
ARTICLES

RACIAL EMOTION IN THE WORKPLACE

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ABSTRACT

Almost everyone in the United States is likely to experience or have experienced racial emotion in the workplace. One person feels uncomfortable making conversation with her coworkers of a different race for fear that she will use the wrong name or say something that is perceived as biased or offensive; another is anxious that his colleague will judge him as less intelligent than the whites on his team. One feels anger at the telling or emailing of a racial joke; another feels frustrated when a colleague raises concerns about bias during a postinterview debriefing. These emotions—and the behaviors that give rise to them and respond to them—are sometimes difficult to describe. We lack a language of racial emotion in the workplace, in no small part because many of us (especially whites) prefer not to see it. But racial emotion does exist, and we ignore it to the detriment not only of our individual relationships, but also of our visions and efforts for equality.

Drawing on a rich body of social science research on emotion and interracial interaction, this Article pushes beyond the recent cognitive turn in understanding discrimination to expose racial emotion as a source of discrimination at work. It uncovers the ways that the law (through Title VII of the Civil Rights Act) and organizations currently close racial emotion out of antidiscrimination discourse and close space for developing positive

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racial emotion at work. By theorizing racial emotion and the relationships that result as a potential source of discrimination, the Article positions the law to better see and address workplace discrimination and to set normative and regulatory grounding for organizations to open space and develop conditions for positive racial emotion and interracial relationships at work. To this end, the Article proposes several specific doctrinal changes in the law of individual disparate treatment, hostile work environment, and retaliation. It resists, however, calls for greater policing of all racial behavior through these laws, urging instead legal regulation of discrimination at the systemic level as a way of directing organizational attention toward developing work conditions that will foster conversation and learning across difference.

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I. INTRODUCTION

After a long day at work, a white woman sits down for a late-afternoon team meeting next to a black woman, whose binders and other materials are spread out on the table around her. The white woman nudges the black woman’s materials aside to make space for her own. The black woman says, “Why are you moving my stuff?” The white woman responds, “Why are you being so aggressive? I was just sitting down.” The black woman, now visibly angry, says, “Aggressive, do you even know you’re being racist right now?” The white woman, near tears, approaches their supervisor and asks to be moved to another team.

Upon reading the title of this Article, *Racial Emotion in the Workplace*, two questions are likely to come to mind: What is racial emotion? And what is it doing in the workplace? We tend not to think much about racial emotion—or at least tend not to discuss it openly—and we therefore seem to lack a term to describe it. Racial emotion is the emotion or emotions related to race that people experience when they

engage in interracial interaction. Racial emotion can be negative (for example, fear, disgust, anger, shame, envy, frustration, anxiety) or positive (for example, affection, respect, admiration, pride, sympathy, compassion). When a black man is told by his white supervisor that his application for promotion has been denied, and he suspects that his race played a role in his supervisor's decision, he is likely to experience racial emotion both in that moment and in subsequent interactions with that supervisor. When a white woman and a black man work together to accomplish a job-related task, they are each also likely to experience racial emotion.¹ Indeed, when racially diverse individuals interact in the workplace, whether in formal meetings or in collaboration to accomplish particular tasks or more informally in the halls or lunchroom, they are likely to experience racial emotion. The variety and level of racial emotion or emotions in any particular interaction will depend both on the histories and experiences that individuals bring to an interaction and the environment—the structural and cultural context—that frames the interaction.² Racial emotion itself, though, is a relatively simple, even obvious concept, once we stop to think about it.

The second question (“What is it doing in the workplace?”) captures a common misconception: that it is possible to eliminate racial emotion from interracial interaction. Moreover, it misses the reality that most interracial interactions in most workplaces will be between individuals who do not regularly interact with members of racial groups different from their own,³

1. Both of these examples reflect the research and literature on interracial interaction, which has focused predominantly on white-black interaction and has also largely ignored the intersection between gender and race, with a few important exceptions. *See generally, e.g.*, Linh Nguyen Littleford, Margaret O'Dougherty Wright & Maria Sayoc-Parial, *White Students' Intergroup Anxiety During Same-Race and Interracial Interactions: A Multimethod Approach*, 27 *BASIC & APPLIED SOC. PSYCHOL.* 85 (2005) (studying black-white dyads and Asian-white dyads); Negin R. Toosi et al., *Dyadic Interracial Interactions: A Meta-Analysis*, 138 *PSYCHOL. BULL.* 1 (2012) (assessing the effects of gender on interaction outcomes). The examples also assume that race is made salient. *See generally* KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006) (describing some of the ways that race is “covered” in social relations).

