PERCEPTUAL SEGREGATION

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This Article argues that outsiders and insiders tend to perceive allegations of discrimination through fundamentally different psychological frameworks. A workplace may be spatially integrated and yet employees who work side by side may perceive an allegation of discrimination through very different lenses because of their disparate racial and gender identities. Most "implicit bias" legal scholarship has focused on the cognitive processes of "insiders" (whites and men) in assessing and evaluating "outsiders" (people of color and women). This Article opens a new field of legal scholarship and complements the implicit bias literature by drawing on empirical studies to explicate the cognitive processes of outsiders in interpreting potential incidents of discrimination. Studies show that blacks and whites are likely to differ substantially in how they conceive of and define discrimination. While many whites expect evidence of discrimination to be explicit, and assume that people are colorblind when such evidence is lacking, many blacks perceive bias to be prevalent and primarily implicit. Studies have also revealed that men and women differ significantly in assessing incidents of sexual harassment. Differences in perception have profound implications for how our judicial machinery, which consists predominantly of white male judges, resolves antidiscrimination claims. Judges are likely to impose their own contingent conceptions of discrimination, with little or no awareness of the perceptual limitations shaping their judgments. This Article explores reforms in the judicial system and in workplaces that could help sensitize both insiders and outsiders to each other's perspective and break down the rigidity in these clashing mindsets.

In the summer of 2005, I presented a work in progress at a conference. Although I was excited about presenting, I also grappled with a barely conscious feeling of fear, and a consequent vigilance, in case my presentation was met with hostility. I have learned always to be on guard in such situations, even though actual confrontations are few and far between. I am an African American man, and my professional speaking engagements typically involve a mostly white audience. I also write and teach about issues of race, which tend to provoke strong reactions. In my experience, the most pointed or dismissive challenges to my ideas often come from white men. In approaching scholarly presentations, I always imagine, at least fleetingly, the worst case scenario: a question that I simply cannot answer. To some extent, this fear is universal. What gives the fear an extra bite in my experience is that I perceive the risk not simply to be that I will be viewed as unprepared or otherwise personally inadequate, but that I will be viewed as a stand-in for all African Americans, or at least all African Americans in academia.[1] My

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1. For a description of the relevant stereotypes, see Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1373 (1988) (setting forth binary

failure then would confirm the racial "question mark," the invisible expectation of inferior performance that many African Americans believe hovers over their heads.

It was with a mix of excitement and trepidation, then, that I approached the summer conference. As part of a panel of scholars, I presented a paper on the legal implications of race and gender discrimination in the casting of actors in the film industry.[2] The chair/ discussant was a white male professor, whom I will call Professor Miller.[3] I had never met nor heard of Miller. Miller became frustrated with me because he perceived that I failed to comply with his request regarding the submission of papers prior to the conference. On May 27th, about one week before the panel, I had emailed Miller to confirm that he was the chair and to ask whether I could use a PowerPoint presentation. Miller never acknowledged my email, but he did send the following email to all the panelists on May 30th:

> Dear paper givers,
> 1) While enlisted as discussant, I discover now that I am sup-
> posed to act as chair as well. I have written for instructions on
> format, but of the 1h45 allotted for our panels, I propose to give
> you each 20 minutes to present your work. I will ruthlessly stop
> you at the 21st minute. As I do not believe that there is any
> utility whatsoever in having meetings without discussion, this will
> preserve a good 35–40 minutes for discussion, including my
> comments.
> 2) I have yet to receive anyone's paper. If I do not get your
> paper by tomorrow (Tuesday, May 31) at noon it is exceedingly
> unlikely that I will have time to receive or print it out, no less to
> read it. I look forward to meeting you all. Thanks in advance
> for your prompt response to this message.
> Yours,
> Phillip Miller

Miller sent his email at 4:32 PM and required us to submit our papers by "noon" the next day. I received Miller's email in the evening. Since classes had ended, I was running errands that day, working from home and not checking email as regularly as usual. Although I had not planned on working on campus the next day, I rearranged my schedule so that I could stop by campus and email him the latest draft of my paper, which was only on my work computer, by 11:15 AM.

Miller perceived that my paper was late and announced this to the audience. In the introduction to his comments on the papers, he stated

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paradigm of black-white stereotypes, including the belief that black people are "unintelligent" and "lazy").

2. See generally Russell K. Robinson, Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms, 95 Cal. L. Rev. 1, 2 (2007) [hereinafter Robinson, Casting] (arguing that "film industry regularly uses discriminatory casting announcements").

3. I have changed the names of the individuals in this story.

that he would not be able fully to discuss my paper because, "Professor Robinson sent it in late, and he sent me a 95-page draft even though he has been reading from a much shorter version."[4] I was utterly confused. Hadn't I sent him the paper by the noon deadline? I could have sworn that I did, but my first impulse was to check my email log to make sure. I was also baffled by Miller's complaint about the "shorter version" of my paper. I was reading from notes summarizing the paper, not the paper itself, which I thought was common practice. But I had never participated in this conference, and I feared that I had unwittingly violated some unarticulated norm. Alongside the thoughts of confusion was a surge of anger. I felt that whatever rules I may have violated, I did not deserve a public rebuke, which I found deeply embarrassing. I perceived that, as an African American, I was particularly vulnerable to a charge of lateness. Given the choice of accepting the word of a tenured, white male professor or a junior, black male, I thought it likely that some in the audience would believe I had submitted the paper on "CPT," or "Colored People's Time."

Thus, I did not feel that I could simply remain silent. I spoke up, hoping that my voice would not wobble or reveal my seething anger.[5] "I'm sorry, but you must be mistaken," I said, "because I *did* submit the paper by the deadline. In any event, surely we can resolve this privately and not in front of the audience." Miller insisted that the paper was late and then went on to critique my paper in scathing terms. He called the central idea "a non sequitur." He also claimed that I failed to deal with the studio development process leading up to the casting of a film, including the writing process.[6] At this point, I felt the need to interrupt again because I did not understand how Miller could fail to read my paper closely (which he had basically admitted) and yet attempt to eviscerate it. I felt embattled because of the combination of an intense substantive critique added to a charge of lateness, both of which I perceived to be unjustified. This time, I spoke up more authoritatively. I stated that I did in fact deal with the aspects that he thought were absent. When Miller attempted to silence me, I said: "Is this a lecture, or will we have an opportunity to respond?"

By now, the audience seemed uncomfortable with the escalating tension in the room. One professor in the audience, Anne, a white woman

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4. I have attempted to recall and quote the statements during the panel as accurately as possible.

5. Although I wanted to rebut the charge of lateness, I knew that coming off too forcefully might trigger another stereotype, that of the "angry black man."

6. In the article, I attempted to resolve the tension between Title VII's ban on race and sex discrimination in hiring and the First Amendment's protection of artistic freedom. I argued that the law permits film producers to use race and sex classifications in casting announcements only when they would demonstrably advance the narrative. See Robinson, Casting, supra note 2, at 2–4 (arguing that "Title VII prohibits [the] industry . . . from using race-/sex-based breakdowns except where a ban would impose a substantial burden on the narrative").

and former colleague of mine, interrupted Miller and said, "Excuse me, but the tone of this panel feels unproductive, and I think it all started with your unnecessary public rebuke of Professor Robinson. Can we move away from that and focus on the substance of the papers?" Miller failed to acknowledge Anne's plea and continued with his remarks. Afterward, I approached Miller and asked him to check his email, so that he could see that I had sent him the paper by the deadline. He disagreed and expressed frustration with people at the conference "not being able to follow deadlines."

Most of the people in the small audience, which was predominantly white, approached me at some point over the next day to express shock and dismay at Miller's behavior. These expressions made me feel better, as they buffered my sense that Miller had breached protocol. Of the six to eight white people who approached me, only Anne stated that she felt the panel was "racialized." All agreed that Miller's behavior was highly unusual and unprofessional, but most people simply labeled him "rude" or a "jerk." To me, it felt like something more. I turned the underlying facts over again and again in my head, trying to understand what had happened and, most importantly, whether I deserved Miller's rebuke or whether he had discriminated against me. In my effort to make sense of this disturbing encounter and work through my anger, I told several friends, family members, and associates about this experience. I attempted to recount the experience as accurately as possible, although of course I cannot claim to view the event "objectively." The night of the panel I went to dinner with several professors who write about race. Everyone in this group (two African Americans, one Latina, and one Asian American) suggested that they agreed that Miller's behavior constituted racial discrimination and some offered similar stories of mistreatment.

The following Monday, I told two white male associates. Both were shocked that I felt discriminated against because of my race. One said that he would understand my perception had Miller said, "Professor Robinson submitted his paper on 'Black People's Time.'" The other accused me of "insisting that everything is about race." I also told a white male professor. In telling the story this time, I recalled a fact that had escaped my memory. One of the white panelists had submitted her paper at 7:33 PM, well after the noon deadline and several hours after I had submitted mine. But she was not publicly chastised for lateness. The white male professor was not persuaded by this fact that there was a racial element. "Maybe he's just a jerk," was his response.

I received different reactions from my two close white friends, Jack and Joel. In telling the story to my friend Jack over brunch, I concluded with my perception that the experience was racially discriminatory. Jack responded that, "it very well might have been racial." He was open to my interpretation, but apparently not convinced. By contrast, Joel was certain that the experience was racially discriminatory. That these are my only close white friends is telling. First, I have selected them as close

friends in part because they have never said anything to me that I regarded as racially offensive. For each close white friend, I could cite dozens of potential white friends who alienated me (almost always unwittingly) with racialized remarks. Second, because of the closeness of our friendships, I often lean on Jack and Joel for support regarding professional, personal, and romantic challenges, and they likewise lean on me. Given the mutually supportive nature of these relationships, I wondered if my friends felt pressure to shutter their skepticism and express support because they thought that was what I needed in the moment rather than cold, hard analysis of the incident.

My perception of the encounter with Miller and the listeners' reactions to my telling of it yielded an important insight. It seemed that the listeners were interpreting the same set of facts through two radically different cognitive frameworks. Race appears to explain this phenomenon, which I call "perceptual segregation." The reactions of people of color were very consistent. Including my professional colleagues and my family members, I told approximately eight people of color, most of whom were African American. My story seemed to resonate deeply and immediately. Those in academia had experienced humiliating treatment at the hands of white colleagues and students. For some in this group, it seemed that just hearing the story caused them to relive their own painful experiences with racial discrimination. No one challenged my interpretation of the incident as discrimination.[7] It is of course possible that some of these people were acting in the capacity of a sympathetic colleague or friend and withheld skepticism about my perception of discrimination. They did not, however, say anything to suggest that they were withholding. I also believed that as people of color they likely felt that they had more latitude to challenge me than Jack and Joel may have felt.

Despite their empathy, no person of color said "I'm sorry" or other similar words of apology. To be sure, they were all very troubled that this had happened to me, but only white people seemed to feel the need to apologize. It was as if only white people had the power—and perhaps the obligation—to apologize for one of their "own." As noted above, although the white people almost uniformly apologized, the vast majority of them did not suggest that they perceived the incident as discriminatory.[8] An additional racial distinction was that while most of the white people were surprised to hear my story, the people of color tended to respond not with shock but with a sigh of weary recognition. Although

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7. In telling this story to all of the people of color and most of the white people, I omitted the part about the white panelist who submitted her paper after I did. Although I had a vague recollection of this sequence of events, I was not able to find her email substantiating the recollection. Months later, I discovered that the email came from her assistant and in fact was sent hours after my submission.

8. Just as the people of color may have withheld skepticism about my interpretation of the incident, it is possible, but unlikely, that some of the white listeners withheld impressions that Miller had discriminated.

there seemed to be a racial correlation in how the listeners interpreted my story, a minority of white observers (Anne and Joel) thought it proba- ble that Miller had racially discriminated against me.

Given the same set of asserted facts, the white listeners tended to focus on difficult-to-answer questions that did not appear to preoccupy the people of color. For instance, some whites asked, "Maybe Miller is sharp with *everybody*, not just blacks?" I later learned that Miller had rubbed people the wrong way during a second panel that he chaired, although I was not told the race and gender of the participants. Miller's mistreatment of some of the white female panelists on my panel, in com- bination with the curt tone of his email, might be understood to support the view that he is generally unpleasant.[9] Maybe Miller had just had a bad day, and anyone whom he perceived to cross him that day would have inspired the same criticism. Maybe I had in fact horribly breached the norms of the conference, and as a result, Miller's rebuke was justified.

I wrestled with these questions in mulling over the incident and dis- cussing it with various friends. Colleagues informed me that the confer- ence's norms regarding the submission of papers were loose and that I had not violated them. In my view, then, the incident was simply a misun- derstanding that was blown out of proportion and likely exacerbated by race. Since most emails I receive are from people on the West Coast, I assumed that "noon" meant noon my time, Pacific Standard Time (PST). It never occurred to me that Miller might expect the paper by 9AM PST, which was noon Eastern Standard Time (EST). Miller, however, appar- ently assumed EST time. Surely there was evidence, including the email sent to all panelists, that Miller was uptight. But I did not view the evi- dence of potential gender discrimination, or of Miller's being a "jerk," as contradicting the interpretation that he discriminated against me. From my perspective, the fact that Miller had mistreated women made it *more* likely that he had a problem with blacks, not *less*, as racism and sexism are often intertwined. At an unconscious level, he may have regarded a (per- ceived) late submission by a black professor as a more serious violation than one from a white professor. The key fact convincing me of this in- terpretation was my discovery that one of the white professors had sub- mitted her paper after mine but was not publicly criticized for lateness. Although I regarded this differential treatment of "similarly situated" panelists as sufficient proof of racial discrimination, I was surprised to learn that it did not convince some white listeners.

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9. Miller's comments regarding most of the other panelists, who were all white women, were also derisive, but more subtly so. Miller refused to let another professor present at all because apparently she did not submit her paper prior to the conference. His criticism of the others all related to the substance of their papers. None of the other panelists challenged Miller.

INTRODUCTION

Many scholars and judges have noted that we live in two different Americas.[10] Over fifty years after *Brown v. Board of Education*, our neighborhoods, occupations, and social settings remain starkly stratified by race.[11] But fewer people have recognized that this segregation extends to our minds: Black and white people tend to perceive allegations of racial discrimination through fundamentally different cognitive frameworks. Polarizing public events, including Hurricane Katrina and the O.J. Simpson trial, have revealed deep racial divides. In both cases, public opinion polls show blacks and whites strongly disagree as to the possibility of racial bias. According to a CNN poll, 60% of black respondents agreed that, "the federal government was slow in rescuing those stranded in New Orleans after Katrina because many of the people in the Louisiana city were black."[12] Just 12.5% of whites concurred.[13] In 1994, a *CBS News/ New York Times* poll found that roughly 40% of blacks, compared to 15% of whites, believed that the criminal justice system was biased against Simpson.[14]

These moments are not isolated instances but rather manifestations of pervasive racial differences in perceiving discrimination. The Simpson poll, for instance, found an even greater difference between blacks and whites when it asked about racial bias in the criminal justice system in general: Roughly 74% of blacks stated that the criminal justice system generally is biased against blacks, while only 22% of whites perceived such bias.[15]

As long ago as 1896, the Supreme Court recognized a perceptual divide between blacks and whites but dismissed the perceptions of blacks as groundless. In *Plessy v. Ferguson*, the Court opined:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but

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10. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 273 (1995) (Ginsburg, J., dissenting) (referring to "the persistence of racial inequality" in America); Andrew Hacker, Two Nations: Black and White, Separate, Hostile, and Unequal 3 (1992) ("Black Americans are Americans, yet they still subsist as aliens in the only land they know.").

11. See, e.g., Michelle Adams, Radical Integration, 94 Cal. L. Rev. 261, 279 (2006) ("Black and white Americans typically inhabit spatially separate worlds that differ in material resources, security, status, culture, and opportunities.").

12. Reaction to Katrina Split on Racial Lines, CNN.com, Sept. 13, 2005, at http://www.cnn.com/2005/US/09/12/katrina.race.poll/index.html (on file with the *Columbia Law Review*).

13. Id.

14. CBS News/New York Times O.J. Simpson Poll #2, July 1994, available at http://dataserv.libs.uga.edu/icpsr/6602/6602.html (on file with the *Columbia Law Review*).

15. Id.

solely because the colored race chooses to put that construction upon it.[16]

Brown, of course, rebuked *Plessy*'s central rationale.[17] Yet part of *Plessy*'s logic survives and continually surfaces in public discourse on race—the belief that blacks tend to imagine racial discrimination and wrongly perceive themselves as victims.[18] A recent iteration of this argument emerged in the wake of the Simpson trial, which made famous the belief that black people who raise the issue of race may be "playing the race card."[19] Underlying this charge in many cases is the assumption that discrimination is rare. Thus, blacks who assert discrimination are likely using race strategically and dishonestly as an excuse for their own failings, such as Simpson's culpability. Since discrimination is very rare, the argument goes, if blacks are not strategically deploying race, they are likely "paranoid" or "hypersensitive."[20] Their preoccupation with race and victimization causes them to see racial disparities where none actually exist. Women sometimes face similar reactions when they claim discrimination. Men may respond to an allegation of sexual harassment by arguing that the female accuser is hypersensitive and therefore has misinterpreted innocent comments as harassment.[21]

Perceptual disparities, however, cannot be dismissed as the mere byproduct of hypersensitivity, paranoia, or playing the race card. This Article attempts to show, through an examination of numerous empirical studies in Part I, that a *reasonable* outsider might perceive discrimination based on facts that would not persuade a *reasonable* insider.[22] The failure to understand this difference and the reasons for it undermines judicial attempts to apprehend discrimination. Judges tend toward one of two conclusions. Some completely ignore perceptual differences, blindly assuming that we all agree what constitutes "discrimination." Others may recognize a difference in perception, but dismiss casually the outsider's perception as "objectively" unreasonable, not unlike the *Plessy* Court.

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16. 163 U.S. 537, 551 (1896), overruled by Brown v. Bd. of Educ., 347 U.S. 483 (1954).

17. See *Brown*, 347 U.S. at 494–95 ("Any language in *Plessy v. Ferguson* contrary to this finding is rejected.").

18. See infra note 216 and accompanying text (discussing idea that individuals in subordinated groups—"outsiders" in this Article's terminology—tend to imagine or exaggerate discrimination).

19. See infra note 217 and accompanying text (defining "playing the race card" as blacks claiming racism for strategic reasons).

20. See infra note 216 and accompanying text (describing pervasive skepticism of blacks' perceptions of persistent discrimination); infra note 269 and accompanying text (explaining that costs of confronting racial discrimination include public shaming, such as accusations of paranoia).

21. See infra note 218 and accompanying text (discussing claims of women's hypersensitivity).

22. I use the term "outsider" to refer to disadvantaged and subordinated social groups, principally people of color and women. I use "insider" to refer to relatively advantaged and powerful groups, including white people and men. Of course a person may be an insider vis-à-vis one trait and an outsider vis-à-vis another (e.g., a white woman).

This psychological stratification has not been examined in legal scholarship, I suspect, because most scholars have reacted to the Supreme Court's doctrinal understanding of discrimination, which focuses on the alleged perpetrator's mindset.[23] Whether under Title VII's disparate treatment model or the Equal Protection Clause, courts usually require evidence of discriminatory intent in order to find discrimination.[24] For decades, scholars have assailed the law's intent requirement on numerous grounds.[25] Recently, legal scholars have drawn on social cognition science to reveal "implicit bias,"[26] which contributes to the persistence of racial inequities.[27] The judicial focus on explicit evidence of intent is flawed, these scholars argue, because there is often a divergence between explicit measures and implicit measures of bias.[28] Although explicit measures tend to support the intuition of many whites that racial discrimination is abating, implicit measures raise considerable doubts about the reliability of self-reports of bias.[29]

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23. For examples of the Supreme Court's requirement of discriminatory intent, see McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (holding that defendants must show discriminatory purpose in their particular cases); Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that constitutional equal protection violation requires discriminatory purpose).

24. The primary exception to this trend is disparate impact claims under Title VII. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that Title VII reaches disparate impact—i.e., practices that are "discriminatory in operation"—as well as purposive disparate treatment).

25. For a recent example, see Linda Hamilton Krieger & Susan T. Fiske, Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment, 94 Cal. L. Rev. 997, 1053–54 (2006) [hereinafter Krieger & Fiske, Behavioral Realism] (arguing that "the intent requirement . . . is a[n] [illegitimate] judicial innovation").

26. "[I]mplicit bias[ ]" consists of "negative beliefs (stereotypes) and attitudes (prejudice)" against stigmatized groups. Jerry Kang, Trojan Horses of Race, 118 Harv. L. Rev. 1489, 1494 (2005).

27. See, e.g., Gary Blasi, Advocacy Against the Stereotype, 49 UCLA L. Rev. 1241, 1256–57 (2002) (discussing how "basic cognitive mechanisms . . . predispose us toward stereotypes"); Kang, supra note 26, at 1496 (arguing that social cognition "discoveries" help reveal "our individual and collective responsibilities for persistent racial inequality"); Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 Stan. L. Rev. 1161, 1199 (1995) (stating that social cognition theory explains how stereotypes subtly influence people to adopt discriminatory attitudes). Charles Lawrence wrote an early influential article that drew on psychoanalysis to argue that governmental decisions may "take race into account" through "unconscious racism." See Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 323 (1987).

28. See, e.g., Kang, supra note 26, at 1506–14 (discussing problems with only examining explicit biases and explaining that implicit biases are also important).

29. See, e.g., Jerry Kang & Mahzarin R. Banaji, Fair Measures: A Behavioral Realist Revision of "Affirmative Action," 94 Cal. L. Rev. 1063, 1071 (2006) ("[O]n socially sensitive matters such as discrimination, implicit bias scores have greater predictive validity than explicit self-reports.").

"Implicit bias" legal scholars have focused primarily on the psychology of privileged groups or "insiders."[30] Many important insights have emerged from this scholarship, as I discuss at various points below. This Article, however, calls for a new examination of the psychology of the targets of discrimination, or what I call "outsiders." Evidence about insiders' perceptions tells us only part of the story of modern discrimination.[31] This Article begins to flesh out the other half of the story.[32] It points legal scholars to a growing body of empirical evidence on how outsiders anticipate discrimination, perceive that they are being discriminated against, and then attempt to manage discrimination. The goal of this Article is to analyze the relevant science on issues of perception and suggest some potential reforms for the legal system and workplaces.[33]

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30. An important exception is the small body of legal scholarship on "stereotype threat." This scholarship explores how "implicit cognitive processes" can lead members of disadvantaged groups to "underperform when cues remind them of their group identity." Id. at 1087–90; see also Claude M. Steele, A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance, 52 Am. Psychologist 613, 614 (1997) (defining "stereotype threat" as threat that undermines performance on tests by provoking disruptive "emotional reaction[s]" during test-taking and, over time, reducing motivation to succeed). Further, Gary Blasi and John Jost coauthored a recent law review article that imports psychological scholarship on "[s]ystem [j]ustification [t]heory." Gary Blasi & John T. Jost, System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice, 94 Cal. L. Rev. 1119, 1119 (2006). System justification theory holds that outsiders have strong incentives to minimize discrimination, in order to avoid the view that the social world is structurally aligned against them. Id.

Legal scholarship's focus on "insiders" may flow in part from the trend among social psychologists to overlook the perceptions of outsiders until relatively recently. See, e.g., Brenda Major et al., Perceiving Personal Discrimination: The Role of Group Status and Legitimizing Ideology, 82 J. Personality & Soc. Psychol. 269, 269 (2002) [hereinafter Major et al., Perceiving] ("For more than half a century, social psychologists have examined stereotyping, prejudice, and discrimination, primarily from the perspective of members of dominant social groups.").

31. I use the term "modern discrimination" to refer to the contemporary phenomenon in which overt evidence of discrimination is decreasing, yet implicit bias appears to continue to be widespread.

32. This is not to say that no legal scholar has ever touched on the other half of the story. Devon Carbado and Mitu Gulati have explored on a theoretical level a phenomenon they call "working identity," which is related to this Article's focus on "outsider" perceptions of discrimination. Carbado and Gulati's theory suggests that outsiders are keenly aware of stereotypes and "work identity" in order to rebut them by self-consciously behaving in ways that seek "to avoid discrimination." See, e.g., Devon W. Carbado & Mitu Gulati, Working Identity, 85 Cornell L. Rev. 1259, 1262 (2000) [hereinafter Carbado & Gulati, Identity].

33. This Article also seeks to build on insights by Jerry Kang and Devon Carbado and Mitu Gulati regarding the relationship between narrative and empiricism. While many scholars have framed empiricism and storytelling as oppositional methodologies, see, e.g., Daniel A. Farber & Suzanna Sherry, Telling Stories Out of School: An Essay on Legal Narratives, 45 Stan. L. Rev. 807, 807–09 (1993), I share Kang, Carbado, and Gulati's belief that employing multiple methodologies will yield more robust understandings of race. See Kang, supra note 26, at 1496–97 (arguing that combination of social psychology, social science, and literary techniques "produce[s] the deepest insight" into race); Devon W. Carbado & Mitu Gulati, The Law and Economics of Critical Race Theory, 112 Yale L.J.

Although I argue that outsiders on average perceive allegations of discrimination through a fundamentally different framework than insiders, I fully recognize that there are exceptions to this trend, as evidenced by Joel in my introductory narrative. Moreover, change is possible because perceptual differences are social constructs, like race and gender, and are neither biological nor necessarily fixed.[34]

Perceptual differences are complex and multilayered. My description of the average insider and outsider is necessarily crude, but my hope is that future work will build on this Article and provide greater definition and clarity to perceptual differences.

My focus is race and gender because the available data tend to concentrate on these traits. Based on studies and polls, I believe that the black-white racial divide probably poses the starkest perceptual chasm.[35] Unfortunately, the data on other racial minorities are both limited and mixed. Accordingly, I present such data where it is available, but I avoid drawing conclusions about the applicability of perceptual segregation theory to other races. The distinction between blacks and nonblack people of color is consistent with racial trends in scores on the Implicit Association Test ("IAT"), which plays a central role in much implicit bias scholarship, as I discuss more fully below.[36] Nonetheless, there may very

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1757, 1785 (2003) (book review). I hope that this Article will demonstrate that narratives can frame important questions for empirical study, and empirical studies can corroborate or complicate intuitions arising from lived experiences.

34. See, e.g., Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. Pa. L. Rev. 1, 39–40 (1995) (discussing social construction of gender); 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, 7 (1994) (rejecting "the idea that race is a fixed essence and instead locat[ing] races with the cartography of other social constructions").

35. I recognize that some readers might view this limitation in scope as a reflection of the "Black/White binary paradigm of race." Juan F. Perea, The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought, 85 Cal. L. Rev. 1213, 1214 (1997). Although I think it is critical to apply the insights of this Article to other people of color, I am not able to do that work in this limited space. Cf. id. at 1256–57 (acknowledging focus on Mexican-Americans, rather than on other Latinos, Asian-Americans, Native Americans, and/or nonblack people of color).

36. See Christine Jolls, Antidiscrimination Law's Effects on Implicit Bias, in 3 NYU Selected Essays on Labor and Employment Law: Behavioral Analyses of Workplace Discrimination 69, at 72, 77–80 (Mitu Gulati & Michael J. Yelnosky eds., 2007) [hereinafter Jolls, Antidiscrimination] (summarizing IAT-based legal scholarship); infra notes 395–398 and accompanying text. The IAT:

> assesses associations between two concepts (e.g., *African American* and *European American*) and two attributes (e.g., *good* and *bad*). Exemplars representing each of the categories appear at the center of the computer screen and participants categorize them into one of the four superordinate categories as quickly as possible using two computer keys. . . . Categorizing the exemplars more quickly when *African American* and *bad* (and *European American* and *good*) share a response key compared to when *African American* and *good* (and *European American* and *bad*) share a response key is taken to indicate an implicit preference for European American compared to African American.

well be a spectrum of different perceptions on issues of discrimination. Each community of color, in light of its unique social position and history, might develop its own particular understandings of race and discrimination. The black-white divide, which is my focus here, may form just one component of a fractured social conception of discrimination.

