only a burden of production, not a burden of proof).

plaintiff automatically prevails.[34] However, if the employer satisfies this burden, the plaintiff must prove that the employer's reason is a pretext for discrimination to win his or her case.[35] The plaintiff may do this simply by disproving the employer's asserted reason for its decision.[36]

For years, scholars have criticized federal courts' interpretation of this framework and of antidiscrimination law in general as being inadequate for addressing and eliminating discrimination in the workplace.[37] For example, Professor Charles Lawrence has detailed the ways in which antidiscrimination law in employment is essentially ill-equipped to correct for deeply entrenched notions of white

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34. The underlying rationale for this result was most clearly explained by the Supreme Court in Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), in which the Court declared:

> A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.

Id. at 577 (citation omitted).

35. *Burdine*, 450 U.S. at 256. The Court held that:

> The plaintiff retains the burden of persuasion . . . . This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Id. (citation omitted).

36. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000) (asserting that the jury may find against the employer but is not required to do so where the plaintiff has disproved the employer's asserted justification); *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-12 (1993). In *Hicks*, the Supreme Court explained that even where the plaintiff proves that the employer's proffered reason is false, the court is not required to find that discrimination has occurred. *Id.* at 507-08. The fact finder may still find for the employer if the fact finder believes that the employer's actions were not motivated by race. *See id.* at 511.

37. *See, e.g.*, Ramona L. Paetzold & Rafael Gely, *Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling?*, 31 HOUS. L. REV. 1517, 1521 (1995) (asserting that Title VII does not facilitate upward mobility for minorities in internal labor markets).

supremacy.[38] Additionally, Professor Emily M.S. Houh has utilized contract law, in particular the doctrine of good faith, to explain the ways in which law and culture evolve slowly even in the face of progressive beliefs about race and thus fail to account for the special burdens placed upon minorities in the workplace.[39] Likewise, Professors Devon Carbado and Mitu Gulati have explored how antidiscrimination law fails to account for the manner in which racial and gender stereotyping disadvantage racial minorities and women in the workplace by forcing them to "work" their identities such that their actions counter harmful stereotypes in their occupations.[40] In sum, scholars have generally analyzed antidiscrimination law in employment as disregarding and failing to account for the social realities of racism. In particular, they have argued that the law fails to properly incorporate antisubordination principles, which inquire whether rules or practices work to subordinate one group over another and examine discrimination as part of a larger societal structure that reinforces the subordination of oppressed minority groups.[41]

The repudiation of antisubordination principles also harms plaintiffs who file race discrimination claims by failing to acknowledge that race is not purely a physical concept but also a social construct. Current interpretations of race-based antidiscrimination law in employment rest on the notion of physical race—that is, discrimination against a person with a certain skin color or other physical features that signal membership in a particular racial group.[42] This understanding of

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38. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329-44 (1987) (explaining the nature of unconscious racism); *see also* Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 2003 (2000) ("[T]his model of discrimination . . . works to identify intentional wrongdoers and demonstrable victims, but leaves untouched unconscious racism, everyday cognitive bias, and institutional structures that faithfully perpetuate patterns of racial subordination."). *But see* Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999) (finding that Title VII pertains if the discrimination is "because of" race and that "[t]his is so regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias").

39. Houh, *supra* note 14, at 461 (asserting that the "cultural legacies" of what had been legal forms of white supremacy "are much more difficult to transform because the myriad apparatuses of their transmission lack the purportedly transparent structure and process of legal reform").

40. Carbado & Gulati, *supra* note 20, at 1260-62 (describing how members of subordinated groups must do extra identity work on the job to negate the imposition of harmful stereotypes associated with outsider group members).

41. *See* KATHERINE T. BARTLETT, ANGELA P. HARRIS & DEBORAH L. RHODE, GENDER AND THE LAW: THEORY, DOCTRINE, COMMENTARY 533 (3d ed. 2002).

42. Rich, *supra* note 9, at 1140 ("Courts have held that an employer only will be held liable under Title VII when she sanctions an employee because the employee

race as a physical concept is most evident in the way courts have treated the last prong of the prima facie case test under the *McDonnell Douglas* burden-shifting framework. Under this prong, an inference of racial discrimination is created (assuming the other three factors exist) if the plaintiff was treated differently than a similarly situated individual *outside* of his or her racial group, a factor that makes it much more difficult for a plaintiff to prove discrimination if he or she was replaced with someone of his or her own race.[43] For example, in *Jefferies v. Harris County Community Action Association*,[44] the Fifth Circuit rejected a black plaintiff's claim of racial discrimination in promotion because the person who was ultimately granted the promotion for which the plaintiff had applied was also black.[45]

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involuntarily displays a biological, visible or palpable characteristic associated with a disfavored racial or ethnic group."); *see generally* Roy L. Brooks, *Race As An Under-Inclusive and Over-Inclusive Concept*, 1 AFR.-AM. L. & POL'Y REP. 9, 12-27 (1994) (arguing that the sociological or "civil rights concept of race" has traditionally been defined by phenotypic differences such as facial features, skin color, and hair, but that this understanding is too narrow or "underinclusive" because it forces us to separately look at experiences of subordination across social groups).

43. Two U.S. Supreme Court justices have recently reaffirmed this point. *See* Olmstead v. L.C., 527 U.S. 581, 616 (1999) (Thomas, J., dissenting) (discussing Title VII and other antidiscrimination laws and asserting that "Discrimination, as typically understood, requires a showing that a claimant received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic."); *id.* at 611 (Kennedy, J., concurring) (agreeing with Justice Thomas' assessment of the showing required to prove discrimination). Courts, however, have recognized the potential for the occurrence of racial discrimination in situations where an employer replaced the plaintiff with someone of his or her own race. *See, e.g.*, Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1229 (10th Cir. 2000) ("[C]omparison to a person outside of the [plaintiff's] protected class . . . is unnecessary to create an inference of discriminatory discharge."); Carson v. Bethlehem Steel Corp., 82 F.3d 157, 158-59 (7th Cir. 1996) ("That one's replacement is of another race, sex, or age may help to raise an inference of discrimination, but it is neither a sufficient nor a necessary condition."); Jones v. W. Geophysical Co. of Am., 669 F.2d 280, 284 (5th Cir. 1982) (rejecting that an absolute requirement for a prima facie case is a showing that, after the plaintiff's discharge, the defendant hired a person who was not in the plaintiff's protected class). Courts have also allowed racial and sexual harassment claims to move forward under Title VII where the employer and the employee were the same race. *See, e.g.*, Bland v. New York, 263 F. Supp. 2d 526 (2003); *cf.* Oncale v. Sundowner Offshore Servs, Inc., 523 U.S. 75, 76 (1998); (finding that for sex-discrimination premised upon harassment, a Title VII discrimination claim may arise "because of" sex in cases where the employer and employee are the same gender).

44. 615 F.2d 1025 (5th Cir. 1980). For an excellent discussion of the difficulties of asserting claims at the intersection of race and gender under Title VII, see Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

45. *Id.* at 1030. In so doing, the Fifth Circuit relied on *Adams v. Reed*, a sex discrimination case, in which the court reasoned that "where both the person seeking to

This Part of the Article applies racial formation theory within the context of employment discrimination to show that race is not purely biological and argues that discrimination based on proxies that highly correlate with race, such as name and voice, should be covered under Title VII. Specifically, Part I.A briefly explains theories regarding the social construction of race, and Part I.B details the results of several studies on discrimination that effectively demonstrate the role of socially constructed racial characteristics in perpetuating present-day discrimination in the workforce.

A. Race as a Social Construct

It is readily accepted among race scholars, including sociologists, that race, although considered primarily in terms of physical features, carries different meanings based upon societal understandings of particular groups. In other words, discrimination against racial minorities, Blacks in particular, is not merely the result of an aversion to dark skin in itself, but to what that dark skin signifies.[46] For many employers, dark skin has signified laziness, unproductivity, and other stereotypes that have wrongfully been associated with all black workers.[47]

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be promoted and the person achieving that promotion were women, 'because the person selected was a woman, we cannot accept sex discrimination as a plausible explanation for [the promotion] decision.'" *Id.* (quoting Adams v. Reed, 567 F.2d 1283, 1287 (5th Cir. 1978) (alteration in original)). The court did, however, recognize that the plaintiff may have a claim as a black female—a claim based on both race and sex combined—stating:

> The essence of Jefferies' argument is that an employer should not escape from liability for discrimination against black females by a showing that it does not discriminate against blacks and that it does not discriminate against females. We agree that discrimination against black females can exist even in the absence of discrimination against black men or white women.

Id. at 1032.

46. In essence, skin color merely acts as a label for the constructed identity. As one scholar has surmised, "Once labels are applied to people, ideas about people who fit the label come to have social and psychological effects." KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY 66 (2005); *see also* Rich, *supra* note 9, at 1148 (describing how certain features are used to make "racist or ethnically-biased generalizations about an individual's physical or intellectual potential").

47. *See* Cooper, *supra* note 10 (manuscript at 25) (asserting that black men "are often subject to stereotypes that negatively influence [their] attributed identity and therefore require [them] to do extra identity work in order to achieve hiring and promotion"); Goodwin, *supra* note 25, at 932 ("Historians comment that blacks were perceived as too immature, unsophisticated, and intellectually inferior to properly exercise the rights granted to citizens."); *see also* Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1714-24 (2000) (examining advantages that may attach to lightness of skin).

To this end, numerous scholars have challenged and criticized the idea of race as a mere biological fact, demonstrating the ways in which race is formed and transformed under a constantly shifting society. For example, Professors Michael Omi and Howard Winant have theorized about how race is formed in society through a sociohistorical process that may transform, create, or eliminate racial categories.[48] Likewise, Professor Ian Haney López has explained the ways in which race, although often signaled by phenotype, is a social construct.[49] Indeed, in addition to physical features, race can and has been defined by a variety of identifying factors, such as class, geography, and politics.[50]

Because race is not purely physical but also socially constructed, racial discrimination often takes the form of unfavorable treatment based upon socially constructed ideas about characteristics that are viewed as being linked to a particular racial group.[51] As Professor Juan Perea once explained, "Identifying traits need not . . . be physical. In our culture, foreign-sounding names, like corresponding accents or languages, often elicit prejudice."[52]

Indeed, several recent studies have demonstrated the ways in which race is socially constructed around characteristics that have come to signal or gain meaning as a defining feature of a racial group and, as a result, have created a basis on which employers and others may discriminate against an individual due to race-based associations or prejudices toward such characteristics.[53] In the same way that people "often link color with undesirable personal qualities such as laziness, incompetence, and hostility,"[54] they also often link factors, such as

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48. *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 55-61 (2d ed. 1994).

49. *See* Haney López, *supra* note 23, at 10-11.

50. Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. (forthcoming 2006) (manuscript at 13, on file with authors).

51. *See* Goodwin, *supra* note 25, at 932-34; *see also* Cooper, *supra* note 10 (manuscript at 9) (stating that "societal discourses about the meaning of different identity categories interact with one another to differentiate between people who are members of a certain race and those who are members of that same race").

52. Perea, *supra* note 13, at 837.

53. *See* Rich, *supra* note 9, at 1158 ("[People] maintain beliefs about the dialects, aesthetics, and mannerisms that signal one's race or ethnic status."); Perea, *supra* note 13, at 835 (asserting that "perceptible differences that mark out-groups include," among other things, speech or accent, names, and place of residence).

54. Wang, *supra* note 10, at 1013-14; *cf.* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1724-45 (1993) (asserting that whiteness tends to be associated with rights and privileges in the context of property); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 34-40 (1990) (discussing how the rhetoric of whiteness often symbolizes innocence).

name or voice, with color and race and any attendant negative stereotypes. In other words, characteristics such as a person's name or voice can, in some instances, "carry enough ethnic meaning to . . . burden [his or her] daily existence with stereotypes imposed by others."[55]

The next section of this Article, Part I.B, will discuss several features that are often used as proxies for determining an individual's race, in particular a person's name and voice or accent.[56] Part I.B.1 focuses on the use of names as proxies for race in social and legal situations, and Part I.B.2 concentrates on the use of voice, or the sound of a voice specifically, as a proxy for race, ethnicity, and national origin under similar circumstances.

B. The Operation of Proxies for Race

1. NAME

In the post-Civil Rights Era, where employers are readily aware that outward racial prejudices are not a legally acceptable basis for making employment decisions, employers can and do use proxies for race, both consciously and unconsciously, as a means of excluding

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55. Perea, *supra* note 13, at 838 (discussing name changes in particular).

56. These categories are, of course, not exhaustive. For instance, credit-worthiness can be used as a proxy for race. Even where Blacks and Whites have poor credit histories, opportunities still appear to be dispersed along racial lines. *See* David G. Blanchflower et al., *Discrimination in the Small Business Credit Market*, 84 REV. ECON. & STAT. 930, 930 (2003) (asserting that there is qualitative and quantitative evidence that Blacks are discriminated against in the receipt of small business loans even where they have similar credit histories to nonblack applicants); *see also* Cecil J. Hunt II, *In the Racial Crosshairs: Reconsidering Racially Targeted Predatory Lending Under A New Theory of Economic Hate Crime*, 35 U. TOL. L. REV. 211, 211 (2003) (claiming that race and not credit risk is the real issue in the lending market and that, through use of economic profiling, race becomes "a proxy for market weakness and exploitability, without regard to the income or particular credit worthiness of the individual"). Credit-worthiness matters within the context of Title VII because of a recent trend among employers to require credit checks for potential employees. *See* Diana Scott, *The Unruly Rules on Employee Background Checks*, CAL. LAW., Jan. 2004, at 17. As Blacks are disproportionately represented among the poor, they tend to have lower credit scores. Employers that set minimum credit scores as requirements for employment and promotion would tend to disproportionately eliminate Blacks from the hiring pool and advancement opportunities. While credit-worthiness can serve as another type of proxy for race, it is not clear that this and other conditions that correlate along racial lines carry the saliency of traits like names and voice, which also implicate a stronger bias—one where actors consciously and unconsciously discriminate without proof that they are only affecting members of the disfavored group.

certain workers from jobs.[57] For example, as stated in the Introduction of this Article, two scholars, Bertrand and Mullainathan, conducted a study on employment discrimination in hiring that demonstrated the ways in which job applicants face discrimination entirely based on social signals of race due to their names,[58] in particular whether their names sounded like African American or white names.[59] In fact, in these experimental cases, the Boston- and Chicago-area employers that were sent the identical fictitious résumés of applicants with both African American and white-sounding names never saw faces for the matching fictitious applicants, nor did they have any means for determining the race of an applicant other than the applicant's names themselves.[60] Yet, those with African American-sounding names stood at a significant disadvantage in the callback process, with applicants with white-sounding names receiving fifty percent more callbacks.[61] In essence, an applicant with a white-sounding name and no markers that identified him or her as black could expect one callback for every ten job advertisements while an African American "would need to apply to

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57. *Cf.* Cooper, *supra* note 10 (manuscript at 31) ("The mainstream accepted the civil rights movement's basic premise that some blacks warrant inclusion, but rejected taking that principle to its fullest extent.").

58. Bertrand & Mullainathan, *supra* note 2, at 2, 7-8; *see also* Bill Maxwell, *Names of Pride or Labels for Stereotypes?*, ST. PETERSBURG TIMES (Fla.), Feb. 12, 2003, at 19A, *available at* http://www.sptimes.com/2003/02/12/news_pf/Columns/Names_of_pride_or_lab.shtml (describing an incident in which Maxwell spoke to a classroom, turned his back to the students, and correctly guessed whether each student was white or African American based on first name alone).