2. Throughout this Article, I use “racial emotion” in the singular to develop a distinct concept, recognizing, however, that individuals in interracial interactions will often experience multiple, even conflicting racial emotions, and that emotions (as well as their relatedness to race) may be unconscious as well as conscious and are themselves contextually and relationally constructed.

3. Continued high levels of racial segregation in housing and education means that work is often the only place where members of different racial groups interact on a sustained basis. *See, e.g.*, WILLIAM H. FREY, BROOKINGS INSTITUTE, *THE NEW METRO MINORITY MAP: REGIONAL SHIFTS IN HISPANICS, ASIANS, AND BLACKS FROM CENSUS 2010*, at 12 (2010), available at http://www.brookings.edu/~media/research/files/papers/2011/8/31%20census%20race%20frey/0831_census_race_frey.pdf (discussing levels of residential segregation); Pat Rubio Goldsmith, *Learning Apart, Living Apart: How the Racial and Ethnic Segregation of Schools Perpetuates Residential*

and that those individuals will interact within a broader context of power aligned along racial lines.⁴ In other words, we should expect a high rather than low level of racial emotion in the workplace.

Scholars in the area of employment discrimination law have come a long way over the past several decades in getting legal, public, and organizational actors to recognize the influence that cognitive biases and stereotypes can have on perceptions and decisions.⁵ An emphasis on the state of mind of specific decisionmakers, however, has obscured the relational component of discrimination, including emotion.⁶ Moreover, the

Segregation, 112 TEACHERS C. REC. 1602, 1602–04 (2010) (considering the role of continued high levels of segregation in education on residential segregation); JOHN R. LOGAN & BRIAN J. STULTS, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 2–3 (2011), available at <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf> (describing the relatively minor increases in racial diversity in predominantly white neighborhoods). The low frequency of interracial interaction has been pinpointed in research as a dominant mechanism for anxiety around interracial interaction. See, e.g., Tamara Towles-Schwen & Russell H. Fazio, *Choosing Social Situations: The Relation Between Automatically Activated Racial Attitudes and Anticipated Comfort Interacting with African Americans*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 170, 178–79 (2003) (detailing experimental results demonstrating that white students' comfort in interacting with black students increases when they have greater numbers of past experiences interacting with blacks).

4. See DONALD TOMASKOVIC-DEVEY, GENDER AND RACIAL INEQUALITY AT WORK: THE SOURCES AND CONSEQUENCES OF JOB SEGREGATION 4–5 (1993) (arguing that “[j]obs rarely have a gender-or race-neutral status” and that jobs perceived as “white” and “male” have higher status than those perceived as “black” and “female”).

5. Cognitively oriented research on intergroup processes emphasizes the role of categorization in the perpetuation of stereotypes. See, e.g., Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 J. SOC. ISSUES 79 (1969) (describing how the mere categorization of people into different groups can have effects on social perception and behavior). This research, including research based on the Implicit Association Test (“IAT”), shows that biases related to cognitive categorization can exist in individuals even when those individuals expressly adhere to an egalitarian ideal and can affect those individuals' perceptions and behaviors. Employment discrimination scholars have drawn heavily on this body of cognitive bias research in arguing for a conceptualization of discrimination in the law that includes implicit, cognitive biases as well as conscious animus. See generally, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Symposium, *Behavioral Realism*, 94 CALIF. L. REV. 945 (2006).