This Article proceeds as follows. In Part I, I examine psychological studies, public opinion polls, and other data that corroborate my intuition that perceptual disparities separate outsiders from insiders. Then, in Part II, I flesh out my theory of perceptual segregation. In Part III, I analyze studies that complicate the potential claim that Part II's evidence shows merely that blacks and women are hypersensitive or paranoid. Although a complex set of factors determines the extent to which blacks and women perceive and claim discrimination, several factors give them disincentives to identify and challenge discrimination. Let me emphasize that I do not present this information in an attempt to prove that outsiders are more accurate in their assessments of allegations of discrimination. I cannot fully address that rather difficult question in this Article, which focuses on describing the phenomenon of perceptual segregation.[37] The point instead is that both the outsider and insider may be reasonable and yet differ substantially as to the likelihood that discrimination occurred; neither can be wholly blamed for the disparity because of irrational perceptions.[38]

In Part IV, I consider some of the implications of perceptual segregation for the legal system's adjudication of Title VII claims and for workplaces. The evidence of significant disparities calls for self-reflexive skepticism of our individual perceptions. In addition to urging individuals to question their intuitions about discrimination and to strain to see and understand the forces that create contrary perceptions, this Article calls into question the legal system's ability to adjudicate claims of race and sex discrimination in a way that is satisfactory to outsiders. Although Title VII was enacted primarily to protect people of color and women by increas-

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Brian A. Nosek et al., Pervasiveness and Correlates of Implicit Attitudes and Stereotypes 4 (2006) (unpublished manuscript, on file with the *Columbia Law Review*), available at http://graphics8.nytimes.com/packages/pdf/business/20061202money2.pdf. Although a a growing body of psychological scholarship relies on the IAT, see Kang & Banaji, supra note 29, at 1072 n.46, there is some debate about what the IAT measures, see, e.g., Andrew Karpinski & James L. Hilton, Attitudes and the Implicit Association Test, 81 J. Personality & Soc. Psychol. 774, 787 (2001) (urging scholars to be "cautious" in light of alternative theories of IAT's meaning)

37. In declining to resolve the accuracy question in this context, I do not mean to imply that I am neutral or agnostic on the question of whether black or white perceptions are more accurate regarding the prevalence of race discrimination. Further, I do discuss the tendency of some outsiders to minimize discrimination in order to cast doubt upon the popular explanation for perceptual differences, which is that outsiders are generally paranoid or hypersensitive.

38. This, however, is not to say that there are simply two different, contingent perspectives on racial discrimination, and that it is futile for courts and scholars to try to determine whether discrimination actually occurred in any particular instance.

ing their employment opportunities, the judges that enforce it are usually members of privileged groups and have little direct experience with, or sensitivity to, the perceptions of outsiders. In a few places, however, Title VII's doctrinal framework can be read to recognize a potential disparity between outsiders and insiders and to attempt to strike a balance between the two. These doctrinal spaces might provide a starting point for using the law to bridge perceptual differences. I focus, however, on some voluntary structural reforms in workplaces that might prevent discrimination and reduce Title VII claims, including positioning outsiders on hiring committees to debias the committee's deliberations and deter perceptions of bias.

I. PERCEPTUAL DIFFERENCES: THE EMPIRICAL FOUNDATION

A. *Race*

This section marshals evidence that supports the theory of perceptual segregation: Blacks and whites, on average, tend to view allegations of racial discrimination through substantially different perceptual frameworks. I begin by examining surveys on perceptions of racial discrimination in the workplace and then move to surveys on perceptions of whether blacks and other minorities are treated fairly in society in general. In addition, I consider two polls that asked respondents whether the U.S. government may have fostered certain social problems in black communities, such as AIDS and drugs, to ensure racial subordination. Finally, I examine a study that asked black respondents to estimate the likelihood of discrimination in several hypothetical daily interactions that involved a black person being rejected by a white person. All of these studies point to significant differences in perceptions of racial discrimination that correlate with the race of the perceiver.

1. *Perceptions of Racial Discrimination in the Workplace.* — Compelling support for the theory of perceptual segregation comes from the Heldrich Center for Workplace Development at Rutgers University, which interviewed approximately 3,000 employees on various issues related to workplace equality.[39] The survey found that:

> [W]orkers describe two very different workplaces. The workplace described by the white worker is one where equitable treatment is accorded to all, few personally experience discrimination, and few offer strong support for policies such as affirmative action . . . . In stark contrast, the workplace of nonwhite workers is one where the perception of unfair treatment is significantly more pronounced, where many employment policies such as hiring and promotion are perceived as unfair to African-

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39. K.A. Dixon, Duke Storen & Carl E. Van Horn, John J. Heldrich Ctr. for Workplace Dev., Rutgers Univ., A Workplace Divided: How Americans View Discrimination and Race on the Job 5 (2002), available at http://www.heldrich.rutgers.edu/uploadedFiles/Publications/Work_Trends_020107.pdf (on file with the *Columbia Law Review*).

American workers, and where support for corrective action is high.[40]

Half of the African American respondents said that "African-Americans are treated unfairly in the workplace," while just 10% of white respondents agreed with that statement.[41] Thirteen percent of nonblack people of color shared this perception.[42] Almost half (46%) of the African Americans surveyed said their employer awarded promotions in a manner unfair to African Americans, compared to 6% of whites and 12% of nonblack people of color.[43] The data suggest that many African American perceptions are not based solely on personal experiences with workplace discrimination: Just 28% of African Americans said that they had personally been treated unfairly at work because of race.[44] Nevertheless, African Americans on average appear to be more sensitive to and conscious of potential workplace discrimination against other African Americans.[45] To illustrate, 55% of black employees said that they knew of instances in the last year in which a coworker believed they suffered racial discrimination.[46] A mere 13% of whites, and 21% of nonblack people of color, reported similar awareness.[47]

Even when employees acknowledge allegations of discrimination, racial differences endure. A large majority of white workers (86%) said that, "their employer takes incidents of discrimination in the workplace seriously," while only 61% of African Americans agreed.[48] Nonblack people of color were in between blacks and whites at 74%.[49] Despite generally favorable impressions of employer responses to discrimination claims, even among blacks, employees who reported being discriminated against (who were predominantly people of color) were generally dissatisfied with their employer's response. Sixty-three percent of this group said the

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40. Id. at 1. Although the report's authors described the divide as a white/nonwhite difference, the underlying results suggest that the real difference is between blacks and nonblacks. On balance, nonblacks in this poll tended to report perceptions closer to whites than blacks. I summarize these results in the text.

41. Id. at 8.

42. Id.

43. Id. at 14.

44. See id. at 11. Sixteen percent of nonblack people of color said they had been treated unfairly at work because of race; 6% of white people reported such treatment. Id.

45. However, the difference is also consistent with the well-documented phenomenon called the "personal/group discrimination discrepancy." Several studies have found that the average outsider is likely to claim that discrimination is prevalent against her group, yet deny that she has personally suffered discrimination. See, e.g., Virginia Valian, Why So Slow? The Advancement of Women 164 (1998); Faye Crosby, The Denial of Personal Discrimination, 27 Am. Behav. Scientist 371, 371–72, 376 (1984). The studies exploring why outsiders minimize personal discrimination, discussed infra Part III, may explain why personal perceptions of discrimination are consistently lower than perceptions of group discrimination.

46. Dixon et al., supra note 39, at 11.

47. See id.

48. Id. at 3.

49. Id. at 12.

employer ignored their claim or took no action.[50] Just 7% reported that the employer reprimanded the alleged perpetrator.[51] In fact, the employee making the charge of discrimination was more likely to be transferred or fired as a result of the complaint (5% of the time) than the alleged perpetrator (2%).[52] Based on these various findings, the survey's authors concluded that "race is the most significant determinant in how people perceive and experience discrimination in the workplace, as well as what they believe employers should do to address such incidents and attitudes."[53]

2. *Surveys of Perceptions of Societal Discrimination.* — Surveys that address perceptions of discrimination more broadly confirm a black-white divide on the prevalence on antiblack discrimination. A 1996 U.S. Merit Systems Protection Board report found that, "while 55 percent of African American survey respondents believe that African Americans are subjected to 'flagrant or obviously discriminatory practices' in the federal workplace, only 4 percent of White survey respondents share this perspective about the treatment of African Americans."[54] Similarly, a 2003 Gallup poll found that "two-thirds of non-blacks say they are satisfied with the way blacks are treated," but nearly two-thirds (59%) of blacks are *dis*satisfied with the treatment of black people.[55] The poll also asked about satisfaction with the treatment of "Hispanics." Two-thirds of non-Hispanics expressed satisfaction; 51% of Hispanics agreed.[56] Blacks were much closer to Hispanics than whites in this regard—53% of blacks were satisfied with the treatment of Hispanics.[57] By contrast, although Hispanics were "somewhat more pessimistic than the general population about the way blacks are treated (58% are satisfied), their expressed level of satisfaction about black treatment is closer to that of whites (68%) than blacks (40%)."[58]

Another 2003 Gallup poll looked at discrimination in local contexts. Seventy-three percent of whites said that blacks were treated the same as

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50. See id.

51. Id.

52. Id. at 12–13.

53. Id. at 1. Race had a more significant effect on perception than income or education. "Among higher and lower income African-Americans, there is very little difference in the perception of discrimination in the workplace." Id.

54. Charles E. Friedman, U.S. Merit Systems Protection Board, Fair and Equitable Treatment: A Progress Report, 17 Rev. of Pub. Personnel Admin. 9, 13–17 (1997) (emphases removed) (describing findings of 1996 report).

55. Steve Crabtree, Worlds Apart? Treatment of Groups in Society, Gallup Poll News Service, July 15, 2003, at http://www.gallup.com/poll/8851/Worlds-Apart-Treatment-Groups-Society.aspx (on file with the *Columbia Law Review*).

56. Id.

57. Id.

58. Id.

whites in the local community.[59] Only 39% of blacks agreed.[60] Half of blacks said they had been treated unfairly in the past thirty days in at least one context.[61] The most likely sites of perceived discrimination in the past thirty days were places of public accommodation (28% for stores; 24% for restaurants, bars, and theatres) and the workplace (23%).[62] The results showed considerable variation from context to context. For instance, 7% of blacks felt that blacks were treated less fairly on local public transportation, while 69% of blacks perceived unfairness in dealing with the police.[63] Despite this variance, in general, "blacks are much more likely than whites to say that blacks are treated less fairly, in virtually all situations considered" in the poll.[64] A 2007 Pew Research Center survey also found high levels of perceived discrimination among blacks but significant variance depending on the specific context:

> 67% say that blacks often or almost always face discrimination when applying for a job, 65% say the same about renting an apartment or buying a house, 50% say this about eating at restaurants and shopping, and 43% say it about applying to a college or university. By contrast, whites, by majorities of two-to-one or larger, believe blacks rarely face bias in such situations.[65]

A related perceptual difference between blacks and whites emerges from questions that Gallup has regularly asked as to whether race relations are getting better or worse. These questions are important because one source of frustration amongst whites appears to be the perceived failure of blacks to acknowledge that race relations have improved. I have witnessed such frustration during presentations by black scholars on the persistence of racial discrimination. In fact, when I have presented my own scholarship on race, I often get a question that basically asks, "But haven't things improved substantially?" or "Haven't we come a long way?" The sense I get is that the white people who ask these questions feel that I

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59. Jack Ludwig, Blacks and Whites Still Perceive Local Treatment of Blacks Differently, Gallup Poll News Service, May 27, 2003, at http://www.gallup.com/poll/8476/Blacks-Whites-Still-Perceive-Local-Treatment-Blacks-Differently.aspx (on file with the *Columbia Law Review*).

60. Id.

61. Id.

62. Id.

63. Id.

64. Id.

65. Pew Research Ctr., Optimism About Black Progress Declines, Blacks See Growing Values Gap Between Poor and Middle Class 5, 30–32 (2007), available at http://pewsocialtrends.org/assets/pdf/Race.pdf [hereinafter Pew Research Ctr. Report] (on file with the *Columbia Law Review*). The Pew Center describes itself as a "nonpartisan 'fact tank'." Id. at i. The underlying survey gathered a nationally representative sample of 3,086 adults, including an oversample of 1,007 non-Hispanic blacks. The margin of error was plus or minus 2.5 percentage points for the full sample and 4 points for the non-Hispanic black sample. Id. The Pew Research Center question asked, "how often do you think blacks are discriminated against when they . . . apply for a job [or another context, such as buying a home]," id. at 79, while the 2003 Gallup poll asked whether the black respondent had *personally* experienced discrimination within a narrow window of time, the last thirty days.

have a "glass half empty" perspective—determined to dwell on the negative rather than the positive developments. Gallup's results reveal a similar racial difference in perspective. It is not that, when pressed, most blacks would deny that progress has been made—seven in ten black respondents in Gallup's 2003 poll agreed that things were either "greatly improved" (25%) or "somewhat improved" (46%).[66] Yet, for blacks, this progress generally does not translate into satisfaction the way it does for whites. Eighty-one percent of blacks reported that blacks still lack equal job opportunities (43% of whites agreed), and 52% of blacks called for the enactment of new civil rights laws (20% of whites agreed).[67]

3. *Perceptions of Government Discrimination Against Blacks.* — An examination of reactions of racial groups to various public policy issues involving potential racial discrimination also reveals significant differences between blacks and whites. A study by Jennifer Crocker and coauthors asked 238 black and white college students about "conspiracy theory" explanations for various social ills that fall disproportionately on black communities.[68] The questions included whether the government might have created AIDS, made drugs available in black communities, or subjected black government officials to greater surveillance.[69] With respect to each of thirteen questions, "Blacks were far more likely to endorse the conspiracies than were Whites."[70] For instance, 84.1% of the black respondents reported that it "might possibly be true" or is "definitely true" that "the government deliberately makes sure that drugs are available in poor Black neighborhoods," while a mere 4.2% of whites agreed.[71] Roughly 60% of blacks stated that that it might be or is definitely true that "the virus that causes AIDS was deliberately created in a laboratory to infect Black people"; 9.5% of whites concurred.[72] On the question of public officials, 86.4% of the black respondents thought that it might be or is

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66. Lydia Saad, Black Dissatisfaction Simmers Beneath Good Race Relations, Gallup Poll News Service, Aug. 22, 2003, at http://www.gallup.com/poll/9100/Black-Dissatisfaction-Simmers-Beneath-Good-Race-Relations.aspx (on file with the *Columbia Law Review*).

67. Id. at 3–4.

68. See Jennifer Crocker et al., Belief in U.S. Government Conspiracies Against Blacks Among Black and White College Students: Powerlessness or System Blame?, 25 Personality & Soc. Psychol. Bull. 941, 944–45 (1999) [hereinafter Crocker et al., Government Conspiracies]. The sample was 40.3% white and 38.2% black; the remaining students (21.5%) of other races were ultimately excluded from the results. Id. at 943.

69. Id. at 946.

70. Id. The mean level of endorsement for blacks was 4.16 on a seven point scale (with seven being the highest level of endorsement); for whites, the mean was 1.67. Id. at 946 tbl.1, 949.

71. Id. at 946 app. A.

72. Id.; see also Gary Alan Fine & Patricia A. Turner, Whispers on the Color Line: Rumor and Race in America 158 (2001) ("Many prominent African-Americans, including Louis Farrakhan, Spike Lee, Grace Jones, and Bill Cosby, as well as doctors, lawyers, and professors, have expressed the belief that AIDS might have been deliberately created.").

definitely true that "government deliberately singles out and investigates Black elected officials to discredit them"; 53.7% of whites agreed.[73]

The Crocker study compared its results to a 1990 poll by the *New York Times* and CBS News, which had posed some of the same questions to nonstudents. The *Times*/CBS News poll found a "racial chasm" between perceptions of black and white respondents, although both groups seemed to be more skeptical of conspiracy theories than the students surveyed by Crocker.[74] For instance, 77% of black adults (compared to 86.4% of students) and 34% of white adults (compared to 53.7% of students) agreed with the conspiracy theory regarding black public officials.[75] One possible explanation for these disparities, which the authors recognized, was differential knowledge of historical instances of racial discrimination, such as the Tuskegee syphilis study.[76] The more recent racial divide over Hurricane Katrina further illustrates that blacks tend to see racial discrimination in public crises that disproportionately harm black communities, while whites tend not to.[77]

4. *Estimations of Discrimination in Various Hypothetical Situations.* — Consider the following scenarios, from a study that asked African American subjects to evaluate a set of common scenarios that could have involved racial discrimination.[78] As a thought experiment, the reader might ask herself in reading each scenario: "To what extent would I interpret this outcome as likely to involve racial discrimination?" (For purposes of the thought experiment, if the reader is not African American, she should assume that "you" refers to an African American.)

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73. Crocker et al., Government Conspiracies, supra note 68, at 946 app. A.

74. See id. at 946 ("[B]elief in these conspiracies is at least as widespread, and perhaps more so, among relatively advantaged college students [the subjects in the Crocker study] as it is in the general population [as polled in the 1990 *New York Times*/CBS *News* poll].").

75. Id. (discussing results of *Times*/CBS News poll). As reported by Crocker, a *New York Times* poll found that 19% of black adults agreed with the AIDS conspiracy, compared with 5% of white adults. Sixty percent of black adults agreed with the drugs conspiracy, compared to 16% of white adults. Id.

76. See Cathy J. Cohen, The Boundaries of Blackness: AIDS and the Breakdown of Black Politics 50 (1999) (arguing that the "medical exploitation of black sharecroppers during the Tuskegee Syphilis Study" is part of the "collective memory" of African Americans); Crocker et al., Government Conspiracies, supra note 68, at 949 ("It should be noted that a number of historical events, such as the Tuskegee syphilis study, provide a compelling reason for Black Americans to suspect that the U.S. government is capable of conspiring to harm Black Americans." (citations omitted)); c.f. Fine & Turner, supra note 72, at 127 (discussing relevance of Tuskegee experiment in black consciousness of conspiracy rumors).

77. As noted earlier, 60% of black respondents in one survey opined that the federal government failed to respond aggressively to Katrina because many of the people in New Orleans were black, yet only 12.5% of whites shared this perception. See supra notes 12–13 and accompanying text.

78. See Nyla R. Branscombe et al., Perceiving Pervasive Discrimination Among African-Americans: Implications for Group Identification and Well-Being, 77 J. Personality & Soc. Psychol. 135, 139–40 (1999) (describing study design).

Suppose you go into a "fancy" restaurant. Your server seems to be taking care of all the other customers except you. You are the last person whose order is taken.

Suppose you go to look at an apartment for rent. The manager of the building refuses to show it to you, saying that it has already been rented.

Suppose you are attracted to a particular white man/woman and ask that person out for a date and are turned down.

Suppose your boss tells you that you are not performing your job as well as others doing that job.[79]

The authors of the study posed these scenarios and six other similar scenarios to 139 African Americans.[80] The respondents circled the percentage likelihood that the outcome was due to discrimination on a scale ranging from 0% (due to factors other than racial prejudice) to 100% (completely due to racial prejudice).[81] White readers might be surprised that the participants thought it was more likely than not (50% or higher) that the outcome was due to discrimination in eight of the ten scenarios. In the two exceptions, involving a boss characterizing the employee's job performance as deficient and a meter maid giving a ticket even after protestations that the meter has only just expired, the percentage was slightly under 50%.[82] Overall, the mean for the ten scenarios was 62%.[83] There was, however, significant variation, suggesting that African Americans do not uniformly perceive discrimination, even if, on average, they perceive more discrimination against blacks than do whites. The mean was 72.3% for the fancy restaurant scenario; 68.2% for the apartment; 62.9% for the date rejection; and 46.8% for the deficient job performance scenario.[84] While the Branscombe study did not compare whites' and blacks' perceptions, the relatively high mean for most of the scenarios lends support to the other studies' conclusions that blacks tend to perceive discrimination more frequently than whites.

Some might suspect that socioeconomic class explains perceptual disparities better than race. If class is most salient, one might argue, middle- and upper-income blacks' views on discrimination should track those of whites of the same class. Not all of the aforementioned surveys and studies reported data on class. Those that did look at class, however, suggest that heightened black perceptions of discrimination cut across socioeconomic classes, connecting low-income blacks with those who earn higher incomes. For instance, the Crocker study on government conspiracies found that class did not predict the likelihood that a black person

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79. Id. at 139.
80. Id. At least half were students, and the remainder was made up of members of churches and other African American organizations. Id.
81. Id. at 139 tbl.1.
82. Id.
83. Id. at 140.
84. Id. at 139 tbl.1.

would endorse a conspiracy theory.[85] The Pew Research Center report concluded that in general, "[p]erceptions of the extent of racial bias against blacks do not vary much among different demographic groups within the African-American community," but "[b]etter-educated blacks . . . are more likely than less educated blacks to say discrimination is more frequent."[86] In sum, these studies show that many blacks perceive antiblack discrimination to be prevalent in several important domains, including employment, government, and places of public accommodation, and that whites typically perceive much less antiblack discrimination.

B. *Gender*

This section examines perceptions of gender discrimination and compares them to disparities in perceptions of racial discrimination. The available data suggest significant differences between men and women in perceptions of discrimination, especially sexual harassment, yet the differences appear to be more modest than the racial differences discussed above. First, I consider polls on gender discrimination in the workplace and in society in general. Second, I examine several empirical studies on gender differences in perceptions of sexual harassment.

The evidence from polls, while mixed, generally suggests that there are perceptual differences between men and women. In a 2003 Gallup poll on gender equality, 56% of women said that women do not have the same job opportunities as men, while 44% of men agreed with that statement.[87] A 2005 follow-up poll found a continuing gender gap, but also growth among women perceiving improvement in job opportunity. In 2005, 45% of women (and 61% of men) said women had equal job opportunities;[88] in 2001, just 32% of women had said so.[89] In 2003, a majority of women reported experiencing gender discrimination in the workplace or public life.[90] As the Gallup report stated, "[d]espite these concerns, women are far more positive about gender fairness in society than blacks are about racial fairness, or than Hispanics are about society's

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85. See Crocker et al., Government Conspiracies, supra note 68, at 946 (finding that participants' family income was not significant predictor "once race of participants was controlled").

86. Pew Research Ctr. Report, supra note 65, at 32 ("Fully three-quarters of all blacks who have graduated from college say blacks often face racism when applying for jobs, a view expressed by about six-in-ten (61%) blacks with a high school degree or less.").

87. See Lydia Saad, Women Skeptical of Societal Fairness to Their Gender, Gallup News Service, Oct. 9, 2003, at http://www.gallup.com/poll/9433/Women-Skeptical-Societal-Fairness-Their-Gender.aspx [hereinafter Saad, Women Skeptical] (on file with the *Columbia Law Review*).

88. See Jeffrey M. Jones, Gender Differences in Views of Job Opportunity, Gallup Poll News Service, Aug. 2, 2005, at http://www.gallup.com/poll/17614/Gender-Differences-Views-Job-Opportunity.aspx (on file with the *Columbia Law Review*).

89. See Saad, Women Skeptical, supra note 87.

90. See id.

treatment of their ethnic group."[91] Sixty-nine percent of women were generally satisfied with society's treatment of their group, while 40% of blacks reported the same level of satisfaction with the treatment of their group.[92]

The significance of gender in perceptions of discrimination is complex and depends in part on how you parse the numbers. Seventy-six percent of men were either "[v]ery satisfied" or "[s]omewhat satisfied" with the treatment of women in society. As noted above, 69% of women—a relatively close number—expressed similar satisfaction. On closer analysis though, 36% of men were "[v]ery satisfied," while only 21% of women expressed that highest level of satisfaction.[93] When one factors in race, the picture becomes even more complicated. Black people (male and female) were less satisfied than women with the treatment of women: 52% of blacks (compared with 69% of women) were either "[v]ery satisfied" or "[s]omewhat satisfied."[94] Similarly, on the related question of support for affirmative action for women, more blacks (77%) favored affirmative action than did women (62%).[95] In reporting personal instances of discrimination, women were much closer to Hispanics than blacks, who reported significantly greater exposure to discrimination. Compared to blacks (39%), about half as many women (22%) and Hispanics (20%) reported monthly exposure to discrimination.[96] Likewise, compared to women (42%) and Hispanics (41%), half as many blacks (19%) said they "never" experienced discrimination.[97] Interestingly, despite these differences in perceived exposure to discrimination, the public is more supportive of affirmative action for women than for racial minorities.[98]

More evidence suggesting perceptual differences can be found in studies on sexual harassment. Psychological scholars, including Antonia Abbey, have conducted several studies over the last few decades designed to identify gender differences in perceptions of potential sexual harass-

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91. Id.

92. See id. (discussing responses to "questions that explore women's perceptions about their treatment in society"). Although I use the poll's terms "blacks" and "women," I fully recognize that black women are constituents of both groups and have distinct experiences that may not have been picked up by these polls. See Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139, 140 [hereinafter Crenshaw, Demarginalizing] (describing black women as "multiply burdened" and stating that antiracist and antisexist discourses often do not "take intersectionality into account").

93. See Saad, Women Skeptical, supra note 87.

94. See id.

95. See id. Fifty-five percent of whites supported such affirmative action, as did 69% of Hispanics.

96. See id.

97. Id.

98. See id. (citing 2003 Minority Relations poll finding that 59% favored affirmative action for women and 49% for "racial minorities").

ment. As Abbey has written, "[e]vidence from a number of studies indicates that men tend to perceive other people and relationships in a more sexualized manner than women do."[99] This approach argues that perceptual differences are partly to blame for sexual harassment. Men may conclude that women are behaving in a sexually oriented way when women intend their behavior merely to be friendly.[100] When men act on these perceived sexual advances, the theory goes, women react with surprise and offense.[101]

The evidence supporting this theory is somewhat mixed. One study, led by Catherine Johnson, compared male and female students' assessments of actors performing a professor-student interaction and found that male and female perceptions differed, in some respects, but not across the board.[102] In the study, the same actors (one male, one female) took turns playing each role and were instructed to express varying degrees of sexual interest. The intent was to make the student's response to the professor somewhat ambiguous, and thus subject to interpretation, rather than a clear rejection or affirmation.[103] Viewers were asked to rate each actor's intent to act flirtatious, seductive, promiscuous, and sexy on a seven point scale.[104]

In the male professor-female student dyad, the male viewers did not differ from the females in their assessment of the male professor, but they rated the female student as sexier, more promiscuous and more attractive than did the female viewers.[105] When the male and female actors switched roles, the male viewers rated the female professor as more flirtatious and seductive and sexier than did the female viewers.[106] Men also rated the male student as trying to behave slightly sexier.[107] The study also varied the level of harassment to see whether that would affect the gender differences. The male viewers' ratings of the male professor did

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99. Antonia Abbey, Misperceptions of Friendly Behavior as Sexual Interest: A Survey of Naturally Occurring Incidents, 11 Psychol. Women Q. 173, 173 (1987) (citation omitted).

100. See, e.g., Catherine B. Johnson et al., Persistence of Men's Misperceptions of Friendly Cues Across a Variety of Interpersonal Encounters, 15 Psychol. Women Q. 463, 464 (1991) ("When women attempt to create a friendly atmosphere at work or school, their behavior may be (mis)interpreted by men as a sign of sexual interest or availability. Men may then act on these (mis)perceptions in a way that is offensive to women and that women label as sexual harassment.").

101. See id. ("Women's threshold for labeling behaviors as harassment appears to be lower than men's." (citation omitted)).

102. There were 187 female students and 165 male students from ages seventeen to thirty-seven. Id. at 466.

103. See id. ("In order to make the videotaped encounters between the professor and the student appear more realistic, the student's response to the professor was muted.").

104. Id. at 467.

105. Id. at 469.

106. See id. (concluding that "men's differential perceptions of the actors . . . persisted in ratings of the female whether she was in a superior or subordinate role").

107. Id.

not increase in the most harassing condition, but the female viewers' ratings did, suggesting that, "women were particularly sensitive to the male professor's behavior in the most harassing condition."[108] The male viewers consistently

> rated the actors in more sexual terms than did females, with one exception (a male professor). Specifically, men more than women believed that the female actor, whether she portrayed the student or professor, was trying to behave in a more promiscuous, seductive, and sexy manner, and they believed that the male student was trying to act in a more sexy manner.[109]

That said, some of the gender differences were relatively small. The mean for the male rating of the female student's flirtatiousness, for instance, was 2.76, while the female mean was 2.65.[110] The greatest difference was the rating of the female professor's sexiness—4.67 male; 3.25 female.[111]

Barbara Gutek and several co-authors' review of the literature on gender differences in perceiving sexual harassment confirms these mixed findings. They explain that two types of studies have predominated: scenario studies, like the Johnson study discussed above, and surveys that asked whether particular conduct, such as sexual touching and sexual comments, constitute harassment. Gutek's review concluded that "[a]lmost all survey studies have found significant differences between the sexes on at least one category of behavior, but also substantial agreement on other categories."[112] Scenario studies have likewise consistently shown women to be "somewhat more likely than men to identify behavior as sexually harassing or inappropriate."[113] But there are "several caveats: The size of the effect was small, the variation among men and among women was often substantial, factors other than sex have been shown to have as large or larger effect, and most studies did not take into account factors correlated with sex."[114] Other meta-analyses have reached similar conclusions.[115] The upshot appears to be that gender differences in per-

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108. Id. at 469–70.