59. Bertrand & Mullainathan, *supra* note 2, at 2 ("We experimentally manipulate[d] perception of race via the name on the résumé."). In selecting names that were either white-sounding or African American-sounding, Bertrand and Mullainathan "use[d] name frequency data calculated from birth certificates of all babies born in Massachusetts between 1974 and 1979" and "tabulate[d] these data by race to determine which names [were] distinctively White and which [were] distinctively African American." *Id.* at 7; *see also* Roland G. Fryer, Jr. & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names,* 119 Q. J. ECON. 767, 769-70 (2004). The authors found that,

> Even among popular names, racial patterns are pronounced. Names such as DeShawn, Tyrone, Reginald, Shanice, Precious, Kiara, and Deja are quite popular among Blacks, but virtually unheard of for Whites. The opposite is true for names like Connor, Cody, Jake, Molly, Emily, Abigail, and Caitlin. Each of those names appears in at least 2,000 cases (between 1989-2000), with less than 2 percent of the recipients Black.

Id. (footnotes omitted).

60. *See* Bertrand & Mullainathan, *supra* note 2, at 2, 6-9 (noting that they restricted themselves to "resumes posted more than six months prior to the start of the experiment").

61. *Id.* at 2-3, 10 & tbl.1.

15 different ads to achieve the same result."[62] As Bertrand and Mullainathan asserted, "a white name yield[ed] as many more callbacks as an additional eight years of experience" would have yielded for an African American.[63]

Additionally, Bertrand and Mullainathan found that the gap between black and white job applicants widened with résumé quality.[64] Although higher quality résumés[65] generally resulted in higher callback rates, the benefit of having a higher quality résumé for a perceived African American applicant was statistically insignificant but was statistically significant for those perceived to be white applicants.[66] The callback rate for white applicants with a higher quality résumé was eleven percent compared to 8.8 percent for those with lower quality résumés, with a statistically significant difference of 2.51 percentage points or thirty percent.[67] However, black applicants with higher quality résumés received callbacks 6.99 percent of the time, compared to 6.41 percent of the time for those with lower quality résumés, resulting in just a .58 percent difference in percentage points, or nine percent.[68]

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62. *Id.* at 10.

63. *Id.* at 3, 10 & tbl.5.

64. *Id.* at 3, 12 ("Discrimination therefore appears to bite twice [for African Americans], making it harder not only for African Americans to find a job but also to improve their employability.").

65. *See supra* note 6 (defining higher quality résumés as those that had more labor market experience, fewer holes in the employment history, an e-mail address, some certification degree, foreign language skills, and some honors).

66. Bertrand & Mullainathan, *supra* note 2, at 12 & tbl.4.

67. *Id.*

68. *Id.* As part of a story on 20/20 in 2004, ABC News conducted its own study by posting on popular job websites twenty-two pairs of names with identical resumes. The only difference, again, was the name on each pair of documents. They found that "the white résumés were actually downloaded 17 percent more often by job recruiters looking for candidates." *20/20: Can a Name Hold You Back in Job Search?* (ABC television broadcast Sept. 20, 2004) (transcript on file with authors). Black participants in the study responded as follows:

> CARITA (PARTICIPANT): I was just blown away. Kathleen got phone call[s] for three of the four weeks of the study and I didn't get any. And Kathleen—does not exist. There is no Kathleen.
>
> JAMI FLOYD (ABC NEWS): Arsenetta was envious of her made-up white counterpart Kimberly.
>
> ARSENETTA (PARTICIPANT): They were calling her morning noon and night. I was sitting there looking at my phone going, I want to answer that phone call and tell the man I'm interested in the job.

Id.

After the results of Bertrand and Mullainathan's study were revealed, numerous reporters interviewed human resources employees to verify the results, finding that in many instances such employees were encouraged, if not ordered, to eliminate applications or résumés with African American-sounding names.[69] Indeed, some job applicants, who are readily aware of hiring biases based on ethnic-sounding names, have purposefully used names other than their own on their résumés to apply for jobs.[70] These job applicants might include a Latino Guillermo who becomes William or a black Tyree who simply becomes Ty. In fact, numerous actors and actresses of color have changed their names to white-sounding names in order to avoid prejudices in the film and television industries. For example, Martin Sheen, star of the hit television series *The West Wing*, changed his name from Ramon Estevez, later explaining his decision by proclaiming "I know what it means to have an Hispanic name."[71]

Moreover, discrimination based on the perceived ethnicity or race of an applicant due to name is not limited to people of color. Just as a

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69. The popular aforementioned *20/20* news program explored issues of proxy discrimination based on name in a show that aired on September 20, 2004. The following colloquy took place between Jami Floyd of ABC News and a job recruiter for Fortune 500 companies in northern California:

> JAMI FLOYD (ABC NEWS): If you're looking at two résumés, all else being equal, one says Shaniqua, one says Jennifer, you're going to call who first?
>
> JOB RECRUITER (FEMALE): I would call Jennifer first.
>
> JAMI FLOYD (ABC NEWS): It's a choice, she said, she was trained to make. When representing certain companies, don't send black candidates. And on a résumé, a name may be the only cue of an applicant's race.
>
> JOB RECRUITER (FEMALE): I think the way that I had been taught and what has helped me to succeed in the industry is unfair.
>
> JAMI FLOYD (ABC NEWS): And racist.
>
> JOB RECRUITER (FEMALE): Absolutely, yes.

Id.

70. *Cf.* Maxwell, *supra* note 58, at 19A (arguing that black parents unfairly burden their children with made-up Afrocentric names).

71. Perea, *supra* note 13, at 837. Not every name change involves a move away from racial or ethnic identification. For example, singer-actress Dana Owens has enjoyed substantial success under her assumed name, Queen Latifah. Based on Bertrand and Mullainathan's work, one wonders how Queen Latifah's name choice would have affected her employment possibilities outside of the entertainment world, and whether even in the entertainment world she would have experienced more difficulties had she selected an African American-sounding name rather than an African name. See *infra* notes 242-43 and accompanying text, for a discussion regarding the significance regarding African- versus African American-sounding names.

black Nyasha may be excluded on the basis of discrimination caused by racial stereotyping due to her ethnic-sounding name, a white applicant named Nyasha, who did not in some way identify herself as white on her résumé, could suffer similar discrimination simply because of her name, which may have incorrectly signaled to hiring decision-makers that she was black or even the "wrong kind" of White.[72]

One could argue, however, that employers who make deeisions based upon the sound of a name alone are not acting solely on the basis of race, but instead may also be drawing inferences about a number of the applicant's traits. For instance, employers who make a decision based on an applicant's name could be making a decision based upon social class. This would certainly seem plausible given the results of another recent study that claims to measure the effect of having black racially-identifiable names on teacher expectations and test performance within elementary education.[73] In this study, Professor David Figlio asserts that teachers and school administrators expect less from children with "names that are associated more with low socio-economic status, names that are disproportionately given to black children."[74] He then theorizes that this disparate treatment may partially explain the testing gap between Blacks and Whites because "names concentrated in the black community are related to diminished student test performance in mathematics and reading."[75] He further claimed that, even among names with a high blackness index, the names with the greatest correlation to lower socioeconomic status experienced the largest test gap, even among children who came from the same family.[76]

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72. One of the author's friends, a white woman named Nyasha, has often commented on surprised reactions from people when they meet her in person after first knowing her name.

73. David N. Figlio, *Names, Expectations and the Black-White Test Score Gap* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 11195, 2005), *available at* http://bear.cba.ufl.edu/figlio/blacknames1.pdf. Figlio does not, however, believe that only Blacks bear the costs of having uncommon names. *See* Noah Bierman, *Students' Names May Play A Role in Classroom*, MIAMI HERALD, June 2, 2005, at 1B (describing another Figlio study that analyzed mostly white subjects and found that persons with the most uncommon spellings of the name "Caitlin" were likely to experience "trouble reading when [they] reache[d] third or fourth grade").

74. Figlio, *supra* note 73, at 3; *see also* Fryer & Levitt, *supra* note 59, at 769-71 (arguing that distinctively black names are associated with lower parental education and lower per capita income).

75. Figlio, *supra* note 73, at 14.

76. *Id.* at 15 (noting that even within the same family, the brother named Dwayne would be expected to test better than his brother DeMarcus, who would test better than his brother Da'Quan); *see also* Christopher Goffard, *Ethnic-Sounding Names May Hurt Kids: UF Professor Finds Some Cause Subtle Bias*, SUN-SENTINEL (Fort Lauderdale), June 15, 2005, at 1E (describing the Figlio study).

While the importance of class as a discriminatory tool should not be minimized, substituting class analysis for discussions of race is dangerous, especially where poor white workers are not generally subject to the assumptions related to racial stereotypes that affect poor Blacks.[77] An argument that decision-makers within labor markets can decouple race and class status also neglects socially constructed meanings of race and how that construction can employ class as a tool to infer which "kinds" of Blacks are acceptable in the workplace. More importantly, as Bertrand and Mullainathan demonstrated in their study, within the labor market context, it was race (even in its strictly physical sense), and not class, that was predominantly at work in the decision of the employers in the study.[78] Even when Bertrand and Mullainathan signaled factors such as class to employers with addresses in predominantly white and more educated neighborhoods, applicants with African American-sounding names yielded no greater returns.[79] Although applicants who lived in more educated and higher income neighborhoods had a higher probability of receiving a callback, there was no evidence that African Americans benefited any more than Whites from living in such neighborhoods.[80] Indeed, as Bertrand and Mullainathan indicated, "if ghettos and bad neighborhoods are particularly stigmatizing for African Americans, one might have expected African Americans to be helped more by having a 'good' address."[81] In sum, it was the names of the perceived African American applicants and the ways in which such names signaled negative social background and characteristics, such as laziness and incompetence, that resulted in the racial discrimination, and not any other external factors.[82]

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77. *See, e.g.*, Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 829-32 (2003) (discussing the manner in which class consciousness is "raced").

78. *See* Bertrand & Mullainathan, *supra* note 2, at 20-21; *see also* Camille A. Nelson, *Breaking the Camel's Back: A Consideration of Mitigatory Criminal Defenses and Racism-Related Mental Illness*, 9 MICH. J. RACE & L. 77, 84 (2003) ("[D]iscrimination is not limited to low-income or uneducated Blacks, but is also reported by Black middle-class professionals.").

79. Bertrand & Mullainathan, *supra* note 2, at 13-14.

80. *Id.* at 14.

81. *Id.*

82. *Id.* at 13-14; *see also* Discrimination Research Ctr., Names Make a Difference: The Screening of Resumes by Temporary Employment Agencies in California 3, 14 (Oct. 2004) (unpublished report), http://drcenter.org/staticdata/pdfs/name_resume_study.pdf (describing in a study of the effect of names on hiring through temporary employment agencies in California that, after September 11, Arab Americans and South Asians received the lowest response rates from temporary agencies) [hereinafter Names Make a Difference]. Researchers have found that these

For courts to allow discrimination that is based on names that correlate with blackness, but which does not directly involve an explicit race-based decision, misses the reality of living as a "raced" person in the United States.[83] It also treats the use of proxies, more generally, as typically not cognizable within antidiscrimination law. This seems bizarre given that courts routinely traffic in the most prevalent proxy for race: color.[84] At bottom, studies, such as the one conducted by Bertrand and Mullainathan, remind us that not all disfavored citizens and workers are created (un)equal. Society operates on the

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racial prejudices based on name, or rather whether a name sounds African American, begins at an early age. Jack Daniel of the University of Pittsburgb found this in his study of elementary school students:

> JACK DANIEL (UNIVERSITY OF PITTSBURGH): Who is the smartest, Sarah or Shaniqua?
>
> GRADE SCHOOL STUDENT (MALE): Sarah.
>
> JAMI FLOYD (ABC NEWS): But how far are we from that kind of change [away from racism in society]? Jack Daniel, vice provost of the University of Pittsburgh studied four and five-year-old children to find out.
>
> JACK DANIEL (UNIVERSITY OF PITTSBURGH): Who would you like to play with, Tanisha or Megan?
>
> GRADE SCHOOL STUDENT (MALE): Megan.
>
> . . . .
>
> JACK DANIEL (UNIVERSITY OF PITTSBURGH): Who took the bite out of your sandwich? Do you think it was Adam or Jamal?
>
> GRADE SCHOOL STUDENT (MALE): Jamal.

20/20: Can a Name Hold You Back in Job Search?, *supra* note 68. Tbe answers of black children were neutral to these questions, but white children "were disturbingly more likely to associate negative traits with black names." *Id.* (quoting Jami Floyd of ABC News).

83. This use of race as an adjective is meant to signal that courts have failed to acknowledge that assigning individuals to a specific race, along with its attendant meanings, is a process. *See* Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1694 (2000) ("The term racialization embodies the idea of race as a process. [There are] two aspects of racialization that are part of racial profiling—the racial category and differences in the cultural means of subordination."); John A. Powell, *A Minority-Majority Nation: Racing the Population in the Twenty-First Century*, 29 FORDHAM URB. L.J. 1395, 1415 (2002) ("Historically, those with power have raced society to stratify people based on color, nationality, and ethnicity."); Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of* Bowers v. Hardwick, 79 VA. L. REV. 1805, 1806-07 (1993) ("I have suggested in some of my work in critical race theory that 'race' is a verb, that we are 'raced' through a constellation of practices that construct and control racial subjectivities.").

84. *See* Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1551-55 (2000).

understanding that there are bad and good (or not quite as bad) Blacks[85] or rather that there are bad Blacks and Blacks who have achieved the status of "honorary Whites."[86]

Names then become difference-markers or tools to distinguish between the acceptable and unacceptable Blacks. The tool could be a proxy for race and socioeconomic status, social compatibility, or political agenda. Race, however, is always present in the consideration. What one's name tells the world about how one performs his or her race controls the ultimate decision.[87] That decision has implications for both the culture of the work environment and the behavior of minority workers.

By distinguishing between name-based discrimination and race discrimination, courts send a signal to employers as to what values and forms of regulation are acceptable within the workplace. At some point, we must ask how the use of proxies as a basis for discrimination harms the workplace. In the résumé context, giving import to names as a proxy for identity invites dubious racial consideration into the work environment by remapping racial constructions onto items that might

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85. *See, e.g.*, Cooper, *supra* note 10 (manuscript at 23) ("The way for a Good Black Man to 'play by the rules' is to 'downplay his racial identity.'"); Carbado & Gulati, *supra* note 9, at 721 (discussing the hiring of "black people of a certain kind"); *see also* David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924, 1924, 1927 (1999) (book review) (analyzing the way in which a black Harvard Law School graduate, who chose to downplay his racial identity, "worked" his racial identity at his law firm).

86. *See* Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1658 (2004) ("A person is racially palatable if she is perceived to be peripherally or unstereotypically nonwhite; she is racially salient if she is perceived to be centrally or stereotypically nonwhite."); Cheryl I. Harris, *Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith—Spectacles of Our Times*, 35 WASHBURN L.J. 235, 236 (1996) (discussing how African Americans who are accorded the status of honorary Whites have a type of racial invisibility).

87. Carbado & Gulati, *supra* note 86, at 1676-77 (asserting that "firms will screen for racial palatability and against performative racial difference," and that "firms will hire people who are phenotypically but unconventionally black—that is to say, people who 'look' but do not 'act' black"). Devon Carbado and Mitu Gulati have written about the work people of color do to counter harmful stereotypes of minority identities operating in employment environments, see *supra* note 40, and have also more generally addressed the notion of race as a "performative identity." Their claim is that "the social meaning of, for example, a black person's racial identity is a function of the way in which that person performs (presents) her blackness" such that Blacks can choose to accept or reject societal expectations of behaving "conventionally" (that is, in accordance with predominant stereotypes). Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory: Crossroads, Directions, and a New Critical Race Theory*, 112 YALE L.J. 1757, 1771-72 (2003) (book review).

otherwise be substantially race-neutral.[88] Additionally, Professor Tristin Green has recently surmised that business practices, such as appearance codes, result in a discriminatory work environment where minorities are punished for failing to "fit in."[89] She further theorizes that courts avoid recognizing the discrimination aspects of the cases by seeing them through the prism of "business prerogative" rather than antidiscrimination.[90] Strangely, similar to the justification for appearance codes, businesses could claim that they avoid ethnic names for business reasons, regardless of an individual's race, because, for example, their customers or partners do not relate to Lakishas or Jamals.[91] Our question then is: should employers be permitted to use this type of justification when such policies endorse the rejection of persons who are presumed tainted by stereotypical notions of what race means? We believe Title VII requires the answer to be no. Even where there are legitimate business reasons, using race in this way results in at least a mixed-motive discrimination claim.[92] Until some proper business purpose is advanced, however, such discrimination violates Title VII because it results in disparate treatment of those perceived as racial minorities.[93]

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88. This statement is premised upon the notion that, with the exception of information like names or group memberships in affinity organizations, one can choose to be race-neutral on a résumé. *See* Thomas, *supra* note 83; Gotanda, *supra* note 83 (discussing race-ing or racialiazation as processes).

89. Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 655-56 (2005).

90. *Id.* at 658-59.

91. This was the nature of the claim of an employer with regard to his Arab employee in El-Hakem v. BJY Inc., 415 F.3d 1068, 1072-73 (9th Cir. 2005). *See also* discussion *infra* notes 186 & 233. As at least one scholar has surmised that even where these types of business concerns are legitimate, they can serve to reinforce harmful social norms. ROBERT C. POST, PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 23-27 (2001). Using a sex discrimination example where an employer claimed that hiring women would reduce profits, Professor Post asserts that we should not imagine Title VII as requiring the destruction of gender norms, but instead we should "challenge [ourselves] to explore the precise ways in which Title VII should alter the norms by which sex is given social meaning." *Id.* at 26.

92. In other words, while we think name avoidance is a type of discrimination "because of" race, it could also represent mixed-motive discrimination. *See* 42 U.S.C. 2000e-2(m) (2000) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (discussing alleged Title VII mixed-motive discrimination in a case brought by a female warehouse worker).

93. While not advocating proxy discrimination claims explicitly, Green appears to agree with this analysis in such cases: "Using disparate treatment theory, for example we might provide individuals with a legal right to be free from adverse

Beyond the work environment, there are also consequences to individual personal choices and behaviors stemming from such practices. The concept that there are preferred behaviors and statuses even among generally disfavored groups reinforces the notion of race as a social construction. It also results in a group of individuals who cover by intentionally acting in a way that avoids identifiers of the unacceptable performance of blackness.[94] According to some scholars, this type of behavior should be expected.

Clark Freshman, for example, theorizes that "outgroup" members do not exist within a uniform coalition.[95] Those who are the most advantaged members of outgroups, like Larry Mungin, a black Harvard Law School graduate who admitted to playing the role of the good Black as a survival strategy,[96] seek to curry favor with the "ingroup" by proving they are more similar to the ingroup than they are to less

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employment actions taken for a lack of fit with a discriminatory work culture." Green, *supra* note 89, at 665-66. Earlier within her article, Green used as an illustration the story of Keisha Akbar, a black female scientist who wore her hair in braids or natural, wore clothing featuring African styles, spoke Black English Vernacular to fellow black employees, and who was not promoted at the small research firm where she worked. *Id.* at 646 (discussing Keisha's story, and citing to its original appearance in the work of another scholar, *see* Barbara J. Flagg, *Fashioning A Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2010-13 (1995)). Under Professor Green's approach, Keisha would be permitted to sue for discriminatory denial of a promotion based on failure to comply with a discriminatory work culture.

94. *See* Carbado & Gulati, *supra* note 9, at 714-19; *see also* Jean Shin, *The Asian American Closet*, 11 ASIAN L.J. 1, 1-2 (2004) (exploring covering behavior by using the metaphor of "the closet" to describe the ways Asian Americans may downplay ethnic behavior either to appear less "visible" as a move toward whiteness or merely to hide their foreignness, as they project identities as "model minorities"). Ultimately, this type of "covering" behavior works to the disadvantage of Blacks and other racial minorities. *See generally* PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (1999) (describing the story of a black Harvard Law School graduate who worked hard in his career and personal life to be the "good Black"—to avoid views, objects, and behaviors that could be identified as black). For example, the irony of the story in *The Good Black* was that the attorney ultimately filed a racial discrimination suit against his law firm, alleging that he was denied consideration for partnership and mistreated in terms of pay and assignments because of his race. *See generally* Mungin v. Katten Muchin & Zavis, 116 F.3d 1549 (D.C. Cir. 1997) (concerning the race discrimination cause of action brought by Mungin). In other words, even though he aggressively "worked" his identity to avoid being grouped as just another Black, he was unable to escape racial discrimination.

95. Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313, 329, 427 (2000).

96. *See supra* note 94.

advantaged outgroup members.[97] This behavior is detrimental on a number of levels. First, because it is a move to prove how much one is like the dominant group, it becomes a new form of "passing,"[98] where one is attempting to mitigate or erase differences through racial identity performance.[99] This behavior, which can be understood as an expression of internalized oppression, can be harmful to the individual engaging in the conduct.[100] Worse still, it results in even minority

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97. Cooper, *supra* note 10 (manuscript at 25-38) (describing how middle class heterosexual black men are incentivized by the "Good Black Man" image to assimilate in the form of emulating white men); Freshman, *supra* note 95, at 435-38; *see also* Carbado & Gulati, *supra* note 86, at 1676 (explaining how the minorities who are most likely to succeed in corporate environments are the ones "who exhibit the greatest insider-group affinity"); Kevin R. Johnson, *The Struggle for Civil Rights: The Need for, and Impediments to, Political Coalitions Among and Within Minority Groups*, 63 LA. L. REV. 759, 779-83 (2003) (discussing intra-group conflicts and differences within minority identity communities that require coalition building to overcome the conflicts and differences). This attempt by outsiders to hide disfavored identities or identity traits has also been noted outside of the context of racial identities. *See* Marc A. Fajer, *A Better Analogy: "Jews," "Homosexuals," and the Inclusion of Sexual Orientation as a Forbidden Characteristic in Antidiscrimination Laws*, 12 STAN. L. & POL'Y REV. 37, 45-47 (2001) (arguing that Jewish people and gays and lesbians engage in identity "self-censorship" with regard to those traits most commonly associated with their identities or engage in "politics of safety" to minimize the appearance of those traits that might emphasize their identities).

98. "Passing refers to an individual's 'decision' to rely upon his or her light skin and European features in order to assume the life and privilege of a White person secretly." Tanya Katerí Hernandez, *"MultiRacial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97, 123 (1998).

> Passing is a deception that enables a person to adopt certain roles or identities from which he would be barred by prevailing social standards in the absence of his misleading conduct. The classic racial passer in the United States has been the "white Negro": the individual whose physical appearance allows him to present himself as "white" but whose "black" lineage (typically only a very partial black lineage) makes him a Negro according to dominant racial rules.

Randall Keunedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1145 (2001). For examples and analyses of the behavior within legal academe, see PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 223 (1991) (discussing her godmother who was abandoned by her mother so the mother could pass as a white woman); Harris, *supra* note 54, at 1710-14 (discussing her grandmother's passing and the significance of race as a factor in property rights).

99. Professor Kenji Yoshino defines a similar type of behavior—downplaying racial identity—as "covering." Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002).

100. *See* Kennedy, *supra* note 98, at 1161-66 (presenting the real and fictional stories of Blacks who passed for Whites and discussing the psychic and emotional toll of the behavior); Onwuachi-Willig, *supra* note 50 (manuscript at 19-23) (detailing the harms of "passing" for those involved in interracial relationships and gay and lesbian relationships); *see also* Fajer, *supra* note 97, at 45-47 (discussing the psychological harm that befalls gays, lesbians, and Jews who hide or "closet" their identities);

persons supporting the ends of tokenism.[101] The names studies prove at once the complexity of how race is constructed by those in power and performed by those who lack it.

2. VOICE

Much like with names, studies have also revealed a direct link between discrimination on the basis of race and voice, in particular between disparate treatment and sounding black or Latino.[102] In the same way that having an African American-sounding name has been proven to be a disadvantage to job applicants on the market, having what is deemed to be a black or a Latino voice has also been proven to be equally harmful under various circumstances.

In fact, as studies and cases reveal, not only do people believe that they can correctly identify the race of a person simply by listening to the individual,[103] but they also do correctly identify people by race on

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Jennifer Swize, Note, *Transracial Adoption and the Unblinkable Difference: Racial Dissimilarity Serving the Interests of Adopted Children*, 88 VA. L. REV. 1079, 1115-16 (2002) (discussing the emotional toll of "passing" as biological children, and how it is less of an issue within the context of transracial adoptions).

101. Since Bertrand and Mullainathan did not report finding differences between black and white decision-makers, we must conclude that Blacks harbor the same bias against African American-sounding names. This bias could operate in the same manner that it works for Whites, where it is the social construction of blackness that leads to the behavior. The choice that some Blacks make in identity performance or relying upon "passing" behaviors might, however, provide a different explanation for the conduct of black employers. Passing carries with it the need to both limit being discovered and to distance one's self from persons who can challenge one's identity performance. Kennedy, *supra* note 98, at 1167-68. Moreover, those who are attempting to pass may have an interest in "community censoring" or of only letting in other minorities who behave appropriately. Fajer, *supra* note 97, at 46-47. Behaviors such as these lead to the conclusion that some black decision-makers may be acting with a greater understanding or consciousness about the choice to exclude than white employers.

102. *See infra* notes 108-23 and accompanying text.

103. *See* Clifford v. Commonwealth, 7 S.W.3d 371, 373-76 (Ky. 1999) (allowing a police officer to testify to the race of the person he heard talking in a room, but did not see, merely because the voice the police officer heard "sounded as if it was of a male black"); *see also* Ferrill v. The Parker Group, Inc., 168 F.3d 468, 471 (11th Cir. 1999) (involving a black plaintiff who sued her employer after she was terminated from a telemarketing firm that conducted "get-out-the-vote" calls, where the firm used "race-matching"—black employees being directed to speak from a "Black" script for their calls); Lis Wiehl, *"Sounding Black" in the Courtroom: Court-Sanctioned Racial Stereotyping*, 18 HARV. BLACKLETTER L.J. 185, 201-10 (2002) (arguing that racial identification on the basis of voice alone is dangerous because it gives legitimacy to the admission of evidence based on racial prejudice and stereotyping); Jill Gaulding, *Against Common Sense: Why Title VII Should Protect Speakers of Black English*, 31

the basis of voice alone.[104] For example, a study conducted by Professors John Baugh, William Idsardi, and Thomas Purnell indicated that the average lay person can accurately identify the race of a person based on voice more than seventy percent of the time.[105] Moreover, as the three scholars noted, the average lay person can correctly identify the race of a speaker simply by hearing him or her say one word.[106] In fact, studies have shown that, "[n]ot only are [lay persons] quick to identify, the race of someone speaking Black English Vernacular, but they are also able to identify the race of code-switching Blacks—those speaking Standard English but with a 'black' pronunciation of certain words."[107]

More importantly, studies have also shown how negative attachments are made by listeners when the voice and the race of the speaker are believed to be or known to be black or Latino.[108] In one study, separate video footage was made of a white child, an African American child, and a Latino child, with each child filmed speaking alone and the same standard English voice dubbed on to all three videotapes.[109] The subjects of the study were then shown the separate films and told to score the speech they heard on each film for standardness and fluency.[110] When the results of the study were tabulated, it was revealed that the white child was judged the most standard and fluent; the African American child was judged fluent, but not standard; and the Latino child was judged the least fluent.[111] As one scholar explained about the effects of stereotyping when one is believed to be or regarded as black or Latino, "The assessors thought

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U. MICH. J.L. REFORM 637, 637 (1998) (arguing that black English is such a close proxy for race that it should be protected under Title VII).

104. *See* Wiehl, *supra* note 103, at 193.

105. Thomas Purnell et al., *Perpetual and Phonetic Experiments on American English Dialect Identification*, 18 J. LANGUAGE & SOC. PSYCHOL. 10, 11, 22 (1999) (describing a study generally measuring the impact of Chicano English, African American Vernacular English, and Standard American English dialects on access to rental housing in four San Francisco and Bay Area communities); *see also* Massey & Lundy, *supra* note 13, at 454.

106. Purnell et al., *supra* note 105, at 28; *see also* Wiehl, *supra* note 103, at 194 ("[S]tudies show that a person can identify an African American caller within the first 5-7 seconds of a phone call.").

107. Massey & Lundy, *supra* note 13, at 454 (providing one example of lay persons' ability to identify race based on voice).

108. See Wiehl, *supra* note 103, at 194 (citing Frederick Williams, *Some Research Notes on Dialect Attitudes and Stereotypes*, *in* LANGUAGE ATTITUDES: CURRENT TRENDS AND PROSPECTS 113, 113-28 (Roger Shuy & Ralph W. Fasold eds., 1973)).

109. *Id.*

110. *Id.*

111. *Id.*

they were reacting to the speech they heard, but in fact they were reacting to racial stereotypes based on what they had *seen*."[112]

Additionally, Professors Baugh, Idsardi, and Purnell found in four different experiments that examined the treatment of different fictitious renters based upon the three dialects—African American Vernacular English, Chicano English, and Standard American English—and found that even qualified black and Chieano renters were unlikely to get an appointment to view an apartment in certain white residential areas.[113] In other words, they found that "auditory discrimination arises without visual contact."[114]

Also, Professors Douglas Massey and Garvey Lundy demonstrated through their study "that landlords do, in fact, discriminate against prospective tenants on the basis of the sound of their voice during telephone conversations."[115] To conduct their study, the professors used a multiracial group of men and women[116] that included native speakers of Black English Vernacular ("BEV"), Black Accented English ("BAE"), and White Middlc Class English ("WME"), who basically spoke from a standard script in their calls to landlords.[117] During this study, the two scholars discovered that people experienced discrimination based on the intersection of race, sex, and class with regard to access to a landlord, access to a rental unit, and requests about their credit histories.[118] For example, Professors Massey and Lundy determined that the likelihood of even reaching an agent by having the agent return a call was significantly affected by race,

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112. *Id.*

113. Purnell et al., *supra* note 105, at 12.

114. *Id.* While this article limits itself to redressing the use of proxies in the context of discrimination in access to employment, studies such as this suggest that the use of proxies should also be further analyzed within the context of housing discrimination. *See, e.g.*, Beck, *supra* note 20, at 170 (proposing that Congress amend the Fair Housing Act to prohibit discrimination based on requirements that are proxies for protected classes and noting that, although one court had analyzed Section 8 discrimination under a Title VII disparate impact theory, a federal circuit court had rejected this type of analysis).

115. Massey & Lundy, *supra* note 13, at 455.

116. The projected image of the renters was of a recent college graduate in his or her early to midtwenties with an annual income of $25,000-$30,000 and a rent ceiling of $800 dollars. *Id.* at 458.

117. *Id.* at 460-61.

118. *Id.* at 461-62. "Not only does considerable discrimination occur over the phone, based purely on a verbal interaction between renters and agents, but considerable discrimination also occurs with *no contact whatsoever*, largely through the use of voice mail and answering machines as racial screening devices." *Id.* at 467. BAE is presumed to be spoken by middle-class Blacks. *See infra* note 122 and accompanying text.

gender, and class (as determined by speech).[119] In particular, female speakers of BEV, otherwise identified as lower-class black women, consistently fared the worst.[120] The professors found that eighty-seven percent of the white male subjects were able to speak with a rental agent while black-accented males got through only eighty percent of the time, white middle-class females got through only seventy-five percent of the time, black-accented females got through only seventy-one percent of the time, and black vernacular females got through only sixty-three percent of the time.[121] In addition, they found that,

> [w]hereas more than three-quarters of white middle-class males gained access to a potential rental unit (76%), the figure dropped to 63% for middle-class black men (those speaking BAE), 60% for white middle-class females (those speaking WME), 57% for black middle-class females (those speaking BAE), 44% for lower-class black men (those speaking BEV), and just 38% for lower-class black women (those speaking BEV).[122]

Finally, they found that whereas credit history was raised and discussed as an issue with only three percent of white middle-class males, it was raised with five percent of white middle-class females, ten percent of black males regardless of class, twenty-one percent of middle-class black females, and twenty-three percent of lower-class black females.[123]

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119. Massey & Lundy, *supra* note 13, at 461-62.