6. Some scholars have stressed the role that cognitive biases can take in perceptions and judgments over time. See Krieger, *supra* note 5, at 1203 (“[O]nce a behavior has been encoded as a trait, its effect on subsequent judgments increases over time.”); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (“Unequal treatment may result from cognitive or unconscious bias, rather than deliberate, intentional exclusion. ‘Second generation’ claims involve social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups.”). The focus on cognitive bias more generally has nonetheless tended to generate solutions aimed at discrete employment decisions. See generally Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435 (2008) (arguing that efforts to reduce unconscious workplace discrimination are focused too narrowly on individuals, and instead should be expanded to address discrimination arising from social interactions at work).

effort to define legal understandings of discrimination to fit the reality of how discrimination operates has focused almost exclusively on the operation of “cool” cognitive biases and stereotypes over “hotter” emotional responses. The rich and growing body of research and literature on racial emotion has gone largely unnoticed in the legal scholarship.⁷

Emotion today takes a central position in the study of interracial interaction within the social sciences.⁸ This research tells us among other things that reducing negative emotion experienced by members of all racial groups in interracial interaction at work may be an important key to reducing prejudice and intergroup inequality.⁹ The workplace provides a

7. It would be an overstatement to say that the role of emotion in discrimination has gone entirely unnoticed by legal scholars. In particular, research by John Dovidio and Samuel Gaertner on aversive racism is often included in descriptions by legal scholars of the research on unconscious or implicit biases. See, e.g., Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1915–17 (2009); Krieger, *supra* note 5, at 1174–75. As this and other research reveals, emotions, like cognitive biases, can be implicit as well as explicit. See Sigale G. Barsade, Lakshmi Ramarajan & Drew Westen, *Implicit Affect in Organizations*, 29 RES. ORG. BEHAV. 135, 137 (2009) (stating that research since the 1980s has demonstrated that implicit, as opposed to explicit, memory is “responsible for much of our day-to-day action”). Cognitive biases and racial emotions, moreover, are likely to be highly interrelated in most contexts. See, e.g., Walter G. Stephan & Cookie White Stephan, *Intergroup Anxiety*, 41 J. SOC. ISSUES, no. 3, 1985, at 157, 167–68 (proposing that anxiety in interracial interaction causes cognitive and motivational information-processing biases). See also ANTONIO DAMASIO, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* 53–54 (1994) (finding that patients who experienced certain brain injuries that interfered with their ability to feel emotions had difficulty making decisions, despite retaining cognitive processing capability).

8. See Toosi et al., *supra* note 1, at 1–2 (conducting a meta-analysis of research on interracial interaction, including research on emotion). See generally HANDBOOK OF THE SOCIOLOGY OF EMOTIONS (Jan E. Stets & Jonathan H. Turner eds., 2006) (describing a rise in study of emotion in social sciences); Dacher Keltner & Jennifer S. Lerner, *Emotion*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 317 (Susan T. Fiske et al. eds., 5th ed. 2010) (describing the emergence of a “robust science of emotion” in social psychology that “appears to represent a paradigm shift in thinking about human nature”). Researchers have also begun to study an affective component to prejudicial attitudes. See, e.g., Victoria M. Esses & John F. Dovidio, *The Role of Emotions in Determining Willingness to Engage in Intergroup Contact*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1202 (2002); Molly Parker Tapias et al., *Emotion and Prejudice: Specific Emotions Toward Outgroups*, 10 GROUP PROCESSES & INTERGROUP REL. 27 (2007).

9. See Kristin Davies, Stephen C. Wright & Arthur Aron, *Cross-Group Friendships: How Interpersonal Connections Encourage Positive Intergroup Attitudes*, in MOVING BEYOND PREJUDICE REDUCTION: PATHWAYS TO POSITIVE INTERGROUP RELATIONS 119, 120–25, 133 (Linda R. Tropp & Robyn K. Mallet eds., 2002) (detailing research showing benefits of cross-group friendships for intergroup attitudes and also sense of self); Thomas F. Pettigrew & Linda R. Tropp, *Allport’s Intergroup Contact Hypothesis: Its History and Influence*, in ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT 262, 272 (John F. Dovidio et al. eds., 2005) (estimating that mediation by lowered anxiety “explains roughly one-fifth to one-fourth of contact’s effects in reducing prejudice”); Linda R. Tropp & Thomas F. Pettigrew, *Intergroup Contact and the Central Role of Affect in Intergroup Prejudice*, in THE SOCIAL LIFE OF EMOTIONS 246, 250 (Larissa Z. Tiedens & Colin Wayne

