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WHERE TITLE VII STOPS: EXPLORING SUBTLE RACE DISCRIMINATION IN THE WORKPLACE

DAMON RITENHOUSE

INTRODUCTION

There are a bevy of statutes whose primary aim is ending racial discrimination in the employment context. The centerpiece of this effort is Title VII of the Civil Rights Act of 1964.[1] Despite the array of laws prohibiting racial discrimination in the workplace, this phenomenon persists and works to the detriment of racial minorities seeking equal treatment at work.[2] While modern employers are much less likely to have formal policies exhibiting racism, discrimination continues to exist in the form of less obvious and even unconscious racism. Overt instances of racial discrimination against minority workers, like the use of racial epithets or the display of items such as a noose, have become practically non-existent. Instead, discrimination against these workers has become much more surreptitious and is often difficult for the untrained observer to detect.[3] Many times, the employer may not even be aware of the discriminatory impact their decisions can have.

The subtle nature of this type of treatment does not change the fact that racial discrimination is a fact of life for minority employees. Wage disparities, undesirable assignments and de-

1 42 U.S.C. § 2000e (2006).

2 Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse*, 3 HARV. L. & POL'Y REV. 3, 7 (2008).

3 Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 2 (2006).

nial of access to training and other opportunities continue to plague racial minorities.[4] Bias often operates below the surface and combines with the "boundaryless workplace" to create problems that Title VII and the judiciary are not equipped to handle.[5]

Although Congress enacted Title VII primarily to confront racial discrimination in the workplace, courts have struggled to properly address the prevalence of subtle racial discrimination that plagues today's minority employees. This paper will describe several categories of employees that have been denied proper protection by the legal system and identify specific ways that the judiciary has taken an overly narrow and simplistic approach to Title VII enforcement. Because the pervasive and subtle nature of this discrimination goes beyond easily understood and identifiable types of racial bias, the statutory and judicial techniques developed to combat overt racial discrimination are simply ineffective against this evolved type of discriminatory treatment.

Modern employers have moved away from the outwardly discriminatory practices of the past and many have embraced formal policies designed to end racial discrimination against minority employees.[6] Deliberate racism has been often been replaced by cognitive bias, which influences the decision-making and interactions involving black workers.[7] This type of discrimination has been dubbed "second generation" and encompasses social practices and patterns of treatment that, over time, work to the detriment of the non-dominant, i.e. racial minority, groups.[8]

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4 *Id.*

5 *Id.* at 3 (Boundaryless is used to denote a workplace that has a decentralized and flexible approach to everyday operations, as opposed to the more rigid hierarchical structures that were common in the past.)

6 Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001).

7 *Id.* at 462

8 *Id.*

This paper will examine several categories of subtle racial discrimination, primarily focusing on treatment of black workers. There will be a discussion of how the current state of the law is incapable of properly dealing with the new types of discrimination faced by these workers. Part I of the paper will look at the original intent of Title VII, analyzing the goals and motivations that existed when it was passed. There will then be an examination of the ways in which Title VII and the judiciary have become deficient in handling subtle race discrimination. Finally, this Part will trace the development of subtle racial discrimination, seeking to define this concept and examining how it functions in today's workplace. Part II will then articulate the particular categories. Following the description of each category, it will be demonstrated how both the law and the judiciary have fallen short in protecting the victims of subtle racial discrimination. A short conclusion will follow.

I. The Original Intent of Title VII and the Advent of Subtle Racial Discrimination

When Congress passed Title VII, it provided minority employees with a powerful tool to combat the racially discriminatory practices that had plagued the workplace for generations.[9] Its structure was designed to address the traditional forms of racial discrimination, which many times took the form of official policies.[10] Direct instances of racial animus often accompanied discrimination against black employees, leaving little doubt as to the reasons for a discharge or failure to promote.[11] However, as the nature of racial discrimination has changed and become much more subtle it appears that the Title VII framework has become outdated. This Part traces the development of Title VII

9 42 U.S.C. § 2000e (2006).

10 Bagenstos, *supra* note 3, at 8-9.

11 *See generally* Bagenstos, *supra* note 3 (discussing how racial inequality in the workplace has evolved from overt forms to more subtle forms of discrimination).

jurisprudence and highlights several ways in which it is no longer effective in addressing the discriminatory issues faced by today's black workers. The Part then goes on to examine the concept of subtle race discrimination and how it has come to pervade the modern employment arena.

A. The Original Intent of Title VII and the Ways That it Has Become Compromised

Due to the history of racial subordination in this country, discrimination based on race is especially disfavored and subject to strict scrutiny.[12] The passage of Title VII reflected an ambitious agenda of transforming society by eradicating discrimination based on protected characteristics and to promote facially neutral decision-making and status-blind employment practices.[13] Senator Hubert Humphrey, one of the champions of the Act, used strong language to describe this principle when he decried the "many impersonal institutional processes, which nevertheless determine the availability of jobs for non-white workers."[14]

Promoting equal opportunities for people of all races, especially blacks, was clearly the driving force behind the passage of the Civil Rights Act.[15] This point is further underscored by the fact that race can never be used as a *bona fide* occupational qualification, preventing any diminishment of the protection afforded to racial minorities.[16] The legislative history of Title VII

12 *See* Mark R. Bandusch, *Ten Troubles With Title VII and Trait Discrimination Plus One Simple Solution (A Totality of the Circumstances Framework)*, 37 CAP. U. L. REV. 965, 992 (2009).

13 *Id.* at 1057-1058 (although Title VII does address other protected categories such as gender or religion, this paper will focus solely on the category of race).

14 *See* William Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 U. PA. J. LAB. & EMP. L. 697, 713 (2000).