120. *Id.* at 467.

121. *Id.* at 460-61, 465 ("At a minimum, therefore, black females can expect to put in 40% more effort than white males *just to reach a rental agent.*").

122. *Id.* at 461 ("In other words, for every call a white male makes to find out about a rental unit in the Philadelphia housing market, a poor black female must make two calls to achieve the same level of access, roughly doubling her time and effort compared with his.").

123. *Id.* The National Fair Housing Alliance recently uncovered racial discrimination against black Hurricane Katrina victims, based on the sound of their voices, at two out of three apartment complexes in seventeen cities including Houston, Texas; Dallas, Texas; Birmingham, Alabama; and Gainesville, Florida. Thomas Korosec, *Hurricane Aftermath: Survey Finds Bias in Evacuee Housing*, HOUS. CHRON., Dec. 27, 2005, at B1. For three months at the end of 2005, the Alliance had callers, whose voices were clearly those of Whites and Blacks, pose as middle-class Hurricane Katrina victims who were seeking information on midpriced apartments in various cities in Alabama, Florida, Georgia, Tennessee, and Texas. *Id.* At sixty-six percent of the apartment complexes, white callers were treated more favorably than black callers. *Id.* The favorable treatment was broad. In some instances, the white callers were quoted lower rents; in others, black callers were told that no apartments were available just moments after white callers had been informed of vacancies. *Id.* Additionally, among other things, managers frequently lied to black callers about incentives that were put in place to benefit evacuees, and sometimes waived security deposits for Whites while not

In sum, much like with name, speech can work to identify individuals as members of a particular race and thus leave them vulnerable to discrimination based upon negative stereotypes that are associated with that racial group.

In some ways, this brand of proxy discrimination is different from name discrimination. With names, there is an understanding that employers who reject Blacks with ethnic-sounding names may still be fine with offering interviews to Blacks with nonblack-sounding names.[124] It would seem odd to surmise, although not entirely inconceivable, that those who are practicing voice discrimination are merely searching for white-sounding Blacks or Latinos. These property owners or managers seem to be using their proxy as a method to eliminate all Blacks and Latinos from the tenant pool, meaning there are no "good Blacks or Latinos" where these individuals are concerned.[125] Voice discrimination, however, is similar to name discrimination in what it tells us about the complexities of racial formation and the performativity of identity.[126] In fact, in the same way that many people of color have changed their names to avoid discrimination, both conscious and unconscious, on the basis of their ethnic-sounding names,[127] many people of color have intentionally used a "'white-sounding' voice, either one's own or a friend's, [as] one painful strategy . . . to get around some discrimination."[128]

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doing the same for Blacks. *Id.* The Alliance's President noted, "I was surprised at the amount of hostility that came out over the telephone when apartment managers could discern the caller was African American." *Id.*

124. In many ways, this is an optimistic assumption, supported mainly by the fact that a substantial number of African Americans are gainfully employed. If, however, one were committed to a more skeptical position, it could be argued that there may be very little difference in the receptiveness toward minorities by those who discriminate on voice versus those who use name, since Blacks who are not eliminated from consideration based on their names can still be effectively eliminated once their race is confirmed at an interview.

125. This claim is proven where Blacks and Latinos who sound white and are invited to view rental units are still denied the ability to rent once their races are discovered. Purnell et al., *supra* note 105, at 12-22.

126. *See generally* Carbado & Gulati, *supra* note 20; Rich, *supra* note 9.

127. *See supra* notes 70-71 and accompanying text.

128. Massey & Lundy, *supra* note 13, at 455 (quoting JOE R. FEAGAN & MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE 229 (1994)); *see also* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 290 (2003) (describing how his mother would "pass" over the phone because listeners imagined she was white).

II. EXPOSING THE FAILURE OF COURTS TO UNDERSTAND THE SOCIAL CONSTRUCTION OF RACE: THE NEED FOR THE "RIGHT KIND" OF ANALYSIS

While society has shifted since the passage of Title VII and the acceptability of openly equating race and color with negative group characteristics and then applying them to individuals has nearly dissipated, context-specific judicial analyses of raced-based employment discrimination claims have deteriorated. While some federal courts once recognized race as a socially constructed and fluid construct, most now treat race as a purely physical concept.[129]

This understanding of race and racial discrimination is problematic. First, in a world where multiculturalism and claims to biracial or multiracial identities are increasing, such a rule gives employers greater power to hide discriminatory treatment in the workplace.[130] Second, this conception hardly leaves any room for analyzing discrimination based upon socially constructed definitions of race, including distinctions that are made between jobs that an employer deems appropriate for certain racial groups and distinctions that are made between members of the same racial group,[131] for example,

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129. *See* Bennun v. Rutgers State Univ., 941 F.2d 154, 173 (3d Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992) ("Discrimination stems from a reliance on immaterial outward appearances that stereotype an individual with imagined, usually undesirable, characteristics thought to be common to members of the group that shares these superficial traits. It results in a stubborn refusal to judge a person on his merits as a human being."); *see also* Rich, *supra* note 9, at 1141-42 (describing how discrimination against race-ethnicity performance should also constitute race-based discrimination because, in such cases, "the employer sanctions the employee because of a fear of racial or ethnic presence: The employee's appearance reminds the employer of the employee's minority status and her potential to disrupt the current cultural hegemony of the workplace."). Of course, in 1964 when Title VII was enacted, it was not necessary to explicitly discuss the ways in which race was socially constructed because it was clear at the time that, in the eyes of much of white society, no black people were acceptable.

130. As Professor Trina Jones argues, where employees inhabit multiracial identities, it gives employers an opportunity to choose which "race" they used to classify a plaintiff in a discrimination suit. Jones, *supra* note 84, at 1552. For example, if a black person is hired or promoted over a person of black and white heritage, the employer could claim they regarded the plaintiff as black. *See id.* If a white or multiracial person were hired or promoted, the employer could similarly claim in each case that he believed the disfavored employee belonged to the racial group of the selected or preferred employee. *See id.* at 1551-53.

131. *See* United States v. Clary, 846 F. Supp. 768 (E.D. Mo. 1994), *rev'd*, U.S. v. Clary, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 513 U.S. 1182 (1995). The court observed:

> As more well-educated blacks flowed into America's mainstream, whites even began to differentiate between the kind of blacks who reflected white

concepts of good versus bad African Americans.[132] For instance, federal courts' application of the "same actor inference," which contends that a decision-maker who fired or did not promote the plaintiff is presumed not to have acted on racial prejudice because of the earlier decision to hire the plaintiff in the first place,[133] neglects the fact that a decision-maker may view some members of a racial group as more preferable than others,[134] or a particular entry level job as appropriate for members of a certain racial group but consider a higher level position in the company as being too good for members of that racial group.[135]

Likewise, cases in which the courts have determined that the hiring or promotion of a person in the plaintiff's same racial group precludes a finding of discrimination disregard the fact that the decision not to hire or promote the plaintiff may have been based on stereotypical conceptions of blackness—of views that the plaintiff was not the "right kind" of Black.[136] The negative power of such stereotypes is evident

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values and who were not like "those other" blacks akin to the inner city stereotype.

> A benign neglect for the harmful impact or fallout upon the black community that might ensue from decisions made by the white community for the "greater good" of society has replaced intentional discrimination. [W]hites have become indignant at the suggestion that they harbor any ill-will towards blacks or retain any vestiges of racism. After all, they have black friends. They work with black people every day. They enjoy black entertainers on their favorite television programs every night.

Id. at 779 (emphasis added); *see also* Bush v. Commonwealth Edison Co., 990 F.2d 928, 931 (7th Cir. 1993), *cert. denied*, 511 U.S. 1071 (1994) (explaining that under Title VII, a fired black employee had to show that, despite his own lacking performance, the employer demonstrated more favorable treatment to nonblack employees with similarly lacking performance).

132. *See, e.g.*, BARRETT, *supra* note 94 (describing the story of a black Harvard Law School graduate who "covered" in certain ways, including his dress, to distinguish himself from other African Americans as a "good Black"); Yoshino, *supra* note 99, at 879-87 (discussing the ways in which Larry Mungin "covered" or downplayed his race to put Whites at ease).

133. Buhrmaster v. Overnite Transp. Co., 61 F.3d 461, 463 (6th Cir. 1995); Choate v. Transp. Logistics Corp., 234 F. Supp. 2d 125, 130 (D. Conn. 2002).

134. *See* Crawford v. Hospitality Enters., Inc., 2002 WL 1905883 at *2 (E.D. La, Aug. 16, 2002) (denying a defendant's motion for summary judgment in a case involving a challenge to a supervisor's discriminatory hiring practices, where the supervisor specifically discriminated against "blacks with gold teeth, blacks with braids, and blacks with jerry curls or greasy hair").

135. *See* Paetzold & Gely, *supra* note 37, at 1520, 1524.

136. *See* Davis v. Boykin Mgmt. Co., No. 91-CV-359E(M), 1994 WL 714517 (W.D.N.Y. Dec. 21, 1994). According to the court,

> [A]s a matter of common sense and experience, that an employer would dismiss a black employee and replace him or her with another black hardly

even where Blacks have acquired elite educations and positions within the workplace. These embedded notions about the constraints of blackness appear to produce alternate permutations of the "right kind" of Black phenomenon. For example, in his book about frustrated black executives, Ellis Cose found that many black executives claimed that companies steered them into dead-end "black" jobs, which involved working in such areas as "community relations" or "minority affairs."[137] This phenomenon suggests that employers see even the highly qualified Blacks they hire as only suitable for the "right kind" of positions.[138] A different version of companies investing in "black slots" is given effect through what Professor Stephen Carter describes as the "best black" syndrome.[139] The syndrome essentially sets up a false choice between diversity and quality.[140] Those who practice this tactic will hire a black applicant because he or she is perceived to be the best

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> establishes (although it may be evidence of) an absence of discrimination. For example, an employer might tolerate outspokenness in his white employees but find objectionable a comparable lack of reserve by a black employee because of a feeling that blacks should "know their place." If his solution is to fire the outspoken black in favor of a more docile or reserved black employee, his action obviously still is discriminatory even though the position was not filled by a "non-protected class member." Other conceivable employers might have a particular animus toward very dark-complexioned black employees and thus replace them with light-complexioned blacks. Again, discrimination is obvious even though the new hires are black.

Id. at *4. Additionally, even Blacks have expectations of what it means to be the "right kind" of black employee. One recent Title VII case dealt with a complaint that arose from a black employee who was not perceived as authentically black, or the "right kind" of Black, by her black supervisor. Bryant v. Begin Manage Program, 281 F. Supp. 2d 561 (E.D.N.Y. 2003) (denying summary judgment in a case where a black woman claimed she was replaced in her job after her black supervisor asked the employee to dress in a more "Afrocentric" style, criticized the employee's dyed-blonde hair, and referred to the employee as a "wannabe"); *cf.* O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996) (explaining how the Fourth Circuit's analysis of discrimination under the ADEA, which required that the person who replaced the plaintiff be under forty years old, created a safe harbor in which employers could discriminate).

137. ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS 80-82 (1993).

138. This phenomenon may work in the reverse as well. For example, in a study of the use of names as a screening device for temporary employment agencies in California, researchers concluded that "White-sounding names may [have] cue[d] positive stereotypes, especially regarding white male applicants, and result[ed] in fewer, not greater, job opportunities" because white men were viewed as "'too good' or 'not appropriate' for the [temporary] administrative office positions." Names Make a Difference, *supra* note 82, at 17.

139. *See* STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 49 (1991).

140. *See id.* at 51.

black applicant, rather than the best applicant irrespective of race.[141] While the practice might be said to be the practical consequence of affirmative action, it is actually grounded upon stereotypes that suggest that the best Blacks cannot compete with the best Whites in the workforce.[142] Such a practice serves the ends of tokenism by ensuring that the best Black—he or she being the finest the race has to offer—will also be the only Black.[143] Taken together, these practices demonstrate how employers searching for the right kind of black person for the "right kind of black position," may then limit their hiring of Blacks to a very discrete set of individuals, whose promotion prospects will be limited.[144]

In other words, analyses in these cases and of employer treatment of minority employees reveal a snapshot of a work world where employers fail to account for policies and actions that may limit opportunities for racial minorities, or exclude certain types of racial minorities altogether. Certainly, very little attention is paid to discrimination in the workplace for minorities who are considered to be the wrong kind of person of color or are viewed as simply too "ethnic." Part of the problem appears to be that courts rarely encounter claims where plaintiffs specifically charge that they are being punished for being the wrong type of person of color. Interestingly, in one such case involving intraracial discrimination based on skin color, *Sanders v. District of Columbia*, the court accepted as viable under Title VII a black plaintiff's claim that "her light-skinned black supervisors gave preferential treatment to other light-skinned black employees, at the expense of [the plaintiff], who [was] dark-skinned."[145] Although the court recognized Ms. Sanders' claim as viable under Title VII, the court's decision reveals that claims of intraracial discrimination are difficult to prove. In dismissing Ms. Sanders' claim the court explained that she "adduced no credible evidence to substantiate [her

141. *Id.*

142. *See id.* at 50.

143. *See id.* at 50-52.

144. *See* Carbado & Gulati, *supra* note 86, at 1672-73, 1675-76.

145. No. 88-3614 SS, 1991 U.S. Dist. LEXIS 7448, at *2-3 (D.D.C. June 4, 1991). The court based this decision on discussions of Title VII contained in the *Congressional Record* and the ruling of another federal court, which previously held that discrimination based on shades of skin color was actionable under Title VII. *Id.* at *7 n.1; *see also* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987) ("[A] distinctive physiognomy is not essential to qualify for § 1981 protection."); Bland v. New York, 263 F. Supp. 2d 526, 547 (E.D.N.Y. 2003) (reporting allegations made in a Title VII sexual harassment complaint, that the plaintiff's supervisor, an African American judge, made derogatory comments about dark-skinned African American women). The Title VII claim was dismissed as the plaintiff was found not to be an "employee" within the meaning of the statute. *Id.* at 557.

claim], other than the lone fact that both [the supervisor] and the . . . [colleague] who was permitted to keep her position ha[d] lighter skin than Ms. Sanders."[146] The court further pointed out that Ms. Sanders could provide no evidence of "a single conversation, comment, or deed showing either directly or indirectly that [the supervisor] or any other . . . official was inclined to, or ever did, discriminate against dark-skinned black individuals."[147]

But given that people are rarely overtly discriminatory, is it likely such evidence would exist? Would the court have accepted Ms. Sanders' arguments had she also presented expert evidence about discrimination against dark-skinned Blacks, along with evidence that her supervisor and her replacement were both light-skinned? Or, returning to the findings of Bertrand and Mullainathan's study that are central to this Article, would a black Jamal Jackson, unlike Ms. Sanders, be able to convince a court that racial discrimination prevented his being hired for a job, where his sole evidence would be that the only Blacks hired by the employer had nonethnic-sounding names? Given how the courts have constructed the operation of race and identity in previous cases, would the presentation of such evidence really be more supportive of a prima facie case?

The question becomes then: whether a court can really make a determination about the import of color or intrarace status distinctions without first complicating its understanding of race and identity. For instance, in the *Sanders* case, one could argue that a more robust analysis would require the court to situate the plaintiff's claims within the context of social science or normative evidence pertaining to the privileges that accompany whiteness and lightness.[148]

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146. *Sanders,* 1991 U.S. Dist. LEXIS 7448, at *7.

147. *Id.* at *8.