109. Id. at 471–72.

110. Id. at 470.

111. Id.

112. Barbara Gutek et al., The Utility of the Reasonable Woman Legal Standard in Hostile Environment Sexual Harassment Cases: A Multimethod, Multistudy Examination, 5 Psychol. Pub. Pol'y & L. 596, 603 (1999); see Elizabeth L. Shoenfelt et al., Reasonable Person Versus Reasonable Woman: Does it Matter?, 10 Am. U. J. Gender Soc. Pol'y & L. 633, 649–50 (2002) ("While most research indicates a gender difference in perceptions of sexual harassment, some researchers have found that there are little or no gender differences.").

113. Gutek et al., supra note 112, at 603 (internal citation omitted).

114. Id.

115. See Jeremy A. Blumenthal, The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment, 22 Law & Hum. Behav. 33, 43 (1998) (summarizing eighty-three effect sizes and reporting mean that "can be characterized as slightly larger than a 'small' effect"); Maria Rotundo et al., A Meta-

ceiving discrimination, including harassment, are significant, but are not as great as the perceptual divide between blacks and whites.

II. PERCEPTUAL SEGREGATION THEORY

In this Part, I describe more fully my theory of perceptual segregation, which builds on the studies I have just presented. I first flesh out what I mean when I say that there are significant perceptual differences between insiders and outsiders. Although I focus primarily on black-white differences, which I believe to be the paradigmatic divide, I address how gender diverges from race in the final section of this Part.

A critical racial difference is that blacks and whites are likely to differ on the very definition of racial discrimination. Because they are using different definitions, blacks may reasonably conclude that discrimination has occurred even as whites may reasonably disagree. I explore the causes of perceptual disparities, emphasizing that such differences are not inherent differences that stem from biology, but rather are manifestations of persistent racial and gender stratification in our society. Moreover, the differences are maintained by the lack of meaningful discussion between people of different races and genders as to their genuine perceptions of discrimination.

The theory of perceptual segregation predicts that blacks and whites, on average, will interpret allegations of racial discrimination through substantially different perceptual frameworks and often will reach different conclusions about whether discrimination has occurred. This is not to say that perception is entirely a product of subject position, that there is no reality of discrimination, or that reaching agreement between people of different races on issues of discrimination is impossible. It is to say that blacks and whites on average find different aspects of an event salient, and these differences create significant obstacles to cross-racial understanding.

I call the typical white perspective the "colorblindness perspective." This perceptual framework views discrimination as an aberration from a colorblind norm, and it regards most forms of race-consciousness as socially disruptive. I call the typical black perspective the "pervasive prejudice perspective," and it views discrimination as a commonplace event, rooted in daily social dynamics. Given this understanding, it is rational—rather than strategic or paranoid—for blacks to be attentive to racial dynamics and to view some conduct that many whites would see as benign as in fact discriminatory. Because most instances of perceived discrimination contain some ambiguity, a person's overarching framework may be more determinative than the facts of the particular incident in forming the person's initial opinion. That is, if one is presented with facts that are open to two different interpretations and one is unsure

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Analytic Review of Gender Differences in Perceptions of Sexual Harassment, 86 J. Applied Psychol. 914, 919 (2001) (describing mean effect size as "not large").

which is accurate, one is likely to follow background assumptions about discrimination—such as, "most people are colorblind," or, "racial discrimination is pervasive." The differing reliance on these assumptions between whites and blacks indicates racial perceptual segregation.

A. *Informational and Incentive Disparities*

As a general matter, racial experiences lead to racialized bases of knowledge. Black and white people draw on this knowledge both consciously and unconsciously, creating different cognitive frames. These cognitive frames pick up on different environmental cues and therefore produce "different information" about the same event.

To illustrate, consider the following hypothetical, based on the aforementioned study by Nyla Branscombe and others on interracial rejections.[116] Imagine that I conducted an experiment in which I randomly selected ten white people and ten black people and asked them to watch a scenario involving potential discrimination. The setting is a mostly white, fancy restaurant situated in a suburb at 8:00 PM on a Saturday. The only all-black party is an African American family, which is seated near the back of the restaurant. The parents try in vain several times to flag down the waiters to ask for menus and to order food. This goes on for ten minutes. Perceptual segregation theory predicts that if we asked our ten black and ten white people whether it is likely that race played a factor in the restaurant staff failing to attend to the black family, the black participants would be significantly more likely to reply that race was a factor. Specifically, the black participants would tend to recognize, recall, and consider different information than the white participants.[117] For instance, the blacks might be keenly aware that the restaurant is dominated by white staff and patrons and the black family was seated near the back, while the white participants might say that they did not even notice race or think that the placement of the family's table might have correlated with race. The black participants might also take note that this is an upscale restaurant in a wealthy suburb, where black patrons might be relatively unusual, and potentially less welcome. By contrast, the white participants might focus on a race-neutral explanation: the fact that the incident occurred during prime dinner hours on a weekend and the possibility that the staff may have just been busy, rather than racially motivated.

An examination of this story reveals how informational disparities contribute to perceptual segregation. In interpreting this ambiguous event, black observers might fill in the informational gaps with the assis-

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116. See Branscombe et al., supra note 78, at 143 (describing study in which African Americans estimated the likelihood of discrimination in various contexts).

117. Nearly three out of four black respondents in Branscombe's study thought it likely that the restaurant staff was racially motivated. See id. at 139 tbl.1.

tance of a schema,[118] such as, "fancy restaurants in suburbs are likely to be a site of discrimination against black customers." This schema would be informed by specific knowledge of the long history of antiblack discrimination in restaurants.[119] For instance, my mother has told me of her experiences as a child driving from Ohio to visit relatives in Georgia. Because most restaurants did not serve blacks at the time, her parents would pack food to sustain the family for the drive. They could not assume that they would be able to find a restaurant willing to serve blacks.[120]

While black people of my parents' generation have certainly perceived progress over the last few decades, they have not lost the memory of outright refusals to serve black customers because of their skin color. Moreover, blacks are likely to see connections between historical instances of discrimination in restaurants and recent antidiscrimination lawsuits brought against restaurant chains that allegedly discriminate against customers, job candidates, and employees.[121] Finally, blacks are

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118. A "schema" is a "cognitive structure that represents knowledge about a concept or type of stimulus, including its attributes and the relations among those attributes." Kang, supra note 26, at 1498 (internal quotation marks omitted) (quoting Susan T. Fiske & Shelley E. Taylor, Social Cognition 98 (2d ed. 1991)). As noted earlier, restaurants are one of the most common sites in which blacks perceive discrimination. See Pew Research Ctr. Report, supra note 65, at 32 ("According to the survey, half of all blacks say African Americans encounter bias when they shop or eat in a restaurant, nearly double the proportion of Hispanics and about four times greater than the share of whites who express that view."); supra text accompanying note 62 (stating that 24% of respondents perceived discrimination at restaurants in last thirty days).

119. See, e.g., Katzenbach v. McClung, 379 U.S. 294, 300 (1964) (noting an "impressive array of [congressional] testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes"); Richard Thompson Ford, The Race Card: How Bluffing About Bias Makes Race Relations Worse 78 (2008) [hereinafter Ford, Race Card].

120. See *Katzenbach*, 379 U.S. at 300 ("[D]iscriminatory practices prevent Negroes from buying prepared food served on the premises while on a trip, except in isolated and unkempt restaurants and under most unsatisfactory and often unpleasant conditions.").

121. Cracker Barrel, for example, has recently faced charges of discrimination against black customers, job candidates, and employees. See Julie Schmit & Larry Copeland, Cracker Barrel Customer Says Bias Was 'Flagrant,' USA Today, May 7, 2004, at 1B (discussing government investigation that showed systematic Cracker Barrel discriminatory practices based "in many cases" on manager participation or acquiescence; the investigation found "that Cracker Barrel segregated customers by race; allowed white servers to refuse to wait on African-American customers; and seated or served white customers before seating or serving similarly situated African-American customers"); see also Chain Settles Bias Suit by Employees, Chi. Trib., Mar. 11, 2006, at 2 (announcing $2 million settlement of race and sex claims brought by fifty-one Cracker Barrel employees); Richard Lezin Jones, NAACP Joins Lawsuit Alleging Cracker Barrel Discriminates, Phila. Inquirer, Oct. 6, 1999, at A4 (describing class action lawsuit charging that Cracker Barrel chain required blacks to take "'back-of-the-house'" jobs, such as dishwasher). Other restaurant chains, such as Denny's and Shoney's, have faced similar charges. See Racial Bias Continues to Shadow Shoney's, St. Petersburg Times, Dec. 23, 1992, at 1A (reporting Shoney's' $105 million settlement with employees and applicants who alleged race discrimination); Schmit & Copeland, supra (noting customer discrimination claims against

more likely to be consciously aware of the stereotype that black people are poor customers, and in particular poor tippers.[122] Thus, black observers of the restaurant scenario might assume that the white staff is ignoring the black family in part because the staff expects them to provide a smaller tip or have an "attitude."

In general, black and white people obtain information through different informational networks, which results in racialized pools of knowledge.[123] These racialized pools are evident at many levels, including the family, media sources, and the workplace. Stories of perceived discrimination are often told in all-black settings, sometimes as a means of group therapy, sometimes as a means of entertainment, and sometimes as a little bit of both.[124] Discussing experiences with perceived discrimination in a "safe space" may serve as a means of recovery, healing, and interpersonal bonding. All-black settings may allow black people a much needed opportunity to vent the pent-up anger and frustration regarding race that they feel they must stifle in white-dominated settings.

Such racialized pools of information are often apparent in the workplace when a black employee perceives discrimination and tries to figure out how to cope with it. The black employee is likely to consult first— and perhaps exclusively—with members of her own group for at least three reasons.[125] First, she may believe that other outsiders are more likely to understand her claim of discrimination and provide therapeutic support because she intuitively knows that outsiders and insiders tend to

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Denny's chain that culminated in landmark $46 million settlement). The relegation of black employees to "back-of-the-house" jobs—where customers cannot see them—is likely to harm the experiences of black customers even as the restaurant expects it to enhance the dining experiences of white customers. The absence of black employees may make black customers more suspicious that they too will face discrimination.

122. See, e.g., Eduardo Bonilla-Silva, Racism Without Racists 89 (2d ed. 2006) (recounting retired white teacher's story arguing that blacks are poor restaurant customers).

123. See David R. Maines, Information Pools and Racialized Narrative Structures, 40 Soc. Q. 317, 317–26 (1999) (explaining that whites and blacks usually receive stories about racial discrimination from members of their own race). For example, Maines found that half of black students surveyed had heard a rumor that Church's Chicken, a fast food chain, is owned by the Ku Klux Klan, while only 4% of whites had heard of the rumor. See id. at 319. Moreover, blacks were overwhelmingly likely to have heard the rumor from another black person, and the same intraracial pattern of transmitting information applied to whites. See id. at 320.

124. See Ray Friedman & Martin N. Davidson, The Black-White Gap in Perceptions of Discrimination: Its Causes and Consequences, *in* 7 Research on Negotiation in Organization 203, at 220 (Robert J. Bies et al., eds., 1999) (arguing that lack of access to effective remedies for discrimination leads outsiders to dwell on thoughts of injustice and "talk privately with others who have similar feelings"); cf. Branscombe et al., supra note 78, at 138 (arguing that minorities seek "inclusion and identification" with other minorities as palliative for "exclusion by the dominant group").

125. Studies showing that black employees were more likely to be aware of a coworker's racial discrimination claim support this argument. See supra notes 46–47 and accompanying text.

perceive allegations of discrimination through different lenses.[126] Second, she may trust outsiders to have the experience necessary to help her figure out whether to allege discrimination through official channels or pursue another coping strategy. Third, she may provide information about her experience to outsider peers in order to warn them that they too may face discrimination from the alleged perpetrator. Given the intense pressure on outsiders not to complain of discrimination to insiders,[127] it is quite likely that outsider informational networks may be the only work spaces in which the outsider complains. Because the alleged perpetrator may not have even regarded the precipitating incident as racialized, he may have no idea that he is widely perceived as a discriminator by the outsiders in his workplace. For instance, I never directly told Professor Miller that I perceived him as having discriminated against me.[128] Based on our tense prior interactions, I was confident that a direct allegation would not be productive. Yet as I struggled to cope with the incident I immediately discussed the matter with several of the people of color on my faculty and eventually used the incident as a springboard for this Article.

White people typically do not have access to blacks' racialized conversations. On the rare occasion when a white person enters an all-black space, black people tend to silence the conversation or at least mute it or speak in racial code.[129] Black people seem to know that race-conscious talk violates whites' expectation of colorblindness and so they play along in whites' presence. They also know that allegations of discrimination are likely to provoke retaliation, even when they have a sound basis in evidence.[130]

As valuable as all-black discussions of racism may be, hearing others' stories may also increase the listener's perceptions of the pervasiveness of discrimination, harden her schemas for interpreting potential discrimina-

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126. Cf. Charles Stangor et al., Reporting Discrimination in Public and Private Contexts, 82 J. Personality & Soc. Psychol. 69, 72–73 (2002) (finding that outsiders are more likely to report perceived discrimination in presence of another outsider than in presence of insider).

127. See infra notes 225, 268 and accompanying text (discussing psychological and social costs of complaining of discrimination publicly).

128. At the urging of some of my colleagues of color, I wrote a letter to the chairs of the association that hosted the conference. The chairs, who are both white, wrote a reply letter that politely expressed regret for the incident but did not mention race or otherwise acknowledge my allegation of discrimination.

129. For example, when some black people have a conversation about race in a public space, such as a restaurant, they use euphemisms for the white race like "the other side of the penny" or "people of the other persuasion." I have also noticed that even when black people are willing to be more direct about referencing whites, they may switch to terms like "European American" or "Caucasian" instead of "white." This language seems to be driven by a willingness to abide by norms of colorblindness or political correctness in white controlled spaces.

130. See infra text accompanying notes 268–279 (discussing retaliation studies by Kaiser & Miller).

tion, and increase the likelihood that she will conclude that a future incident is discriminatory.[131] If the black person tends to minimize discrimination, hearing others' experiences with discrimination may bring her closer to an accurate perception. Conversely, if she tends to overestimate the prevalence of discrimination, hearing others' stories might further exacerbate this tendency. It is difficult to predict the impact of hearing others' experiences because the individual's receptivity or skepticism toward others' experiences mediates the effect. Nonetheless, to the extent that sharing experiences with discrimination creates a risk of overstated perceptions among some listeners, this cost may be offset not just by the therapeutic benefits of disclosure but also the deterrence value of informing others about scenarios where they might face future discrimination, particularly when they can take concrete action to avoid such situations. When I was young, for example, my parents told me how an extended family member was wrongly imprisoned for rape for having consensual sexual relations with a white woman in the South.[132] I was not alive when this happened, but my parents told me the story so that I would be vigilant as I became a teenager and began socializing at a mostly white private high school. Such stories are seared into my memory and are activated when I encounter a potentially relevant scenario—for instance, a white female student asking to close my office door in order to discuss her performance on an exam. Although I have not lived these experiences and they are temporally distant, they remain vivid and influence my conduct on a largely unconscious level. The risk that a white student would accuse me of something inappropriate might be small, but I suspect my mother would say that it's better to be safe than sorry.

White people have their own racialized pools of information.[133] They sometimes have frank conversations about race that they would not maintain in the presence of blacks.[134] African Americans may imagine

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131. See Friedman & Davidson, supra note 124, at 220 (arguing that discussions of discriminatory experiences bolster group frames and increase likelihood of future perceptions of discrimination); cf. Rodolfo Mendoza-Denton et al., Sensitivity to Status-Based Rejection: Implications for African-American Students' College Experience, 83 J. Personality & Soc. Psychol. 896, 913 (2002) ("African-American students who entered college with high anxious expectations of race-based rejection reported more frequent experiences of race-based negativity during the transition and a stronger sense of alienation and rejection following such race-based negativity than did students with low expectations.").

132. My family's story is not uncommon. See Fine & Turner, supra note 72, at 157 ("Most African-American informants were easily able to identify individuals in their own families who were unfairly targeted by law enforcement officers or self-appointed vigilantes.").

133. See Bonilla-Silva, supra note 122, at 76–77 (arguing that white people tell standard stories and testimonies which create narratives of colorblindness to justify white privilege).

134. For example, studies suggest that whites are more open about being race-conscious when blacks are not around. One study required pairs of students to play a game in which the subject had to identify previously viewed facial photographs by asking

that the absence of blacks enables whites to revel in racial epithets and jokes. In some cases, this appears to be true. Based on self-reports by hundreds of white college students who recorded racial incidents in a journal, Leslie Houts Picca and Joe Feagin argue that many whites have "two faces": "They frequently present themselves as innocent of racism in the frontstage, indeed as 'colorblind,' even as they clearly show their racist framings of the world in their backstage comments, emotions, and actions."[135] All-white settings may provide white people the opportunity to rebel against perceived pressure to behave in a "politically correct" manner and vent the pent-up anger and frustration regarding race that they feel they must stifle in mixed-race settings. A key insight from this investigation is that even though a minority of white people may continue to make overtly racist remarks in all-white settings, they are aided and abetted by many other whites that either passively enjoy the racial entertainment or feel uncomfortable but are unwilling to object and instead often minimize its harm.[136]

In some more sophisticated, liberal white circles the norm against overt expressions of racism may continue to operate when blacks are not around. This does not mean that whites speak just as if blacks were present, however, but they may frame complaints about blacks in terms that are socially acceptable to other liberal whites.[137] For instance, a white person might be more likely to fault his employer for granting a "racial preference" or "lowering its standards" in order to hire an "unqualified" black coworker than to suggest that the coworker is incompetent because he is black. In this way, white people may employ a critique of affirmative

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the confederate as few questions as possible about the photo. See Michael I. Norton et al., Color Blindness and Interracial Interaction: Playing the Political Correctness Game, 17 Psychol. Sci. 949, 950–51 (2006). When the white subject was coupled with a white confederate, she asked about race in 93% of the trials. But white subjects who were paired with a black confederate mentioned race in just 64% of the trials. Id. at 951.

135. Leslie Houts Picca & Joe R. Feagin, Two-Faced Racism: Whites in the Backstage and Frontstage 19 (2007). The study, which took place from 2002 to 2003, included nearly 1,000 students from across the nation, including 626 whites. Id. at 31.

136. See id. at 22 ("The majority of whites still participate in openly racist performances in the backstage arena—as protagonists, cheerleaders, or bystanders—and do *not* define such performances as problematical and deserving of action aimed at eradication."); id. at 103 (reporting comments of white male subject who distinguished racial jokes from "'real' racism," which is typified by "'Klansmen or burning crosses'"); infra text accompanying note 158 (discussing black-white differences as to whether telling racial jokes represents racism). The study concluded that white men were more likely to perform the "protagonist" role (i.e., telling an antiblack joke), while white women were more likely to play the accomplice role (laughing along or acquiescing). Women were more likely to challenge such expression, yet they also faced greater retaliation for breaking ranks than male dissenters. See Picca & Feagin, supra note 135, at 120–21.

137. See Bonilla-Silva, supra note 122, at 70–71 (describing how "[c]olor-blind racism's talk avoids racist terminology and preserves its mythological nonracialism through semantic moves such as 'I am not a racist, but . . .'").

action as an outlet for airing frustrations about blacks since the policy framing allows them to avoid appearing racist to their white peers.[138]

A second important factor that contributes to perceptual segregation is incentives. Information and incentives interact in that an individual's social position shapes his willingness to pursue information about a particular topic. Whites tend to think about race less often than blacks because they have fewer incentives to be race-conscious[139]—especially since, among whites, race-consciousness is figured as the cause of racism. The difference in attentiveness to race is consistent with general outgroup/ingroup dynamics. Race is simply one example of a general phenomenon in which a stigmatized minority group is more attentive to the stigmatizing trait and potential discrimination because of that group's relative powerlessness.[140] White employees might not consciously pay much attention to race in the workplace because they are less likely to be dependent on a black supervisor than vice versa.[141] Whites' relative invulnerability to racial discrimination in most workplaces enables them not to

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138. I am grateful to my colleague Ann Carlson for this insight.

139. See Donna Chrobot-Mason & William K. Hepworth, Examining Perceptions of Ambiguous and Unambiguous Threats of Racial Harassment and Managerial Response Strategies, 35 J. Applied Soc. Psychol. 2215, 2221 (2005) ("Race and ethnicity generally are not a salient or meaningful social identity group for most White Americans."); Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 Mich. L. Rev. 953, 969–72 (1993) (noting that "the white person has an everyday option not to think of herself in racial terms at all" and using label "transparency phenomenon" to refer to "the tendency for whiteness to vanish from whites' self-perception"); Friedman & Davidson, supra note 124, at 203, 213 (discussing surveys showing that blacks are more likely than whites to cite race as key aspect of personal identity); Don Operario & Susan T. Fiske, Ethnic Identity Moderates Perceptions of Prejudice: Judgments of Personal Versus Group Discrimination and Subtle Versus Blatant Bias, 27 Personality & Soc. Psychol. Bull. 550, 555 (2001) ("[E]thnic identity simply means less for Whites than for minorities . . . .").

140. See Patricia L.N. Donat & Barrie Bondurant, The Role of Sexual Victimization in Women's Perceptions of Others' Sexual Interest, 18 J. Interpersonal Violence 50, 58 (2003) ("Those in society with less power are often more aware of the actions and beliefs of those in more powerful positions."); Cheryl R. Kaiser et al., Prejudice Expectations Moderate Preconscious Attention to Cues that Are Threatening to Social Identity, 17 Psychol. Sci. 332, 332 (2006) ("[I]ndividuals belonging to stigmatized, or socially devalued, groups may become especially attentive to cues that their social identity is discredited."). For example, Jewish individuals may be more attentive to sounds such as "eu," because the sardonic use of such sounds can be a way for non-Jews to stigmatize Jews. This example indicates the degree to which it is psychologically rational for outsiders to become adept at ascertaining even subtle references to outsider identity, as a means of social bonding and avoiding discrimination. See Kaiser, et al. supra, at 332 (citing G.W. Allport, The Nature of Prejudice, 144–45 (1979)). Similarly, while queer men have a greater incentive to ascertain whether other men are gay, bi, or straight (i.e., develop "gaydar") because they are looking for male romantic partners, such attentiveness is also a means of identifying and allying with other queer people in order to avoid discrimination. Presumably, queer women display a similar attentiveness with respect to other women.

141. Moreover, many whites lack easy access to (and perhaps interest in) the experiences of blacks who have perceived discrimination that calls into question the colorblindness perspective.

think about race. The different social positions of blacks and whites explain the general differences in attentiveness to race.

Returning to the restaurant scenario, because blacks are more likely to view antidiscrimination lawsuits as relevant to their lives, they are more likely to follow media coverage about lawsuits against restaurant chains and to retain that information. Even when blacks and whites are equally motivated to learn about public events, they may tune into news sources that have radically different slants on issues.[142] Black Entertainment Television (BET) may cover a news story from an entirely different perspective than Fox News.[143] Many black parents consider it their parental responsibility to instill in their children race-consciousness and tools for coping with discrimination, and their messages about the prevalence and mechanisms of racial discrimination tend to diverge from those of white parents.[144] In general, white parents are less likely to transmit and preserve the history of discrimination. They may think their children are unlikely to be victimized by racial discrimination, and they may believe that the best way to move beyond race is simply not to discuss it. Perhaps they would rather forget such ugly traditions rather than face the feelings of "white guilt" and discomfort they might trigger. Studies by Janet Swim and Deborah Miller found a correlation between perceptions of discrimination against blacks and feelings of white guilt.[145] When whites are forced to confront historical examples of racial discrimination, such as slavery, they are likely to try to deny the relevance of that history to the

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142. See Cohen, supra note 76, at 208–10 (noting differences in New York black newspapers as compared to white-controlled media, including focus in black publications on Kemron, a purported cure for HIV developed in Africa).

143. The breakdown of viewership by station suggests this possibility. Felicia R. Lee, Network for Blacks Broadens Its Schedule, N.Y. Times, July 9, 2007, at E1 (stating that 82% of BET viewers are black); Pew Research Ctr., Online Papers Modestly Boost Newspaper Readership: Maturing Internet News Audience—Broader Than Deep 70, July 30, 2006, available at http://people-press.org/reports/pdf/282.pdf (on file with the *Columbia Law Review*) (reporting that 10% of white respondents described themselves as regular viewers of Fox News's *The O'Reilly Factor*, compared to just 4% of black respondents).

144. See generally Diane Hughes et al., Parents' Ethnic-Racial Socialization Practices: A Review of Research and Directions for Future Study, 42 Developmental Psychol. 747, 747–48 (2006) (describing scholars' view that "communications to children about ethnicity and race are central and highly salient components of parenting in ethnic minority families").

145. See Janet K. Swim & Deborah L. Miller, White Guilt: Its Antecedents and Consequences For Attitudes Toward Affirmative Action, 25 Personality Soc. Psychol. Bull. 500, 505, 507, 509 (1999) ("The more participants believed . . . that Blacks often experience discrimination . . . the higher were their feelings of White guilt."). Based on a sample of 102 white college students, Swim and Miller found that women were marginally more likely to report feeling white guilt. Id. at 504. Subsequent studies, including a smaller sample of adults, found no correlation between gender and white guilt, however. Id. at 508, 511.

current racial order, with explanations such as "the past is the past."[146] Thus, whites have powerful incentives not to think about race.

B. *Clashing Perspectives: Colorblindness vs. Pervasive Prejudice*

In part because of these differences in incentives and information, blacks and whites are likely to disagree on the very definition of "racial discrimination." Whites are likely to share the view of the Supreme Court, which defines discrimination primarily as an aberrational form of bad intent.[147] I will call this the "colorblindness perspective." It believes that most white people are colorblind, and deviations from this norm are unusual.[148] Deviation—that is, racial discrimination—is evident primarily when there is overt evidence of racial hostility, such as using a racial epithet or some other clear evidence of racial bias.[149] This view can be seductive to white people because it is factually true that overt expression of racial hostility has diminished over the last several decades.[150]

Black people, by contrast, are more likely to be unapologetically race-conscious and to see their world reflected in the implicit bias literature.[151] According to this view, which I call the "pervasive prejudice perspective," racism is common and structural.[152] It is embedded in routine

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146. Bonilla-Silva, supra note 122, at 77–79 (internal quotation marks omitted) (reporting results of interviews with white respondents).

147. See Washington v. Davis, 426 U.S. 229, 239 (1976) (defining discrimination under equal protection clause as "a law or other official act . . . [that] reflects a racially discriminatory purpose"). Indeed, the Court has suggested that taking account of race— even in affirmative action programs or school desegregation plans—promotes racism. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007) (rejecting race-conscious effort to maintain integrated schools because "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race").

148. See, e.g., Joe Feagin & Eileen O'Brien, White Men on Race: Power, Privilege, and the Shaping of Cultural Consciousness 159 (2003) (arguing that "many white Americans accent color-blindness"); Fine & Turner, supra note 72, at 148 ("Many white Americans believe, sincerely, that they have transcended overt discrimination.").

149. Even such overt evidence may not convince some insiders. Consider two cases, which I discuss in more detail below. In one case, the plaintiff's white supervisor described her as an "incompetent nigger." Shorter v. ICG Holdings, Inc., 188 F.3d 1204, 1206 (10th Cir. 1999), abrogated on other grounds by Desert Palace v. Costa, 539 U.S. 90 (2003). In the second, the plaintiff's supervisor exclaimed: "Fucking women, I hate having fucking women in the office." Heim v. Utah, 8 F.3d 1541, 1546 (10th Cir. 1993). In both cases, judges refused to treat these statements as "direct evidence" of discrimination. See *Shorter*, 188 F.3d at 1208; *Heim*, 8 F.3d at 1547.

150. See John F. Dovidio & Samuel L. Gaertner, Aversive Racism, 36 Advances Experimental Soc. Psychol. 1, 2 (2004) ("[W]hites' expressions of prejudice toward traditionally underrepresented groups, and toward blacks in particular, have declined substantially over time.").

151. See Friedman & Davidson, supra note 124, at 215–16 (discussing reasons why "perceptions of discrimination will be high for blacks who receive negative outcomes").