15 *Id.*

16 *See generally* Forbath, *supra* note 14 (discussing core motivating factors and key tenants in 1964 civil rights legislation).

supports the notion that Congress intended to eliminate all forms of workplace discrimination caused by a person's race, color, sex, religion or national origin.[17] This history and the resulting legislation provided a broad framework to address all forms of discrimination facing racial minorities, whether obvious or subtle.

Thus, the central focus of Title VII became to dismantle tangible barriers that operate to disadvantage minority employees.[18] These barriers are most commonly conceived of as the traditionally blatant discriminatory policies, which have become almost non-existent in the years since the Act was passed.[19] This approach, which focuses on easily observable discriminatory treatment, often fails to adequately recognize and address the true nature of racial discrimination in today's workplace.

The last time Congress significantly amended the Civil Rights Act was in 1991.This raises questions about how its well-worn structures address the subtle discrimination that proliferates in today's workplace.[20] Due to compromises with employers, even the amendments passed by Congress do not fully provide adequate remedy for victims of subtle race discrimination.[21] The result is that Title VII still tolerates a large measure of racial abuse and mistreatment despite its stated goals of equality and eliminating racial disparities in the job market.[22]

In many instances, the courts have adopted simplistic definitions that require a showing of an intentional and clear-cut racial animus behind any act of discrimination that harms minority

17 CHARLES W. WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).
18 *Id.*
19 *See* Sturm, *supra* note 6 at 460.
20 *See* Bandusch, *supra* note 12, at 965.
21 Stephen Plass, *Reinforcing Title VII With Zero Tolerance Rules*, 39 SUFFOLK U. L. REV. 127, 130-31 (2005).
22 *Id.*

employees.[23] This approach may seem desirable based on its simplicity, but it misapprehends the modern nature of racism, which is no longer characterized by overtly racist acts.[24] Instead, racism has largely gone underground, and its subtle nature can often escape the attention of courts around the nation.[25]

The judiciary bears the burden of enforcing Title VII and ensuring the victims of discrimination have adequate recourse. The current judicial framework may appear to provide plaintiffs a reasonable opportunity to have their claims fairly adjudicated.[26] However, a closer examination reveals that there exists a clear bias against recognizing many forms of employment discrimination.[27] At least one scholar has characterized this judicial bias as a "deep skepticism" about the ongoing occurrence of racial discrimination in modern society.[28] A number of courts have rendered decisions that seem to indicate their belief that actionable discrimination is rare and that most claims are ultimately not viable.[29] Many courts have created "interpretational sideshows," formulations of the law that have little connection to workplace realities and have diminished the effectiveness of Title VII as a shield for victims of racially discriminatory practices.[30]

Some courts exhibit bias and hostility to Title VII race claimants.[31] Judges may believe that plaintiffs bringing these cases have already received too many breaks along the way and are merely whining about treatment that does not amount to action-

23 Ann C. McGinley, *Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J. L. & PUB. POL'Y 415, 416-18 (2000).
24 *See generally* McGinley, *supra* note 23.
25 *Id.*
26 Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1152 (2008).
27 *See* Clermont & Schwab, *supra* note 2, at 112-115.
28 Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?* 61 LA. L. REV. 555, 562 (2001).
29 *See generally* Clermont & Schwab, *supra* note 2.
30 *See* Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49 (2006).
31 *See* Selmi, supra note 28, at 561.

able discrimination.[32] Courts exhibiting bias against Title VII race discrimination claimants most often do not demonstrate open animus towards these cases. Instead, they let their own personal perspective color their approach to handling the claims.[33] This narrow-mindedness certainly seems to impact how a court rules on racial discrimination claims and helps to explain why these cases are so difficult to win.[34]

Such a viewpoint makes it very difficult for plaintiffs to have success in bringing racial discrimination claims. Plaintiffs bringing Title VII race claims won only 2.1% of pretrial adjudications, compared with 22.23% by other civil plaintiffs.[35] When going to trial before a judge, they won 18.7% while other plaintiffs won nearly 46% of the time.[36] Even when these plaintiffs prevail at the trial level, the appellate courts are far more likely to reverse them: 48% of plaintiff wins are reversed, compared to only 16% of defendant's victories.[37] These stark numbers appear to indicate a bias on the part of judges toward employees bringing claims of race discrimination. This disinclination to find in favor of plaintiffs may not reflect outright racial animus, but it certainly exhibits hostility towards the notion that subtle race discrimination is alive and well in many workplaces.

In the great majority of Title VII cases, the plaintiff alleges disparate treatment.[38] Most courts hearing a disparate treatment case require some showing of intentional discrimination on the part of the employer.[39] Proving this intent has always been difficult, especially now as decision makers have become increas-

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32 *Id.*

33 *Id.* at 564.

34 *Id.*

35 *Id.*

36 *See* Selmi, *supra* note 33, at 560-61.

37 *Id.*

38 Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious* Discrimination *and Implicit Bias in Proving Intentional Discrimination*, 73 Mo. L. Rev. 83, 85 (2008).

39 *Id.*

ingly sophisticated in obscuring any discriminatory motivations.[40] When courts require plaintiffs to make this showing, they are failing to take into account recent psychological and behavioral theories that show discrimination often occurs at an unconscious level over the course of many interactions, rather than one clearly defined adverse action.[41]

The plain language of Title VII does not mandate proof of purposeful or intentional discrimination.[42] Courts could reasonably interpret the statute to require a showing of causation but not necessarily intent.[43] It is unclear why courts have chosen to narrow the broad language of the statute, but it is clear that this interpretation unduly burdens plaintiffs who have suffered subtle racial discrimination but struggle to prove intent.