148. *See* cases cited *supra* note 145; *see also* KATHY RUSSELL ET AL., THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS 124-34 (1992) (discussing how within and outside the workplace context, black people discriminate in favor of Blacks with lighter skin); Ronald Turner, *The Color Complex: Intraracial Discrimination in the Workplace,* 46 LAB. L.J. 678 (1995) (discussing intraracial workplace discrimination among Blacks); Harris, *supra* note 54, at 1724-45 (discussing the property-like qualities of whiteness or lightness); *see also* STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 1-24 (1996) (identifying whiteness as one of the societal sources of systemic privilege); Leonard M. Baynes, *If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy,* 75 DENV. U. L. REV. 131, 157-84 (1997) (examining the hypothesis that lighter-skinned people of color experience less discrimination than those who are darker-skimied); Hernandez, *supra* note 98, at 118 (describing the value of whiteness to multiracial individuals as "an intrinsic part of an institutional racial hierarchy in which the closer one can approximate whiteness, the better off one is economically and socially").

Unlike the *Sanders* case, the more prevalent cases involving intrarace distinctions typically involve courts deciding the import of an employer's ostensibly race- or color-neutral decisions, which serve to disadvantage certain persons of color. For example, in *Rogers v. American Airlines, Inc.*, a district court completely disregarded the possibility that the employer's policy banning all braided hairstyles was the result of an attempt to exclude not all Blacks,[149] but the kind of Black who is negatively stereotyped based on their wearing cornrow braids—in other words, one who is too "ethnic." Again, the court failed to recognize the ways in which the policy may have been premised upon a more complex behavioral response to racial difference—in this case, the improper reliance upon racial stereotyping as determined by a proxy for race such as hairstyle.[150] Relying solely on the concept of physical race, the court dismissed the discrimination claim of the plaintiff, which was based on a work policy that prohibited all braided hairstyles.[151] In so doing, the court held that unlike skin color, "[a]n all-braided hairstyle is an 'easily changed characteristic,' and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the

149. 527 F. Supp. 229, 229 (S.D.N.Y. 1981). The same conclusion was reached in a similar suit brought against American Airlines seventeen years later. Cooper v. American Airlines, No. 97-1901, 1998 WL 276235 (4th Cir. May 26, 1998) (affirming the dismissal of an African American woman's Title VII claim that alleged intentional and disparate impact discrimination based upon race, where she was reprimanded for wearing braids in violation of the company's revised grooming policy); *see also infra* notes 177-85 and accompanying text (discussing McBride v. Lawstaf, Inc., No. 1:96-CV-0196-CC, 1996 WL 755779 (N.D. Ga. Sept. 19, 1996). For a more recent case involving an African-American challenging an ostensibly race-neutral grooming policy, see Booth v. Maryland, 327 F.3d 377 (4th Cir. 2003). The policy actually allowed braids, but not the dreadlocks the petitioner wore. *Id.* at 379. The complaint essentially alleged that the petitioner was being singled out for discrimination because, as one who practiced the Rastafarian religion, which necessitated the dreadlocks, he was the wrong kind of black person. *Id.* Unlike the *Rogers* plaintiff, Booth's racial discrimination claims were not brought under Title VII, but under 42 U.S.C. §§ 1981, 1983. *Id.* The Appellate court affirmed the dismissal of his section 1981 claim, even where Booth alleged that grooming standards were not enforced against Whites and some other black employees. *Id.* at 383-84. Interestingly, the lower court's dismissal of the section 1983 claim was reversed and remanded because the lower court had erroneously held that Booth was required to file this intentional discrimination claim under Title VII. *Id.* at 382-83.

150. One "braids" case does seem to make this connection to how the policy is actually being used by the employer. *See* Hollins v. Atlantic Co., 188 F.3d 652, 660-61 (6th Cir. 1999) (finding a Title VII disparate treatment claim was sustainable where an unwritten, race-neutral hairstyle policy was differentially applied to a black female employee).

151. *Rogers*, 527 F. Supp. at 231-32.

application of employment practices by an employer."[152] Additionally, the court reasoned that the policy was not racially discriminatory because it applied equally to both Blacks and Whites.[153] Such reasoning, however, neglects an even more important point about how race is socially constructed—in particular, the idea that the policy that prohibited all braided hairstyles may not have only been a means of excluding the "wrong kind" of Black but the "wrong kind" of White, meaning a white person who would dare wear a "black" hairstyle such as cornrows.[154]

As *Rogers* and the other "braids" cases suggest, federal courts have consistently rejected claims filed by individual plaintiffs who have alleged discrimination based on proxies for an impermissible trait covered by antidiscrimination legislation, thereby neglecting the fact that disfavored status is not merely about the physical but about how the social identity of any particular group has been constructed.[155] Indeed, both prior to and since the United States Supreme Court's decision in *Hazen Paper Co. v. Biggins*,[156] which involved an allegation of age discrimination based on the use of pensions as a proxy for age,[157] courts have generally been resistant to using Title VII as a means of remedying discrimination by proxy.[158] In *Hazen Paper*, the plaintiff, Walter Biggins, filed a lawsuit under the ADEA, alleging that his age motivated his employer's decision to terminate him.[159] Specifically, Biggins claimed that his employer fired him just weeks before his pension vested because the employer wanted to avoid any costs associated with his pension.[160] In reviewing the case, the Supreme

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152. *Id.* at 232.

153. *See id.*

154. Recently, a white teenage girl was sent home from school for wearing her hair in cornrows. The headteacher asserted that her hair was "too extreme." Deborah Haile, *School Bans "Wrong Race" Hairstyle*, Mar. 17, 2005, http://www.manchesteronline.co.uk/news/education/s/151/151512_school_bans_wrong_race_hairstyle.html. A school official explained, "We don't allow any extreme hairstyles of any description at the school. We are a high-achieving school with high standards and we don't allow any street culture into school." *Id.* Although this example occurred in the United Kingdom, this example of punishment for a white teenager who wore her hair in cornrows demonstrates how in society even Whites are expected to perform their racial identity in a way that distances them from blackness.

155. *Cf.* Carbado & Gulati, *supra* note 9, at 717 ("The social meaning of being a black woman is not monolithic and static but contextual and dynamic.").

156. 507 U.S. 604 (1993).

157. *Id.* at 606-07.

158. *See infra* notes 164-86 and accompanying text.

159. *Hazen Paper Co.*, 507 U.S. at 606.

160. *Id.* at 607. In support of his claim, Biggins highlighted the fact that his employer offered to retain him as a consultant, a capacity in which he would not have been entitled to receive pension benefits. *Id.*

Court held that discharging an older employee to prevent his pension benefits from vesting did not violate the ADEA where the vesting of the pension benefits was based on years of service, a factor that merely correlated with age.[161] According to the Court, the ADEA was not enacted to address decisions made by employers that were related to but not necessarily based on age; instead, it was targeted at employment decisions that were based upon stereotypes of older workers as unproductive and incompetent.[162]

The effects of *Hazen Paper* on cases concerning discrimination based on proxies, even those concerning race discrimination, have been damaging despite the fact that the Supreme Court itself explained that its decision should not preclude liability where an employer directly uses pension status as a proxy for age.[163] In numerous age discrimination cases, federal courts have rejected plaintiffs' proxy discrimination claims on the ground that the challenged employment decision was not based on misperceptions about the competence of older workers, but instead on factors not covered by law.[164] Such

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161. *Id.* at 608-09, 611. For a discussion of the complications arising from the Court's handling of age-correlated factors, or the "age proxy doctrine," see Toni J. Querry, Note, *A Rose By Any Other Name No Longer Smells As Sweet: Disparate Treatment Discrimination and the Age Proxy Doctrine After* Hazen Paper Co. v. Biggins, 81 CORNELL L. REV. 530 (1996). While asserting that employers should be able to act based upon some factors that correlate with age, the Note argues that correlations that appear to defeat the congressional purpose of the ADEA—preventing employers from "acting on inaccurate stereotypes about older workers' abilities and productivity and discriminating . . . 'because of [their] age'"—must be prohibited. *Id.* at 566 (footnote omitted).

162 *Hazen Paper Co.*, 507 U.S. at 610-11. The Court recently reaffirmed its belief that the general purpose of the ADEA was to protect older persons from being discriminated against on the basis of age. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 586 (2004). We recognize that there are distinctions between these age discrimination cases and cases involving the use of an outside factor as a proxy for race; nonetheless, we find the comparison to be useful.

163. *Hazen Paper Co.*, 507 U.S. at 612-13 ("We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination."); *see also* Robert J. Gregory, *There Is Life in That Old (I Mean, More "Senior") Dog Yet: The Age-Proxy Theory After* Hazen Paper Co. v. Biggins, 11 HOFSTRA LAB. L.J. 391, 392 (1994) (asserting that the Supreme Court "did not foreclose the use of the proxy theory in all cases" after *Hazen Paper*).

164. *See Gen. Dynamics Sys.*, 540 U.S. at 592. *But see* EEOC v. Ceres Terminals, Inc., No. 99C5320, 2001 WL 109811, at *6-7 (N.D. Ill. Feb. 5, 2001) (distinguishing the plaintiffs' lawsuit from *Hazen Paper* where the employees' "receipt of pension plan disbursements was directly correlated with age"); *see also* Huff v. UARCO, Inc., 122 F.3d 374, 388 (7th Cir. 1997) (affirming a denial for a motion for summary judgment where the pension plan was triggered by "a hybrid of age and years of service"); Kiser v. Naperville Cmty. Unit, 227 F. Supp. 2d 954, 963-64 (N.D. Ill. 2002) (same).

decisions by courts ignore a number of important concerns about the dangers of discrimination based on proxies, including the fact that even decisions made on *correct* perceptions about older workers may be motivated by reasons that contravene the purposes of antidiscrimination legislation.[165]

Moreover, such a limited analysis of discrimination has essentially left a gaping hole in which employers may avoid liability for their potentially discriminatory decisions and has extended into lawsuits concerning race and national origin discrimination. For example, in some instances, employers have relied on the proxy of voice or accent as a means of excluding applicants from jobs.[166] Although accent is intrinsically intertwined with national origin, courts have consistently held that accent may serve as a legitimate reason for not hiring an individual if it can be shown to interfere with job performance.[167]

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165. For example, as Professor Michael Zimmer has explained, the Supreme Court failed to acknowledge that "the employer [in *Hazen Paper*] might not have discharged Biggins to prevent his pension from vesting if he had been much younger because receipt of any pension benefits would have been so much further off." Zimmer, *supra* note 31, at 1901. Likewise, some courts have rejected claims under the ADEA where the decision to fire older employers was partially based on the fact that older workers tend to have more experience and thus cost more in terms of salaries and benefits (a rather reliable perception of older workers). *See* Criley v. Delta Air Lines, Inc., 119 F.3d 102, 105 (2d Cir. 1997). According to these courts, even though older workers may specifically be targeted by the employer's actions, such decisions are not the result of animus or misperceptions due to age, but rather the result of applying a neutral factor that has some correlation to age. *Id.* For example, in *Criley*, the Second Circuit affirmed a district court's decision to grant summary judgment on the plaintiffs' claims under the ADEA where there was evidence to "support an inference that Delta was reluctant to hire pilots who would shortly be disqualified from piloting and might begin drawing pension benefits" because "an employer's concern about economic consequences of employment decisions does not constitute age discrimination . . . even though there may be a correlation with age." *Id.*

166. *See* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1348-57 (1991) (analyzing Fragante v. City of Honolulu, 888 F.2d 591 (9th Cir. 1989) and other incidents where speakers of Hawaiian Creole, Korean, and other languages were discriminated against in employment and other contexts based upon accents); Dawn L. Smalls, *Linguistic Profiling and the Law*, 15 STAN. L. & POL'Y REV. 579, 580-82 (2004) (discussing the negative effects within employment contexts of linguistic and ethnic minorities having "non-standard dialects").

167. *See, e.g.*, *Fragante*, 888 F.2d at 596-97 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990) (asserting that the city clerk must be able to communicate effectively with the public where the clerk would be responsible for handling hundreds of daily inquiries); Hou v. Pa. Dep't of Educ., 573 F. Supp 1539 (W.D. Pa. 1983) (concluding that a professor's accent materially affected his performance in his job where there were student complaints regarding difficulty in understanding him). *But see* Odima v. Westin Tucson Hotel Co., 991 F.2d 595 (9th Cir. 1993) (stating that accent was an improper basis for an employment decision where the plaintiff testified for several hours at trial and the court understood him).

Additionally, although language and national origin are often intertwined, courts have held that employers may discharge employees for speaking languages other than English in the workplace even if it does not affect their job performance.[168] In essence, while there are certainly instances in which accent or speaking a different language may clearly hinder performance on a job, courts have created a space in which employers may be able to hide any prejudices they may have toward certain ethnic groups by invoking an English-only rule or communication-skills requirement, even when such factors may be helpful but not necessary to effective performance on the job.[169]

Indeed, such race- and ethnicity-based motives on behalf of employers, even if unconscious, can be inferred from the fact that such issues tend to arise only when employers are dealing with the accents of and languages spoken by people who speak Spanish and rarely against those with British or other European accents.[170] For example, in *Garcia v. Gloor*,[171] the Fifth Circuit upheld an employer's ban on Spanish-speaking in the workplace where Spanish-speaking sales employees were actually expected to speak Spanish to Spanish-speaking customers, who made up seventy-five percent of the employer's customer base. Noting that the plaintiff "was hired by [the employer] *precisely* because he was bilingual,"[172] the Fifth Circuit held that the employer had not discriminated against the plaintiff on the basis of national origin because Title VII "does not prohibit all arbitrary employment practices"[173] and because "English-speaking customers [had] objected to communications between employees that they could not understand;"[174] a feeling that several scholars have explained can be attributed to prejudices against Latinos and perceptions of Latinos as perpetual

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168. *See* Perea, *supra* note 13, at 808 & n.15.

169. *See Fragante*, 888 F.2d at 596. The court observed that,

> Accent and national origin are obviously inextricably intertwined in many cases. It would therefore be an easy refuge in this context for an employer unlawfully discriminating against someone based on national origin to state falsely that it was not the person's national origin that caused the employment or promotion problem, but the candidate's inability to measure up to the communications skills demanded by the job.

Id.; *see also* Matsuda, *supra* note 166, at 1350-57 (claiming that courts are too willing to accept explanations for accent discrimination that are rooted in prejudice without questioning whether an accent renders the speaker nonfunctional for a particular job).

170. *Cf.* Johnson & Martínez, *supra* note 20, at 1251-52, 1268-70.

171. 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

172. *Id.* at 269 (emphasis added).

173. *Id.*

174. *Id.* at 267.

foreigners.[175] In essence, although restrictions or decisions based on accent and language not only correlate highly with national origin, but also for many employers, signal national origin or, more importantly, carry with them negative social meanings based on race and ethnicity, federal courts do not generally recognize claims challenging language and accent restrictions under Title VII. As explained by the court in *Garcia*, "neither the statute nor common understanding equates national origin with the language that one chooses to speak."[176]

Additionally, courts have indicated that they would reject similar proxy discrimination claims filed by applicants to a temporary employment agency if they alleged that they were discriminated against because of race where hairstyle was used as a proxy for blackness.[177] For example, in *McBride v. Lawstaf, Inc.*, the plaintiff, Corrine McBride, filed a lawsuit alleging that her employer terminated her in retaliation for challenging what she considered to be the agency's discriminatory policy of not referring qualified applicants with braided hairstyles for employment positions.[178] McBride believed that the agency's policy was simply a means of excluding Blacks from work through the agency,[179] or as some scholars would clarify, of precluding a particular type of Black from participation.[180] Soon after McBride threatened to complain about the agency's grooming policy to the Equal Opportunity Employment Commission (EEOC), she was fired by her employer for unprofessional conduct.[181] In reviewing a motion to dismiss McBride's claim of retaliation under Title VII, the district court

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175. *See generally* Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347 (1997) (discussing discrimination against Latinos in the context of bilingualism and English-only rules); Steven W. Bender, *Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience*, 2 HARV. LATINO L. REV. 145, 157 (1997) (discussing how the English-only movement is "fueled by prejudice against and fear of Latinos/as").