principal site for the kind of sustained interracial interaction that can reduce negative racial emotion, even generate positive racial emotion. Yet, extant research suggests that racial emotion in most workplaces today is likely to be negative and that the brunt of this negative emotion is likely to be borne by racial minorities.¹⁰

In this Article, I bring racial emotion to the fore of conceptualizing and addressing discrimination in the workplace. I uncover the ways that law and organizations currently close racial emotion out of antidiscrimination discourse and close space for developing positive racial emotion at work. I argue that opening the law to see racial emotion as a potential source of discrimination will not only help identify discrimination and disadvantage when it occurs, but will also set important normative groundwork for incentivizing organizations to open space for developing positive racial emotion in workplace relationships. To this end, I propose several specific legal reforms and caution against others.

By emphasizing emotion within workplace relationships as a source of discrimination, this Article builds on and brings together several lines of important legal scholarship in the area of employment discrimination.¹¹ It positions the cognitive bias account not as wrong, but as incomplete and misunderstood. It draws on and pushes beyond the emerging conception of discrimination that is rooted in cool, cognitive biases at the same time that it heeds a call for attention to ongoing relationships in identifying barriers

Leach eds., 2004) (relaying study results suggesting importance of affective dimensions of prejudice and contact over cognitive dimensions).

10. See *infra* Parts II, III.C.

11. These lines include scholarship on cognitive bias, see, e.g., Krieger, *supra* note 5, and on relations within organizations as a source of discrimination and disadvantage, see, e.g., Devon Carbado, Catherine Fisk & Mitu Gulati, *After Inclusion*, 4 ANN. REV. L. & SOC. SCI. 83, 83 (2008) (discussing the need for greater attention to what happens “after inclusion,” that is, after a person is hired and becomes an employee). Fundamentally, this Article is a project of law and emotion. See Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 1998–2000 (2010) (explaining law and emotion scholarship); Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119, 123–25 (2006) (discussing what constitutes law and emotion scholarship). It asks how the law currently approaches emotion and how it might better approach emotion in a particular type of relationship, interracial relationships, and in a particular context, the workplace. For a sampling of scholarship examining law and emotion in other contexts, or with other emphases, see generally Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CALIF. L. REV. 319 (2007) (considering the law’s cultivation of emotions); Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73 (2001) (examining the relationship between the law and workplace humiliation); Clare Huntington, *Happy Families? Translating Positive Psychology into Family Law*, 16 VA. J. SOC. POL’Y & L. 385 (2009) (describing how positive psychology research should influence family law reform); Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441 (2008) (providing recommendations on how the law can encourage forgiveness between divorcing parents).

to workplace equality. Discrimination is not just a matter of prejudiced attitudes, even as most broadly construed to include cognitive biases, but of “the many ways in which our construals, motivations, expectations, and emotional responses impact our intergroup experiences and relationships.”¹²

Once we see the relational component of discrimination, we can begin to see the importance of considering the perceptions, expectations, and cognitive, emotional, and behavioral reactions of both whites and racial minorities as they interact at work and in other contexts.¹³ In this way, the Article dovetails with important conversations taking place about diversity in educational settings.¹⁴ Demographics are just the starting point for understanding diversity in a wide range of institutions. Interactions and relations with their dual emotional and cognitive components are the next crucial step.

The Article also seeks to bridge the conceptual divide in law and legal scholarship between work as a rational space where livings are made and home as an emotional one where living is done.¹⁵ Important research in the fields of sociology and organizational behavior has exposed the substantial emotion work carried on within organizations (and the gendered division of that work) as well as the role of gender emotion stereotypes in perpetuating inequality within organizations.¹⁶ Increasingly, moreover, organizations are coming into focus as fully emotional arenas, places within which people

12. Linda R. Tropp & Robyn K. Mallett, *Introduction: Charting New Pathways to Positive Intergroup Relations*, in MOVING BEYOND PREJUDICE REDUCTION: PATHWAYS TO POSITIVE INTERGROUP RELATIONS, *supra* note 9, at 4.