152. See Bonilla-Silva, supra note 122, at 171–72 ("[U]nlike whites, blacks realize that racism is structural . . . ."); Pew Research Ctr. Report, supra note 65, at 31 (reporting "widespread perception in the black community that encounters with anti-black bias are common in the day-to-day lives of blacks").

cognitive processes and regularly manifests itself in daily interactions even where the evidence of racism would not be overt enough to convince most white people.[153] This definition of discrimination is interactional and is not predicated on bad intent. Blacks tend to believe that race-consciousness is necessary to detect racism leaking out in the numerous interactions with nonblacks that happen each day. While many whites view race-consciousness as an evil that must be strenuously avoided, blacks tend to see race-consciousness as critical to their survival in white-dominated realms.[154]

C. *How Insiders and Outsiders Disagree on What Constitutes Racism*

These differing definitions of racism prime whites and blacks to disagree when the topic of race arises.[155] In talking about "racism" or "discrimination," black and white speakers think they are talking about the same thing, but they may not be. Whites may require overt, indisputable proof, while blacks might be more likely to accept circumstantial evidence. Moreover, whites may focus on the intent of the white person, while blacks may be concerned with the effect of the white person's conduct, given their belief in the interactional and implicit nature of much discrimination.

To further illustrate, consider the following study by Samuel Sommers and Michael Norton on what behaviors indicate racism.[156] Sommers and Norton asked white and nonwhite respondents to review a list of behaviors and report whether the behavior was typical of white racism. They found that "non-Whites are more likely to consider subtle

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153. Cf. Kang & Banaji, supra note 29, at 1079–80 ("[I]mplicit bias . . . is pervasive but diffuse, consequential but unintended, ubiquitous but invisible."). Although much implicit bias scholarship is highly skeptical that Title VII is responsive to the most pervasive form of discrimination today—that which is implicit or subtle—Christine Jolls and Cass Sunstein argue that scholars have overlooked the fact that antidiscrimination law reduces at least some implicit bias by diversifying workplaces and other regulated environments. See Jolls, Antidiscrimination, supra note 36, at 70; Christine Jolls & Cass R. Sunstein, The Law of Implicit Bias, 94 Cal. L. Rev. 969, 981 (2006) (arguing that antidiscrimination law reduces implicit bias by "increasing the level of diversity in workplaces, educational institutions, and other organizations").

154. See Adams, supra note 11, at 297 ("A strong racial or ethnic identity is central to self-protection and self-actualization, and it is a necessary precursor to success in American society."). Blacks also tend to be more frank about their race-conscious mindset, at least when whites are not around. See Norton et al., supra note 134, at 950 (finding that whites "underestimated the speed with which they would be able to categorize [faces] by race" and that black estimates were significantly higher).

155. See Bonilla-Silva, supra note 122, at 8 ("One reason why . . . whites and people of color cannot agree on racial matters is because they conceive terms such as 'racism' very differently.").

156. Samuel R. Sommers & Michael I. Norton, Lay Theories About White Racists: What Constitutes Racism (and What Doesn't), 9 Group Processes & Intergroup Rel. 117 (2006).

forms of bias to be indicative of racism than are Whites."[157] Specifically, nonwhite respondents were more likely than whites to label as suggestive of racism traits that Sommers and Norton categorized as "discomfort/ unfamiliarity with Blacks."[158] In addition, nonwhite respondents were more likely to label as suggestive of racism traits that Sommers and Norton categorized as "denial of problem."[159] Sommers and Norton suggested that white respondents may have excluded some of these traits because of a "self-distancing function."[160] In other words, because these white respondents possessed some of these traits, to label them as indicative of racism would have been self-implicating.[161] Although the study found a racial divide, it also found that a subset of whites with low scores on the Modern Racism Scale were more aligned with the nonwhite perspective on what constitutes racism.[162] Thus, although the colorblindness and pervasive prejudice perspectives correlate with race, they are not racially exclusive.

From the pervasive prejudice perspective, a test for discrimination that ignores or discounts the foregoing signs of discomfort and denial and focuses entirely on bad intent will miss much of the discrimination that exists in the world. Because black people tend to expect bias to be implicit and manifested subtly, they look for faint shards of evidence, such as a racial code word (e.g., "you people" or referring to a neighborhood as "too urban") or a brief look of fear (as when a white woman

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157. Id. at 132. The nonwhite group was predominantly black and Asian. See id. at 121.

158. The traits were:

Feels anxious around Blacks, Is uncomfortable around Blacks, Doesn't socialize regularly with Blacks, Has trouble distinguishing Black people from one another, Only has White friends, Believes Blacks are more likely to commit crimes than Whites, Only dates other White people, Prefers not to be around Blacks, Laughs at another person's jokes about Black people, [and] Tells jokes about Black people.

Id. at 128, 129 tbl.4.

159. The traits were: "Believes that prejudice against Blacks is no longer a problem, Thinks slavery so long ago that it is unimportant to talk about, Doesn't speak up or act when someone else is racist, Supports flying the Confederate flag, [and] Opposes affirmative action." Id. at 129 tbl.4. Note that the first of these beliefs—that prejudice against Blacks is no longer a problem—is a central component of the colorblindness perspective. The study showed that whites and nonwhites agreed on traits that Sommers and Norton categorized as "overt racism," such as "favoritism toward white job applicants or membership in a group that espouses racism." Id. at 130. Further, nonwhites were more likely to rate the overt traits as indicative of racism than the discomfort and denial traits. See id. at 128, 132.

160. Id. at 133.

161. See id. at 133–34 ("A self-distancing function is most likely for Whites, whose race-related behavior is often driven by concerns about appearing racist.").

162. Cf. id. at 131 ("Non-white participants and individuals with low MRS scores appeared more sensitive to subtle forms of racism, as they were more likely to deem ambiguous behaviors to be indicative of prejudice.").

grabs her husband's arm suddenly when a black man approaches[163]). Such conduct might be the tip of the iceberg of largely concealed, but very real, bias.[164] Since blacks believe bias is often masked, they vigilantly read behavioral details.[165]

My father, who is a physician, likes to tell the story of announcing my admission to Harvard Law School to his colleagues at work, who are all white. After my father told one colleague "My son is going to Harvard Law School!" the colleague responded: "Howard Law School. That's great." "No, Harvard," my father corrected. "Right. Howard Law School," the colleague replied. From my father's perspective, the substitution of a historically black university for Harvard, the most prestigious (and rather lily-white) university—even after an attempted correction— divulged implicit bias. The white colleague may have (mis)interpreted my father's statement through a schema that holds that "white people go to Harvard; black people go to Howard."[166]

The average white person would not recognize many of these racial cues. My father's colleague probably never realized that he had offended him. He likely would have been surprised and offended if my father had accused him of expressing a racial stereotype. This obliviousness may explain why some white people repeatedly engage in such racial "microaggressions" without any apparent awareness of how they are received by black people.[167] Although it might be difficult for a white observer to parse language and expression closely enough to identify—and avoid— all the cues that might disturb black people,[168] such attentiveness be-

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163. The film *Crash* expertly depicted this scenario with Sandra Bullock's white, upper-class character. Crash (Lions Gate Films 2005). The African American men who prompted the response, played by Larenz Tate and Chris "Ludacris" Bridges, perceived her reaction as discrimination. Id. The challenge, from the African American's perspective, is that one cannot be absolutely certain that such a woman did not just happen to grab her husband's arm for some reason having nothing to do with race.

164. See Janet K. Swim, Laurie L. Cohen & Lauri L. Hyers, Experiencing Everyday Prejudice and Discrimination, in Prejudice: The Target's Perspective 37, 37–39 (Janet K. Swim & Charles Stangor eds., 1998) ("[A]nticipating prejudice and discrimination in new situations may require an ability to identify and interpret particular environmental cues.").

165. See Terry Smith, Everyday Indignities: Race, Retaliation, and the Promise of Title VII, 34 Colum. Hum. Rts. L. Rev. 529, 551 (2003) (discussing study that concluded that middle-class blacks generally feel need to "carefully" assess whether bias is present (internal quotation marks omitted)).

166. In the white colleague's defense, he may have known that my older brother attended Howard as an undergraduate, which may have contributed to his hearing "Howard" instead of "Harvard." Often in these situations there is some ambiguity, which creates an opening for racialized differences in interpretation.

167. See Flagg, supra note 139, at 977 (stating that "white decision makers make the relatively simple [racial] errors illustrated by this story quite frequently"). See generally Peggy C. Davis, Law as Microaggression, 98 Yale L.J. 1557, 1559 (1989) (defining "microaggressions" as "incessant, often gratuitous and subtle offenses" (internal quotation marks omitted)).

168. See Flagg, supra note 139, at 977 (arguing that "[w]hites as a group" lack the "analytic tools" necessary to avoid all racist cues).

comes the norm for many blacks.[169] A study by Jennifer Richeson and J. Nicole Shelton found that black subjects were more adept than white subjects at identifying implicit bias from viewing "thin-slices of nonverbal behavior" by white people.[170]

Disparities in incentives and information and differing definitions of racism often lead to racialized misunderstandings when a black person makes an allegation of racial discrimination.[171] Blacks are likely to think that whites who quickly dismiss the possibility of discrimination and overlook subtle evidence "just don't get it." Meanwhile, whites are likely to view blacks as recklessly accusing white people of a most serious charge. In the introductory narrative, a white acquaintance of mine was taken aback by my perception of discrimination but said that he would understand it if Professor Miller had said "Professor Robinson submitted his paper on 'Black People's Time.'" This acquaintance's comment reflects the view of some whites that allegations of racism are extremely serious, perhaps even quasicriminal, and therefore should be made only when there is clearly convincing proof (by white standards).[172] Since such overt and incontrovertible demonstrations of racial bias are extremely rare, at least in educated, liberal circles, many white people are at a loss to understand black people's frequent accusations of discrimination.[173] Because of the paucity of indicia of overt racism, widespread expressions of commitment to racial equality across the political spectrum, and the rise

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169. At least, that is, with respect to one's own racial group. An African American might be intimately familiar with the cues signifying racial bias against African Americans, yet clueless about or indifferent to those pertaining to Asian Americans, Latinos, or Native Americans. Such cluelessness might lead her to downplay the discrimination faced by nonblack people of color. The same can be said of the tendency of some blacks to downplay or dismiss discrimination based on gender and sexuality, even though many blacks are subject to multiple intersecting forces of discrimination. See Russell K. Robinson, Uncovering *Covering*, 101 Nw. U. L. Rev. 1809, 1821 (2007) (arguing that experience of racial and other identities are "always intertwined") [hereinafter Robinson, Uncovering]. See generally Crenshaw, Demarginalizing, supra note 92 (describing "multidimensionality" of black women's experiences of discrimination).

170. Jennifer A. Richeson & J. Nicole Shelton, Thin Slices of Racial Bias, 29 J. Nonverbal Behav. 75, 80 (2005). In this study, thirty white and thirty black students watched a twenty second silent videotape of a white person interacting with another person who was off screen (half of the off screen partners were white, half black). See id. at 78–79. Blacks on average were better than whites at predicting the IAT bias score of the white person during an interaction with a black offscreen partner. See id. at 80.

171. This phenomenon is an example of the larger "climate of misperception and distrust" surrounding race relations in America. Dovidio & Gaertner, supra note 150, at 23–24 (arguing that "conscious and unconscious attitudes" about race interact in interracial settings, "interfer[ing] with . . . communication and trust").

172. See, e.g., Sommers & Norton, supra note 156, at 121 ("Few contemporary social categories in this day and age are as undesirable as that of 'racist,' and Whites' concerns about self-classifying as such might lead to narrower, less intrusive conceptualizations of racism.").

173. See id. at 134 ("[B]etween-race discrepancies in theorizing about racism are fertile ground for real-life racial misunderstandings.").

of antidiscrimination laws in most aspects of public life,[174] whites are primed not to perceive racial discrimination unless it is so overt that it is rather difficult to deny (such as a white person using the so-called "N-word").[175]

D. *The Rationality of Outsider Perspectives*

The interaction between the relative invisibility of modern discrimination, because of norms making overt bias relatively rare, and the visibility of traits such as race and gender require a rational outsider to assume that bias is always a possibility.[176] So long as people are aware of the outsider's identity, it is risky to rule out bias as a possibility. I was reminded of this phenomenon with respect to gender when I worked at a major law firm. This was a rare moment when I—a black queer man—was made to feel like an insider. There were two junior female attorneys in my practice group, but all of the partners were male and they established the group's work culture.[177] I was stunned that in all-male settings, some of these male attorneys made explicit sexual remarks about women, including female clients and secretaries.[178] As soon as a woman entered the room, these conversations ceased. When the group's work slowed

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174. See Bonilla-Silva, supra note 122, at 4 (discussing reasons for "whites' racial attitudes in the post-civil rights era"); cf. Daisuke Akiba & Fayneese Miller, The Expression of Cultural Sensitivity in the Presence of African Americans: An Analysis of Motives, 35 Small Group Res. 623, 625 (2004) ("[A]n overwhelming majority of European Americans reportedly agree that it is socially undesirable to express racial bias publicly . . . .").

175. See Flagg, supra note 139, at 977 (noting the "unsupported faith by whites in the reality of race-neutral decisionmaking"); see also supra note 149 (showing that white and male judges sometimes downplay evidentiary weight accorded to use of racial and gender slurs).

176. Kenji Yoshino has written about the threatening nature of invisible discrimination:

> To be black, or to be a woman, in present-day America is to inhabit a virtual Panopticon. This is because the visibility of race and sex and the invisibility of racism and sexism create "naturally" the dynamic that the architects of the Panopticon sought to replicate artificially. This dynamic is one in which an actor perceives her visibility to be heightened precisely because the invisibility of her putative observers causes her own imagination to act as a perpetual watchguard. Thus, when a black woman enters a room of people she does not know, everyone immediately knows she is both black and female without her knowing— immediately or perhaps ever—whether none, some, or all of them are racist or sexist.

Kenji Yoshino, Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell," 108 Yale L.J. 485, 525–26 (1998) [hereinafter Yoshino, Assimilationist Bias] (citing Michel Foucault, Discipline and Punish 34 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977)).

177. By "work culture," I mean "a social process [that] . . . . tells us what to wear, how to talk, [and] what to talk about." Tristin K. Green, Work Culture and Discrimination, 93 Cal. L. Rev. 623, 625 (2005). Work culture can be a source of employment discrimination. See id.

178. I was also disturbed that these men assumed that, simply because of my sex, I would partake in such comments. Because I viewed the comments and jokes as distinctly

down and the two junior female attorneys were asked to leave the firm, I did not view it as coincidental.[179] If the women had sensed or assumed that sexist attitudes were "in the air," they would not have been "paranoid," even though a male observer might have perceived them as such— their hunch would have been right on the money.

Because of the interaction of the outsider's visibility and the belief in the invisible or veiled nature of discrimination, an outsider could rationally decide that the best strategy is to assume the possibility of discrimination before it is evidenced.[180] From the pervasive prejudice perspective, the alternative—assuming equal treatment—is perilous. Many outsiders have learned that performing exactly like insiders is insufficient to guarantee success. First, they have been penalized for doing the same minor things—arriving to work a few minutes late, failing to attend social functions with colleagues, or, say, being aggressive—that insiders could commit without penalty.[181] This is in part because of visibility/invisibility: A male colleague's failings are overlooked because there are many men, but the few females work under a spotlight.[182] Second, because of prevailing stereotypes, outsiders often begin work with a performance deficit. Female attorneys are often presumed to be softer, less aggressive, and burdened in their ability to put work first because of family commitments.[183] Because the male is presumed to be competent and a good fit for the firm's work culture, mere adequate performance may sustain success. If a female ignored these dynamics and presumed equal treatment, she might work no harder than her male coworkers and sometimes work from home, as permitted by company policy. By the time bias is revealed, such

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heterosexually male, they made me doubly uncomfortable—for the women and for myself as a queer man whose masculinity was likely questioned.

179. I do not mean to imply that I think these women would or should have been able to win a Title VII lawsuit against the firm. As a peer, rather than a supervisor, I knew next to nothing about the quality of their work.

180. See Yoshino, Assimilationist Bias, supra note 176, at 527 ("[T]he invisibility of racism may cause a rational black woman to entertain constantly at least the possibility that she is dealing with a racist."). Although I defend the reasonableness of being vigilant about discrimination, I do not mean to suggest that all or even most outsiders are vigilant. As I argue in Part III, some outsiders minimize discrimination for various psychological and social reasons.

181. See, e.g., Laurie A. Rudman & Peter Glick, Prescriptive Gender Stereotypes and Backlash Toward Agentic Women, 57 J. Soc. Issues 743, 757 (2001) (finding that female candidates who expressed aggressiveness in interviews were deemed less likeable than similar males when job required good social skills).

182. See Rosabeth Moss Kanter, Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women, 82 Am. J. Soc. 965, 972–73 (1977) (discussing heightened visibility of women and blacks in male and white-dominated workplaces). A similar dynamic occurs with respect to race. See Dovidio & Gaertner, supra note 150, at 5 (discussing similar visibility/invisibility issues as forms of "social categorization" and arguing that "social categorization by race is virtually automatic" in America).

183. See Rudman & Glick, supra note 181, at 744–45 (detailing "bind" that ties women who "overcome descriptive stereotypes of lesser competence" and as result of doing so are viewed as "insufficiently nice").

as a comment in her evaluation that she seems to be on the "mommy track," it is too late in the game for a course correction. Her decision not to assume biased treatment may lead a woman to make decisions that, as it turned out, made her vulnerable to gender bias.

E. *The Causes of Racial Perceptual Segregation*

I have attempted to flesh out the theory of perceptual segregation by describing two disparate perspectives on race discrimination—pervasive prejudice and colorblindness. But where do racial and gender differences in perception come from? Racial disparities stem in large part from the stark racial segregation that *Plessy* validated and that persists in de facto form today. Long after *Brown* overturned *Plessy*, black people continue to live primarily in mostly black communities, date and marry black people, and attend primarily black schools and churches.[184] Whites also tend to live in mostly white communities, including wealthy, gated suburbs, and are most likely to form their social and intimate relationships with other white people.[185] Such pervasive segregation leads to divergent life experiences; as these experiences accumulate, disparate perceptual frameworks are created and reinforced.[186]

Although there is more racial integration in some workplaces than in social and intimate interactions, workplace interaction is constrained by norms of professionalism and civility that may stifle frank discussion and efforts to reach genuine understanding across racial lines.[187] The failure of black and white people to interact meaningfully with one another and to engage those of other races on racial issues perpetuates distinct communal understandings of race and racism that can diverge dramatically. As a result, a workplace may be physically integrated but psychologically stratified.

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184. See, e.g., Adams, supra note 11, at 279 ("Black and white Americans typically inhabit spatially separate worlds that differ in material resources, security, status, culture, and opportunities."); Goodwin Liu, Seattle and Louisville, 95 Cal. L. Rev. 277, 277–78 (2007) [hereinafter Liu, Seattle] (discussing persistent and in some cases increasing segregation of black, white, and Latino school children).

185. See, e.g., Liu, Seattle, supra note 184, at 285 ("Whites remain the most racially isolated group . . . .").

186. See Cohen, supra note 76, at 50 (stating that one "consequence[ ] of marginalization" is "that historical experiences of exclusion inform and influence the framework through which marginal groups currently view other groups, political issues, and their ability to mobilize around critical concerns").

187. Cf. Fine & Turner, supra note 72, at 59–60 (2001) (discussing "'racialized pools of knowledge'" in which "whites are unlikely to share claims about blacks with blacks" and blacks are "just as likely to keep private what they 'know' about white institutions"); id. at 80 ("[B]lacks and whites often are part of communication channels that do not overlap."); Swim & Miller, supra note 145, at 511 (surmising that low levels of white guilt or awareness of white privilege may be due in part to fact that many whites have "little intergroup contact").

Recall that black employees were much more likely to be aware of a black coworker's claim of discrimination than were whites.[188] White employees may feel that the employer has created a racially diverse workforce so long as there are a handful of visible people of color. Blacks, by contrast, might view the few people of color as tokens and perceive the overall employment environment as white-dominated. White employees, relying on their perception that the workplace is racially integrated, may assume that people of color are generally comfortable and happy and feel free to express their genuine opinions on issues with racial implications. Yet the black employees may feel embattled and guarded, even as they foster an appearance of comfort and cordiality for strategic reasons.

Devon Carbado and Mitu Gulati argue that people of color in predominantly white workplaces feel pressure to provide "racial comfort" to their white supervisors and coworkers.[189] People of color may fear that failure to abide by the norm of colorblindness and come off as moderate and balanced when race is at issue could lead to various disadvantages, including lost credibility, retaliation, and alienation from white peers. A study by J. Nicole Shelton and her coauthors on interracial college roommates supports and extends Carbado and Gulati's argument.[190] The study examined the interactions between interracial college roommates and compared them to situations where both roommates were people of color.[191] The study found that minority students who held high expectations of being the target of discrimination from their white roommates engaged in conduct consistent with "compensatory strategies" designed to reduce the risk of discrimination and strengthen the relationship.[192] Such minority students also reported experiencing greater negative affect (i.e., feeling anxious, frustrated, and tense during interactions) and feel-

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188. See supra notes 46–47 and accompanying text.

189. See Carbado & Gulati, Identity, supra note 32, at 1295–97 (arguing that workplaces pressure blacks to engage in comforting behaviors, such as telling or laughing at discriminatory jokes); Robinson, Uncovering, supra note 169, at 1841 (telling story from workplace experience in which I failed to challenge coworker's "joke" that he would "lynch" me if I failed to complete work assignment satisfactorily).

190. J. Nicole Shelton et al., Expecting to Be the Target of Prejudice: Implications for Interethnic Interactions, 31 Personality & Soc. Psychol. Bull. 1189 (2005).

191. The study focused on fifty-four Princeton University students, who were 50% black, 37% Asian American, 7% Latino, and the remainder unspecified other minority. Id. at 1191. All of the students were freshman and had a roommate of the same sex. Id. at 1191–92.

192. The minority students who held high expectations of discrimination were more likely to disclose personal information to their White roommates. By contrast, "prejudice expectations were unrelated" to minority students' level of disclosure with minority roommates. As the study concluded, "the more ethnic minorities had a dispositional tendency to expect prejudice, the more they self-disclosed during interactions with a White roommate." Id. at 1194.

ing less authentic, as compared to the minority students whose roommate was another minority.[193]

In a related study, the authors primed half of the sample of minority students to expect prejudice by having them read a news article reporting that most whites engage in discrimination.[194] The control group read an article reporting that discrimination against the elderly is widespread.[195] The students then interacted briefly with a white student (who was not their roommate). White students reported enjoying the interaction with the minority student more and feeling less negative effect during the interaction when the minority student had high expectations of discrimination.[196] The reason for this outcome appears to be that minority students who expected prejudice engaged in compensatory strategies.[197] Two observers (one black, one white), who did not know about the prejudice expectations manipulation, watched videotapes of the interracial interactions.[198] The observers rated the minorities who were primed to expect prejudice as more "verbally engaged" than the other minorities; they did not discern differences between the whites who interacted with a minority student who expected prejudice and whites who interacted with a minority student in the control group.[199] These studies reveal the complexity of interracial interactions and, more importantly, their potential to perpetuate perceptual segregation rather than to dismantle it. The very conduct that facilitated the interaction and made it pleasant for the white person—the minority person's compensatory strategies—may contribute to the latter's sense of anxiety and feelings of inauthenticity. Unfortunately, "[w]hites and ethnic minorities can participate in the same interaction but walk away with vastly different experiences."[200]

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193. See id. at 1193–94.

194. See id. at 1195. The sample consisted of twenty-nine white students and twenty-nine "ethnic minority" students. Id. at 1194. The authors did not further specify the racial breakdown of the minority students.

195. Id. at 1195. The articles were "virtually the same except" that the elderly were the targets of discrimination in the article for the control group. Id.

196. Id. at 1198.

197. Id. at 1199.

198. Id. at 1196.

199. Id. at 1198.

200. Id. at 1199. In a subsequent study, Shelton and her coauthors found a related reverse effect: Black students who were required to discuss affirmative action or immigration with a white student viewed whites who had high implicit bias scores more favorably than whites who were lower in implicit bias, because the black students perceived whites who had high implicit bias scores as being more engaged in the interaction. Shelton suggested that whites that have high implicit bias scores were motivated to compensate so as not to appear racist during the conversation. See J. Nicole Shelton et al., Ironic Effects of Racial Bias During Interracial Interactions, 16 Psychol. Sci. 397, 400–01 (2005) [hereinafter Shelton, et al., Ironic Effects]. But cf. Norton et al., supra note 134, at 951 (finding, under different experimental circumstances, that white attempts to avoid mentioning race correlated with lack of eye contact and reduced perceptions of friendliness by blacks with whom they were conversing). Since the interaction was only ten minutes long, it is unclear whether this effect would endure over long term interactions.

F. *How Gender Compares to Race*

So far, I have focused primarily on race since it presents perceptual segregation in its starkest form. Nonetheless, at least some of the dynamics I have identified occur with respect to gender. Men speak with one another about women and sports more frankly and frequently than when women are present.[201] And men expect a male stranger to be conversant and interested in these topics. Such conversations are not exclusively male in the sense that women can try to be "one of the boys," but a male is presumptively included in these conversations (even against his will) while his female counterpart would have to work hard to earn entry into this space.[202] At the same time, women are likely to seek out other women to share information about instances of sexual assault and harassment and other gendered issues, such as an employer's maternity leave and childcare policies.[203] Moreover, women, like black people, struggle with the tension between the invisibility of much discrimination and their heightened visibility as others.[204] This tension may also require women rationally to assume and prepare for the possibility of discrimination. Finally, some studies suggest that women define sexual harassment more broadly than men.[205]

Yet race and gender are distinct in important respects. A critical difference relates to the causes of perceptual segregation and may explain why racial differences in perception of discrimination are greater than gender differences. Gender differs from race in that men and women are not segregated in most settings. Virtually everyone has significant relationships, on a familial, intimate and/or social level, with people of the other sex. This does not mean that gender does not matter: Psychologi-

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See Shelton et al., Ironic Effects, supra, at 401 ("It is unclear . . . to what extent our findings would generalize to interactions that last longer than 10 min. and do not involve race-related topics.").

201. Cf. Kanter, supra note 182, at 978 ("In some cases, dominants do not wish to carry out certain activities in the presence of a token; they have secrets to preserve.").

202. Although men are presumptively admitted to these conversations, they can opt out by signaling disinterest. However, if they opt out, they may be viewed as transgressing gender norms. Similarly, women who have no interest in discussing "female" topics with other women may incur social penalties.

203. See Maureen O'Connor et al., Explaining Sexual Harassment Judgments: Looking Beyond Gender of the Rater, 28 Law & Hum. Behav. 69, 73 (2004) ("Besides their own experiences, women may have listened to more stories from others about harassing experiences or other potentially negative interactions at the workplace.").

204. See supra text accompanying notes 176–183.

205. See O'Connor et al., supra note 203, at 70 ("The most widely reported finding is that women tend to have a broader definition of sexual harassment than men."); cf. id. at 78, 90 (finding no significant gender difference in certain ratings of sexual harassment based on scenario in which potential harassment occurred in work environment permeated with pornography and other material objectifying women, but significant gender difference when same conduct occurred in nonsexual work environment); Rotundo et al., supra note 115, at 920 (suggesting, based on meta-analysis of 145 studies, that women are more likely than men to view "sex-stereotyped jokes or repeated requests for dates after refusal" as harassment).

cal integration does not necessarily follow from spatial integration. Just as black and white employees can work in the same office and develop substantially different perceptions of the office's racial dynamics, a brother and sister raised by the same parents may embody substantially different conceptions of gender. Because of a gendered double standard, for example, sexual expression and conduct by the brother would likely provoke a different reaction if it came from the sister.[206] In this way, the siblings can have radically different childhoods, even as they grow up in the same home.

These disparities have consequences as girls and boys mature into adults. Two primary factors contribute to gender differences in perceiving sexual harassment. First, men and women usually have disparate experiences with respect to the threat of sexual violence. Women are more likely to be victims of rape or other sexual abuse, and thus are taught to be sensitive to potentially coercive sexual behavior.[207] Unlike men, women are likely to "experience the fear and potential of rape on a daily basis."[208] However, the actual difference between the risk that a woman and a man will experience sexual coercion appears to be smaller than many assume.[209] Yet society has framed rape as a "women's issue," which may relieve men of their responsibility for thinking of themselves as both potential perpetrators and potential victims.[210] Second, men are raised

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206. See Kimberly A. Yuracko, Trait Discrimination as Sex Discrimination: An Argument Against Neutrality, 83 Tex. L. Rev. 167, 197 (2004) ("Vulgarity in women is shocking and disturbing in a way that vulgarity in men is not.").