176. *Garcia*, 618 F.2d at 268.

177. McBride v. Lawstaf, Inc., No. 1:96-CV-0196-CC, 1996 WL 755779 (N.D. Ga. Sept. 19, 1996); *see also supra* notes 149-53 and accompanying text (discussing the *Rogers*, *Cooper* and *Booth* discrimination claims, which were also premised upon hairstyle); Caldwell, *supra* note 20, at 366 (discussing the *Rogers* case and describing discrimination of this type as "widespread and longstanding").

178. *McBride*, 1996 WL 755779, at *1.

179. *See id.*

180. *See* Carbado & Gulati, *supra* note 9, at 723 ("[S]hould the firm not hire [Toney], it will not be because Toney is black in a phenotypic sense . . . . Instead, the decision will be based on the kind of black person the firm perceives Toney to be—that is, the individualized social meaning of Toney's black identity.").

181. *McBride*, 1996 WL 755779, at *1.

granted the motion on the ground that McBride's retaliation claim was viable only if she complained about an unlawful employment practice.[182] It then held that an employer's refusal to place applicants with braided hairstyles into jobs did not constitute an unlawful employment practice.[183] In other words, much like the situation in *Hazen Paper*,[184] the court held that, while there may be a correlation between ethnic hairstyle and race or national origin, such styles were not tantamount to race and thus were not an unlawful basis for making hiring or other employment decisions.[185]

Overall, the treatment of proxy discrimination cases in federal courts falls in line with the failure of courts to evaluate race discrimination cases in a manner that recognizes the complexities of racism and race discrimination.[186] Indeed, the courts' treatment of such cases often fails to acknowledge that race discrimination against an individual may involve unfair or differential treatment based upon a mere perception of a person's race—in other words, disparate treatment based upon racial stereotyping due to a trait, factor, or quality that is considered to belong to persons of a particular race.[187] In sum, current interpretations of race-based antidiscrimination employment laws depart from an understanding of race that acknowledges the social meanings of

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182. *Id.* at *1-3.

183. *Id.* at *2.

184. *See supra* notes 156-63 and accompanying text.

185. *See McBride*, 1996 WL 755779, at *2.

186. *See* Houh, *supra* note 14, at 464 ("[A]ntidiscrimination laws have reified marginalization, powerlessness, and/or cultural imperialism by failing to address in any substantive way 'the social process by which the results of work and work itself are appropriated.'"); *see also* Aaron Celious & Daphna Oyserman, *Race from the Inside: An Emerging Heterogeneous Race Model*, 57 J. SOC. ISSUES 149, 149 (2001) (quoting LAWRENCE O. GRAHAM, OUR KIND OF PEOPLE 5 (2000), which claimed that persons working with racial identity theories "typically handle race as a simple Black-White dichotomy that overlooks within-group heterogeneity, substituting a subgroup—young, low socioeconomic status, darker skinned men—for all African Americans"). *But see* El-Hakem v. BJY, Inc., 415 F.3d 1068, 1072-73 (9th Cir. 2005) (finding valid a claim under federal antidiscrimination law based upon an employer's insistence on modifying an employee's ethnic-sounding name); *supra* note 19 (discussing the *Orhorhaghe* and *Pilliod* immigration discrimination cases in which courts recognized that names were improperly being used as proxies for national origin).

187. *See* K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, *in* PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 62-65 (Robert Post ed., 2001) (noting that the dominant society ascribes traits and behaviors to certain groups, generally assumes all group members have the assigned characteristics, then acts with false beliefs leading to societal discrimination against group members).

race, in particular what blackness or other markers for racial or ethnic identity signify on the job market and in society.[188]

III. WHY TITLE VII SHOULD APPLY EVEN IF LAKISHA AND JAMAL ARE WHITE: IMPORTING THE "REGARDED AS" PRONG OF THE ADA INTO TITLE VII CASE ANALYSIS[189]

As this Article demonstrates, individuals are not only discriminated against on the job market because of animus toward their racial group as defined by phenotype, but also because they are perceived, whether consciously or unconsciously, as belonging to a particular racial group and as having the negative qualities linked to stereotypes of that group. For instance, an individual, whether or not he or she actually is black, may be discriminated against because he or she is perceived to be or "regarded as" black (that is, what it socially means to be black) based upon a proxy for blackness.[190]

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188. *See* Jones, *supra* note 84, at 1494-95 ("In the United States, being White generally means that one has access to the psychological and economic privileges of Whiteness. Being Black generally means that one is pegged lower in the socioeconomic hierarchy.").

189. Two scholars once posed the following provocative questions:

> Should women or African-Americans claim they are victims of discrimination on the basis of disability—because they are regarded as being physically or mentally impaired in the performance of major life activities—rather than on the basis of race or sex? At first, the question seems insulting, suggesting as it does, that there is something aberrant or defective about not being male or white. Or perhaps the question is merely pointless: if federal civil rights laws broadly prohibit discrimination on the basis of race, sex, religion, national origin, age, and disability—and they do—then what difference does it make how we categorize forbidden conduct?

Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 2 (1996). While the article goes on to treat the questions as largely rhetorical, and instead focuses on similarities and differences between the ADA and preexisting antidiscrimination statutes, it introduces the beginnings of an idea that we explicitly and substantively explore in this Part of our Article.

190. It is not our intent to place too much emphasis on the admittedly rare instances where non-Blacks with African American-sounding names will become the victims of discrimination. We understand that it is African Americans who bear the greatest burden of this type of discrimination based upon having black-sounding names. Our goal is to illuminate the power and prevalence of the negative construction of race that the name is a proxy for. This skewed understanding of race and how individuals learn to discriminate based upon it is so powerful that it prevents employers from seeing that they are also eliminating potentially acceptable nonblack candidates. The alternate and equally devastating conclusion is that the race bias is so strong that

Even though this article proposes a methodology for dealing with the innovation of proxy discrimination, it is arguable that there is nothing in Title VII that would prevent courts from regulating this type of conduct as traditional disparate treatment discrimination. The basic differences between proxy discrimination and more typical forms of discrimination under Title VII have to do with the methods of discrimination and the cognitive processes or steps involved. Whereas traditionally, intentional forms of race discrimination have involved face-to-face encounters, which confirm through physical characteristics the victim's membership in the protected class to which negative social stereotypes are attached, proxy discrimination operates without the requirement of any such interaction or confirmation. Instead, proxy discrimination involves the use of some other marker as an indicator of physical characteristics or group membership, to which negative stereotypes have been attached prior to the discriminatory act. It is not outlandish to suggest that, even with these differences in the operation of the conduct, proxy discrimination simply is race-based discrimination.[191] The problem, however, arises in convincing federal courts of this fact; courts hearing antidiscrimination claims have been reluctant to regulate behaviors premised upon traits that highly correlate with, but do not necessarily implicate, protected categories.

Given the trend in Title VII case law, a black plaintiff with an African American-sounding name who sent a résumé to a prospective employer could not state a claim for race discrimination even if she could show that an applicant with a similar résumé but a white-sounding name received a callback and she did not. The black plaintiff's claim would likely fail in federal courts on the ground that the two factors, name and race, while highly correlated, are not equivalent. Likewise, if a white plaintiff filed a claim asserting that she was not given a callback because "she sounded too black,"[192] her claim would likely fail even if the employer admitted that the sound of the applicant's voice was the reason for the decision. The reasoning would be that discriminating against someone because they "sound black" is not discrimination on the basis of an impermissible trait and therefore is not covered by Title VII.

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employers intend to discriminate against non-Blacks with African American-sounding names, because the name is enough to taint such applicants with the social stigma of blackness.

191. Or, using the language of Title VII, proxy discrimination is discrimination "because of [an] individual's race." 42 U.S.C. § 2000e-2(a) (2000).

192. *See* Wiehl, *supra* note 103, at 194 (identifying a study that showed that a white male, who "had adopted the style and speech associated with African Americans," was incorrectly identified as black ninety-two percent of the time).

Such rulings by federal courts, however, would be misguided because they would essentially eviscerate one of the purposes of Title VII—to combat decisions based upon negative stereotypes associated with particular racial groups.[193] They would fail to acknowledge the fact that discrimination based upon race actually encompasses discrimination based upon social meanings of race—that is, what it means to be perceived as black, whether one is or is not actually black.[194] Moreover, these holdings by courts would actually fly in the face of the Supreme Court's actual words in *Hazen Paper*, where the Court specifically noted that it did not intend to "preclude the possibility that an employer who targets employees with a particular [feature] on the assumption that these employees are likely to [belong to a certain group] thereby engages in . . . discrimination."[195] As the Supreme Court explained in *Hazen Paper*, an employer may have discriminated against an individual where the employer has "suppose[d] a correlation between two factors and act[ed] accordingly."[196]

If nothing else, *Hazen Paper* and the purposes of Title VII indicate that claims brought by an individual who has experienced discrimination because he or she was "regarded as" belonging to a certain race should fall under the protection of Title VII.[197] The

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193. *See, e.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) (discussing an employer's reliance on "subconscious stereotypes and prejudices" related to race and describing the conduct as the type of harm "that Title VII was enacted to combat"). As Professor Samuel Bagenstos has surmised, "[I]t should be clear that the *goals* of [the] antidiscrimination and accommodation requirements [of the ADA] are parallel, for both seek to dismantle a system of group-based subordination and the patterns of occupational segregation that support that system." Samuel R. Bagenstos, *"Rational Discrimination," Accommodation and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 859 (2003) (emphasis added) (discussing the "normative equivalence" of the requirements of traditional antidiscrimination and accommodation statutes).

194. Thomas A. Mayes, *Confronting Same-Sex, Student-to-Student Sexual Harassment: Recommendations for Educators and Policy Makers*, 29 FORDHAM URB. L.J. 641, 648 (2001) (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) for the proposition that "[t]he Supreme Court has long made clear that Congress enacted Title VII in part to combat differential treatment based on sex stereotypes" (footnote omitted)).

195. Hazen Paper Co. v. Biggins, 507 U.S. 604, 612-13 (1993). *Hazen Paper* specifically addresses this possibility in terms of pensions and age discrimination, but the statement is easily applied to all forms of proxy discrimination.

196. *Id.* at 613.

197. This would include both the claims of Blacks who are correctly identified as such and perceived to be the wrong kind of Black, and Whites who are falsely identified as Blacks, because in both cases the discrimination is premised upon race—employers attempting to keep the workplace free of persons who through name, speech, or other ascribed trait come to be associated with races that have been constructed to be less socially acceptable.

intricacies of borrowing such language would have to be worked through, because not even the ADA provides a blanket correction for merely wrongly identifying someone as disabled. The ADA provides relief for persons who are disabled or "regarded as" having a disability,[198] and defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual."[199] This language supports granting relief where an employer mistakenly believes that someone is disabled or where an employer believes that an actual impairment, which is nonlimiting, is substantially limiting. Using the ADA's definition of disability, courts have concluded that the ADA encompasses claims by people who are "regarded as" disabled and discriminated against as a result of a false perception of disability and unfounded stereotypes about persons with disabilities.[200]

It should be acknowledged that there are both challenges and limits to courts' looking to the "regarded as" language of the ADA in deciding Title VII cases. As a practical matter, one wishing to derail such an approach could simply argue that because the "regarded as" language does not appear in Title VII, courts should not be able to consider the approach without a statutory amendment. While such an amendment would be ideal, there is nothing that prevents a court from using doctrinal analyses and understandings from other antidiscrimination statutes to assist in understanding the operation of discriminatory conduct within the Title VII context.[201] The turn to the "regarded as" prong need not be understood as literal, but can be encouraged as an intellectual tool to assist the court in answering the critical question: "How is discrimination working?" The importance of the specific language is that it could support an emboldened court's claim that Congress understands that minority identity categories or

198. 42 U.S.C. § 12102 (2)(c) (2000).

199. 42 U.S.C. § 12102 (2)(a) (2000).

200. *See, e.g.*, Seifken v. Vill. of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995).

201. In fact, courts have looked to Title VII as a framework for structuring causes of action under the ADA. *See* Talanda v. KFC Nat'l Mgmt. Co., 140 F.3d 1090, 1095 (7th Cir. 1998) (stating that, "the case law of Title VII serves as a useful guide because its proscription against retaliation is quite comparable to the ADA's"). In addition, federal law has created some explicit procedural overlap between the statutes. *See* 42 U.S.C. § 12117(a) (2000). Section 12117(a) of the ADA states:

> The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act . . . .

perceived impairments are given power through social constructions and understandings.

Setting the specific language to one side, however, a more general look at the ADA can assist a court in realizing how proxy discrimination might be understood to be discrimination based upon or "because of" one's protected status. For example, perhaps the absurdity of tolerating proxy discrimination within the Title VII context would be exposed by asking whether a court would ever allow an employer to argue that it was not discriminating based on a person's disability, but on the fact that they used a wheelchair. The analogy is extreme, but the point is that it is likely that courts would be very skeptical if employers were to engage in Title VII-like proxy discrimination within the ADA context. Additionally, referring back to the way that same-race (or intra-group) decisions or color choices can operate to protect employers within a Title VII analysis,[202] it seems very unlikely that courts would similarly allow an employer who discriminated against a person with a severe mobility impairment to claim they should not be held liable because they subjectively did not regard the individual as impaired.[203]

The absence of statutory "regarded as" language in Title VII is not the only problem with direct application of the "regarded as" prong to proxy discrimination. In the ADA context, the language protects persons from being wrongly identified as belonging to the category of persons who are impaired. Within the context of this Article, such a similar categorical misidentification would attach only to a white Lakisha or Jamal. For the great many job applicants with black-sounding names, the employer is correctly identifying their category. The operation of misidentification or the use of misinformation on the part of the employer is different in Title VII proxy cases than it is under the ADA. The employers are, however, for all applicants, perceiving impairment based on the assigned category—blackness—where no such impairment exists. In other words, the point is not to suggest a direct and literal application of the ADA's use of the "regarded as" provision,

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202. *See supra* notes 42-45 (discussing how courts have rejected claims based on race or color, where employers claim they believed the disfavored employee belonged to the same identity group as the selected employee).

203. Interestingly, at least Justice Thomas has attempted to import the Title VII limits stemming from intragroup decisions into an ADA analysis. Olmstead v. L.C., 527 U.S. 581, 616-22 (1999) (Thomas, J., dissenting). However, the majority rejected Justice Thomas' argument that would have ostensibly required the plaintiffs to allege some disparate treatment as compared to nondisabled persons. *See id.* at 557 n.10. For an excellent discussion of the issues surrounding this case, see Carlos A. Ball, *Looking for Theory in All the Rights Places: Feminist and Communitarian Elements of Disability Discrimination Law*, 66 OHIO ST. L.J. 105, 152-56 (2005).

but to emphasize what the provision represents—an understanding that discrimination takes place through assignments of individuals to categories that convey lower social status. Black and white Lakishas and Jamals are being assigned to a category that is viewed as debilitated—ethnically named Blacks who employers understand to be deficient or unsuitable based on social understandings of blackness.

In addition to textual and structural differences, there is also the matter of limitations that have been placed on the "regarded as" language within the context of the ADA. The congressional testimony related to whether the ADA could regulate discrimination based upon genetic information included an argument that a perceived impairment cannot be disconnected from the requirement that said impairment "substantially limit a major life activity."[204] That record suggested that the "regarded as" language would not pertain where a covered employer regarded the supposed impaired person as merely not capable of performing some types of work.[205] Only a belief that the disabled person was completely incapable of working would satisfy the "substantially limit[ed] in a major life activity" standard.[206]

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204. *Genetic Information in the Workplace: Hearing on Examining Issues Relating to the Development of Federal Policy Governing the Treatment of an Individual's Genetic Information in the Workplace in Light of the Recent Human Genome Project Breakthroughs Before the S. Comm. on Health, Education, Labor, and Pensions*, 106th Cong. 63-69 (2000) (Statement of Harold P. Coxson, Esq., relating to genetic information discrimination in the workplace) [hereinafter *Hearing*]. Interestingly, Professor Bagenstos has proposed that nothing in the ADA suggests that the "regarded as having [a substantially limiting] impairment" prong has to be viewed through the eyes of the employer. Samuel R. Bagenstos, *Subordination, Stigma and "Disability,"* 86 VA. L. REV. 397, 447 (2000). Instead, requiring courts to take a broader societal view of the individual's perceived disability might mitigate the limitations the "major life activities" prong places on finding discrimination. *Id.* In making the claim, he provides a helpful analogy to a restaurant owner who denies service to a person with a disfiguring skin condition. *Id.* Where such a person accurately perceived that he or she was being "regarded as" disabled by patrons, the person is entitled to a remedy under the ADA, just as a black patron would be entitled to a remedy under the Civil Rights Act of 1964 if denied service based on the complaints of bigoted patrons. *Id.* at 447-48.