To succeed on a claim of disparate treatment, a plaintiff must establish a *prima facie* case as outlined in *McDonnell Douglas Corp. v. Green*.[44] Once a *prima facie* case has been established, the employer has an opportunity to set forth a "legitimate non-discriminatory reason" for its employment action.[45] The plaintiff then has a chance to show that the reason given by the employer is a pretext for discrimination.[46] An employer can easily articulate some non-discriminatory reason for its decision, and the burden of proof at all times remains with the plaintiff to show that intentional discrimination has occurred.[47] This proof structure may appear to provide both plaintiff employees and defendant employers a fair chance to present evidence supporting their position, but it actually places an onerous burden on em-

40 *Id.* at 97.
41 *Id.* at 85.
42 *Id.* at 86.
43 Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1056 (2006).
44 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
45 *Id.* at 802.
46 *Id.* at 804.
47 Bagenstos, *supra* note 3, at 15.

ployees who struggle to identify clear evidence of the subtle discriminatory treatment they have faced.

In *St. Mary's Honor Center v. Hicks,*[48] the Supreme Court placed an additional burden on plaintiffs in employment discrimination cases by requiring further proof of intentional discrimination after the plaintiff has proved that the employer's "legitimate nondiscriminatory reason" was pretextual. The plaintiff, a black male, was terminated for allegedly poor attendance.[49] He was able to present evidence that there were white employees who had worse attendance records but were not terminated.[50] Prior to this case, many courts would have found for the plaintiff as a matter of law.[51] However, the Supreme Court concluded that Hicks had to go beyond proving that the employer's proffered reason for firing him was pretextual; he had to prove that the adverse action was based on his race.[52] This additional step has been labeled "pretext plus," and it adds yet another hurdle for victims of subtle racial discrimination to overcome.[53] Considering that almost all evidence in these cases is circumstantial and not direct, many minority plaintiffs will struggle to marshal sufficient evidence to meet the increasingly stringent burdens placed on them by the Supreme Court.

Another example of how the judiciary has constructed obstacles for Title VII is the same-actor principle. This principle holds that where the same decision maker engages in an adverse employment action and a positive employment decision within a short period of time, there is a strong presumption that the deci-

48 *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

49 *Id.* at 507.

50 *Id.*

51 *See generally* Bandusch *supra* note 12, at 1045.

52 *See Hicks*, 502 U.S. at 523-24.

53 *See* Catherine L. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*,43 HASTINGS L.J. 57, 66-68.

sion-maker harbored no discriminatory intent.[54] Many courts have found that it would defy common sense for a decision maker to take discriminatory action against a minority person that they had recently hired or promoted.[55] The doctrine has become widespread and often presents a serious hurdle for victims of subtle racial discrimination.[56]

The major problem with the application of this doctrine in such a formalistic manner is that it ignores many of the realities of the modern workplace. The methods of evaluation and changing corporate structures that predominate in many businesses reflect a complex system of decision-making and defy attempts to analyze them in a simplistic manner.[57] The same-actor doctrine rests on the often-incorrect presumption that discrimination originates in a single bad actor harboring clear racial animus.[58] As will be discussed more fully below, this type of discrimination is largely a thing of the past. To discover the subtle discrimination that exists today requires a more searching and nuanced inquiry.

Courts have continued to conceptualize discrimination as occurring in moments of specific, identifiable decision-making and struggle to comprehend the ways subtle discrimination functions.[59] There has been a failure to recognize the "psychological tax" incurred by blacks that are forced to work in environments where racial discrimination is rampant.[60] Thus, courts have consistently held that dissatisfaction with work assignments, being subjected to unfair criticism or placement in unpleasant working

54 Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117, 1122 (2008).
55 *Id.* at 1121.
56 *Id.*
57 *Id.* at 1122.
58 *Id.*
59 *See* Gina Chirichigno, *Crying Wolf? What Can We Learn From "Misconceptions" About Discrimination: A Transformational Approach to Anti-Discrimination Law*, 49 How. L.J. 553, 585 (2006).
60 *Id.*

conditions is not severe enough to be intolerable.[61] The failure by courts to appreciate the true cost, both psychologically and economically, of such treatment has meant that large numbers of black workers are left trapped in damaging environments with no adequate legal protection.

B. Development of Subtle Racial Discrimination

In the past, discriminatory practices were blatant and often a result of institutional policies.[62] Racial discrimination generally was traceable to individuals or groups acting on clear racial animus to exclude minorities.[63] This kind of action led to the continuing subordination of minority employees and fit within commonly held conceptions of racial discrimination.[64] These clear actions were subject to clear remedies, which often came in the form of rules.[65] Such rules prohibited employers from taking race into account when making hiring or employment decisions and commanded that minority employees have access to the same opportunities as other workers.[66]

As these traditional forms of racial discrimination have receded over time, they have been replaced by less obvious types of discriminatory treatment.[67] This new breed of racially motivated action is often characterized by patterns or practices that are not formalized policies of the employer but which nonetheless have a negative impact on minority workers.[68] Because implicit bias drives many of those who perpetrate this subtle discrimination, there is often difficulty tracing the exclusionary

61 *Id.*
62 *Id.* at 575.
63 *Id.*
64 *See generally id.*
65 *Id.*
66 *Id.* at 578.
67 *See* McGinley; *supra* note 23, at 418.
68 *Id* at 419-20.

effect on workers to intentional acts of individual decision makers.[69]

Social psychologists have christened this new phenomenon "aversive" racism.[70] Aversive racism is characterized by subtle and often unintentional forms of bias perpetrated by whites.[71] Employers believe they are acting free from prejudice and may be unaware that their decision-making negatively impacts black workers.[72] Aversive racism has become widespread, and because of its subconscious and implicit nature, it is especially difficult for the existing Title VII structure to handle.[73] This type of racism can offer advantages for members of the dominant group, boosting their self-esteem and promoting feelings of authority and superiority.[74] In a more tangible sense, aversive racial discrimination offers economic advantages to whites and allows them to maintain dominance in the workplace.[75]