207. See, e.g., Donat & Bondurant, supra note 140, at 55 (reporting that 59% of women in study reported at least one "sexual victimization experience" and noting national survey of college students showing rate of 54%); id. at 60 (finding that "women who had been sexually victimized through force or threat of force perceived more sexual interest than nonvictimized women in the man's behaviors"); Carol T. Kulik et al., Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes, 27 Law & Hum. Behav. 69, 71 (2003) ("Women are most frequently the victims of harassment, and their personal experience with sexual harassment may make it easier for them to identify with victims of harassment than for men."). Men and women also tend to conceive of rape differently; studies show men are more likely to believe rape myths and blame the victims. See, e.g., Irina Anderson, What Is a Typical Rape? Effects of Victim Participant Gender in Female and Male Rape Perception, 46 Brit. J. Soc. Psychol. 225, 228 (2007).

208. Anderson, supra note 207, at 229 ("[W]omen may be expected to know considerably more about rape than men, take notice of media reports of incidents and discuss these issues with friends.").

209. See id. at 227 (citing several studies to show that "male rape . . . is increasingly recognized as a more frequent phenomenon than previously thought" and that "a substantial number of men are raped each year in the general population"); Cindy Struckman-Johnson & David Struckman-Johnson, College Men's and Women's Reactions to Hypothetical Sexual Touch Varied by Initiator Gender and Coercion Level, 29 Sex Roles 371, 371–72 (1993) (reviewing studies that suggest that "moderate percentages of college men" have been targets of cross-gender or same-gender sexual aggression).

210. See Devon W. Carbado, Straight Out of the Closet, 15 Berkeley Women's L.J. 76, 86, 103 (2000) [hereinafter Carbado, Closet] ("Gender, for men, is a term that relates to women and women's experiences; it is synonymous with 'female.' Thus, men have not

to be sexual aggressors and to view the world in different sexual terms than women.[211] While women quickly learn to expect the male gaze and to negotiate it, men are not as accustomed to being the object gazed upon.[212] Consequently, women and men may differ significantly as to whether a sexual joke or overture by a male coworker constitutes sexual harassment or rather is an attempt at being funny or friendly. Men may perceive sexual intentions in female behavior that a woman does not intend to be sexual.[213]

Despite these factors, which tend to create a gendered gap with respect to perceptions of sexual harassment, other aspects of male-female relations tend to make the male-female perception gap smaller than the black-white perception gap. Childhood plays an important role. The typical hetereosexual family has both men and women in it, meaning that girls (as well as boys) are subject to male and female perspectives on gender and gender discrimination. Moreover, fathers continue to play the "head of household" role in many families, meaning that their views may dominate.[214] Blacks and whites, by contrast, tend to grow up in racially segregated homes and social environments.

Women's childhoods may lead them to receive mixed messages that frustrate their abilities to identify and cope with gender discrimination in the outside world. In this respect, women are somewhat like queer people, who usually grow up in a heterosexual family that instills homophobia in them instead of encouraging queer children to develop queer identities and preparing them for experiences with sexual orientation discrimination in the outside world. Although the mother contributes to her daughter's views on gender discrimination, most mothers are not feminists. Even when the mother has feminist commitments, a misogynistic father's contrary views (as "head of the household") may prevail.

Black people, by contrast, usually grow up in an all-black family that provides a relatively unified education on race and negotiating racial discrimination.[215] This disparity between blacks and women seems to be the most likely explanation for the smaller perceptual gap between men and women.

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paid much attention to the ways in which the social constructions of gender shape and define men's experiences as men.").

211. See, e.g., Johnson et al., supra note 100, at 464 (describing "tendency for men compared to women to perceive interactions . . . in more sexual terms").

212. Hence, heterosexual men who find themselves the object of a queer man's gaze may experience discomfort because this casts them in a role that they have always thought reserved for women.

213. See supra text accompanying note 100.

214. Thus, we should expect to see significant differences in perspective between girls raised by two mothers (especially if the moms are lesbian feminists) and those raised by a father and mother.

215. In some families, of course, the parents might disagree on the prevalence of discrimination. The father might perceive discrimination to be pervasive, while the mother (or other father) might tend to minimize discrimination.

* * *

This Part has explained how outsiders and insiders develop different cognitive frameworks for interpreting incidents of potential discrimination and illustrated how they are likely to play out. This clash of cognitive frameworks primes black and white people to misunderstand each other when allegations of discrimination arise. Both insiders and outsiders have perceptual limitations, which may obscure their ability to ascertain discrimination. Yet few people on either side of a divide are aware of these limitations, which can enhance frustration and social isolation.

III. Minimizing Discrimination

Parts I and II attempted to show that there are substantial differences in how blacks and whites tend to perceive allegations of discrimination, and that there are smaller differences between men and women. This research raises the question of whether the law should attempt to reflect the perceptions of blacks or whites, or women or men, when adjudicating claims of discrimination. Some might respond that blacks and women tend to exaggerate discrimination, and thus their perceptions of discrimination would provide an unreliable baseline for the law.

The notion that black people in particular imagine or exaggerate instances of potential discrimination seems to have gained traction in the popular culture. "From the perspective of those who do not see discrimination at work, black claims of discrimination appear frantic and paranoid."[216] A recent variation of this idea crystallized in the wake of the O.J. Simpson trial when white people began to describe blacks as "playing the race card," which means alleging racism strategically, even though the black person knows that race is not actually at issue.[217] Rather than genuinely but mistakenly perceiving discrimination as pervasive (the "paranoid" black person), those who play the race card are seen as deliberately and dishonestly using race as an excuse for their own failings. Women

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216. Friedman & Davidson, supra note 124, at 219; see Fine & Turner, supra note 72, at 126–27 (recounting specific conspiracy theories that "many whites . . . [see as] nonsens[ical]"); Ford, Race Card, supra note 119, at 20 ("Some people are convinced that most accusations of bias are disingenuous. There are plenty of pundits, politicians, and bloggers ready to dismiss any accusation of bias as calculating and self-serving."); Roger Waldinger & Michael I. Lichter, How the Other Half Works: Immigration and the Social Organization of Labor 175–76 (2003) (discussing examples of such accusations by nonblack employers and managers); Friedman & Davidson, supra note 124, at 203–04 (suggesting that *Wall Street Journal* editorial accusing blacks of "indiscriminately—almost whimsically—raising the issue of race when it has no direct relevance" is indicative of broader views among some whites (internal quotation marks omitted)); Kang, supra note 26, at 1495–96 (noting that "calls for equality are often derogated as whining by those who cannot compete in a modern meritocracy").

217. See Bonilla-Silva, supra note 122, at 1 (defining "playing the race card"); Kimberlé Crenshaw, Playing Race Cards: Constructing a Pro-active Defense of Affirmative Action, 16 Nat'l Black L.J. 196, 198 (1998–2000) (discussing "gamesmanship" metaphor that appeared in white discussions of O.J. Simpson trial).

are at times subject to somewhat similar charges when men fear that wo-
men have irrationally misinterpreted their comments or other overtures
as sexual harassment.[218]

Although there are individual cases in which a particular person ex-
aggerates the impact of race or sex or wields it strategically, this Part ar-
gues that the available psychological and sociological evidence casts
doubt on this theory as a sufficient explanation for the perceptual differ-
ences between outsiders and insiders. I describe below a complex set of
factors that shapes the extent to which a black person or woman per-
ceives discrimination as well as the subsequent decision whether to claim
discrimination.

A. *Psychological Costs*

Although early scholarship suggested that blacks and women benefit
psychologically from attributing adverse outcomes to discrimination,
more recent studies have identified countervailing psychological forces
that give outsiders disincentives to identify and challenge discrimination.
I first examine a major study by Jennifer Crocker and Brenda Major
which suggested that perceiving discrimination may buffer self-esteem,
and then I turn to subsequent studies that call into doubt that hypothesis
by revealing several countervailing psychological costs.

In an influential article published in 1989, Crocker and Major theo-
rized that outsiders may benefit from attributing failures to discrimina-
tion because such attributions are preferable to accepting that one's per-
formance is responsible for the failing.[219] Accordingly, when negative
outcomes arise from ambiguous circumstances, the outsider may attri-
bute the adverse outcome to discrimination.[220] This interpretation may

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218. David Bernstein cites as an example of what he sees as hypersensitivity a woman
who complained of harassment after her male coworker told her about a *Seinfeld* joke
involving Jerry Seinfeld's girlfriend, whose name rhymed with a female sex organ. See
David E. Bernstein, You Can't Say That: The Growing Threat to Civil Liberties from
Antidiscrimination Laws 23–26 (2003). As I discuss further in Part IV, sexual harassment
law contains objective and subjective components in order to protect employers from
employees who are deemed to be overly sensitive. See Gutek et al., supra note 112, at 598
("The objective reasonableness part of [sexual harassment] analysis is intended at least in
part to protect employers and individuals accused of sexual harassment from the
hypersensitive employee, the one who sees any sideward glance or obnoxious remark as
sexual harassment.").

219. See Jennifer Crocker & Brenda Major, Social Stigma and Self-Esteem: The Self-
Protective Properties of Stigma, 96 Psychol. Rev. 608, 612 (1989) [hereinafter Crocker &
Major, Social Stigma] (describing attribution to discrimination as "self-protective
mechanism" that is prone to "[o]veruse"). Crocker & Major emphasized that they were
not arguing that experiencing discrimination has no harmful psychological effects; they
restricted their theory to one psychological measure, "global self-esteem," which they
defined as "a generalized feeling of self-acceptance, goodness, worthiness, and self-
respect." Id. at 609, 611.

220. See id. at 612 (arguing that outsiders protect their self-esteem by "attributing . . .
relatively poor outcomes" to insider prejudice).

allow the outsider to avoid acknowledging her "personal inadequacies" as possible explanations, thus "buffer[ing]" her self-esteem.[221] Crocker and Major's theory did not purport to explain all perceptions of discrimination. It focused on circumstances where a perception of discrimination enabled an individual to deflect negative information that would otherwise call into question her competence. In some contexts, discrimination lacks a relationship to perceptions of competence. When an apartment manager tells a black person that he has no vacancies or a waiter ignores a black customer, for example, there is no interpretation of the incident that would call into question the African American's competence. Under such circumstances, attributing adverse treatment to discrimination would not seem to buffer self-esteem.

Nonetheless, when self-esteem is at stake, Crocker and Major's theory could be read to suggest that outsiders may too frequently attribute outcomes to discrimination in order to protect self-esteem.[222] This reading might be seen as consistent with the psychology literature on "motivated reasoning."[223] This literature suggests that motivation may affect reasoning by biasing the cognitive processes used to reach a conclusion.[224] For instance, in one study, subjects who consumed high amounts of caffeine and read a description of a study finding a link between caffeine and disease were more critical of the methodological aspects of the study than subjects who consumed less caffeine.[225]

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221. Id. In some cases, there are other psychological and social benefits to perceiving and claiming discrimination, although the literature has not fully explored them. In one study, white subjects viewed a job candidate who attributed a rejection to discrimination as a complainer, but also, interestingly, as more true to himself than in the control condition. See infra text accompanying notes 271–276. Moreover, discussing perceived racial discrimination in all-black settings may benefit a person by helping him bond with other African Americans. (Of course whites also bond by discussing their racial experiences, including perceptions that a black person has "played the race card" and complaints about so-called "reverse discrimination.").

222. See id. (noting that "[o]veruse of this self-protective attributional function" has been documented for other "stigmatizing conditions").

223. See, e.g., Ziva Kunda, The Case for Motivated Reasoning, 108 Psychol. Bull. 480, 480 (1990) (discussing motivated reasoning literature, which suggests that "motivation may cause people to make self-serving attributions" and reason based on "biased set of . . . strategies for accessing, constructing, and evaluating beliefs"). For an application of the motivated reasoning literature to a legal issue, see Sung Hui Kim, The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper, 74 Fordham L. Rev. 983, 1029 (2005) (describing study where subjects were presented with materials abstracted from actual lawsuit).

224. See Kunda, supra note 223, at 493 (arguing that motivations "have been shown to affect people's attitudes, beliefs, and inferential strategies," leading them to construct ex post lines of reasoning to justify conclusions that their motivations have predisposed them to accept).

225. See id. at 490 (stating that "[s]ubjects motivated to disbelieve the article (high caffeine consumers who read that caffeine facilitated disease, low caffeine consumers who read that caffeine hindered disease) were less persuaded by it").

However, subsequent scholarship, including some by Crocker and Major, has complicated an attempt to read their theory to suggest that most perceptions of discrimination are motivated by a desire to protect self-esteem.[226] These studies suggest that various psychological and social forces provide outsiders with disincentives to perceive and claim discrimination. A series of studies that measured the tendencies of women and people of color to perceive discrimination found that, although "individual perceptions of discrimination are not pure reflections of reality," the departure from reality is a tendency among outsiders to underestimate— rather than overestimate—discrimination.[227]

These studies suggest that outsiders tend to avoid attributing adverse treatment to discrimination unless such attributions are very difficult to avoid. In the first study, the researchers asked 100 female university students to take a test that they were told would evaluate future career success.[228] After each participant completed the test, the experimenter told her that all eight judges were male. Depending on the condition, the

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226. The empirical studies attempting to validate the theory came up with mixed results. See, e.g., Branscombe et al., supra note 78, at 136 (arguing that the relationship between self-esteem and attribution to prejudice is complex, "depend[ing] not just on the externality of the attribution but also on what the attribution means for the devalued group member"); Jennifer Crocker et al., Social Stigma: The Affective Consequences of Attributional Ambiguity, 60 J. Personality & Soc. Psychol. 218, 227 (1991) (proposing that stigmatized persons' "subjective experiences" of discrimination will "directly depend on" whether they believe outcomes in their lives are due to their individual worthiness or rather to intergroup discrimination). For instance, one of Major's experiments found, contrary to her initial hypothesis, that attributing negative feedback to discrimination protected self-esteem only when the situation was "unambiguously prejudiced." Brenda Major et al., Attributions to Discrimination and Self-Esteem: Impact of Group Identification and Situational Ambiguity, 39 J. Experimental Soc. Psychol. 220, 230 (2003). In the ambiguous condition, which is more common in the "real world," attributing negative feedback did not protect self-esteem. Id. Major thus acknowledged that her study added to the "growing evidence that it is overly simplistic to assert that attributing negative outcomes to prejudice protects self-esteem." Id.

227. Karen M. Ruggiero & Donald M. Taylor, Coping with Discrimination: How Disadvantaged Group Members Perceive the Discrimination that Confronts Them, 68 J. Personality & Soc. Psychol. 826, 831 (1995) [hereinafter Ruggiero & Taylor, Coping]. In 2001, Karen M. Ruggiero admitted fabricating data regarding other publications, which were retracted, and Ruggiero resigned from her position at the University of Texas. See Mark Lisheron, Former UT Professor Disciplined for Faking Data While at Harvard, Austin American-Statesman, Jan. 3, 2002, at B1. These revelations did not concern the two Ruggiero coauthored articles that I cite in this Article. See infra note 235 (citing 1997 Ruggiero article). The two articles have wielded considerable influence and have been cited in leading psychology journals after Ruggiero's admissions. A search in the PsychInfo database on August 13, 2007 for citations in 2004 or later yielded twenty-five citations to the 1995 Ruggiero & Taylor article and thirty to their 1997 article. Moreover, Ruggiero's coauthor, Donald Taylor, who did not collaborate with Ruggiero on any of the retracted articles, affirms that the data and findings of these two coauthored articles are sound. See E-mail from Donald Taylor, Professor of Psychology, McGill Univ., to author (Aug. 2, 2007) (on file with the *Columbia Law Review*).

228. See Ruggiero & Taylor, Coping, supra note 227, at 832. The participants were asked to list potential uses of five items. See id.

experimenter then told the participant that 100%, 75%, 50%, or 25% of the judges discriminated against women.[229] The participant had no way of knowing which judge graded her test. The experimenter then asked the participant to answer a questionnaire, which included a question requiring her to rate on a 0 to 10 scale (10 being the highest) the extent to which six factors played a role in her grade. The relevant factors were "discrimination" and "quality of your answers."[230] The mean attribution to quality of answers significantly exceeded the mean attribution to discrimination in all conditions except the 100% condition.[231] Only when it was absolutely clear that discrimination was a cause—the 100% condition—did the mean attribution to discrimination outstrip quality of answers.[232] In the 75%, 50%, and 25% conditions, mean attributions to discrimination were "systematically low[er]" than the researchers expected based on a "rational" interpretation of the applicable probability.[233] Surprisingly, the mean attributions were roughly the same in the 75%, 50%, and 25% conditions: around 2 on the 0 to 10 scale for discrimination, and around 7 for quality of answers.[234]

The researchers replicated these findings with similar studies using a different sample of women and a sample of fifty African American and fifty Asian American students.[235] Both racial groups minimized discrimination, but there was "an even greater tendency for Asians to minimize discrimination and, instead, blame their failure on the quality of their answers on the test."[236] The studies assessed self-esteem as well and found that blacks and Asians in the 100% condition, those most likely to attribute their grade to discrimination, were significantly higher in "performance state self-esteem" than those in each of the other conditions (75%, 50%, and 25%).[237] By contrast, those in conditions with a probability of less than 100% were significantly higher in "social state self-esteem" than those in the 100% condition.[238] Performance state self-esteem refers to an individual's self-esteem about her ability to perform, while social state self-esteem refers to self-esteem with respect to the

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229. See id. at 833.

230. See id. (internal quotation marks omitted).

231. See id. at 834 fig.2.

232. See id.

233. Id. at 834–35.

234. See id. at 834.

235. See Karen M. Ruggiero & Donald M. Taylor, Why Minority Group Members Perceive or Do Not Perceive the Discrimination That Confronts Them: The Role of Self-Esteem and Perceived Control, 72 J. Personality & Soc. Psychol. 373, 378–81 (1997) [hereinafter Ruggiero & Taylor, Why Minority] (reporting findings with respect to women); id. at 382 ("The pattern of attributions for negative feedback among Asians and Blacks parallels the pattern found with women . . . .").

236. Id. at 382.

237. Id. at 383.

238. Id.

group's standing in society.[239] Thus, even though the protection of performance state self-esteem might incentivize outsiders to perceive discrimination, that benefit may be countered by a drop in social state self-esteem.[240] Moreover, this series of studies suggests that Crocker and Major's prediction that attributions to discrimination protect one type of self-esteem has a narrow application because outsiders tend to perceive discrimination only when such attributions are hard to avoid.[241]

A related limitation of Crocker and Major's theory is that it did not fully account for the cumulative effects of experiences with discrimination. When the target perceives that a negative reaction to the target's identity is not idiosyncratic (e.g., an aversion to people with blue eyes) but a manifestation of a pervasive form of discrimination, "attributions to discrimination should be more costly because they locate the cause of discrimination within a broader social context in which one's social identity is consistently devalued and disadvantaged."[242] A single incident of discrimination can thus create an apprehension of future and perhaps regular exposure to discrimination.[243] In one study, targets that perceived pervasive gender discrimination experienced lower self-esteem after a single incident of discrimination than did those who experienced the same incident but perceived that discrimination was rare.[244]

Similarly, Nyla Branscombe and her coauthors surveyed 139 African Americans and found that perceiving pervasive discrimination reduces well-being.[245] At the same time, however, perceiving pervasive discrimination increased racial group identification, which enhanced well-be-

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239. Cf. id. at 375 (highlighting distinction between self-esteem in performance and social states).

240. Cf. Crocker & Major, Social Stigma, supra note 219, at 609 (arguing that discrepancies between studies finding lowered self-esteem among blacks and those finding equal or greater self-esteem among blacks are attributable to different measures of self-esteem—racial group-based vs. personal self-esteem).

241. See Ruggiero & Taylor, Coping, supra note 227, at 836 (finding participants minimize discriminatory explanations when there is ambiguous potential for discrimination).

242. Michael T. Schmitt et al., Women's Emotional Responses to the Pervasiveness of Gender Discrimination, 33 Eur. J. Soc. Psychol. 297, 308 (2003).

243. See id. at 298–99 (arguing that "[w]hen a specific negative outcome is attributed to pervasive discrimination it implies that one can expect to be treated negatively across both times and situations").

244. See id. at 307–08. All women in the study received a negative evaluation from a male interviewer after a mock job interview. The women in the "rare" discrimination condition were told that 19 out of 20 interviewers were fair, but the one who conducted her interview happened to be biased against women. The women in the "pervasive" discrimination condition were told that all 20 interviewers were biased against women. See id. at 303. The study measured public and private collective self-esteem. See id. at 305.

245. See Branscombe et al., supra note 78, at 142 ("[T]he more participants saw prejudice as pervasive, the more likely they were to have poor personal and collective well-being."). The measure of well-being included different conceptions of self-esteem and experiencing negative emotions. See id. at 140.

ing.[246] Although the reduced well-being stemming from perceiving pervasive discrimination was mitigated by the effect of increased racial group identification, "the overall relationship between willingness to make attributions to prejudice and the well-being constructs was still negative."[247] This is consistent with other findings that the net psychological impact of making an attribution to discrimination is negative.[248] Crocker and Major's initial article did not canvass other potential psychological consequences of perceiving discrimination, including experiencing anger,[249] "anxiety, depression, [and] hopelessness."[250] Expectations of discrimination may also produce a feeling of loss of control because individual effort may seem futile in light of pervasive bias.[251] Further, with respect to sexual harassment at least, studies show that targets of discrimination commonly blame themselves for perceived discrimination.[252]

"System justification theory" indicates that an additional cost of perceiving discrimination is the belief that the system in which one lives is

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246. See id. at 143 (finding that attributing outcomes to prejudice "influence[s]" group identification).

247. Id. at 142. But cf. Enrique W. Neblett Jr. et al., The Role of Racial Identity in Managing Daily Racial Hassles, in Racial Identity in Context: The Legacy of Kenneth B. Clark 77, 85 (Gina Philogéne ed., 2004) (finding that for blacks for whom race is very central to self-identity, "daily racial hassles seemed to have no impact on the[ir] subsequent mental health"). The Branscombe study found more support for the theory that attributions to discrimination influence racial group identification among African Americans than for the theory that racial group identification influences attributions to discrimination. See Branscombe et al., supra note 78, at 143.

248. See Ruggiero & Taylor, Why Minority, supra note 235, at 387 (concluding that "minority group members are inclined to minimize personal discrimination because the consequences of doing so are, on balance, psychologically beneficial").

249. See Brenda Major et al., It's Not My Fault: When and Why Attributions to Prejudice Protect Self-Esteem, 29 Personality & Soc. Psychol. Bull. 772, 774 (2003) [hereinafter Major et al., Fault] ("There is substantial evidence that the perception of injustice is associated with the emotional response of anger.").

250. Schmitt et al., supra note 242, at 298–99; see Neblett et al., supra note 247, at 81 (describing negative psychological consequences of perceived discrimination). Although these studies find a correlation between negative well-being and perceptions of pervasive discrimination, they do not necessarily show causation. See Schmitt et al., supra note 242, at 299 ("One could argue that the negative relationship between pervasive perceptions of discrimination and well-being could result from the reverse causal direction—that individuals who are . . . generally sensitive to rejection . . . are consequently more likely to see themselves as the target of discrimination.").

251. See Ruggiero & Taylor, Why Minority, supra note 235, at 384 (finding that attribution of outcomes to discrimination is negatively correlated with "lower social state self-esteem" in Asians and Blacks); Valian, supra note 45, at 165 (suggesting that belief in biased nature of society leads to "hopelessness" and "helplessness"); cf. Schmitt et al., supra note 241, at 299 ("[P]ervasive discrimination . . . implies that one can expect to be treated negatively across both time and situations.").

252. See Janet K. Swim & Lauri L. Hyers, Excuse Me—What Did You Just Say?!: Women's Public and Private Responses to Sexist Remarks, 35 J. Experimental Soc. Psychol. 68, 71 (1999) [hereinafter Swim & Hyers, Excuse Me] ("Self-blame is a common response to sexual harassment . . . .").

unfair.[253] This theory was developed by John Jost and Mahzarin Banaji to explain the psychological process whereby "losers" in various social hierarchies are motivated to justify the status quo.[254] Although it may seem counterintuitive to lay people, this theory and its numerous supporting studies show that "those who are seemingly disadvantaged by a social system [may] become its most ardent supporters."[255] Given the choice of accepting that one lives in an unjust world or accepting responsibility for personal failures—a choice which creates "cognitive dissonance"[256]— some outsiders embrace the latter belief, including majority-created stereotypes about their group.[257] This impulse to justify the status quo may drive some outsiders to "engage in cognitive distortions to convince [themselves] that people are actually the recipients of their deserved outcomes."[258] One such cognitive distortion may be ignoring (consciously or unconsciously) discriminatory experiences. Outsiders resolve this mix of costs and benefits to perceiving discrimination in various ways.[259] Although scholars do not yet understand fully the mechanisms that explain why one outsider copes by aggressively perceiving discrimination and another responds by denying discrimination, it appears that the latter response is more common. This is because to the extent that the self-esteem benefit predicted by Crocker and Major exists, there is persuasive evidence that it may be offset by the various psychological costs of making attributions to discrimination: a reduction in other types of self-esteem, anger, anxiety, hopelessness, loss of control, self-blame, and a perception that society is unjust.[260]

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253. See, e.g., Blasi & Jost, supra note 30, at 1124 (arguing that "human psychology is such that we tend to assume that people (including ourselves) get what they deserve and deserve what they get").

254. See id. at 1123 (explaining that there is "a general human tendency to support and defend the social status quo" (citing John T. Jost & Mahzarin R. Banaji, The Role of Stereotyping in System Justification and the Production of False Consciousness, 33 Brit. J. Soc. Psychol. 1 (1994))).

255. Id.

256. See id. at 1130 ("[E]specially stark forms of inequality can create a discrepancy between the need to justify the system and the need to feel good about oneself and one's fellow group members.").

257. See id. (arguing that outsiders may rationalize their life outcomes by concluding that stratified social system is in fact fair, and that they have personal flaws, which are consonant with majority stereotypes, that explain their failures). Examples of justifications by professional women who responded to one survey included declarations that gender discrimination no longer exists because "[i]t's against the law," that "[a] lot of women are treated unfairly because they ask for it," and that women could evade discrimination if they just became "one of the boys." Edward Lafontaine, Forms of False Consciousness Among Professional Women, 10 Humboldt J. Soc. Rel. 26, 33–34, 36 (1983) (internal quotation marks omitted).

258. Crosby, supra note 45, at 375.

259. See Elizabeth C. Pinel, You're Just Saying That Because I'm a Woman: Stigma Consciousness and Attributions to Discrimination, 3 Self & Identity 39, 39–40 (2004) (describing variance in "stigma consciousness").

260. Although Crocker and Major have disagreed with some of their critics, Major has revised their initial thesis to acknowledge that outsiders' coping mechanisms are shaped

B. *Social Costs*

Outsiders who perceive discrimination face not just psychological costs, but also substantial social costs if they articulate that perception. Several compelling studies demonstrate that social pressures may silence targets of discrimination. These social costs include being perceived as a hypersensitive complainer and facing negative career effects.

Janet Swim and Lauri Hyers conducted a study in which female students heard a male peer make three sexist remarks, such as depicting women as sex objects or as responsible for domestic chores, during a group task in which the group was evaluating particular male and female candidates.[261] Although the authors defined "confrontation" generously—"verbal expressions of displeasure or disagreement with the sexist remark"—the majority of the women (55%) failed to confront any of the sexist comments.[262] Indeed, "only 16% of the women confronted the sexist person with direct verbal comments such as indicating that his remarks were inappropriate or that he should retract them."[263] The responses did not track the perceptions of the women as to whether the comments were discriminatory—91% of those who did not confront reported negative thoughts and feelings about the speaker after the incident.[264] Gender norms requiring women to be demure and polite may in part explain why some women did not confront, and why many of those who confronted used indirect methods of objecting.[265]

As suggested earlier with respect to race, such failures to confront, although reasonable in light of the threat of retaliation, perpetuate gendered differences in perceptions: Men who make offensive remarks may not even know they have done so. The women's actual reactions

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"both by a powerful motive to protect and enhance self-esteem and by a powerful need to perceive one's social world and the position of oneself within that world as just" and that there is "substantial variability in self-esteem and psychological well-being" among outsiders. Major et al., Perceiving, supra note 30, at 280; see also Major et al., Fault, supra note 249, at 780 ("Clearly, it is overly simplistic to claim that attributing negative outcomes to prejudice protects self-esteem. . . . Perceiving oneself as a target of discrimination involves recognizing that you and your group are devalued by society at large, that negative events are outside of your control, and that you are likely to face similar events in the future.").

261. Swim & Hyers, Excuse Me, supra note 252, at 69–70.

262. See id. at 75 (defining "confrontation"); id. at 79 (describing results of study). The authors included within their definition of "confrontation" requesting that the man repeat himself, deflecting the comment with humor or sarcasm and making decisions that implicitly contradicted the speaker's rationale. See id. at 76. The authors were surprised that those who confronted the speaker did not report higher self-esteem than those who failed to confront. See id. at 78.