205. *Hearing*, *supra* note 204, at 68.

206. *Id.*; *see, e.g.*, EEOC v. General Electric Company, 17 F. Supp. 2d 824, 831 (N.D. Ind. 1998) (denying that the plaintiff had been "regarded as" disabled where the defendant falsely believed the plaintiff was infected with HIV and harassed him upon this basis, but the plaintiff had failed to establish the defendant believed HIV infection substantially limited the plaintiff's ability to work or engage in another major life activity); *Talanda*, 140 F.3d at 1098 (upholding termination of a manager who refused to follow a direction to reassign an employee who lacked many teeth from contact with the public as reasonable and concluding that the employee would not be "regarded as" disabled since her impairment was not substantially limiting within the meaning of the ADA); McCollough v. Atlanta Beverage Co., 929 F. Supp. 1489, 1496-98 (N.D. GA 1996) (dismissing the plaintiff's claim where it decided that the

The congressional testimony is bolstered by the decision in a Supreme Court case that considered the effect of the "regarded as" disabled language in the ADA. In *Sutton v. United Air Lines, Inc.* the Court accepted that the ADA protects those who are merely "regarded as" being disabled, but not where the availability of corrective measures would result in the presumably impaired being able to function identically to those without impairments.[207] The case and the applicability of its holding within the Title VII context will be discussed more fully below.[208] Here, the important finding to take from the case is the Court's determination that the "regarded as" prong is nullified where there is no proof that the employer believed that the presumed impairment substantially limited the claimants in the major life activity of working.[209] As proof for this supposition, the Court noted that there were several other types of positions that poorly sighted pilots would have been able to perform at the airline.[210]

Despite the Court's tendency to narrow the class of individuals protected under the "regarded as" prong of the ADA's disability definition, the previously referenced congressional testimony expressed support for the *Sutton* Court's acknowledgement that the object of the ADA is to prohibit discrimination against persons with disabilities and that the "regarded as" prong of the statute is necessary to prevent employers from making decisions based upon "myths, fears, or stereotypes."[211] In reviewing the Rehabilitation Act of 1973 (the predecessor to the ADA's "regarded as" prong), the Supreme Court explained in *School Board of Nassau County v. Arline*, "society's accumulated myths and fears about the disability and disease [can be] as

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employer correctly regarded the plaintiff as disabled and unable to do his assigned job, but where the impairment did not prevent the plaintiff from working in other jobs).

207. 527 U.S. 471, 482-83 (1999) (deciding an ADA discrimination claim where pilots claimed that they were "regarded as" disabled based upon their impaired vision that was correctable with the use of glasses or contact lenses). For an extended analysis of this element of the Court's decision, see Bagenstos, *supra* note 204, at 514-19 (praising the court's recognition that the "regarded as" prong was intended to remedy the effects of stereotyping, but criticizing the Court's restrictive reading of the statute).

208. *See infra* notes 219-22 and accompanying text.

209. *Sutton*, 527 U.S. at 491-92; *see also Talanda*, 140 F.3d at 1097 & n.13 ("We do not mean to imply that facial disfigurement, including facial disfigurement caused by dental problems, can never be a disability for purposes of the ADA. Such an impairment can be so severe as to limit, or be perceived as limiting, the employee in a major life activity.").

210. *Sutton*, 527 U.S. at 493.

211. *Hearing*, *supra* note 204, at 68.

handicapping as are the physical limitations that flow from actual impairment."[212]

Based upon the above cases and definitions, it is quite clear that Title VII and the ADA share a common goal—eradicating the effects of negative social constructions of outsider identities.[213] Professor Michael Stein addresses this commonality when he argues that majority society views minority workers along a continuum of "physical atypicality" where women, African Americans, and the physically disabled are all atypical.[214] Society, he further contends, is merely slowest to adjust to persons with those differences with which it is least familiar.[215] It is this shared experience of society using "markers" as a shorthand for ascribed otherness that supports broadening Title VII to cover lawsuits based upon the improper use of race-based proxies. Indeed, such protection is necessary to further Title VII's goal of eliminating the use of improper stereotypes pertaining to people who belong to certain racial groups.

Although the ADA may differ from Title VII in a number of ways,[216] it does not differ from Title VII in its purpose of stamping out

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212. 180 U.S. 273, 275, 284 (1987).

213. The major policy justification for antidiscrimination laws, whether they are designed to protect racial minorities or the disabled, are to remedy the injuries arising from social stigma. Bagenstos, *supra* note 193, at 841-42 (arguing that across categories of difference, the goal of antidiscrimination laws is to mitigate the social inequality of subordinated group members); *see also* Bagenstos, *supra* note 204, at 426 (arguing that the ADA is premised upon the notion of the disabled as an identifiable class of individuals who "share[] a common experience of systematic prejudice, stereotypes and neglect."); Karlan & Rutherglen, *supra* note 189, at 5-11 (1996) (noting that with the exception of the ADA's reasonable accommodation provision, the central prohibitions of the ADA are borrowed from Title VII; and that both statutes measure discrimination by looking to how employers treat those who are similarly situated as compared to those who are different).

214. *See* Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 583-84 (2004).

215. *Id.*

216. *See* Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 977-78 (2003) (asserting that Congress took different approaches to remedying race and disability discrimination, in that failure of employers to provide disabled persons preferential treatment may be considered discrimination under the ADA, but Title VII has no such provision); Karlan & Rutherglen, *supra* note 189, at 3 ("[U]nder the civil rights statutes that protect women, blacks, or older workers, plaintiffs can complain of discrimination against them, but they cannot insist upon discrimination in their favor . . . .") (footnote omitted); S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603, 618-22 (2001) (articulating statutory differences and claiming that, while courts have borrowed from Title VII analysis for ADA cases, discrimination based on disability, which is often unintentional, is very different from race and gender discrimination, which are often based on use of stereotypes or deliberate malfeasance); For a discussion

employment decisions based purely on the social meanings attached to membership in a marginalized group.[217] For this reason, it makes sense that antidiscrimination law concerning race discrimination, like that concerning disability discrimination, should include a means of evaluating claims where a person is "regarded as" being black or as belonging to any particular race in the hiring market.

The ADA prohibits discrimination by employers against qualified individuals with a disability.[218] Under the ADA, a plaintiff is disabled, and thus entitled to protection, if: (1) she shows that she has a disability as defined by the statute, meaning she is substantially limited in performing one or more major life activities; (2) she shows that she has a record of having such disability; or (3) she shows that she was regarded as disabled by her employer.[219] Returning to the *Sutton* case, with respect to the "regarded as" prong of the ADA, the Supreme Court explained that there are two ways in which a plaintiff may fall within the statutory definition of being "regarded as" disabled: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities."[220] These two methods of proving discrimination are recognized because of an understanding that people are affected by negative and often mistaken stereotypes about the capabilities of disabled people.[221]

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of the accommodation requirements of the ADA, see Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 648 (2001). Jolls asserts that,

> Even if the standard of intent is somewhat different under the disparate treatment branch of Title VII (and it is not clear whether it is), it is clear that no existing Title VII precedent has found disparate treatment liability for behavior that is the Title VII analogue of neglecting the distinctive building-access circumstances of individuals with disabilities.

Id.

217. Ross v. Campbell Soup Co., 237 F.3d 701, 706 (6th Cir. 2001) ("The breadth of the [ADA's] protection is the embodiment of its drafters' will to stamp out the stereotyping of and discrimination against persons with disabilities in all their forms, even when that stereotyping or discrimination is misplaced.").

218. 42 U.S.C. § 12112(a) (2000).

219. 42 U.S.C. § 12102(2) (2000); *see also* Sutton v. United Air Lines, Inc., 527 U.S. 471, 478 (1999).

220. *Sutton*, 527 U.S. at 489.

221. Statement of Representative Tony Coelho (Sept. 27, 1988), Legislative History of Pub. L. 101-336, The Americans with Disabilities Act, Vol. 2, at 942-43 (Dec. 1990). According to Representative Coelho,

> when a program, or a job, or a school, has excluded disabled people, or segregated them in a separate facility, this has been justified through the unchallenged myth of equating *disability* with *inability* . . . . Equating disability with inability is false. In employment, for example, numerous

These same factors and principles can and should be transferred to an analysis of "regarded as" in disparate treatment race discrimination cases. For example, the second method for proving disability discrimination, where one is "regarded as" disabled because of an actual, nonlimiting impairment, would essentially be similar to having a black plaintiff, who was discriminated against either because of an African American-sounding name or a black-sounding voice, bring a claim alleging race discrimination based on his or her *actual* race, which was perceived as limiting his or her ability due to negative stereotypes such as black incompetence or laziness, but was mistakenly perceived as being lazy and incompetent. Likewise, the first method for proving disability discrimination, where one was "regarded as" disabled because the "covered entity mistakenly believe[d] that"[222] the plaintiff had an impairment that substantially limited a major life activity, would essentially be similar to having a white plaintiff, who was discriminated against either because of an African American-sounding name or a black-sounding voice, file a lawsuit claiming race discrimination on the ground that he or she was mistakenly believed to be black and therefore "regarded as" having all the negative qualities and stereotypes that are generally associated with Blacks, even though the plaintiff was not actually black.

This direct application of ADA language and case law, however, is not perfect. As we discussed above, there are times where it is possible that a person could regard someone as impaired but not trigger the ADA.[223] This seems much less likely within the Title VII context, where the presupposition about race and its import would appear to be almost per se violative of the statute. While the statutes may not necessarily operate in precisely the same manner, it still makes sense to attempt to regulate the underlying offending behaviors in both race and disability-based decision-making.

> studies have shown that employment for the disabled is restricted more by misconceptions, stereotypes, and generalizations about handicaps, unfounded fears about increased costs and decreased productivity, and outright prejudice, than by people's disabilities themselves.

Id.

222. *Sutton*, 527 U.S. at 489.

223. In the *Sutton* case, the Supreme Court used diabetics as an example of persons with a condition that could be considered a disability under certain circumstances, but is not necessarily so under the ADA. *Id.* at 483-84; *see also* Tory L. Lucas, *Disabling Complexity: The Americans with Disabilities Act of 1990 and Its Interaction with Other Federal Laws*, 38 CREIGHTON L. REV. 871, 884 (2005) (discussing EEOC guidelines and stating that just because a person qualifies as having a "serious health condition" under the Family and Medical Leave Act that does not mean that they are regarded as disabled under the ADA).

CONCLUSION

Prior to concluding, we want to acknowledge that while it is critical that courts begin to grapple with how the socially constructed nature of race shapes discrimination within employment and other contexts, importing the ADA's "regarded as" language into Title VII represents only one methodological starting point for beginning to address the problem. Given the scope and nature of problems related to societal understandings of race and identity, the approach is neither a panacea nor a solution free of problems. We recognize there are challenges that result from borrowing the ADA's "regarded as" language. For instance, the recognition of proxy claims could significantly increase the bases upon which claimants could file causes of actions. Additionally, although Bertrand and Mullainathan's research provided a starting place for analyzing the labor market costs of behaviors premised upon social constructions of race, the research was limited only to exploring the disadvantages associated with African American-sounding names. As other research and our analysis in this paper suggests, proxy discrimination is not just an issue of white-on-black discrimination.[224] There will be complications for Title VII "regarded as" claims, which may arise outside the context of the black-white binary understanding of race.

First, as we have discussed, names are merely one method of approximating a job candidate's ascribed "otherness." We have covered other bases for discrimination, such as accents or speech

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224. *See supra* notes 82, 108-14, 165-75 and accompanying text. The tendency of scholars to focus far too much of the racial discourse upon how race operates in the context of black-white social relations, thereby obscuring the lived experiences of the many other minority identity groups, is typically referred to as the black-white binary paradigm. *See, e.g.*, Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1214-15 (1997) (demonstrating the existence of the paradigm and how it operates to exclude Latinos from inclusion in racial discourse); *see also* Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1200-03 (2004) (discussing the uniqueness of the black experience with racism and white power within the context of multiracial politics, but ultimately concluding that an overemphasis on the black-white binary paradigm unacceptably hinders the racial discourse); Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship and the Black-White Binary*, 75 TEX. L. REV. 1181, 1196-1200 (1997) (book review) (discussing the doctrinal and practical consequences of the paradigm and arguing that as a symbol it stands for the premise that Blacks are the only oppressed group who deserve to have their racial grievances addressed); Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 248-50 (1995) (describing the binary paradigm as a type of "bipolar essentialism" and discussing its effect on Asian Americans).

vernacular.[225] We have not thoroughly covered how markers that may correlate with race, such as credit history,[226] education,[227] or geography[228] (residing in, or hailing from a neighborhood or area with a significant minority population), can be used in a similar fashion. It is not even possible to construct a comprehensive list of all of the conditions or behaviors that constitute proxies. Borrowing the "regarded as" language would likely result in proxy cases significantly expanding the Title VII docket.[229] This result is somewhat unavoidable. Part of the development of proxy discrimination jurisprudence would necessarily involve discerning between which types of ascriptive traits most highly correlate with race and the other protected Title VII

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225. *See supra* notes 14, 102-23 and accompanying text. Interestingly, Latinos might be understood to have claims based on multiple traits, meaning they could potentially claim discrimination based on race, ethnicity, and national origin.

226. *See supra* note 56. The same claim could really be made for any income-related distinction or category, as many minority groups are disproportionately poor. *See* Beck, *supra* note 20 (discussing Section 8 status as linked to income level, which may be a proxy for race and other protected classes); Rachel Rubey, *There's No Place Like Home: Housing for the Most Vulnerable Individuals with Severe Mental Disabilities*, 63 OHIO ST. L.J. 1729, 1736-38 (2002) (noting that courts have upheld discrimination based on minimum income requirements for renting in the private housing market, which in effect legitimates discrimination against the mentally disabled in housing since they are disproportionately low-income individuals).

227. For instance, attendance at a historically black college or university breaks down heavily along racial lines and one might expect that for some employers, seeing references to Spelman or Morehouse colleges on a résumé, might be tantamount to seeing the names Lakisha or Jamal.

228. *See, e.g.*, John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope From a Mountain of Despair,"* 143 U. PA. L. REV. 1233, 1235-36 (1995) (discussing the racialization of space: "the process by which residential location and community are carried and placed on racial identity" and noting "I take my meaning from Susan Smith, who characterizes the term to be 'the process by which residential location is taken as an index of the attitudes, values, behavioural inclinations and social norms of the kinds of people who are assumed to live [there]'" (citing Susan J. Smith, *Residential Segregation and the Politics of Racialization, in* RACISM, THE CITY AND THE STATE 128, 133 (Malcolm Cross & Michael Keith eds., 1993))). Society then uses such information to perfect practices such as red-lining—"a discriminatory practice by banks or insurance companies whereby the potential customer is denied a loan or insurance coverage because of the neighborhood in which the subject property is located." Terry W. Gentle, Jr., Comment, *Rethinking Conciliation under the Fair Housing Act*, 67 TENN. L. REV. 425, 442 n.129 (2000).