Aversive racism differs from more overt forms because it is less openly hostile to members of minority groups.[76] People harboring this racial bias tend to have feelings of uneasiness and distrust around blacks, which are much more difficult to detect than the open racial animus of the past.[77] In the employment context, aversive racism acts in subtle ways to influence the behavior of whites in making work assignments or creating teams for specific projects.[78] This can have detrimental outcomes for

69 *Id.* at 419.
70 Reginald Oh, *Latcrit Introduction Methods*, 50 VILL. L. REV. 905, 910-11 (2005).
71 *Id* at 911.
72 *Id.*
73 *Id.* at 912.
74 John F. Dovidio & Samuel L. Gaertner, *Color Blind or Just Plain Blind?: The Pernicious Nature of Contemporary Racism*, 12(4) THE NON-PROFIT QUARTERLY (Winter 2005) http://academic.udayton.edu/race/01race/racism10.htm.
75 *Id.*
76 *Id.*
77 *Id.*
78 *Id.* at 6.

black employees, who are either completely shut out of assignments or are rendered ineffective due to the inconsistent behavior and distrust of white supervisors and co-workers.[79]

Charles Lawrence wrote that dominant theories of modern psychology believe that perceptions of race tend to occur in the subconscious of human thought.[80] Professor Peggy Davis described the phenomenon as "white micro-aggressions."[81] Whites in a dominant position now tend to act dismissively towards blacks, motivated largely by unconscious attitudes of white superiority and black inferiority.[82] The widespread occurrence of this unconscious prejudice is not surprising when it is considered how recently America adopted principles of racial equality.[83] The long history of racial oppression and marginalization of blacks in this country has improved, but its lingering impact is expressed in the deeply held attitudes on race described by Lawrence and Davis.

It is no coincidence that subtle race discrimination has become prevalent with all of the major changes occurring in the structure of the contemporary work environment. In today's employment context, hierarchies are often relaxed, and flexibility is prized above all else.[84] Workers change jobs often and seek to develop skills and experience that can be marketed to future employers.[85] Day-to-day interactions between employees and management are more important than ever because making connections and developing expertise is so critical to workers.[86] The presence of racial bias in a decision maker can be especially

79 *See* Dovidio & Gardner, *supra* note 74, at 8.
80 Terry Smith, *Everyday Indignities: Race, Retaliation and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 536 (2003) (hereinafter *Everyday Indignities*).
81 Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1576 (1989).
82 *Id.*
83 *See* Smith, *supra* note 80, at 540.
84 *See* Bagenstos, *supra* note 3, at 11.
85 *Id.*
86 *Id.*

harmful at this level.[87] Under these circumstances, passing over an employee for a particular assignment can be as damaging as denying them a raise or a promotion.[88]

The focus of many employers is now centered on decisions about how and by whom work is accomplished, rather than who is hired or where they are placed in the company's hierarchy.[89] These decisions are very susceptible to being influenced by subtle racial discrimination. Managers may impose less desirable assignments on racial minorities or assign them extra work because of an implicit bias.[90] Decisions made according to subtle racial bias are also likely to create stratifications in jobs or job functions that tend to devalue minority workers and reinforce the stereotypes that led to the original decision.[91] In this sense, the racially discriminatory practices become a self-fulfilling prophecy, whereby whites are validated in subordinating black employees.

Racial bias today operates at multiple stages of the workplace and at all levels of interaction between employees.[92] Discrimination that hinders the professional development of minority workers often falls outside the scope of traditional Title VII protections, and courts are hesitant to recognize such claims as causing tangible harm.[93] The effects of this kind of discrimination are "softer" because their benefits and harms are not always immediately apparent.[94] However, the damage is undeniable as minority employees often find themselves segregated into low status jobs and assignments, unable to advance in any meaningful way. Denying victims of this type of discrimina-

87 *Id.*
88 *Id.*
89 Tristin K. Green, *Race and Sex in Organizing Work: "Diversity," Discrimination, and Integration*, 59 EMORY L.J. 585, 587 (2010).
90 *Id.* at 588.
91 *Id.*
92 *Id.* at 595.
93 *Id.* at 590.
94 *Id.*

tion redress fails to understand both the current nature of racial bias and the changing structure of the employment arena.

II. Categories of Subtle Racial Discrimination and Shortcoming of Title VII in Addressing Them

There are many categories of minority workers subjected to racially discriminatory treatment. This treatment negatively impacts their professional development and also exacts a steep psychological toll.[95] This part examines four different categories of employees who face subtle discrimination based on race. Each category will be described in detail, then specific shortcomings of the current Title VII structure will be applied to the group to demonstrate the obstacles that members of the particular class face in seeking legal protection.

A. Intragroup Discrimination

Intragroup discrimination arises between members of the same racial minority group and is often based on a failure to assimilate to dominant white norms in the workplace.[96] This type of discrimination encompasses instances of blacks discriminating against other blacks.[97] Assimilation may be defined as the degree to which a person is associated with a privileged group.[98] The less a black person conforms to the prevailing racial norms, the greater the risk they will be discriminated against, even by members of their own minority group.[99] While this brand of subtle racial discrimination can be less conspicuous than that perpetrated by whites, it is no less harmful to the equal employment opportunities of its victims.