263. Id. at 79.

264. Id.

265. The study found a correlation between the perceived politeness of a reaction and the frequency of such reaction occurring. See id. at 84–85. The socially conditioned "feminine" methods of objecting contrast sharply with the feelings that the women reported in the survey, which "frequently" included "hitting and punching." Id. at 81.

stood in marked contrast to predictions made by a similar sample as to how they would react to sexist remarks. Eighty-one percent of the women in that sample predicted that they would confront the man in some way, while only 45% of those actually exposed to the comments confronted.[266] Forty-eight percent said they would state that the comments were inappropriate, but just 16% of the women actually exposed to sexist comments responded in that way.[267]

While Swim and Hyers' scholarship shows that many targets of discrimination do not object, the work of Cheryl Kaiser and Carol Miller helps flesh out the reasons for this passivity.[268] The costs of confronting discrimination can be substantial because the target may be labeled as "hypersensitive, emotional, and generally unpleasant."[269] Moreover, confronting discrimination often requires placing the blame on another person (the "perpetrator"), which may escalate interpersonal hostility, especially if that person is someone in authority or a coworker with whom the target must interact regularly.[270]

In one study validating these dynamics, Kaiser and Miller led predominantly white male college student subjects to believe that a black college student had taken a test designed to measure the black student's future career success.[271] The subjects read that the experimenter told the student that there were eight white judges evaluating the test and that either none, four, or eight were biased against blacks. According to the narrative, the black student received a failing grade. He was then asked to rate on a 0 to 10 scale the extent to which six potential factors, including answer quality and discrimination, impacted his grade. In one condition, the subjects read that the student rated answer quality as 8 and discrimination as 2 (with 10 being the highest possible attribution), while in the other, they read that the student rated answer quality as 2 and discrimination as 8. Finally, the subjects were asked to rate the extent to which the student was "a complainer, made a favorable impression, was

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266. Id. at 82 tbl.3.

267. Id. Eight percent said they would hit or punch the man; none actually did. Id.

268. See Cheryl Kaiser & Carol T. Miller, Derogating the Victim: Interpersonal Consequences of Blaming Events on Discrimination, 6 Group Processes & Intergroup Rel. 227, 236 (2003) [hereinafter Kaiser & Miller, Derogating the Victim] (concluding that "claiming discrimination is a risky behavior for members of stigmatized groups"); Cheryl R. Kaiser & Carol T. Miller, Stop Complaining! The Social Costs of Making Attributions to Discrimination, 27 Personality & Soc. Psychol. Bull. 254, 263 (2001) [hereinafter Kaiser & Miller, Stop Complaining] ("The social costs and negative evaluations that arise from claims of discrimination may prevent stigmatized people from attributing their failure to discrimination.").

269. Kaiser & Miller, Stop Complaining, supra note 268, at 255.

270. See id. (arguing that outsiders consider possibilities that "blame-pointing . . . may be unpleasant . . . [because] the perpetrator . . . is someone whom they will have to interact with" and also noting that "discrimination accusations against someone with power who controls important resources (e.g., an employer) may result in retaliation and further negative treatment").

271. See id. at 256–57 (describing study design).

true to himself, and was potentially successful in his future."[272] The authors were struck that the likelihood of discrimination (i.e., whether none, four, or all eight of the judges were biased) did not significantly impact the extent to which the target was labeled as a "complainer":[273] "An African-American who said he received a poor grade due to discrimination was perceived as a complainer regardless of whether none, half, or all of the judges in the pool from which he was graded discriminated against African-Americans."[274] When the student attributed his failing grade to discrimination he was viewed less favorably than when he attributed his grade to answer quality (again, regardless of the actual likelihood of discrimination),[275] but he was viewed as more true to himself when he made the discrimination attribution.[276] The authors replicated these findings in a second study with a majority white female college student sample.[277]

In a subsequent study, Kaiser and Miller extended the same model to an interview setting in which the subjects learned about a black male candidate who was interviewed and rejected for a job by a white male interviewer. The subjects read the interviewer's explanation for his decision, which contained comments suggesting either extremely high, high, moderate, or low prejudice.[278] Again, the subjects rated the African American candidate as more of a "troublemaker" when he made an attribution to discrimination, irrespective of the degree of bias expressed by the white

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272. Id. at 257.

273. See id. at 258.

274. Id.

275. See id. (noting authors' surprise that "attributions to discrimination resulted in less positive evaluations regardless of the chance of prejudice"). Specifically, the black student was rated as "more hypersensitive, emotional, argumentative, irritating, trouble making, and complaining when he attributed his failure to discrimination." Id. at 261; see also Friedman & Davidson, supra note 124, at 218 ("Claims of discrimination can also lead to backlash against the accuser for being a 'complainer' or 'radical,' or for raising the specter of group identity, which is antithetical to dominant norms in America.").

276. See Kaiser & Miller, Stop Complaining, supra note 268, at 259 (describing second experiment setup and summarizing study findings as: "[A]n African American man was evaluated more negatively when he attributed a failure to discrimination rather than the quality of his work.").

277. See id. at 259–61 (describing study design and results). The sample in the first study included 108 students, 76.6% of whom were male and 95.3% of whom were white. Id. at 256. The sample in the second study included 154 students, 62.9% of whom were female and 94.0% of whom were white. Id. at 259.

278. See Kaiser & Miller, Derogating the Victim, supra note 268, at 230–31 (describing study design). In the extremely high prejudice condition, the interviewer's remarks included the statement: "Black people are just not as smart as white people." In the moderate prejudice condition, the interviewer stated: "Recently, I've had some mixed experiences with black people. Although some people like him work out well, it's still a big financial risk." In the low prejudice condition, the interviewer explained: "I decided to offer the job to another candidate who seemed to have more potential." Id. (internal quotation marks omitted).

interviewer.[279] In deciding whether and how to respond to an incident of perceived discrimination, the target must weigh the psychological and social costs and benefits of each response, namely "(a) how much one believes that the action is likely to reduce injustice, minus (b) the costs associated with the action."[280] Derogation of people who complain about discrimination extends even to some outsiders, suggesting that some may have internalized insiders' hostility to those who claim discrimination and might expect other outsiders to suppress their perceptions.[281]

In light of the potentially substantial costs of perceiving discrimination and complaining, outsider perceptions of discrimination do not ineluctably lead to allegations of discrimination being made to employers, other authorities or courts. In fact, as suggested by the Swim and Hyers studies, in many, if not most instances, such perceptions may never culminate in a charge of discrimination.[282] These studies indicate that

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279. See id. at 234. In this study, however, the candidate was not rated as less "nice" when he attributed his rejection to discrimination as opposed to his interviewing skills or competition for the job. See id. As in the first studies, the candidate was viewed as more true to himself when he made an attribution to discrimination. See id. at 235.

280. Friedman & Davidson, supra note 124, at 218.

281. A study by Donna Garcia and her coauthors performed a variation on the Kaiser and Miller studies with a sample of students that was about half male and half female. See Donna M. Garcia et al., Perceivers' Responses to In-Group and Out-Group Members Who Blame a Negative Outcome on Discrimination, 31 Personality & Soc. Psychol. Bull. 769, 773 (2005). The sample was 81% white and just 4% African American. See id. at 772. Subjects evaluated either a man or woman who failed a test and had learned that the grader discriminated against the test taker's gender. Id. at 773. In the discrimination condition, subjects were told that the test taker blamed the bad grade primarily on discrimination, while the remaining subjects were told that the test taker attributed the bad grade primarily to poor quality of answers. Id. Not only were subjects prone to dislike people who claimed discrimination, but they were harder on those of the same gender who complained about discrimination than they were on those of the other gender. See id. at 774–75. They were more likely to view those of the same gender who complained as failing to take personal responsibility and reported disliking them. See id. at 775. At the same time, subjects rated test takers who perceived discrimination as more concerned with truth than those who attributed the bad grade to answer quality, suggesting that subjects thought the perceptions of discrimination were accurate yet expected the test taker to suppress them. See id. at 774. Although both insiders and outsiders may be critical of those who complain of discrimination, it would be a mistake to conclude that this is a universal phenomenon disconnected from race and gender. For instance, studies show that outsiders are more likely to claim discrimination when in the presence of another outsider and less likely to do so when in the presence of an insider. See Gretchen B. Sechrist et al., When Do the Stigmatized Make Attributions to Discrimination Occurring to the Self and Others? The Roles of Self-Presentation and Need for Control, 87 J. Personality & Soc. Psychol. 111, 117 (2004); Stangor et al., supra note 126, at 72 (concluding that outsiders who were asked to report whether a failing grade on a test was due to discrimination were more likely to attribute grade to discrimination, rather than ability, when they were in presence of another outsider and more likely to attribute grade to their ability when asked to report in the presence of an insider).

282. See, e.g., Friedman & Davidson, supra note 124, at 219 ("Given the low probability that going public with claims of discrimination will improve the situation, and the high probability that doing so will be costly, we expect that many perceptions of

blacks and women, on average, may be more likely to minimize discrimination than exaggerate it. Consistent with these social psychology studies are surveys indicating a "claiming gap" in that "self-perceived victims of discrimination are less likely to claim than victims of other kinds of problems."[283]

In sum, the evidence described in this Part complicates the claim that outsiders systematically exaggerate or imagine discrimination. Disparities between the perceptions of outsiders and insiders cannot be so easily explained. There is nothing inconsistent between this Part's hypotheses and the perceptual segregation hypothesis. Although outsiders are more likely to perceive discrimination than insiders, outsiders may simultaneously minimize much discrimination. To be sure, outsiders may sometimes fail to attribute outcomes to discrimination when it would be fair to do so, but this does not mean that outsiders are colorblind or believe that discrimination only occurs when it is clearly expressed. In short, the psychological literature suggests that we should take outsiders' perspectives seriously; if anything, these perspectives may undercount, rather than overcount, instances of discrimination.

IV. IMPLICATIONS AND INTERVENTIONS

Having attempted to establish the phenomenon of perceptual segregation, I now turn to its implications for the legal system and for struc-

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discrimination lay dormant and unexpressed."); Charles Stangor, Ask, Answer & Announce: Three Stages in Perceiving and Responding to Discrimination, 14 Eur. Rev. Soc. Psychol. 277, 305 (2003) (concluding, based on multiple studies, that "individuals are often unlikely to perceive and report discrimination").

283. Herbert M. Kritzer et al., To Confront or Not to Confront: Measuring Claiming Rates in Discrimination Grievances, 25 Law & Soc'y Rev. 875, 877 (1991); see id. at 882 (finding that claiming rate for discrimination is lower than for torts, property, or consumer claims). Relatedly, Barry Goldman surveyed 439 terminated workers at unemployment offices and found a statistically significant correlation between being white and claiming discrimination. See Barry M. Goldman, Toward an Understanding of Employment Discrimination Claiming: An Integration of Organizational Justice and Social Information Processing Theories, 54 Personnel Psychol. 361, 370, 378 (2001) (comparing minorities' tendency to claim discrimination with that of whites, and concluding that whites who were fired were "more likely" to have claimed discrimination in one way or another). It is worth noting that Goldman's sample was overwhelmingly made up of people of color (87.1%), which means the sample of whites (12.9% of 439) was relatively small. See id. at 370. Still, Goldman's findings seem consistent with the phenomenon of whites overestimating the extent to which they are harmed by affirmative action policies, which they perceive as "reverse discrimination." See Goodwin Liu, The Causation Fallacy: *Bakke* and the Basic Arithmetic of Selective Admissions, 100 Mich. L. Rev. 1045, 1046, 1078 (2002) (arguing that "[i]n any highly selective competition where white applicants greatly outnumber minority applicants . . . the average white applicants will not fare significantly worse under [a race-conscious] selection process"); see also Fine & Turner, supra note 72, at 117–18 ("For each African American who receives a job or a space at a college because of affirmative action, there are dozens, perhaps hundreds, of whites who can claim that they were the one who was denied that very spot. . . . A single [admissions] decision may cause many to feel resentment.").

tural interventions in the workplace. I offer only preliminary thoughts rather than an evaluation of all of the theory's implications for antidiscrimination law (and other legal contexts), which will have to await future scholarship. In particular, I focus on antidiscrimination law in employment contexts.

I outline four potential interventions. Part IV.A deals with the first three interventions, all of which explore revising Title VII's doctrinal framework: (1) adopting identity-specific standards in sexual harassment and retaliation cases; (2) informational remedies to correct mistaken assumptions about discrimination; and (3) devising remedies for Title VII plaintiffs who bring claims that fall short of prevailing at trial, yet are sufficiently meritorious to warrant some relief.

Interventions aimed at changing Title VII doctrine are likely to focus on altering the perceptions of insiders, because the current doctrinal framework strongly reflects the intuitions of whites and men, who dominate the federal judiciary.[284] The defining judicial intuition in the antidiscrimination context is what Michael Selmi calls a "deep skepticism" about the contemporary existence of race and sex discrimination.[285] Such skepticism may not be easily discerned from the various doctrinal tests that govern race and sex claims. Although scholars disagree on the breadth and content of current tests, many might think that, on its face, Title VII and its judicial doctrine provide reasonable opportunities for outsiders to obtain redress for discrimination. When we look at Title VII outcomes in the aggregate, however, a bias against finding discrimination emerges more clearly.[286] As one empirical study concluded, "[o]nly prisoners fare worse" as plaintiffs than do individuals alleging discrimination.[287]

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284. As Linda Krieger and Susan Fiske have written, "[i]n discrimination cases, as elsewhere, judges are constantly using 'intuitive' or 'common sense' psychological theories in the construction and justification of legal doctrines and in their application to specific legal disputes." Krieger & Fiske, Behavioral Realism, supra note 25, at 1006. These theories stem in part from judges' racial and gender identities and experiences. Id. at 1004 (discussing growing scholarly concern with "uncontrolled application of . . . subtle ingroup preferences"). As of 2004, federal judges were 92% male and more than 80% white. See Elizabeth Chambliss, Am. Bar Ass'n, Miles to Go: Progress of Minorities in the Legal Profession 53–54 (2004). Although juries may be more diverse, judges can—and often do—overturn their verdicts or make pretrial rulings that prevent plaintiffs from taking the cases to a jury. See infra text accompanying notes 289–298.

285. Michael Selmi, Why Are Employment Discrimination Cases So Hard to Win?, 61 La. L. Rev. 555, 562–63 (2001) (discussing biases about racial discrimination); see id. at 568 (discussing "ambivalent" attitude of American society towards women who work, and suggesting that this attitude has "precluded various litigation strategies aimed at challenging . . . the traditional workplace").

286. Of course, one who believes that discrimination no longer exists might take judges' refusal to find discrimination as support for this position.

287. Wendy Parker, Lessons in Losing: Race Discrimination in Employment, 81 Notre Dame L. Rev. 889, 891 (2006).

While these changes to Title VII may help bring more balance to the jurisprudence, my fourth intervention turns to employers. In Part IV.B, I propose that employers adopt structural policies to prevent and remedy discrimination, actual and perceived, by diversifying the set of decisionmakers in hiring, promotion, and EEO processes. Some employers already follow such policies informally, but usually not because of awareness of perceptual segregation. I demonstrate how such policies may narrow perceptual divides by encouraging dialogue and collaboration across race and gender lines.

The appeal of each of the Title VII interventions may depend in part on the question of accuracy. These interventions respond in one way or another to judicial intuitions that (1) discrimination is rare and (2) most outsiders who claim to have suffered discrimination are either paranoid or strategic. However, those who accept the judicial intuitions and believe that perceptual disparities are primarily caused by outsiders' erroneous perceptions would likely focus on nonjudicial interventions, since courts in Title VII cases typically rule against outsider plaintiffs. Although my examinations of the first three interventions are somewhat cursory, I explore in greater detail the structural workplace intervention, which is likely to appeal to both camps.

A. *Interventions into Title VII Jurisprudence*

Title VII jurisprudence has become decidedly unfavorable to employment discrimination plaintiffs. Based on their examination of every civil case terminated in the federal court system from 1970 to 2001, Kevin Clermont and Stewart Schwab concluded:

> Employment discrimination plaintiffs have a tough row to hoe. They manage many fewer happy resolutions early in litigation, and so they have to proceed toward trial more often. They win a lower proportion of cases during pre-trial and at trial. Then, more of their successful cases are appealed. On appeal, they have a harder time upholding their successes and reversing adverse outcomes.[288]

This Part first discusses how the problems Clermont and Schwab identify are indicative of an "insider bias" in the enforcement of antidiscrimination law. It then turns to explore three interventions to correct for this insider bias.

1. *"Insider Bias" in Title VII Jurisprudence.* — As the above summary indicates, Clermont and Schwab found hurdles for employment discrimination plaintiffs at each stage in the process. These hurdles are indicative

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288. Kevin M. Clermont & Stewart J. Schwab, How Employment Discrimination Plaintiffs Fare in Federal Court, 1 J. Empirical Legal Stud. 429, 429 (2004). Clermont and Schwab used data collected by the Administrative Office of the U.S. Courts, beginning in 1970, when the courts began using a computerized record keeping system. Id. at 430. The database included cases brought under various federal employment discrimination statutes, but Title VII cases constituted roughly 70% of the cases. See id. at 431, 433.

of what I refer to as an "insider bias" in the enforcement of antidis-crimination law—meaning the courts tend to reflect the insider view that discrimination is rare and that most claims are meritless, rather than the opposing view that discrimination is pervasive.[289]

Employment discrimination plaintiffs have a harder time than other plaintiffs securing a favorable settlement from the defendant early in the process.[290] Further, in Clermont and Schwab's sample, discrimination plaintiffs won a mere 4.23% of pretrial adjudications, while other plain-tiffs won 22.23%.[291] At trial, roughly 20% of employment discrimination plaintiffs won before judges, compared to nearly 46% of other plain-tiffs.[292] Further, doctrinal frameworks that should limit the ability of ap-pellate courts to overturn the rare plaintiff victory do not seem to restrain appellate judges in discrimination cases: "[A]ppellate courts reverse [em-ployment discrimination] plaintiffs' wins below far more often than de-fendants' wins."[293] The appellate courts reversed 54% of plaintiff pretrial victories, while defendants' reversal rate was 11%.[294] With respect to trial victories, the gap in reversal rates persisted—42% for plaintiffs versus 8% for defendants.[295] This is notable in that questions of discriminatory in-tent often turn on credibility findings that should be largely insulated from appellate second-guessing.[296] Clermont and Schwab thus stated, "we have unearthed a troublesome anti-plaintiff effect in federal appel-late courts."[297] Other studies have found similar obstacles to employ-ment discrimination plaintiffs at both the district and appellate levels.[298]

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289. To be sure, this is not the explanation that Clermont and Schwab give. Instead, they theorize that appellate judges think that district judges are "pro-plaintiff." Id. at 452. They dispute this "appellate favoritism" for defendants, concluding that "employment discrimination plaintiffs constitute one of the least successful classes of plaintiffs at the district court level." Id.

290. See id. at 440–41 (comparing success in settlement efforts and concluding that "employment discrimination cases settle less frequently . . . than other cases").

291. Id. at 444.

292. Id. at 442.

293. Id. at 450.

294. Id.

295. Id.

296. See id. at 451 ("When the plaintiff has convinced the factfinder of the defendant's wrongful intent, that finding should be largely immune from appellate reversal, just as defendants' trial victories are largely immune from reversal. . . . Yet we find the opposite."). Clermont and Schwab found that these trends were consistent across the various types of discrimination. See id. at 445–46.

297. Id. at 451.

298. See, e.g., Parker, supra note 287, at 891, 893 (discussing national study of 940 district court opinions in 2003 and concluding that plaintiffs have "slim chances of winning an employment discrimination suit"). I also note two other factors that interact with judicial skepticism to depress the extent to which perceived discrimination is redressed. First, people who perceive that they have been discriminated against are less likely to bring legal claims than other injured parties. See supra note 283. Second, those who wish to bring Title VII claims have a harder time finding an attorney to represent them than plaintiffs asserting age or family leave discrimination claims—20% of the former versus 5% of the latter group lacks representation. See Clermont & Schwab, supra note 288, at 433

These findings support the conclusion that there is an insider bias in the enforcement of antidiscrimination law. To be clear, I do not use the term "insider bias" to suggest that courts tend to reach inaccurate judgments when assessing charges of discrimination. My more limited claim is that antidiscrimination adjudications are biased in the sense that they tend to align with white and male perspectives rather than outsider perspectives, irrespective of the accuracy question.[299] The upshot of this insider bias is that outsiders are likely to perceive discrimination adjudications as inaccurate, and also inconsistent with their lived experiences. Insider bias is exacerbated by the fact that, even when the decisionmakers are outsiders, one cannot assume that female judges and judges of color adopt a typical outsider perspective on discrimination. It may very well be that the outsiders selected to be federal judges are more likely to be those who minimize discrimination rather than those who are sensitive to allegations of discrimination.[300] Studies attempting to assess whether female and racial minority judges are more likely to favor employment discrimination plaintiffs have yielded mixed results.[301] Early studies suggested that female judges were no more receptive to employment discrimination plaintiffs than their male peers,[302] but this may have been a reflection of small sample sizes and tremendous pressure on the first female judges to conform.[303] Some more recent studies have found that gender makes a

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(combining Title VII and § 1983 claims in making this comparison). These two trends must be understood against the backdrop of judicial hostility to Title VII claims because plaintiffs and plaintiffs' lawyers may be responding to the reality that the prospect of winning a race or gender claim is exceedingly slim.

299. My argument that there are disparate, contingent perceptions on discrimination may remind some readers of debates in feminist epistemology and critical race studies. See, e.g., Susan Hekman, Truth and Method: Feminist Standpoint Theory Revisited, 22 Signs 341, 342 (1997) (considering epistemological question at center of feminist politics, i.e., whether feminists' claim that women suffer discrimination is correct); Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323, 324 (1987) (proposing an epistemology based on "looking to the bottom" because "those who have experienced discrimination" have special insight into failures of liberal constitutional democracy). Unlike some scholars writing in these fields, I do not argue that outsider experiences or perspectives are more accurate or truthful. It is not necessary to address that question in order to make my central point.

300. Cf. 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, 1688 (2004) [hereinafter Carbado & Gulati, Corporate Ladder] (arguing that outsiders who advance to top of corporate hierarchy have various institutional incentives to distance themselves from other outsiders).

301. See, e.g., Kulik et al., supra note 207, at 73 (noting argument that "a judge's personal characteristics may be most influential in discrimination or harassment cases in which the issues are directly associated with race or gender").

302. See Christina L. Boyd et al., Untangling the Causal Effects of Sex on Judging 2, 5 (Second Annual Conference on Empirical Legal Studies Paper, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001748 (on file with the *Columbia Law Review*) (reviewing studies).

303. See Jennifer L. Peresie, Note, Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts, 114 Yale L.J. 1759, 1764 (2005)

significant difference in gender-related cases,[304] but found no similar race effect for racial minority judges.[305] These studies suggest that minority judges are more likely to be unrepresentative of the perspectives of racial outsiders than female judges are of the perspectives of women.

Still, it may be possible to partially correct for the insider bias in Title VII jurisprudence by pursuing several interventions, which I explore in turn.

2. *First Intervention: Identity-Specific Standards in Retaliation and Harassment Cases.* — Identity-specific standards may bring some balance to the adjudication of Title VII claims by making the judge cognizant of perceptual differences, including his own, and chipping away at the dominance of insider perceptions. Identity-specific standards are those that focus on the plaintiff's identity: A "reasonable African American" standard, for example, is an identity-specific one.

Currently, Title VII's standards are typically phrased in "neutral" terms. Consider, for instance, the law of retaliation. Title VII permits an employee to obtain relief for employer retaliation that the employee suffers "because he has opposed any practice made an unlawful employment practice by this subchapter."[306] This text suggests that the challenged

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(suggesting that problems with selection bias, sample size, and unique positions of first female judges may explain outcomes of early studies).

304. See, e.g., Boyd et al., supra note 302, at 25, 27 (concluding, based on study using nonparametric matching of federal appellate sex discrimination opinions from 1995–2002, that "the probability of a judge deciding a sex discrimination case in favor of the plaintiff decreases by about 10 percentage points when the judge is a male" and including female judge on panel increases likelihood that male peer will vote for plaintiff by 12%–16% (emphasis omitted)); Sean Farhang & Gregory Wawro, Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making, 20 J.L. Econ. & Org. 299, 310, 320–21 (2004) (finding, based on sample of 400 cases in 1998–1999, not only that female judges are more liberal in discrimination cases, but also that presence of one female judge influences male panelists to vote more liberally, increasing plaintiff's odds of winning by approximately 20%); Peresie, supra note 303, at 1761 (concluding, based on study of 556 sex discrimination and harassment cases from 1999–2001, that plaintiffs "were twice as likely to prevail when a female judge was [on the appellate panel]"). But see Kulik et al., supra note 207, at 75, 80 (finding no significant gender or racial differences based on sample of 143 hostile environment sexual harassment decisions by district courts from 1981–1996); Parker, supra note 287, at 919 (finding no significant gender differences).

305. See, e.g., Farhang & Wawro, supra note 304, at 319–20 (concluding neither race of individual judge nor race of panel members has statistically significant effect on outcome of case); Parker, supra note 287, at 919 (concluding that racial composition of panel "did not affect" outcome); Peresie, supra note 303, at 1774 (concluding race "had no statistically significant effect").

306. 42 U.S.C. § 2000e-3(a) (2000). "Unlawful employment practices" include failing or refusing to hire, discharging or otherwise discriminating against any individual with respect to compensation, terms, or conditions of employment because of a protected trait, such as race and sex. See id. § 2000e-2(a)(1).

practice must actually be "unlawful" under Title VII,[307] but most circuits have interpreted it more loosely.[308] The predominant test contains "both subjective and objective elements, requiring that the plaintiff have a reasonable, good faith belief that the alleged employer practices . . . violated Title VII."[309] However, some courts have conflated these two terms—reasonable and good faith—as if they were the same thing.[310]

An insight flowing from perceptual segregation is that the doctrine pits the plaintiff's subjective perception against the judge's own subjective perception, and the law privileges the latter. That is, a black employee might in good faith allege racial discrimination, or a female employee might in good faith assert sexual discrimination or harassment, but a white male judge might readily conclude that the outsider's good faith assertion was unreasonable. Because courts require a plaintiff to meet both requirements, and it is hard for courts to assess the subjective good faith component, the "reasonableness" requirement tends to be dispositive in these cases. Although the reasonableness test is framed as "objective," in application the judge's intuitions about reasonableness are likely to be shaped by the judge's race and gender, which will usually be white and male.[311]

How could this doctrine be reformed so that outcomes do not ultimately turn on an insider judge's subjective perspective? The law might retain the good faith and reasonableness tests, but align the latter with the plaintiff's identity, i.e., a "reasonable woman" or a "reasonable African American." The Ninth Circuit has led the way in adopting identity-specific standards in Title VII cases. In 1991, the Ninth Circuit held in *Ellison v. Brady* that in assessing hostile environment sexual harassment claims, "[w]e adopt the perspective of a reasonable woman primarily because we believe a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[312] The court explained that there is a gender-based "gap in perception"— men and women are likely to differ as to what constitutes harassment.[313] Women may reasonably anticipate that overtures from male coworkers

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307. See 2 Arthur Larson & Lex K. Larson, Employment Discrimination § 34.03[2], at 34-35–34-39 (2d ed. 2007) ("Notice that the clause does not say '*alleged* practices made unlawful.'").

308. Id. (citing D.C., Second, Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits).

309. Id. at 34–35.

310. See, e.g., Volberg v. Pataki, 917 F. Supp. 909, 914 (N.D.N.Y. 1996) (providing example of confusion of two concepts); Larson & Larson, supra note 307, § 34.03[2], at 34–37 n.54 (describing confusion in Sixth Circuit).

311. See supra note 284 (discussing racial composition of federal bench).

312. 924 F.2d 872, 879 (9th Cir. 1991).