229. This result alone may be a reason why courts seem extremely hesitant to adopt such a remedy. Although as one scholar has pointed out, even if the doctrine gains a foothold, courts find ways to effectively limit "litigation explosions" in the area of race-related discrimination claims. *See* Brooks, *supra* note 42, at 14-15 (alleging that, in response to increased filings under 42 U.S.C. § 1983 (2000), courts found ways to limit the effectiveness of the filings).

categories.[230] Moreover, it would require more work for administrative agencies and courts that adjudicate employment discrimination claims, but it would also force these entities to come to grips with the way racism (and other -isms) are often practiced—unconsciously and through proxies.

Beyond the challenges associated with the myriad types of proxies that exist, there will be issues arising from the fact that not all races are similarly socially or legally constructed. Again, various studies allowed us to explore the harmful consequences of blackness, a racial category for which negative societal stereotypes are prevalent.[231] Being "regarded as" a Black is clearly punitive within the employment context because of socially ascribed stereotypes. We do not, however, have either the data or a developed record of social relations to make the same types of claims for other races and ethnicities.

For example, some of the studies we have analyzed suggest that Latinos also experience serious disadvantages in access to employment

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230. As one scholar has asserted, proxies essentially serve as a type of social short hand for marking group difference, and not all proxies are bad: "Employers (like everyone else) treat individuals as members of groups all the time; we could not manage all of the information in the world if we did not act on the basis of proxies." Bagenstos, *supra* note 193, at 855 (citation omitted). The goal of this Article is to make real the author's additional claim that "antidiscrimination law [should] bracket[] out one set of proxies (those based on race, gender, and the other forbidden classifications) and prohibit[] employers from relying on the proxies in that set." *Id.* at 865 (citation omitted). While empirical data of the type discussed in this Article can be helpful to legal decision-makers, such evidence will not exist for many proxy categories. Part of the challenge to implementing the proxy discrimination cause of action will be in the courts' ability to "know it when they see it." *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (making the same comment, somewhat in jest, about pornography).

231. Within the context of a discussion of the crippling effects of racial stereotypes, Professor Jody Armour has referred to the consequences of such stereotypes as a type of "black tax" or "the price Black people pay for their encounters with Whites (and some Blacks) because of Black stereotypes." JODY D. ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 13 (1997). The breadth of such costs is astutely captured in the following passage:

> Race, gender, and disability stereotypes are not likely to be idiosyncratic to a particular employer, nor are they likely to be limited to the employment context. When a person loses out on a job because of such a stereotype, that loss is likely to be only the tip of the iceberg. Similar stereotypes are likely to foreclose other jobs and opportunities in society. A person subject to such a stereotype is therefore likely to face stigmatic and cumulative disadvantage.

Bagenstos, *supra* note 193, at 854.

and housing through proxy discrimination.[232] In the structure we have proposed, the "regarded as" prong attaches remedies only where one can prove both that the employer has used some proxy for the protected category and that persons within the relevant category are socially constructed as undesirable. Thus, we would be able to support claims of negative social construction for Latinos, and in our post-September 11th society, the same would likely be true of persons possessing traits that revealed them to be of Arab descent or Islamic faith.[233] However, other races and ethnicities would be more difficult to adjudge. For instance, in this Article, we cite to a study indicating that somc Asians were discriminated against in the temporary services employment industry.[234] Also, the *Fragante* case involved a claimant of Filipino descent, and Professor Mari Matsuda makes the case that Mr. Fragante and other Asians may be socially constructed as the undesirable "other"

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232. *See* Bendick et al., *supra* note 14, at 29-31 (reporting that in two separate sets of study data, Latino tester applicants respectively experienced a twenty percent (UI study) to twenty-two percent (FEC study) disadvantage in treatment by prospective employers); Purnell et al., *supra* note 105, at 14-15 (finding that persons presumed Latino by voice, for example, those subjects using the Chicano English dialect, received the least number of appointments to view rental properties, as compared to persons using Standard American English or African American Vernacular English).

233. Interestingly, at least one federal appeals court has implicitly dealt with the significance of names and the social construction of identity by ruling that an employer's insistence on substituting an American-sounding name in place of an Arab employee's ethnic-sounding name was racial discrimination in violation of 42 U.S.C. § 1981 (2000). El-Hakem v. BJY, Inc., 415 F.3d 1068, 1072-73 (9th Cir. 2005). While this is not precisely a proxy discrimination matter, the court recognized how attitudes toward a name reflect racial bias. *See supra* note 82. Professor Adrien Katherine Wing has described the more recent disfavor directed toward Arabs as similar to that Blacks have historically been subjected to in the Unted States. *See* Adrien Katherine Wing, *Civil Rights in the Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 718-21 (2003) (asserting that, post-September 11th, Arabs "have been socially constructed as 'Black,' with the negative legal connotations historically attributed to that designation. For example, racial profiling, which originated as a term synonymous with Blacks and police traffic stops, now equally applies to both Arabs and Muslims in many contexts." (footnote omitted)); *see also* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 299 (2002) (noting the U.S. Government has recently been subjecting Arabs and Muslims to "[a] complex matrix of 'otherness' based on race, national origin, religion, culture, and political ideology"); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 2 (2002) ("In the wake of the terrorist attacks of September 11, 2001, Arab, South Asian, and Muslim Americans have borne the brunt of the presumptions of foreignness and disloyalty."); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1592 (2002) (noting that, after September 11th, even persons of Arab descent who have been naturalized or were born here were not considered American citizens "as a matter of identity").

234. *See supra* note 82.

based upon origin and accent.[235] While we accept these claims as authentic, there is data that suggests that Asians and perhaps Pacific Islanders are often believed to be an academically superior, socially acceptable, "model minority."[236] Based on beliefs in this type of positive stereotype, one might expect Asian names to generate disproportionate positive interest when they appear on résumés for certain permanent jobs.[237] Would this mean employers could claim there would be no harm in being "regarded as" Asian?[238] On the other hand, at least one study suggests that Asian Americans may be more susceptible to discrimination because of stereotypes about docility in that employers, in this case temporary employment agencies, "may believe that they can ignore résumés submitted by Asian American without fear of a complaint or a civil rights investigation, which they might more likely receive if they ignored a member of another ethnic group."[239]

That some races are associated with positive social constructions or stereotypes presents other problems as well. Even where a minority group is thought to have positive traits, there may be some confusion as to who is included in the group. Asians, like Latinos, present the challenge of often being referred to as a monolith when each of these groups is actually extremely heterogeneous.[240] For the purposes of our

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235. *See* Matsuda, *supra* note 166, at 1384-86, 1392-1401.

236. Many scholars have challenged this myth, which has been described as follows: "The model minority stereotype posits Asian Americans as uniquely successful among minority groups. They work hard, save money, and achieve material success, while their children study equally hard and earn high marks in school." Shin, *supra* note 94, at 3; *see also* Frank H. Wu, *Changing America: Three Arguments About Asian Americans and the Law*, 45 AM. U. L. REV. 811, 813-14 (1996).

237. Such a finding would comport with findings in the Figlio study that Asian children with distinctively Asian names such as "Vivek" were more likely to be referred to gifted programs and to have higher mathematics test scores than Asian children with "whiter" names like "Alex." Figlio, *supra* note 73, at 19-20.

238. As Frank H. Wu indicates, the problem with the model minority myth is not only that people ignore that it is, in fact, a myth based upon stereotypes, but also that it is typically offered as empirical proof or evidence for whatever legal claim is being advanced. *See* Wu, *supra* note 224, at 818-19. Reliance on the myth can, however, be as dangerous as it is potentially advantageous. Even as one employer might use stereotypes related to the myth to suggest that Asians will perform certain types of jobs well, the reverse side of the essentialist ploy is the notion that Asians cannot do well in certain other types of jobs. At bottom, it is just another version of seeking the "right kind" of employee that we discussed in the context of the black identity performance at work. *See supra* notes 135-43, 149-53 and accompanying text.

239. Names Make a Difference, *supra* note 82, at 4.

240. *See* Leti Volpp, *"Obnoxious To Their Very Nature": Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71, 72 n.1 (2001) (stating that experiences of persons of Japanese and Chinese ancestry are often regarded as synonymous with the Asian American experience, when actually "[t]here are enormous differences within the

new prong of Title VII jurisprudence, questions will arise from societal tendencies to interchangeably and simultaneously use race as a reference to appearance, nationality, ethnicity, and culture.[241] Are Chinese, Korean, and Taiwanese persons "regarded as" the same? Is a Cuban a Latino? Would an employer be able to defend against a proxy suit brought by a Thai person where the employer admitted to generally using proxies to disfavor Asians but asserted as his defense that he did not consider Thai folks Asian and he "kind of" knew that Thai names did not sound like most Asian names? How would one handle the claims of a recent African immigrant who has an African-sounding name? Is the social construction of African or Caribbean immigrant identity something separate and different from that of constructions for blackness as embodied by African Americans?[242] The immigrant may

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identity category 'Asian American' along lines of class, gender, immigration history, and sexuality, as well as along lines of ancestry"); *see also* Celious & Oyserman, *supra* note 186, at 150-51 (making a similar claim about the heterogeneity of the African American community).

241. Most of the questions relate to the limited effectiveness of larger "racial" categories for capturing more nuanced forms of identity affiliation. The following passage is generally descriptive of the nature of the problem:

> The history of discrimination against Mexican-Americans differs from that of Cuban-Americans, though both groups are lumped together with Puerto Ricans, Dominicans, Central Americans, and others under the classification "Hispanic." Although Haitians are considered black, their status as recent immigrants and the language barriers they face can separate and exclude them from more established segments of the African-American community. Filipinos, though classified as Asians, experienced a unique history of oppression at the hands of Spanish and American colonialists. Koreans still resent their country's historical oppression by Japan. And Japanese and Chinese cultures and militaries have often clashed. Yet, in the eyes of the Census Bureau, as well as the courts and legislatures, in implementing race-conscious remedies, Filipinos, Koreans, Japanese, and Chinese are all classified as "Asian." An additional accounting problem arises with Latinos because the Census Bureau classifies this group as an ethnicity, even though many Latinos are also black or Asian. In other words, the census currently counts people on the basis of race, but ethnicity transcends race in the case of Latinos.

Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 963 (1995).

242. Separate from the name issue, there are questions related to the different social perceptions that may operate with regard to African or Caribbean immigrants versus the descendants of slaves in this country. *See, e.g.*, John H. McWhorter, *What's Holding Blacks Back?*, CITY J., Winter 2001, at 24-31 (contrasting the educational failure of American Blacks to the relative success of the children of African and Caribbean immigrants as part of his claim that it is American Blacks' belief in themselves as victims, rather than racism, that accounts for their lack of success). The black immigrant divide is often mentioned during discussions of who should benefit from race-based programs and remedies. *See, e.g.*, Brooks, *supra* note 42, at 13-16

identify as black, but does he or she have the same claim as Blacks with African American-sounding names? Does the employer who sees the African name on a résumé even use it as a proxy for race?[243]

The above questions make it clear that, like race in general and identity politics more specifically, regulating proxy discrimination could become very complicated. Even so, these types of problems do not make the "regarded as" standard unworkable. Just like in other cases, the plaintiff will be responsible for identifying the employer's impermissible conduct. The employer then will need to offer a reason for the conduct premised on something other than direct or proxy discrimination. If at this point courts then have to make hard choices between strong and weak evidence of proxies, then these choices are an appropriate consequence. Again, this process at least forces courts to acknowledge discrimination as the complex phenomenon it is.

While we accept that proxy discrimination complaints expand the ambit of Title VII jurisprudence because the potential number of proxies is substantial and racial categories are typically messy subjects, there can be some limitations. For instance, although we would provide remedies to a white Lakisha and Jamal, we would not offer the same to a white Billy Bob or Peggy Sue, even where their names were also the source of employment discrimination. Similarly, we would deny these same persons relief if they were denied employment because of geography, such as their southern or rural roots, which may also be used as proxies. These claims could be alleged to be cognizable as race-based because a person who bypasses a white Billy Bob or someone he believes to be southern or rural may be acting based upon stereotypes and attempting to exclude the "wrong type" of white person. In this way, the discrimination looks somewhat like the exclusion practiced against white persons with African American-sounding names. The differences, however, are that the exclusion of

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(discussing the exceptional history of subordination borne by African Americans since the earliest days of our Republic and why it matters to remedies for discrimination); S. Allen Counter, *Descendants of American Slaves*, THE BLACK COLLEGIAN, Feb. 2002 (discussing the unique debt America owes to the descendants of slaves as opposed to Blacks more generally, in an article written by a Harvard Medical School neuroscience professor); Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, But Which Ones?*, N.Y. TIMES, June 24, 2004, at A1 (discussing the concerns of Professors Lani Guinier and Henry Louis Gates, Jr., that while eight percent of Harvard's students were black, potentially only a third had four grandparents who were born in the United States). The distinction is also prominently discussed within the context of the reparations for slavery movement. *See, e.g.*, Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2543-46 (2001).

243. Neither the Bertrand and Mullainathan study nor the Figlio study answers the question of whether African names, such as Barak Obama, trigger the same type of discrimination as names such as Lakisha and Jamal.

whiteness is not the impetus for the behavior nor is the white race category typically socially constructed as inferior. The employer avoiding the southern-named or rural-living white person is making decisions based on socioeconomic background or perhaps stereotypes based on geographical customs, but not upon race or another protected Title VII trait. It is this requirement that the claim implicate a negative social construction of a protected Title VII category that becomes the limitation on more innovative proxy claims.[244]

In conclusion, judicial recognition of race-based proxy discrimination as actionable in hiring discrimination cases would not only be more effective in remedying race discrimination as it functions on the job market for applicants, but also would help to deter such discrimination by forcing employers to pay for any decisions that rest on proxies for race. Moreover, it would further the purposes of Title VII by creating a space in which insiders or members of the dominant racial group can be compensated for discrimination against them when they too are perceived as racial minorities and "disabled" or lacking in ability because of their racial status. In the same way that the socially constructed racial meanings or proxies, such as name or voice, underlie discrimination against minorities based on signals of race, they also enable discrimination against majority members, not only because of such signals, but also based on their views, which may, according to social definitions, be considered as thinking too much like a racial

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244. The support for such a claim can be seen by comparing this example to the findings of Bertrand and Mullainathan's research. In that study, African American-sounding names became proxies for the Blacks whom employers did not wish to hire. Such a practice resulted in the creation of at least one group that could be described as consisting of false positives—acceptable job candidates whom are erroneously eliminated through use of the practice—white (or any nonblack) persons with African American-sounding names. One could argue that Blacks who did not conform to the behavioral conventions that the employers thought the names signified are also false positives, but this is less clear because it may just be that only the disfavored name (African American-sounding) combined with the disfavored race (Blacks) was needed to satisfy the unacceptable choice (any African American-named Black). We have essentially argued that false positives like the white Jamal and Lakisha should receive Title VII protection because their exclusion is also based on race in that the choice to exclude them is premised upon negative social understandings of blackness. In the Billy Bob example, however, where is the false positive? There does not appear to be one because the employer is trying to exclude all applicants with the name, not Blacks or Whites in particular. In this example, the black Billy Bob would be without Title VII remedy just like the white Billy Bob because stilted racial constructions are not the impetus for the behavior. This, of course, presents a paradox that will have to be dealt with on an ad hoc basis within proxy cases. In the case of African American-sounding names, an employer treating all similarly named persons the same tends to prove the power of the racist construction in effect. Treating all applicants the same in other contexts, however, may serve to prove there was no unlawful discrimination present. In other words, intentions really do matter for this type of disparate intent claim.

minority, along with any attendant negative stereotypes. Indeed, this expanded understanding of Title VII case law will only work to further the goals of Title VII and to effectuate the intent of its drafters, who certainly understood, as so many of us do, that it is not physical race itself that is damaging, but the social meanings that are attached to race that are dangerous and must be eradicated.[245]

245. At a minimum, we believe that Congress should make this understanding of racial discrimination explicit by adding the "regarded as" language to Title VII legislation concerning racial discrimination.

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