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[95] *Everyday Indignities*, *supra* note 80, at 545.
[96] *See* Enrique Schaerer, *Intragroup Discrimination in the Workplace: The Case for "Race Plus,"* 45 Harv. C.R.-C.L. L. Rev. 57, 58-60 (2010).
[97] *Id.*
[98] *Id.*
[99] *Id.* at 61.

Many workplaces adhere to white behavioral stereotypes, and under this system, whites are privileged, blacks that "act white" are assimilated and blacks that "act black" are unassimilated.[100] The assimilated blacks have internalized the white norms in an attempt to achieve an elevated status within the workplace.[101] They may then act in discriminatory ways against blacks that have not acquiesced to the dominant behavioral norms.[102]

Two cases demonstrate the difficulties faced by plaintiffs who have been victimized by intragroup discrimination. In *Sere v. Board of Trustees of the University of Illinois*,[103] the plaintiff was a Nigerian man who was fired by his light-skinned black supervisor and replaced with a light-skinned man.[104] While the court dismissed the plaintiff's Title VII claim as untimely, it did consider his racial discrimination claim under § 1981.[105] The court found that while discriminatory behavior may occur between members of the same race, in this case, the plaintiff had failed to establish actionable discrimination.[106] Most notably, the court failed to provide any doctrinal guidance for future adjudication of these claims.[107]

In *Bryant v. Begin Manage Program*[108], the plaintiff, a light-skinned black woman, alleged that her dark-skinned supervisors treated her in a discriminatory way based on her skin color and failure to "act black."[109] The supervisors referred to the plaintiff as a "want to be" as in wants to be white.[110] The court allowed the case to survive summary judgment on the basis of conduct-

100 *Id.* at 63.
101 *Id.*
102 *Id.*
103 *Sere v. Bd. of Trs.*, 648 F. Supp. 1543 (N.D. Ill. 1986).
104 *Id.* at 1546.
105 *Id.*; *See also* 42 U.S.C.A. § 1981 (explaining that "all persons shall have the same rights as are enjoyed by white citizens").
106 *Sere*, 628 F. Supp. at 1546.
107 *See generally id.*
108 *Bryant v. Begin Manage Program*, 281 F. Supp. 2d 561 (E.D.N.Y. 2003).
109 *Id.* at 565.
110 *Id.*

based racial discrimination without giving any serious attention to the color of the parties.[111]

Interestingly, the facts of this case reflect the opposite of what takes place in many intragroup discrimination cases, namely that the victim was penalized for acting "too white" as opposed to "too black." Nevertheless, racial norms were implicated. This is because members of her own racial minority targeted the plaintiff for a perceived failure to adhere to their conception of how race should be expressed. The court recognized that discrimination may have occurred, but the aspect of skin color as a basis for the disparate treatment was ignored.

Many of the proof structures under Title VII, such as the "tangible affect" requirement, pose problems in the modern workplace, especially for victims of intragroup discrimination.[112] Much of the subtle race discrimination today is more likely to hinder opportunity and development, which certainly has a deleterious effect on those who are subjected to it.[113] However, it is often quite difficult to make a showing of tangible harm that will satisfy the current burden of proof.

For example, performance evaluations are critical to success in the workplace, but many courts will not find a negative evaluation to be an adverse employment action unless it is used in a decision-making context.[114] This approach ignores the impact the negative evaluation may have on the minority employee's morale and their future work opportunities.[115] Further, courts already skeptical of claims involving minorities discriminating against one another are unlikely to characterize the harm suffered by targets of intragroup bias as severe or tangible enough to warrant Title VII protection.[116]

111 *Id.* at 572.
112 Chirichigno, *supra* note 59, at 584-85.
113 *Id.*
114 *Id.* at 586.
115 *Id.*
116 *Id.*

The concept of discrimination within a minority group can be difficult for many to grasp. This includes the great majority of courts, who have expressed suspicion toward such claims.[117] However, for victims of such discrimination, the phenomenon is all too real, and its existence is impossible to ignore. These employees are subjected to harassment and deprived of opportunity just as victims of the more traditional forms of discrimination are. Until the judiciary acknowledges the validity of these claims, those suffering intragroup discrimination in the workplace are left with little legal recourse.

B. Intergroup Discrimination

Many workplaces today have a tendency to intertwine being a good employee with being a good white person.[118] This culture not only works to the detriment of black workers, but it enforces a certain set of expectations on whites and how they should behave towards minorities on the job.[119] Creating a system of social relations that favors the dominant white norm reinforces the superiority of whites and the inferiority of blacks and acts to produce discrimination throughout the employment market.[120]

In some cases, employers make clear their expectations of race-based intergroup interactions, with explicit warnings to white workers not to associate with blacks.[121] There may be signals given, such as accusations of being disloyal,[122] calling a white person a "nigger lover"[123] or social shunning.[124]

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117 Chirichigno, *supra* note 59, at 587.

118 *See* Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 Ind. L.J. 63, 65 (2002).

119 *Id.*

120 *Id.* at 68.

121 *Id.* at 126.

122 *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1441 (10th Cir. 1988).

123 *Moffet v. Gene B. Glick Co.*, 621 F. Supp. 244, 254 (N.D. Ind. 1985).

124 *See Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878 (7th Cir. 1997).

When employers take such actions to encourage whites to discriminate against minorities, or retaliate against them for calling attention to a workplace plagued with racial discrimination, they create a hostile work environment for all the workers involved.[125] When workers are subjected to threats, work sabotage or unfair work assignments, they suffer adverse employment actions.[126]

The next step of the analysis is whether the harms occurred because of race.[127] Many courts have refused to recognize such claims brought by white workers, adhering to the view that members of the dominant group could never be victimized by racial discrimination.[128] This perspective implies that whites have no stake in discriminatory behavior directed at other groups and are no more than third-party bystanders when race discrimination is perpetrated.[129]

The need for whites to take a stand against racial discrimination and to be legally protected when they do so is illustrated by the case of *Childress v. City of Richmond.*[130] In *Childress*, six white male police officers found themselves in the midst of a severely hostile work environment, one where their commanding officer showed contempt for any non-whites on the force.[131] This commander referred to a black female officer as "motherfucking worthless black bitch" and invited the other white officers to act in a similar discriminatory fashion.[132]

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125 *See* Zatz, *supra* note 118, at 134.