313. Id. at 881. The court noted that where the plaintiff is a man "the appropriate victim's perspective would be that of a reasonable man." Id. at 879 n.11.

might escalate into sexual violence, even if a reasonable man might not agree.[314]

The court demonstrated the significance of the difference between the "reasonable person" and "reasonable woman" standards by sketching out two conflicting versions of the facts before it. Kerry Ellison's male coworker, Sterling Gray, repeatedly expressed an interest in getting to know her, asking her to lunch, and writing several long, emotionally intense letters.[315] Some men might view Gray as a "modern-day Cyrano de Bergerac."[316] Indeed, the Ninth Circuit panel, which consisted of all male judges, stated that, "it is not difficult to see why the [male] district court [judge] characterized Gray's conduct as isolated and trivial."[317] Ellison, however, found the letters extremely disturbing because she perceived Gray to be obsessed with her.[318] Gray "told her he had been 'watching' and 'experiencing' her; he made repeated references to sex; he said he would write again. Ellison had no way of knowing what Gray would do next."[319] Therefore, viewing the case from the perspective of a reasonable woman, the Ninth Circuit concluded that it could not "say as a matter of law that Ellison's reaction was idiosyncratic or hyper-sensitive."[320] Judge Stephens dissented. He rejected the assumption that "men's eyes do not see what a woman sees through her eyes," particularly since he saw the majority as providing no evidence for its finding.[321] Various studies documenting differences in how men and women perceive sexual harassment strengthen the empirical foundation for the Ninth Circuit's belief that there is a gender-based perceptual disparity, but they also raise questions, which I address below.[322]

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314. See id. at 879 & n.10 ("[B]ecause women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior.").

315. See id. at 873–74.

316. Id. at 880.

317. Id.

318. Ellison explained that "I thought he was nuts. I didn't know what he would do next. I was frightened." Id. at 874 (internal quotation marks omitted).

319. Id. at 880.

320. Id.

321. Id. at 884 (Stephens, J., dissenting). Judge Stephens also argued that using a reasonable woman standard privileges female perspectives over male perspectives. A version of this critique would likely be made of adopting any reasonable outsider standard. See id. at 884 (criticizing the majority for ignoring the Supreme Court's command to adopt "gender or race neutral" legal standards (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989))).

322. In addition to the unresolved empirical questions, there is a vigorous debate among feminist scholars and others as to whether the law should adopt a "reasonable woman" standard. See Gutek et al., supra note 112, at 600–01, 612 (describing various reasons to support "reasonable woman" standard, including "facilitat[ing] proper application of the law," but ultimately concluding that study results showed that application of standard "had very little impact on judgments"); Shoenfelt et al., supra note 112, at 655–57 (reviewing literature on both sides of debate). Based on my skepticism of

In *McGinest v. GTE Service Corp.*,[323] the Ninth Circuit extended its reasoning to racial harassment: "[A]llegations of a racially hostile workplace must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff."[324] Judge Paez, writing for the majority, reasoned that "[r]acially motivated comments or actions may appear innocent or only mildly offensive to one who is not a member of the targeted group, but in reality be intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group."[325] The court's adoption of this identity-specific standard was specifically designed to counteract "the perspective of an adjudicator belonging to a different group than the plaintiff."[326] A few courts have followed the Ninth Circuit, but most adhere to the "reasonable person" language favored by the Supreme Court.[327]

The promise of changing the doctrinal language to signal to insider judges that they should consider outsider perspectives, however, is questionable because language alone may not suffice to sensitize judges and jurors to outsider perspectives. Two empirical studies instructed subjects to apply either the "reasonable person" or the "reasonable woman" standard and found no significant differences in outcome. Unlike many studies on potential gender differences in assessing sexual harassment, a study by Barbara Gutek and coauthors attempted to come close to replicating the conditions of an actual jury trial. The study included almost 2,000 subjects and divided them into five groups that were given varying amounts of information regarding the same incident of potential harassment.[328] Subjects in the most elaborate subgroup watched a video depiction of a sexual harassment trial that was intended to be realistic, lasted one hour and twenty minutes, and included opening and closing statements and witnesses on both sides.[329] The videotrial subgroup included

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the efficacy of identity-specific standards, see infra text accompanying notes 336–338, I do not step into this debate.

323. 360 F.3d 1103 (9th Cir. 2004).

324. Id. at 1115.

325. Id. at 1116.

326. Id.

327. See, e.g., Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."). The Supreme Court's more recent statement in Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998), that "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances,'" is unclear as to whether the plaintiff's gender and race count as a relevan. "circumstance." See Shoenfelt et al., supra note 112, at 636–37 ("But this formulation leaves the issue unresolved because 'plaintiff's position' could mean one of two things: (1) only the circumstances to which the plaintiff was exposed, or (2) those circumstances plus the plaintiff's own gender.").

328. See Gutek et al., supra note 112, at 609–10 ("Across all five studies, the same fact pattern was presented in versions ranging from very brief and basic to elaborate and nuanced.").

329. See id. at 610 (describing study design).

not just students, like most social science studies, but also supervisory em-
ployees of a transportation company.[330] After viewing closing statements,
the subjects were asked, "[i]n your view was [the female plaintiff] sexually
harassed?"[331] The subjects answered this question in writing, and then
they were given jury instructions and a second questionnaire.[332] The jury
instructions' legal standard either referred to a "reasonable person" or a
"reasonable woman."[333] The analysis of the answers revealed that the dif-
ference in legal standards had "little, if any, effect" on judgments across
the various samples.[334] A subsequent study by Elizabeth Shoenfelt
reached similar conclusions.[335] It found that "the reasonable woman
standard had no effect on the determination of hostile environment for
men" and concluded that, "[u]nder both standards, males were less likely
than females to make a determination of hostile environment sexual
harassment."[336]

The studies indicate that doctrinal tinkering alone is unlikely to
dislodge the insider bias of antidiscrimination law.[337] If insider judges
and jurors do not understand the difference between a "reasonable man"
and a "reasonable woman" or a "reasonable white person" and "reasona-
ble black person," their use of an identity-specific standard will either pro-
duce inconsistent outcomes or will do nothing to change their insider
biases. Because of persistent racial segregation, many whites have not
had the type of sustained exposure to people of color that would enable
them to understand outsider racial perspectives. With respect to gender,
many men and women interact at a more intimate level, for instance as
mothers and sons, or husbands and wives. Yet such interactions do not

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330. The videotrial subjects included 129 students and 97 supervisory employees. See
id. at 611.

331. Id. (internal quotation marks omitted).

332. See id. (describing setup in long scenario study).

333. Id.

334. Id. at 623; see id. at 622 ("[R]espondents generally considered the plaintiff
equally reasonable whether the question was about a reasonable woman or a reasonable
person.").

335. See Shoenfelt et al., supra note 112, at 667–68 ("The particular standard . . . did
not have an impact on whether or not a change in perceptions occurred."). In this study,
instead of dividing the subjects into groups and assigning the groups different legal
standards, the authors asked each subject to evaluate two different scenarios—one under
the "reasonable woman" standard and one under the "reasonable person" standard. See
id. at 663.

336. Id. at 666, 668. However, the authors also concluded that the reasonable woman
standard bolstered women's perceptions of harassment. See id. at 668 ("For those women
participants who initially encountered the reasonable person standard, the reasonable
woman standard increased their confidence in a finding of sexual harassment."); see also
Richard L. Wiener et al., Perceptions of Sexual Harassment: The Effects of Gender, Legal
Standard, and Ambivalent Sexism, 21 Law & Hum. Behav. 71, 89 (1997) (finding that
"[o]verall, the moderating effect of the reasonable woman standard on [subjects with
attitudes of] hostile sexism were found more often with women participants").

337. Cf. Selmi, supra note 285, at 574 (concluding in general terms that "doctrine is
rarely sufficiently restraining to limit the bias of courts").

ensure understanding. In particular, men may have a hard time grasping the significance of the threat of sexual violence that women must consider on a daily basis.[338] Thus, there are social barriers to insider's abilities to understand outsider perspectives.

Moreover, even where an insider understands outsider perspectives, he may face some cognitive difficulty in overcoming his own entrenched perceptual framework. In one study that asked subjects to apply either a "reasonable person" or "reasonable woman" standard, nearly half of the men who were assigned the latter standard reported that they actually applied the former.[339] Further, researchers remain in the early stages of understanding the various factors that produce gender differences in perceptions of sexual harassment.[340] The authors of one study concluded: "it is . . . overly simplistic to identify a sex difference in sexual harassment perceptions and build a legal framework around it" because a "reasonable woman" standard would fail to "encompass the complexity we are just beginning to understand."[341]

In light of these challenges, any doctrinal intervention should be accompanied by a sustained and rigorous educational effort sensitizing insiders to perceptual differences.[342] Those whites and men who have been able to understand how an outsider would likely view a claim of discrimination have gained this insight over time through developing close relationships with people of color and women and engaging in extended honest conversations about race and gender. Studies have shown that interracial contact tends to reduce interracial prejudice,[343] but it is

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338. See Carbado, Closet, supra note 210, at 99 (suggesting that men, unlike women, "can walk in public, alone, without fear of being sexually violated").

339. See Weiner et al., supra note 336, at 79 tbl.1, 89 (stating that 48% of men assigned "reasonable woman" standard reported that they applied "reasonable person" standard). Compare Weiner's results with those in Linda M. Isbell, Who Says It's Sexual Harassment? The Effects of Gender and Likelihood to Sexually Harass on Legal Judgments of Sexual Harassment, 35 J. Applied Soc. Psychol. 745, 765 (2005) (reporting that 95.7% of male and female subjects who were told to apply "reasonable person" standard correctly identified that standard). In the Wiener study, women were more likely to apply the assigned standard than men, and men assigned the "reasonable woman" standard had the highest rate of error. See Wiener et al., supra note 336, at 79 tbl.1 (stating that 88% of female subjects applied correct standard, compared to 65% of men).

340. See O'Connor et al., supra note 203, at 93 (calling for research to attain "better grasp on decisions and processes within organizations" in order to better understand "the variance in judgments inside and outside the legal system").

341. Id. at 92–93 (suggesting that "hostile sexism, self-referencing and complainant credibility" are among the mediating factors); see also Blumenthal, supra note 115, at 53 (urging courts to "be cautious in proceeding with the reasonable woman standard" because of the complexity of changing men's impressions).

342. See Weiner et al., supra note 336, at 89 ("[M]en (and women) need to be educated about the differences in points of view before the reasonable woman standard can have its full intended effect of helping people take on the perspective of the injured party in harassment incidents.").

343. See, e.g., Thomas F. Pettigrew & Linda R. Tropp, A Meta-Analytic Test of Intergroup Contact Theory, 90 J. Personality & Soc. Psychol. 751, 766 (2006)

doubtful that the most common, perfunctory interracial interactions in workplaces and educational contexts help instill a deep understanding of the forces that create perceptual segregation. Perceptual segregation theory suggests that educational efforts directed at judges and lay people would be necessary to effectuate legal change.

Current education efforts—workplace diversity training and the like—do not appear to have been effective enough.[344] In many offices, sexual harassment and other diversity training is a mere formality and rarely delves into the difficult and polarizing issues at the heart of gender and racial disparities.[345] A more substantive educational effort would have to focus on raising consciousness of the elements of modern discrimination, including implicit bias and perceptual segregation, rather than simply encouraging norms of politeness or "respect," which may mask bias and further entrench colorblindness.

Although I cannot explore the details of such an educational effort here, one fruitful starting point might be educating white people about statements that they intend to be harmless or friendly but are received as racially offensive by blacks and other people of color. For instance, white people sometimes praise blacks for their speaking skills ("You are so articulate!"),[346] yet a black person might believe that the underlying assumption is that blacks generally have difficulty speaking proper English. Along the same lines, statements such as "you're not like most blacks" are not compliments to many black people.[347] Rather, the statement is seen

("[I]ntergroup contact typically reduces intergroup prejudice."). The mechanisms through which interracial contact reduces racial prejudice are not comprehensively understood. Scholars know little about factors that may impede the ability of interracial contact to reduce prejudice. See id. at 767 (describing directions for future research on reducing prejudice through interracial contacts).

344. See, e.g., Krieger & Fiske, Behavioral Realism, supra note 25, at 1018 ("[V]irtually no empirical support exists for the proposition that antiharassment policies, training programs, or internal grievance procedures actually reduce the amount of unwanted sexualized conduct in the workplace."); Elizabeth Levy Paluck, Diversity Training and Intergroup Contact: A Call to Action Research, 62 J. Soc. Issues 577, 579 (2006) ("[O]ftentimes programs are not designed on established theory or empirical evidence, and there is a serious lack of rigorous evaluation and follow-up to gauge program impact.").

345. For example, in some workplaces, including UCLA, employees can satisfy their sexual harassment training requirement by taking a computer-based tutorial that requires no interaction or discussion with another person.

346. Senator Joe Biden's praise of Senator and presidential candidate Barack Obama as "articulate" and "clean," in purported contrast to previous black candidates, sparked public awareness of black perceptions of such "compliments." See Xuan Thai and Ted Barrett, Biden's Description of Obama Draws Scrutiny, CNN.com (Feb. 9, 2007), at http://www.cnn.com/2007/POLITICS/01/31/biden.obama (on file with the *Columbia Law Review*).

347. Cf. Carbado & Gulati, Corporate Ladder, supra note 300, at 1689 (discussing "racial exceptionalism," which they define as proving that one is not like stereotypes of one's race). The dynamics of such awkward interactions apply to gender as well as race. Cf. Kanter, supra note 182, at 969 (comparing "dynamics of tokenism" in gender stratified and racially stratified workplaces).

as an implicit put-down of "most blacks." Another common refrain among African Americans is being mistaken for or compared to another African American, such as a celebrity, when a black person would know that the two look nothing alike.

White people may try to talk around race by employing euphemisms to mask direct references to black people or black issues, such as "inner city problems" or "urban youth," yet a black person might view this as sophistry. I have had white people tell me, "You must meet [fill in the blank]!" and yet give me no real reason why I need to meet the person. Of course, the person always turns out to be black.[348] Whites may think that their race-consciousness is the cause of blacks' aggravation, and thus they try to mask it. But it actually might be their clumsy attempt to avoid mentioning race that bothers blacks. Sensitizing white people to the gap between what they intend and how they are perceived should help reduce such microaggressions and improve intergroup relations.[349]

3. *Second Intervention: Overcoming Informational Disparities.* — A major contributor to Title VII outcomes that give short shift to outsider perceptions may be informational disparities, such as misperceptions about the socioeconomic status of African Americans, and relatedly, the prevalence of antiblack discrimination. In Part II, I discussed how access to different pools of information shapes perceptions about discrimination.[350] In particular, studies have shown that many white people overestimate the socioeconomic progress that African Americans have achieved in employment, wages, and other important measures of advancement. A 2001 poll by the *Washington Post*, Kaiser Family Foundation, and Harvard University reported that half of whites said that "the average black is about as well off as the average white in terms of the jobs they hold," while in fact "[b]lacks are about twice as likely as whites . . . to hold lower-paying, less prestigious service jobs . . . [and] are more than twice as likely to be unemployed."[351] Further, the poverty rate for blacks, as of 2001, was more than twice that for whites.[352] Interviews related to the poll suggested that some whites view blacks as "playing the race card" in order to procure government benefits. As one white man in Illinois stated with respect to

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348. A number of my black friends have told me stories of white coworkers either assuming that they were romantically involved with a black coworker or attempting to set them up with another black person, when the only discernable connection between the two black people seemed to be race.

349. A longer list of such instances could be developed by looking at the experiences of other people of color and women. For instance, some of my Asian American friends frequently face the question from white people, "where are you from?" When one of my friends responds, "I'm from California," the next question often is, "no, where are you *really* from?" The white speaker thinks she is showing interest in learning about the Asian American's background, but the Asian American person may feel that she is being stereotyped as a perpetual foreigner.

350. See supra notes 122–137 and accompanying text.

351. Richard Morin, Misperceptions Cloud Whites' View of Blacks, Wash. Post, July 11, 2001, at A1.

352. See id.

the socioeconomic status of blacks and whites, "I think it's pretty even, but you'd never get blacks to admit it . . . . It keeps the pressure on government for more programs."[353] The study also found that inflated white perceptions of black socioeconomic progress correlated with a weaker commitment to federal efforts to guarantee racial equality.[354]

This macro level skepticism about the existence of discrimination likely influences judges and juries. As I argued earlier, since most instances of perceived discrimination contain some ambiguity, an individual's overarching framework regarding discrimination may be dispositive in some cases. If one is presented with facts that are open to two different interpretations and one is unsure which is accurate, one is likely to follow one's background assumptions about discrimination—such as "most people are colorblind" or "racial discrimination is pervasive." In theory, plaintiffs' lawyers could try to erode the skepticism about claims of discrimination by providing jury members with factual information debunking misplaced perceptions that race no longer disadvantage blacks in the workplace—or even gives them an undue advantage over whites. Defense counsel, however, can be expected to challenge such moves on evidentiary grounds, including relevancy.[355] Since judges are the gatekeepers of jury instructions, their own intuitions about discrimination are likely to create an additional barrier.

In many instances, judges have created evidentiary rules that implicitly rest on substantive assumptions about the nature of discrimination. Although judges tend to frame these as neutral evidentiary rules, they may actually be vehicles for judicial skepticism about the prevalence of discrimination. For instance, Donna Shestowsky has shown how judges in sexual harassment cases have refused to admit social scientific evidence to prove that men and women differ as to whether some sexualized conduct is "reasonable" and to explain why many women do not complain about harassment.[356] These rulings often burden plaintiffs.[357] A key example of evidentiary rulings that rest on substantive assumptions is the "direct evidence" rule that flourished before the Supreme Court's decision in

353. Id. (internal quotation marks omitted).

354. See id. (discussing study finding that "informed whites . . . were more likely" than uninformed ones to believe that government had positive "obligation to ensure that the races [are] treated equally").

355. See Tyus v. Urban Search Mgmt., 102 F.3d 256, 262–64 (7th Cir. 1996) (correcting district court's hasty conclusion that professor's proffered expert testimony about historical patterns of housing discrimination in Chicago was irrelevant to Fair Housing Act claim).

356. See Donna Shestowsky, Note, Where is the Common Knowledge? Empirical Support for Requiring Expert Testimony in Sexual Harassment Trials, 51 Stan. L. Rev. 357, 358 (1999) (concluding that federal courts "frequently express a reluctance to allow expert testimony [on] . . . what constitutes sexual harassment").

357. See id. at 357, 379, 383 ("Without expert testimony, there is a greater chance that cases will be determined on the basis of gender-based misperceptions.").

Desert Palace Inc. v. Costa.[358] Although lower courts defined and applied this rule in various, and often confusing, ways, the general idea was that Title VII plaintiffs had the option of proving discrimination with high level evidence of animus as an alternative to the more indirect inferential method of *McDonnell Douglas*'s burden-shifting method.[359] However, some judges were unwilling to categorize even overt evidence of animus as "direct evidence."

Consider *Shorter v. ICG Holdings, Inc.*,[360] in which Shorter's supervisor referred to her as an "incompetent nigger" a couple of days after firing her.[361] Rather than being perceived as a "smoking gun," this evidence was deemed insufficient to entitle Shorter to go to trial. In affirming the district court's grant of summary judgment to Shorter's employer, the Tenth Circuit majority concluded that this and other racist statements "are not direct evidence that [supervisor] Dughman fired Shorter because she was black. Instead the trier of fact would have to infer Dughman's motive from her statements."[362] The court characterized Dughman's remarks as mere "statements of personal opinion and not statements directly relating to Shorter's termination," even though Shorter was fired for alleged incompetence, including being disorganized, and Dughman uttered the epithet in anger while trying in vain to find an important document in Shorter's office.[363]

The *Shorter* court relied on a similar holding in a sex discrimination case. In *Heim v. Utah*,[364] the female plaintiff's male supervisor exclaimed in the midst of handling alleged problems with Heim's work: "Fucking women, I hate having fucking women in the office."[365] Shortly thereafter, Heim's supervisor denied her request for a desirable field assignment, and she alleged that the refusal constituted sex discrimination.[366] Again, the court did not see the comment as rising to the level of "direct evidence" of discrimination, explaining:

> Although the remark by Mr. Tischner was certainly inappropriate and boorish, it was on its face a statement of Mr. Tischner's

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358. 539 U.S. 90 (2003). In *Desert Palace*, the Court held that plaintiffs in Title VII mixed-motive cases do not have to "present direct evidence of discrimination." Id. at 92.

359. See McDonnell Douglas v. Green, 411 U.S. 792, 802–03 (1993) (setting forth burden-shifting paradigm).

360. 188 F.3d 1204 (10th Cir. 1999), abrogated on other grounds by *Desert Palace*, 539 U.S. 90.

361. Id. at 1206.

362. Id. at 1208. Dughman also criticized Shorter for "talking black," asked her an offensive question about black men's sex organs, and accused her of being "'on the defensive because you are black.'" Id. at 1206.

363. See id. at 1207–08. Judge Lucero criticized the majority for downplaying "explicit evidence of racism" and assuming the role of factfinder. Id. at 1211, 1213 (Lucero, J., concurring in part and dissenting in part).

364. 8 F.3d 1541 (10th Cir. 1993).

365. Id. at 1546. Her boss also complained that Heim "'occasionally swore a little bit,'" which . . . would 'typically happen during her mood period of time.'" Id. at 1547.

366. See id. at 1546.

personal opinion. The evidence does not show Mr. Tischner ac-
ted with discriminatory intent, only that he unprofessionally of-
fered his private negative view of women during a display of bad
temper at work. At best, it is only arguable that a discriminatory
intent to keep Ms. Heim in the office can be inferred from the
statement. This type of inferential statement is not "direct evi-
dence" of discrimination satisfying the plaintiff's burden.[367]

Thus, any intervention based on the introduction of empirical infor-
mation to the factfinder, like the proposal of identity-specific standards, is
likely to hinge on a rigorous educational program, in this case directed at
judges in the first instance.[368]

4. *Third Intervention: Expanding Plaintiffs' Remedies in Close Cases.* —
Title VII, like many statutes, has traditionally employed a "winner-take-all"
remedial framework. That is, the plaintiff either wins and is entitled to
damages or walks away with nothing. This might be acceptable if we
thought ascertaining whether illegal discrimination occurred was rela-
tively easy, but this Article has attempted to show how complex and con-
tingent such judgments may be. I have argued that in some cases a rea-
sonable insider and reasonable outsider can disagree as to whether
discrimination occurred. There are of course cases where reasonable in-
siders and outsiders will agree either that discrimination did or did not
occur. But there is also a significant subset of very difficult cases where
divergent racial and gendered perceptual frameworks may largely ac-
count for different opinions. Given this conflict, one might explore con-
structing a category of "close cases" and permitting judges to award some-
thing less than the full complement of damages that a winning plaintiff
would obtain.

Title VII can be understood as already moving slightly in this direc-
tion. In the Civil Rights Act of 1991, Congress revised the law so that "an

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367. Id. at 1547.

368. Although my focus has been on innovations in the legal system, informational
interventions need not be directed only at judges or juries, or only at whites and men.
Providing more information about otherwise opaque decisionmaking processes might call
into doubt perceptions of discrimination among outsiders who were not selected for a
position. For example, a faculty might decide to permit junior professors to attend faculty
meetings regarding internal promotions (except for meetings pertaining to their own
promotion) in order to instill confidence among outsiders that the process is rigorous and
fairly applied. Similarly, a law firm that hired no black or Latino students in its summer
associate class for one particular year could post on its website the average GPA of its
summer associates at each law school represented in its class. A particular applicant of
color might see these numbers and conclude that he failed to meet the firm's minimum
qualifications, and race was probably not the reason for his rejection. However, under
certain circumstances, this policy might also exacerbate perceptions of discrimination, and
potentially reveal actual discrimination, insofar as applicants of color attained GPAs
meeting or exceeding the firm's average and yet were not hired. There may have been
numerous other reasons why such applicants were rejected, of course. Posting the "hard"
qualifications of successful applicants might undermine some perceptions of
discrimination, but judgments based on "soft" qualifications, such as personality factors,
could not be so easily justified.

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.*"[369] Before this amendment, a defendant that was motivated in part by a prohibited factor could avoid liability entirely by demonstrating that it would have made the "same decision" even if it had not discriminated.[370] The law now gives plaintiffs the opportunity to obtain injunctive relief and attorneys' fees even if the employer would have reached the same decision.[371] This splitting of remedies gives some relief to plaintiffs who have shown discrimination but no ultimate harm in terms of an adverse employment decision. Congress could further develop Title VII's remedial structure by creating an intermediate category of cases in which a reasonable outsider would find the claim compelling, yet an insider judge might not.[372]

As an example of a case that would be a good candidate for this intermediate category, consider *Monteiro v. Poole Silver Co.*,[373] a retaliation race discrimination case. As described more fully above, a retaliation plaintiff must show "a good faith, reasonable belief that the practices opposed took place and that such events violated Title VII."[374] The First Circuit determined that Monteiro's assertion of racial discrimination was not made in good faith. The court put forth reasoning that seems dubious from an outsider perspective.

Frank Monteiro, the plaintiff, was an African American man who accused his employer of discrimination several times over a span of more than ten years.[375] Monteiro voluntarily terminated his employment with the defendant in 1963 because he believed that his white supervisor, Norman Courcy, applied a harsher standard in scrutinizing the work of the few black employees and required them more frequently to redo their buffing work.[376] About six years later, the defendant rehired Monteiro to work at a new plant in a senior buffer position.[377] In 1972, Monteiro was demoted after a conflict with his nonblack manager.[378] Monteiro filed a grievance claiming that he was harassed and discriminated against based on race. His employer settled the grievance by rein-

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369. 42 U.S.C. § 2000e-2(m) (2000) (emphasis added).

370. See Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003) (describing pre-1991 amendment law, which required plaintiffs to show that illegitimate factors were "substantial factor" in challenged employment practice).

371. See 42 U.S.C. § 2000e-5(g)(2)(B).

372. The remedies here could be compromises between the competing viewpoints. Cf. Michael Abramowicz, A Compromise Approach to Compromise Verdicts, 89 Cal. L. Rev. 233, 233–34 (2001) (arguing that juries should be able to reach "compromise resolutions" in close cases).

373. 615 F.2d 4 (1st Cir. 1980).

374. Larson & Larson, supra note 307, § 34.03[2], at 34–35.

375. See *Monteiro*, 615 F.2d at 5–6.

376. See id.

377. See id. at 6.

378. See id.

stating him, but also requiring him to "refrain from the continuing use of the word discrimination."[379] Then in 1974, Courcy, Monteiro's former supervisor, was appointed as supervisor at Monteiro's plant.[380] Less than a year later, Monteiro and Courcy had an altercation, which culminated in Courcy firing Monteiro.[381] Courcy ordered Monteiro to return to his work station, and Monteiro responded: "What about the other people walking around? You are harassing me."[382] After additional heated verbal exchanges, Monteiro made a more pointed charge of discrimination, at which point Courcy replied: "I will not be accused of discrimination. You're fired."[383]

At trial, the district court rejected Monteiro's retaliation claim and reasoned:

> It is likely that the plaintiff's accusation of discrimination was one of the factors in bringing about his discharge. . . . In my opinion, [Title VII's retaliation provision] applies to orderly opposition and not to an isolated flare-up. It applies to situations in which the employee has a conscientiously held belief that there was racial discrimination. That may have been the plaintiff's belief, but it is at least as likely that the plaintiff decided that the best defense to correction from the superintendent was a strong offense. I find this discharge to be essentially the result of a challenge by a volatile and voluble employee to the authority of a hard-nosed and short-fused supervisor. . . . Title VII does not provide a remedy.[384]

The First Circuit interpreted the district court analysis to mean that, "Monteiro had not shown that his accusations of discrimination were voiced in good-faith 'opposition' to perceived employer misconduct; the [district] court instead saw those accusations as likely having been raised as a smokescreen in challenge to the supervisor's legitimate criticism."[385] Accordingly, the First Circuit affirmed what it described as the district court's credibility determination that Monteiro lacked a good faith belief that Courcy had committed racial discrimination.[386]

From an outsider's perspective, the ease with which the district court and the First Circuit brushed aside Monteiro's asserted good faith belief is disturbing. It seems that the district court was influenced by Monteiro

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379. Id.

380. See id.

381. See id. at 6–7.

382. Id. at 6.

383. Id. at 6–7. This is the plaintiff's version of the facts; Courcy's version differs slightly. See id.

384. Id. at 7.

385. Id. at 8. Some of the district court's language suggests that it also thought that Monteiro failed to object in a "reasonable" manner. For a critique of this judicial requirement and judges' failure to consider interracial dynamics, see Smith, supra note 165, at 561–68.