126 *Id.*

127 *Id.* at 135.

128 *Id.*

129 *Id.*

130 *Childress v. Richmond, Va.*, 907 F. Supp. 934, 938 (E.D. Va. 1995), *dismissed*, 919 F.Supp. 216 (E.D. Va. 1996), *vacated*, 120 F.3d 476 (4th Cir. 1997)(panel opinion), *aff'd en banc*, 134 F.3d 1205 (4th Cir. 1998) (per curiam).

131 *Childress*, 907 F. Supp. at 938

132 *Id.*

The officers refused to engage in this offensive behavior and joined with the black officers in calling for their superior to be disciplined.[133] When they were subjected to harassment, threats of discharge and adverse transfers, the officers chose to file suit under Title VII for being placed in a hostile working environment in which the officers were divided by race.[134] However, a federal court also divided the officers by race, dismissing the white officers' claims on the ground that they merely faced a workplace biased in their favor.[135] The *Childress* court assumed that unambiguously racist rhetoric could not possibly create a hostile environment for white men because they should feel favored not threatened, by such an atmosphere.

This case provides a stark example of employees being punished for standing up to serious racial discrimination. The fact that some of the victims were themselves members of the dominant class should not preclude them from protection against retaliation. All those who oppose discrimination must be offered protection under the law, regardless of their racial identity.

Judicial biases appear to be even more pronounced when it comes to claims of intragroup discrimination, as their relative novelty stretches the knowledge and understanding of many jurists.[136] Courts, already unlikely to rule in favor of victims of more direct forms of discrimination, certainly do not welcome these lesser-known incarnations of racial inequality in the workplace. Judges must set aside their personal beliefs and consider all the relevant circumstances of a subtle race discrimination case in order to afford the plaintiff, whether black or white, a full and fair hearing.

133 *Id.*
134 *Id.*
135 *Id.* at 939.
136 Schaerer, *supra* note 96, at 59.

C. Performance Based Discrimination for Black Women

For black women, race and gender are both points of discrimination. At times, they exist separately, but most often they combine and create a synergistic form of discrimination.[137] These characteristics cannot be severed to give precedence to one over the other.[138] For black women, race and sex are inextricably linked, and both are predominant in her perception of self.

The Fifth Black Woman discusses a fictional attorney, Mary, who works at a large law firm.[139] This attorney, a black woman, chooses to wear her hair in dreadlocks and wear traditional African attire on Casual Fridays.[140] She has participated in committees at the law firm that promote racial diversity and has been outspoken about increasing the number of black female attorneys at the firm.[141] She rarely attends social events sponsored by the firm and does not belong to the local country club frequented by many partners.[142]

Her characteristics stand in stark contrast to the other black women lawyers at the office.[143] These other women wear their hair straightened and dress conservatively.[144] They regularly attend firm events and are active members of the country club.[145] None of them has ever belonged to a firm committee dealing with issues of race or gender, and none have spoken out about

137 Pamela J. Smith, *Part II-Romantic Paternalism-The Ties That Bind: Hierarchies of Economic Oppression That Reveal Judicial Disaffinity for Black Women and Men*, 3 GENDER RACE & JUST. 181, 220 (1999) (hereinafter *Romantic Paternalism*).

138 *Id.*

139 *See* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 710-719 (2001).

140 *Id.* at 717.

141 *Id.*

142 *Id.* at 718.

143 *Id.*

144 *Id.*

145 *Id.*

these topics at work.[146] The other women were all promoted to partner status at the firm, while Mary, who possessed an exemplary work record, was not.[147]

Identity performance theory posits that a person can experience discrimination based not only on their status as a member of a minority group, but also on how they choose to identify themselves with respect to that group.[148] In other words, her status is something that is a constant, but the identity choices can be variable. A black woman will be black whether or not she straightens her hair or wears it natural, whether she wears a business suit or a dashiki.

However, this choice of how to style her hair or what type of clothing to wear is an example of how she chooses to express her identity as a black person; it is a reflection of how she perceives herself as both black and a woman.[149] In this sense, the choices a minority person makes about how to express their racial identity should be protected as much as the racial status itself.

It seems that Mary was discriminated against because of how she chose to express her racial identity. The other black women were able to overcome their racial status and advance their careers by making choices about identity performance that conformed to the dominant white norm. Mary chose to perform her identity in a different way, one that was likely perceived as "too black" by the partnership committee, and she suffered an adverse employment action as a result. Such performance discrimination should be recognized as a cognizable claim under Title VII.

Courts have required a characteristic to be "immutable," meaning very difficult or impossible to change, in order to be

146 *Id.*
147 *Id.*
148 Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).
149 *Id.*

protected under Title VII.[150] This mandate is misplaced because it does not take into account the performance of identity through mediums such as dress or speech. Its actual effect is most often to force black employees, especially women, to conform their behavior and appearance to the dominant white norm.[151] Most courts ignore the retributions exacted against black females based on how they wear their hair, the way they speak or when they actively demand racial diversity at the office.[152] This lack of protection forces black women to subvert expression of their true identity and assimilate to the white standard for fear of adverse employment consequences.