386. See *Monteiro*, 615 F.2d at 8 (interpreting district court to have been unconvinced as to Monteiro's intentions during altercation).

having filed two claims with the EEOC as well as an internal grievance alleging discrimination. Although one could understand these repeated allegations of discrimination to reflect actual discrimination, the district court apparently understood them to show that Monteiro was prone to playing the race card, and strategically used race as a "smokescreen" in order to avoid complying with Courcy's legitimate request.[387] Yet the district court's own finding that Monteiro's supervisor did discriminate against him when he was demoted in 1972,[388] as well as the context of the dispute—a racially stratified, blue collar factory in the 1960s and early 1970s—lend some credence to Monteiro's asserted belief. Furthermore, his employer's unusual—and seemingly illegal—demand that Monteiro "refrain from the continuing use of the word discrimination"[389] suggests that it may have had something to cover up. Indeed, one could read the district court itself to have engaged in antiblack stereotyping in describing Monteiro as a "volatile and voluble employee."[390] Although it is of course possible that Monteiro demonstrated these qualities before the district court judge, it is also possible that the judge unfairly perceived Monteiro to be another "angry black man."[391]

The court's characterization of the conflict between Monteiro and Courcy as "an isolated flare-up" attributable more to personality differences than race[392] also appears to rip the dispute from its temporal context and the history of discrimination asserted by Monteiro. It could have been a personality dispute *and* a racial dispute. Given the difficulty of extricating the personality conflict from its racial and historical contexts, even a judge who is not prepared to accept Monteiro's claim might recognize that it has more merit than many other claims. This judge might believe that Monteiro should receive some form of relief, such as attorneys' fees or a portion of the damages that a prevailing plaintiff would normally recover. One intervention would be to provide for such partial remedies. The biggest difficulty would likely be the challenge of defining the category of intermediate cases so as to channel judicial discretion and encourage consistency among outcomes.

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387. See id. at 7–8 (stating that Monteiro used discrimination allegation as a "smokescreen" to avoid returning to his work station and likely "decided that the best defense to correction from the superintendent was a strong offense").

388. See id. at 6 & n.2.

389. Id. at 6.

390. Id. at 7.

391. See Devon W. Carbado & Mitu Gulati, Conversations at Work, 79 Or. L. Rev. 103, 111 n.19 (2000) (discussing propensity of car dealers to identify rigorous bargaining by African American men as signals of appearance of "angry black man" behavior). On the host of negative stereotypes that employers have of African American men, see Waldinger & Lichter, supra note 216, at 174–77 (reporting that employers often view black men as having a bad "attitude," thinking they are owed something because they are black, and quick to charge discrimination).

392. *Monteiro*, 615 F.2d at 7.

B. *Diversifying Workplace Structures*

While changes to Title VII hold promise, they may face political op-
position and may depend on implementing a rigorous educational effort.
The structural changes to the workplace that I propose are likely to face
less opposition and are more easily implemented. My proposal joins
other recent scholarship that draws on the relationship between environ-
mental factors and structures in the workplace and the reduction of im-
plicit bias.[393] In particular, I build on Jerry Kang and Mahzarin Banaji's
proposal for positioning outsiders in order to "debias" target audiences,
that is, to reduce the implicit biases of such groups.[394] I focus on the
racial and gender composition of committees that handle interviewing,
promotion and EEO matters. As I explain below, the proposals offer at
least four benefits: (1) The presence of outsiders on interviewing com-
mittees will help the interviewee when bias emerges during the interview;
(2) the presence of outsiders in decisionmaking groups concerning hir-
ing and promotion will help the employee/interviewee in that the outsid-
ers may debias the group's deliberations; (3) the employer benefits from
the increased presence of outsiders in that fewer applicants and employ-
ees will perceive discrimination and bring lawsuits; and (4) when the em-
ployer is trying to determine whether to settle those claims that are not
deterred, including outsiders may balance the discussions so that the em-
ployer does not exaggerate its likelihood of success.

These interventions will address the problem of implicit bias. The
dominant test for assessing implicit bias is the Implicit Association Test or
"IAT." Different versions of this test measure associations with respect to
race, gender, and other traits. Since 1998, a Harvard University website
has allowed visitors to the site to take the IAT and has tracked their

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393. See Jolls, Antidiscrimination, supra note 36, at 70–71 (arguing that Title VII
reduces implicit bias by diversifying population makeup of workplaces and other regulated
settings and altering sensory environments of such spaces, such as by banning
pornography); Kang & Banaji, supra note 29, at 1108–10 (arguing that placing counter-
stereotypical outsiders in positions of authority may reduce implicit bias); cf. Susan Sturm,
Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L.
Rev. 458, 470–71 (2001) (arguing that second generation bias results "from ongoing
patterns of interaction [in the workplace] shaped by organizational culture").

394. See Kang & Banaji, supra note 29, at 1066 (defining "debiasing" as "ameliorating
the problem of bias [by] . . . producing the sort of integration that reduces stereotypes and
prejudice"). Kang and Banaji cite to a manuscript version of an article by Christine Jolls
and Cass R. Sunstein; in the article, Jolls and Sunstein argue that "in some cases it may be
desirable . . . to reform the substance of the law . . . with an eye toward debiasing those who
suffer from bounded rationality." Christine Jolls & Cass R. Sunstein, Debiasing Through
Law, 35 J. Legal Stud. 200, 202 (2006). Note that my use of the term "debias" differs
somewhat from other usages. For instance, Kang and Banaji use it to refer to the capacity
of counter-stereotypical outsiders to decrease implicit bias. Kang & Banaji, supra note 29,
at 1101–06 (discussing importance of "exposure to 'counter-typical'" members of group).
In this context, I use the term to refer to people who can reduce actual and perceived bias.

scores.[395] Brian Nosek and several coauthors, including the founders of the Harvard website, analyzed data from over 2.5 million completed IATs.[396] Based on this rich resource of voluntary tests, researchers found that across racial categories, 68% of respondents exhibited an implicit attitudinal preference for white over black.[397] Nosek and his colleagues reported: "Notably, Black participants were the only racial group that did not show an implicit pro-White preference on average . . . . Black partici- pants showed no implicit preference on average between Blacks and Whites."[398] Thus, my claim that blacks may be special in terms of their perceptions of discrimination is compatible with (but not compelled by) the IAT trends.

Implicit bias affects real world behavior, including interactions in in- terviews and committee meetings. Kang and Banaji rest their debiasing intervention, which they call "fair measures," on empirical studies that show that "implicit bias correlates with real-world behaviors."[399] For ex- ample, studies have shown that white people high in implicit bias toward blacks smiled less frequently, created greater physical distance, and dis- played stiffness with their body language during interactions with a black person, and spent less time conversing, as compared to interactions with a white person.[400] Further, studies have confirmed that job candidates,

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395. Nosek et al., supra note 36, at 2; see Project Implicit, at http:// projectimplicit.net/ (last visited Feb. 20, 2008) (on file with the *Columbia Law Review*).

396. See Nosek et al., supra note 36, at 26 (discussing study size and drawing conclusions). Because the Harvard website database relied on volunteers, it was not a random sample. However, "this sample was far more demographically diverse than the laboratory samples traditionally drawn from college psychology students." Kang & Banaji, supra note 29, at 1072 n.47. It was also much larger.

397. Nosek et al., supra note 36, at 7; see also Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 Cal. L. Rev. 945, 957 tbl.1 (2006) (reporting similar findings as Nosek—69.2% of respondents exhibiting an implicit attitudinal preference).

398. Nosek et al., supra note 36, at 7, 10. In fact, concerning most types of bias they were quite similar to other groups. For instance, in general, male and female participants "showed stronger associations of *science* with *male* and *humanities* with *female* than the reverse academic-gender pairing (. . . 72% of the sample)," and blacks did not differ significantly in this regard. Id. at 11. Blacks also appear to share certain stereotypes about black people, such as an association of weapons with blackness. See id. at 19.

399. Kang & Banaji, supra note 29, at 1073. Kang and Banaji relied on an unpublished manuscript by T. Andrew Poehlman and others, entitled *Understanding and Using the Implicit Association Test: III. Meta-analysis of Predictive Validity*. Id. at 1072 n.46, 1073 n.49. The importance of changing implicit biases is underscored by several other studies. See Rudman & Glick, supra note 181, at 755–57 (finding that implicit bias scores predicted extent to which male and female evaluators rated aggressive female candidate as "less socially skilled and likeable than an identically presented man"); Jonathan C. Ziegert & Paul J. Hanges, Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias, 90 J. Applied Psychol. 553, 560–61 (2005) (finding that implicit bias scores predicted the likelihood of white subjects to go along with racist preferences of supervisor).

400. See, e.g., Allen R. McConnell & Jill M. Leibold, Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes, 37 J.

black and white, tend to respond negatively to such uncomfortable behavior, which can lead to a deteriorating interview.[401] The negative reactions of African Americans or other outsiders in such circumstances may reinforce cultural tropes such as the perception among some white people that black people have a "chip on their shoulder." Such manifestations of bias and ensuing reactions are likely to have real world consequences because many employers rely on interviews, even though their discretionary nature creates ample opportunities for bias.[402]

Just as implicit bias has real world effects, structural changes to group settings can change real world outcomes. As discussed below, a pioneering study by Samuel Sommers has shown that racial diversity in juries can lead to more careful deliberation by *insiders* as well as outsiders. Similarly, the structural changes suggested here may encourage deliberation and debiasing.

Perceptual segregation holds that blacks are likely to be sensitive to small behavioral differences and may perceive such conduct to be evidence of an otherwise concealed antiblack bias.[403] Consider, for example, a hypothetical black male candidate applying for an associate position at a major law firm. When he meets his interviewers, he notices that all five attorneys are white. He perceives it to be a difficult interview, largely because of the subtle aversive behavior of his interviewers, such as failing to smile or laugh when expected and remaining physically distant from him. If the black candidate perceives himself as highly qualified and yet does not get the job, he may suspect that the interviewers were uncomfortable with him because of race. If he had been a white male with the same credentials and presentation, he might surmise, his interviewers would have been warmer and more engaged and willing to take his candidacy seriously. Note that because these are unconscious biases,

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Experimental Soc. Psychol. 435, 439 (2001) (finding correlation between IAT scores and length of speaking time, smiling, and speech errors and hesitations); Carl O. Word et al., The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction, 10 J. Experimental Soc. Psychol. 109, 114–15 (1974) (finding that white interviewers placed their chairs farther from black candidates, spent 25% less time talking to them, and had a higher rate of speech errors).

401. See, e.g., Kang, supra note 26, at 1524–25 (describing "vicious circle" of interviewer's "unfriendly nonverbal behavior" and responsive, unfriendly behavior from the interviewee); Word et al., supra note 400, at 118–19 (finding that black candidates responded to uncomfortable behavior by making more speech errors and increasing physical distance from interviewer).

402. See Kang & Banaji, supra note 29, at 1094 ("Interviews are extraordinarily subjective, and . . . making decisions based on interviews produces worse outcomes than arriving at them via the paper record."); cf. Rudman & Glick, supra note 181, at 757 (reporting that "agentic" women were perceived in interviews as "less socially skilled" and therefore were "viewed as less hireable for a managerial job" when job qualifications included requirement of "interpersonal skills").

403. See supra text accompanying note 170 (discussing study that found that black subjects were capable of identifying implicit bias from viewing "thin-slices of nonverbal behavior" by white people).

the white members of the hiring committee would not be aware of any bias, and if they learned of the candidate's perception of discrimination, they would likely dismiss it out of hand and possibly suspect that he was paranoid.[404]

If a firm took into account the insights of perceptual segregation, however, it might insist on having a critical mass of black attorneys among the interviewers in order to avoid actual and perceived antiblack bias. The IAT studies reveal that blacks are less likely than others to hold antiblack bias.[405] Further, blacks are adept at perceiving bias (as measured by the IAT) in white behaviors that might not be noticed by white observers.[406] Accordingly, if two of the five attorneys are black, they are more likely to notice the signs of discomfort and awkwardness among the white attorneys that the black candidate would also likely spot. Recognizing the emergence of potentially biased conduct, the black interviewers may intervene to alter the dynamic by asking a friendly question, smiling, complimenting the candidate on his accomplishments, or otherwise demonstrating support and encouragement. In some cases, this could make the difference between a positive or negative interview and employment outcome.

I am not naïve about the possibility that the black interviewers will make a difference. In many cases, they may not. First, the black attorneys may have internalized the firm's norms and may be just as averse to the black candidate.[407] Second, even if the black attorneys notice their white peers' biased behavior and want to intervene, they might be too risk averse to try to change the dynamic.[408] For instance, they might fear that their white colleagues will view an intervention as an illegitimate sign of racial bonding or loyalty. These limitations may be heightened if the black attorney is a "token," meaning the only black attorney at the firm or among the interviewers.

At the end of the day, even if there is a critical mass of black decisionmakers and they attempt to intervene, they are still likely to be in the minority and their views may not prevail. But the injection of a critical

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404. See Dovidio & Gaertner, supra note 150, at 4, 21–23 (noting that whites often deny "personal prejudice" and that blacks are likely to form "very different impressions [from ambiguous behavior] about whether racial bias is operating").

405. See, e.g., Nosek et al., supra note 36, at 7 (noting that "Black participants were the only racial group that did not show an implicit pro-White preference on average"); Kang & Banaji, supra note 29, at 1072 (noting that 75% of Whites versus 50% of Blacks showed antiblack bias on IAT).

406. See Richeson & Shelton, supra note 170, at 80 (finding that blacks on average were better than whites at predicting the IAT bias score of white people based on observing nonverbal behavior during interracial interactions).

407. As noted earlier, the racial minorities selected as federal judges do not appear to hold significantly different attitudes toward discrimination plaintiffs than their white colleagues. See supra note 305 and accompanying text.

408. See supra Part III.B (identifying social costs to outsiders of identifying discriminatory acts by insiders).

mass of black people among the interviewers at least opens the door to countering bias in the moment during the interview. This intervention addresses the problem of employment discrimination at its source—during the very interaction that could give rise to actual discrimination, a perception of discrimination, and potentially a Title VII claim. It is preventive and remedial at the same time.

Some firms may not consider race in assembling interview teams because of the norm of colorblindness. They may worry that matching black candidates with black interviewers would constitute a racial stereotype. Most blacks, however, would not regard such a policy as a stereotype, because, unlike whites, they tend to be unapologetically race-conscious.[409] Here we see the harm of a perceptual divide. Whites may resist race conscious policies based on fear of offending black candidates, but they may be misapprehending the perspective of the average African American.

Some employers finesse the colorblindness concern by taking race into account subtly in assembling interview teams but not adopting a formal policy. Cynics might say such firms are driven by a desire to maintain racial appearances or political correctness. The firm might think it just "looks better" when there is at least one black person interviewing a black candidate. The firm might also be responding to a market-based preference. It might have learned (unlike those who fear racial stereotyping) that black recruits want to meet black attorneys, and failure to produce them will hurt the firm's ability to recruit a diverse array of candidates. Perceptual segregation suggests that something more than cosmetic rationales justifies assembling a diverse set of interviewers. Even if the firm partners who adopt such a policy are simply concerned about appearances or catering to market-based preferences, the rule is likely to reduce actual discrimination and perceptions of discrimination, and that is what ultimately matters.

The debiasing effect of black and female participants is not limited to the interviewing stage. It extends to several critical junctures in the employment process, including decisions whether to promote and how to handle claims of discrimination. First, it has implications for internal promotion decisions, such as the decision to make an associate a partner or to tenure a junior professor. Many such decisions may not be preceded by a formal interview, where the candidate may have access to behavior giving rise to a perception of discrimination. However, bias might still emerge in the deliberations of the committee making the promotion decisions, and an outsider may suspect bias even if she has little information regarding the deliberations.

During the deliberations, a decisionmaker might make an overtly biased remark that makes salient a stereotype, such as mentioning a female associate's parenting responsibilities. Or the gendered opposition to the

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409. See supra note 154 and accompanying text.

outsider candidate might be more implicit, such as describing a female candidate as lacking social skills and having an unpleasant personality, when an unspoken gender stereotype underwrites this impression.[410] Either way, the presence of outsiders can make a difference.

Studies suggest that insiders act differently in the presence of an outsider. The mere presence of an African American may shut down biased remarks that would otherwise flourish and lead to an adverse outcome for the outsider.[411] One study led white male students to believe they were in the presence of either two white males, one black and one white male, or two black males.[412] The subjects watched a video clip of a TV comedy containing racial stereotypes of black people, and they believed that two other men in the adjacent rooms were viewing their reactions. They were then asked to rate privately how prejudiced the clip was. Subjects who viewed the clip in the perceived presence of at least one African American rated the clip significantly more prejudiced than those who were with two white students.[413] Interestingly, the presence of the second black student did not further increase perceptions of prejudice.[414] One African American was enough to "prompt European American males to show cultural sensitivity."[415]

Of course not every display of cultural sensitivity is genuine; some insiders may retain biased attitudes and stereotypes even as they withhold expressing them in the presence of an outsider. But reducing such expressions could halt the flowering of bias that might occur in all-white and all-male settings. Returning to the example of the female candidate being considered for partnership, the comment about her parenting responsibilities could derail her candidacy if other decisionmakers who had supported her reconsider once the biased remark is made and she is reframed as a mother. On the other hand, if the presence of a woman on the committee deters the speaker from making the biased remark, the salience of the candidate's family situation might be reduced.

A recent study by Samuel Sommers provides more details as to the mechanics of interracial interactions in group decisionmaking. Sommers compared the decisionmaking of racially mixed and all-white juries,

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410. See Rudman & Glick, supra note 181, at 744–46, 757 (arguing that society holds women to "higher standard" of politeness and punishes women who do not live up to it, while failing to similarly censure men who are not polite); see also Price Waterhouse v. Hopkins, 490 U.S. 228, 244–45 (1989) (holding that sex role stereotyping is form of Title VII sex discrimination).

411. See Akiba & Miller, supra note 174, at 637 ("[T]he perceived presence of at least one African American individual in a small group appears to prompt European American males to show cultural sensitivity . . . .").

412. Id. at 631–32.

413. See id. at 637 (discussing "strong trend to cite prejudice" in general in viewing of clip, but noting that "participants in the African-American present . . . conditions rated the humor to be reliably more prejudiced than did" other participants).

414. See id.

415. Id.

which viewed a simulated trial of a black defendant in a criminal case.[416] After watching a thirty minute summary of a trial on sexual assault charges, the jurors were told to deliberate as if they were deciding the actual case. Several differences emerged. The racial composition of the juries seemed to have an impact even before deliberations. Consistent with perceptual segregation, prior to deliberations black and white jurors differed significantly as to whether they were inclined to vote that the defendant was guilty.[417] Roughly 23% of black jurors voted guilty, while over 44% of white jurors voted similarly.[418] But this racial gap closed when whites and blacks were on racially mixed juries.[419] Although whites on racially diverse juries were slightly more likely to vote guilty than their black peers, the difference was statistically insignificant.[420]

Once deliberations began, the groups also behaved differently. Diverse juries discussed more case facts than all-white juries.[421] Notably, this was not primarily because the black jurors expressed more skepticism and pressed novel facts.[422] Instead, the *white* members of these diverse juries raised more novel facts.[423] By contrast, the members of all-white juries made more inaccurate statements, and such errors were more likely to go uncorrected.[424] Moreover, "[o]nly five all-White groups mentioned racism, and in all five instances, at least 1 participant objected on the basis that it was not a relevant issue for discussion. Similar resistance to discussing racism occurred in only two of the nine diverse groups that mentioned the topic."[425]

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416. See Samuel R. Sommers, On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations, 90 J. Personality & Soc. Psychol. 597, 601 (2006) (describing study design). The racially mixed juries each consisted of four white and two black jurors. Two hundred jury-eligible citizens participated. See id. at 601–02.

417. Id. at 603 (discussing predeliberation votes). The black jurors might have been more aware of and concerned about stereotypes of black male sexuality than their white peers and thus may have been more skeptical of the charge of sexual assault. Studies also show that in general blacks view the criminal justice system as more biased against blacks, and thus they might be less willing to convict. See supra text accompanying note 15.

418. See Sommers, supra note 416, at 603.

419. Id. (noting that whites in diverse juries had 33.8% vote guilty rate).

420. Id. The same pattern emerged when jurors were asked the percent likelihood of guilt. See id. at 604.

421. See id. at 605 (describing "effect of racial composition on deliberation breadth").

422. See id. (concluding that deliberation breadth was not due to "performance of Black participants").

423. Id.

424. See id. ("[D]eliberations of diverse groups contained fewer inaccurate statements.").

425. Id. at 606. The study involved twenty-nine juries. See id. at 602. It does not appear that any studies have replicated the findings of Sommers and Akiba and Miller with a male-female sample, instead of a black-white sample. However, studies on the effect of female judges on federal appellate courts show a similar gender effect. These studies indicate that adding one woman to an appellate panel significantly increases the probability that the male judges will favor the plaintiff in sex discrimination cases. See,

The Sommers study suggests that insiders, namely whites and men, have a critical role to play in debiasing decisionmaking processes. An important overall finding was that "group racial composition influenced information exchange, but White participants were just as, if not more, responsible for these effects as were Black participants."[426] Therefore, the debiasing effect of diverse decisionmaking bodies need not depend primarily on whether the outsiders are willing and able to challenge the other group members. Simply by being present black members may make their white peers more race-conscious, more careful and rigorous in their deliberations and more sensitive to concerns about discrimination.

The combination of outsiders and insiders who are sensitive to discrimination may be the most effective means of combating bias in group decisionmaking. Outsiders' efforts to debias, through presence and active intervention, might be significantly advanced by working with insiders whose perceptions on issues of discrimination are aligned with the "pervasive prejudice" perspective.[427] Such insiders have more freedom to intervene to correct bias because they are not subject to the "identity work" expectations that outsiders typically must shoulder.[428] Even highly motivated outsiders have to be careful and nimble in attempting to debias their peers without triggering stereotypes of being "hypersensitive," "militant" or a "PC-er."[429] Explicitly asserting that a comment in a meeting is racist or sexist, for example, might expose the outsider to re-

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e.g., Boyd et al., supra note 302, at 25, 27 (concluding that including female judge on panel significantly increases likelihood that male peer will vote for plaintiff); Farhang & Wawro, supra note 304, at 321 (finding that "the gender composition of the panel influences the behavior of male judges"); Peresie, supra note 303 at 1782, 1786 ("Male judges may feel constrained in what arguments or preferences they put forward when a female judge is a member of the appellate panel . . . because they fear that they will appear biased . . . .").

426. Sommers, supra note 416, at 606.

427. Just as an employer should seek to include insiders who demonstrate a sensitivity to discrimination, it should avoid selecting outsiders who demonstrate a hostility to other insiders and to perceiving discrimination.

428. Consider a study by Alexander Czopp and Margo Monteith that asked students to imagine how they would feel if a person confronted them about making a subtle race or gender-biased remark. Alexander M. Czopp & Margo Monteith, Confronting Prejudice (Literally): Reactions to Confrontations of Racial and Gender Bias, 29 Personality & Soc. Psychol. Bull. 532, 538 (2003). They found that "confrontations made by target group members (i.e., Blacks and women) may elicit different reactions than similar confrontations made by nontarget group members." Id. at 534. In particular, participants "felt more guilty when confronted by a nontarget than a target group member." Id. at 539. Hence, they concluded that, "nontarget group members may have unique opportunities for prejudice reduction via confrontation." Id. at 542; cf. Robinson, Uncovering, supra note 169, at 1846 (arguing that outsiders must cope with extra pressures associated with their race, gender, and/or sexual orientation).

429. Cf. Carbado & Gulati, Identity, supra note 32, at 1289–90 (discussing social costs of challenging discrimination, which include being labeled "uncollegial, a potential troublemaker, [or even] a radical").

taliation.[430] The reality is that the same comment from a white or male decisionmaker will likely be interpreted differently.[431] A white person is unlikely to face accusations of playing the race card. Further, insiders are more likely to be deeply entrenched in their organizations and enjoy a degree of influence and respect that may elude outsiders.[432] Such interventions by whites and men might help close the divides that separate us when it comes to issues of race and gender.[433]

In addition to interviewing and promotion committees, perceptual segregation informs the composition of administrative committees that respond to employee complaints of discrimination. Because insiders and outsiders are likely to differ as to the persuasiveness of an outsider's claim of discrimination, an institution truly committed to combating discrimination should include a critical mass of outsiders among the decisionmakers who evaluate and respond to complaints. If the committee dismisses the employee's complaint or tolerates retaliation against her, the dispute is likely to escalate and may well end up in court. By diversifying the committee, the employer would be more likely to elicit both sides of the dispute and evaluate the strengths and weaknesses of the claim in a more balanced fashion. Such insight might lead the employer to grant relief that might satisfy the employee and resolve the complaint. Further, diversity among the decisionmakers will likely foster the perception that both sides were considered and the employee's complaint was taken seriously. Diversity among decisionmakers continues to be relevant for those complaints that result in lawsuits. An all-white or all-male committee may exaggerate the strengths of the employer's position and overlook the risks of proceeding to trial before a more diverse jury.[434]

Let me close by responding to two potential objections to this proposal. First, some might view the proposal as a form of affirmative action or a race and gender "preference."[435] This conceptualization would misun-

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430. See supra text accompanying notes 268–280 (reviewing studies on retaliation against outsiders who complain about discrimination).

431. See, e.g., Rudman & Glick, supra note 181, at 757 (concluding that agentic women receive different reaction in workplace than agentic men do); cf. Yuracko, supra note 206, at 188 (arguing that women who exhibit same or similar traits to some men may receive different reactions than men who possess that trait).

432. Outsiders are more likely to be new entrants to positions of power or "first generation decisionmakers," the first person in the family to be a law firm partner or to hold a law degree at all, for instance, because they are less likely to benefit from the intergenerational transfers of wealth and educational resources that sustain white dominance and patriarchy.

433. There may be social costs, however, for insiders who "break ranks" in this fashion. See Noah D. Zatz, Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity, 77 Ind. L.J. 63, 69 (2002).

434. Cf. Russell Korobkin, Psychological Impediments to Mediation Success: Theory and Practice, 21 Ohio St. J. Disp. Resol. 297–308 (2006) (arguing that in general both sides in a mediation are likely to overestimate strengths of their position).

435. My proposal differs from Kang and Banaji's, which more closely resembles affirmative action in that, under certain circumstances, they would grant outsiders a "plus"

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derstand the proposal. As I have suggested elsewhere, a defining feature of a preference is that it favors or privileges at least one outsider and disadvantages an insider.[436] My proposal does no such thing. In fact, it arguably burdens outsiders who may have to conduct more interviews and sit on more committees than they otherwise would. Most employees view such administrative assignments as duties, not pleasures. Further, in sitting on such committees, the role of the outsider is not to favor or prefer outsider candidates. Rather, it is to debias the decisionmaking processes—to level the playing field, not tilt it in favor of outsider candidates. The goal of the proposal is quite simply to combat bias, and there are no grounds for assuming that it is a veiled preference.[437]

Second, some outsiders might object that my proposal places disproportionate burdens on them, as they might be called on to sit on numerous committees regarding interviewing, promotion, and EEO decisions. In response to this valid concern, I call for employers to formalize their policies and give outsiders credit for performing this vital debiasing work. To the extent that outsiders are required to play a greater role in the aforementioned committees, they should play a lesser role in those administrative roles that do not directly implicate race and gender. In this way, the proposal erodes colorblindness and brings debiasing work out of the shadows.[438]

CONCLUSION

It is well known that Americans remain starkly divided by race in terms of wealth, education, health, and residential patterns and that even though men and women are more integrated, gender powerfully defines each person's life. This Article reveals another dimension of racial and gender stratification, which I call perceptual segregation. Despite strong internal and external pressures to ignore or minimize discrimination, outsiders continue to view discrimination in society as more pervasive than insiders. Moreover, at the micro level, we can expect insiders and outsiders to differ on whether a particular fact pattern warrants a charge of discrimination. This Article thus challenges norms of colorblindness and simplistic assumptions that we know what constitutes "discrimination." The social position of the perceiver may be critical in understand-

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when competing with insiders for positions because of outsiders' debiasing capacity. See Kang & Banaji, supra note 29, at 1112.

436. Cf. Note, The Constitutionality of Proposition 209 as Applied, 111 Harv. L. Rev. 2081, 2085 (1998). My argument in this Note was slightly different because it attempted to draw a distinction between the use of the words "preference" and "affirmative action" in the language of the ballot initiative known as "Prop. 209."

437. Any assumption that outsiders will inevitably favor "their own," and that insiders are neutral, not only ignores the contrary implicit bias literature, but would seem to rest on a stereotype.

438. Cf. Devon W. Carbado & Mitu Gulati, Tenure, 53 J. Legal Educ. 157, 171–72 (2003) (describing "shadow work" as work that outsiders feel racially compelled to do but that employers do not formally require).

ing perceptions of discrimination. The hope of this Article is that recognizing our differences will open the door to frank engagement with them, which would foster a healthy degree of self-skepticism toward our intuitions about discrimination. Further, insiders who have come to understand outsider perspectives may play a special role in bridging perceptual differences. We may not easily come to agreement on these thorny issues but we can at least understand the forces that predispose us to disagree.