The *Shorter* case[153] provides an example of an employee who was discriminated against based on how she expressed her racial identity. In *Shorter*, a white male supervisor criticized the plaintiff for "talking black" and accused her of "being on the defensive because she was black".[154] Two days after she was fired, allegedly for incompetence, the supervisor was heard referring to her as an "incompetent nigger."[155] In spite of this apparent "smoking gun" evidence, the trial court granted summary judgment to the employer.[156]

The Tenth Circuit concluded that this and other racist statements made by the supervisor are not direct evidence that the plaintiff was fired because she was black.[157] The court characterized the statements as merely expressions of personal opinion and not directly related to the termination.[158] This case presents seemingly direct evidence of racial animus, including offensive comments made in close proximity to the termination of a black

150 Bandusch, *supra* note 12, at 1064.
151 *Id.*
152 *Id.* at 1099.
153 *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204 (10th Cir. 1999).
154 *Id.* at 1206.
155 *Id.* at 1208.
156 *Id.*
157 *Shorter*, at 1205.
158 *Id.*

employee. Still, this court refused to make the link between the supervisor's bias and the adverse action taken against the employee. If this type of overt evidence is not sufficient for a court to allow a case to avoid summary judgment, victims of more subtle discrimination will likely meet with little success in litigating their claims.

Courts often fail to place racial discrimination in the workplace within the proper historical, social and economic context.[159] These courts allow subtle discrimination to occur without judicial intervention because they are ignoring the history of racial segregation in America.[160] Judges in this situation do not recognize that subtle mechanisms of discrimination continue to operate freely despite a society that purports to have achieved formal racial equality.[161] Further, these courts employ an anti-discrimination doctrine that tends to bifurcate identity and expression, thus providing an inadequate approach to equality.[162] A court that does not understand that expression of racial identity can be just as critical as the racial identity itself fails to grasp the realities and lived experiences of many black women.

It is far from certain if black women asserting claims based on the intersection of their race and sex will gain consistent protection from the legal system.[163] As a result of courts' inability to fully grasp the ways black women are discriminated against based on performance of their identities, there has been only sporadic allowance of such assertions.[164] The progress up to this point has been unsatisfactory and has left many black female employees without adequate remedies when they are discrimi-

159 Darren Lenard Hutchinson, *Factless Jurisprudence*, 34 COLUM. HUM. RTS. L. REV. 615, 616 (2003).

160 *Id.*

161 *Id.*

162 *Id.* at 619.

163 Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2481-82 (1994).

164 *Id.*

nated against based on the varied ways they choose to perform and express their identities.

D. Identity Based Discrimination for Black Males

Employment discrimination against black males is not limited to either race or gender discrimination; it is often based on a combination of both.[165] In other words, neither race nor gender is the exclusive factor that impedes the opportunities of black men in the workplace. This discrimination can occur when they choose to perform this identity, through clothing or grooming choices such as the ones made by Mary in the above section. However, it is often the case that black males face damaging racial discrimination simply based on their status as both black and male, as opposed to any overt performance of this identity.[166] This intersection of race and gender meshes with powerful stereotypes to create a strain of discrimination both difficult for black men to prove and for courts to analyze in a proper fashion.[167]

Obviously, black females face discriminatory treatment because of both their race and gender, but black males face unique and particularly pernicious forms of discrimination based on their status.[168] The amount of stereotypical bias directed at black males in the workplace appears to have no limits or boundaries.[169] While black females battle stereotypes in the employment context, they rarely inspire the feelings of hate and fear that often form the undercurrent of bias against black men.[170]

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165 D. Aaron Lacy, *The Most Endangered Title VII Plaintiff?: Exponential Discrimination Against Black Males*, 86 NEB. L. REV. 552, 556 (2008).
166 *Id.*
167 Floyd D. Weatherspoon, *Remedying Employment Discrimination Against African-American Males: Stereotypical Biases Engender a Case of Race Plus Sex Discrimination*, 36 Washburn L.J. 23, 25 (1996).
168 *Id.* at 33.
169 *Id.* at 57.
170 *Id.*

The perception of black men as violent and uncontrollable erects unique barriers that black women usually do not face.[171] These stereotypes often prevent black males from gaining entry to jobs in the service sector or working directly with the public.[172] It is difficult for them to obtain desirable "starter" jobs or to advance in any meaningful way if they do get hired.[173] The negative qualities commonly ascribed to black men assures that they receive less desirable work assignments, lower performance evaluations, closer monitoring and frequent accusations of sexual harassment.[174]

The contrast is even greater when made against white men. For white males, privilege is like an "invisible weightless knapsack of special provisions, assurances, tools, maps, guides, and blank checks."[175] Whereas maleness is clearly beneficial for white men, when it is combined with blackness, it invokes a whole range of stereotypes that cause it to be a clear negative.[176] While white males leverage their privileged status to attain greater status and success in the workplace, black males are relegated to more menial jobs with less chance for advancement based on their race and gender.[177]

Black men are commonly stereotyped as unintelligent, violent, dangerous, criminal, aggressive, ignorant and hypersexual.[178] This perception of black males as base and animalistic began in Europe and was transferred to the United States during the slavery period.[179] These perceptions are advanced in

171 *Romantic Paternalism*, *supra* note 137, at 230.
172 *Id.* at 232.
173 *Id.*
174 *Id.*
175 *See* Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, in Leslie Bender & Dan Braveman, Power, Privilege and Law: A Civil Rights Reader 22, 23 (1995).
176 *See* Lacy, *supra* note 165, at 556.
177 *Id.*
178 *Everyday Indignities*, *supra* note 80, at 537.
179 *Id.* at 537-38

modern times through the news and other media.[180] The racially segregated history of the United States has created implicit divisions based on race that continue to exist today.[181]

Many whites draw their perceptions of black men from the media, motion pictures, or television.[182] These sources most often show black men to be violent and involved in some type of criminal behavior.[183] Popular culture reinforces the stereotypes of black males as incompetent and instable and has left the majority of white Americans either fearing black males, or at the very least, feeling uncomfortable in their presence. These notions have become embedded in the consciousness of contemporary society.[184]

Whites, along with other minority groups, have been inundated for years with negative images about black males.[185] This has led nearly every significant institution in America, including the educational and criminal justice systems, the political sphere and the mainstream media, to operate to the detriment of black males.[186] Adverse treatment in the employment realm is but one symptom of a larger problem that has had a devastating impact on the ability of black men to make any substantive gains socially or economically in this country.[187]

Black males have documented the ways they have experienced discrimination on the job.[188] These workers are often not rewarded for their innovative ideas and contributions, but rather are made to feel uncomfortable about their successes.[189] They

180 *Id.*
181 *Id.* at 537-38
182 *See* Ronald E. Hall, *Clowns, Buffoons, and Gladiators: Media Portrayals of the African-American Man*, 1 J. Men's Stud. 239, 242-43 (1993).
183 *Id.* at 243.
184 *See generally id.* at 239.
185 Weatherspoon, *supra* note 167, at 31-33.
186 *Id.*
187 *Id.*
188 Lacy, *supra* note 165, at 571-72.
189 *Id.* at 571.

are perceived as messengers when they enter a room to deliver a presentation or as defendants when they are in fact attorneys.[190] Black male employees have been told that customers or clients did not want to work with a person of "that kind."[191] This type of subtle discrimination occurs on a daily basis and is damaging to not only the pride and dignity of the affected workers, but also in a tangible way to their career prospects going forward.

Black men also face obstacles in the employment context based on their lack of viable professional networks.[192] White males have long had control of the workplace and have excluded blacks in both overt and covert ways.[193] While the more blatant forms of discrimination have since receded, whites continue to act as "informal gatekeepers" of meaningful employment opportunities.[194] The networks of professional contacts enjoyed by whites often lead to both an initial job and subsequent advancement throughout their careers.[195]

The changing nature of the workplace, with its decentralization and the more transitory nature of employees, only increases the value of a strong network to allow for mobility and advancement. These networks are rarely available to black males, mainly due to the societal stereotyping that continues to plague them.[196] This lack of professional connections is yet another obstacle placed in front of black males seeking substantive employment opportunities in the modern job market.

Griggs v. Duke Power Co.[197] is an example of a case that appears on its face to be very favorable to black male victims of racial discrimination. In *Griggs*, the plaintiffs, black males, brought an action under Title VII, alleging that they were de-

190 *Id.*
191 *Id.* at 571-72.
192 *Id.* at 572-74.
193 *Id.* at 574.
194 *Id.* at 574-75.
195 *Id.*
196 *Everyday Indignities*, *supra* note 80, at 538.
197 *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

nied employment opportunities under the personnel practices and policies of Duke Power.[198] The Court found that employment practices, procedures or tests neutral on their face that were not intended to discriminate but that nevertheless "freeze" out a protected class of individuals may violate Title VII.[199] While this ruling is of great value to plaintiffs who are subject to discrimination based on clearly delineated policies or procedures, it does not appear to encompass the many black male employees who are subjected to a much more amorphous form of bias.

Much more often than not, black male employees cannot pinpoint a practice that results in them being excluded; they can only show that they have been denied promotion or some other employment benefit.[200] Due to the varied and deeply ingrained biases against black men and the increasingly subtle ways these biases are manifested, it is a substantial burden to require a black male plaintiff to point to a specific policy that explains their treatment.[201] Closer analysis of a case such as *Griggs* reveals that while the precedent may have been a victory in its time, to a large extent modern workplace discrimination against black males has evolved beyond its scope.

Many commentators argue that the reason why Title VII plaintiffs have had such difficulty in having their claims of subtle racial discrimination properly adjudicated is that courts are using an outmoded concept of racial discrimination.[202] Judges often fail to see the unconscious and institutionalized biases that exist in today's workplace because they are expecting racially discriminatory actions to have a clear motivation and easily identifiable perpetrators.[203] Especially in the instance of black

198 *Id.*
199 *Id.* at 430.
200 *See* Weatherspoon, *supra* note 172, at 48-49.
201 *Id.*
202 *See* Oh, *supra* note 75, at 909.
203 *Id.*

male plaintiffs, many courts are expecting claims to be brought on the basis of race alone and fail to grasp the negative implications that being male can have when it is combined with being black. This pigeonholing of discrimination claims brought by black males into a narrow legal framework has effectively prevented them from getting adequate relief for the discriminatory practices they have faced.[204]

Conclusion

In modern times, racial discrimination rarely occurs in a clear, discrete manner. Instead, it is most often characterized by a pattern of subtle bias, which perpetrators may not even realize they are engaged in. Courts seem to have a difficult time recognizing such patterns, but their impact is all too apparent to the countless victims who deal with missed opportunities, uncomfortable work situations and relegation to low-status jobs.

This paper has delineated several categories of people who are victimized by subtle racial discrimination. Stubborn adherence to outdated modes of analyzing race discrimination has prevented minority employees from accessing the relief that they deserve under the original intent of Title VII. Many courts would prefer to analyze discrimination claims as if race and sex are separate and discrete classifications. This fails to recognize the clear reality that all individuals, including racial minorities, embody several protected categories. This type of discrimination is predominant in the current employment landscape, and it is incumbent upon the courts to take steps to acknowledge and understand how it functions in order to give these workers the protection they are legally entitled to.

[204] Weatherspoon, *supra* note 167, at 48.

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