13. For scholarship seeking to understand multiple, complex racial perspectives and the implications of recognizing those perspectives for the law of employment discrimination, see generally Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497 (2010) (examining the effects of minority-targeted workplace discrimination on whites); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008) (analyzing the differences in perceptions of discrimination between “insiders” and “outsiders”).

14. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

15. For other work urging a similar advance, see Marion Crain, *Arm's-Length Intimacy: Employment as Relationship*, 35 WASH. U. J.L. & POL'Y 163, 169 (2011) (contending that the employment relationship is closer to marriage than an impersonal transaction), and Laura A. Rosenbury, *Working Relationships*, 35 WASH. U. J.L. & POL'Y 117 (2011) (analyzing workplace friendships). See also VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* (2005) (examining the interaction between economic activity and intimacy).

16. See Stephen Fineman, *Emotional Arenas Revisited*, in EMOTION IN ORGANIZATIONS 1, 4–5, 10–12 (Stephen Fineman ed., 2000). See generally ARLIE RUSSEL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* (1983) (discussing the effects and pervasiveness of emotional labor in workplaces); Susan Ehrlich Martin, *Police Force or Police Service? Gender and Emotional Labor*, 561 ANNALS AM. ACAD. POL. & SOC. SCI. 111 (1999) (exploring emotional labor and the role of gender in shaping emotion in interactions in police forces).

live, connect, and feel as well as work.¹⁷ Understanding emotion in organizations is important therefore not just in building venues for equal opportunity and productive, committed workers; it is important in understanding the experience of work.

Finally, this Article challenges the conventions of employment discrimination scholarship by examining multiple doctrines and legal theories together rather than as discrete projects that fall into doctrinal categories. This is not an article about individual disparate treatment law, hostile work environment law, retaliation law, or systemic disparate treatment or disparate impact law; it is an article about all of these theories (and potentially new theories) as they relate to racial emotion in the workplace.¹⁸ Particularly as we seek to grapple with the complexity of discrimination, we need also to think about cross-doctrinal workings and solutions.¹⁹

One initial caveat is in order. Despite the potential applicability of much of the discussion in this Article to intergroup relations and emotional experiences in interaction between members of other socially salient groups, like men and women, the old and young, and groups with varying disabilities or impairments, and even to intragroup interactions, I limit my focus in this Article to race and interracial interactions. I do this for several reasons. The research relevant to racial emotion provides unusually rich empirical footing for developing theoretical groundwork that may be extended to other areas. Moreover, this is an area where attention is sorely needed. Although still incomplete, the idea that relationships experienced on the job have equality consequences has been more readily recognized and thickly theorized in the scholarship on sex-based discrimination and even disability-based discrimination;²⁰ it has been slower to emerge in

17. When people talk about work, it turns out, “they talk primarily about other people” and their relationships with those people. Lloyd E. Sandelands & Connie J. Boudens, *Feeling at Work*, in EMOTION IN ORGANIZATIONS, *supra* note 16, at 46, 50 (arguing that while job satisfaction is an individual judgment, feelings about work always involve relationships and the group).

18. Although my overarching proposal emphasizes the role of systemic theories, I make a number of recommendations across individualized theories as well. *See infra* Part IV.

19. We must even think beyond employment discrimination theories. *See infra* Part IV.

20. *See, e.g.*, Harlan Hahn, *Can Disability Be Beautiful?*, 18 SOC. POL’Y, Winter 1988, at 26, 26 (discussing disability and “existential anxiety” in individuals who perceive themselves as nondisabled (internal quotation marks omitted)). *See generally* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003) (discussing sex-based discrimination and sex-based emotion in the workplace). *Cf.* Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659 (1991) (providing a group- and emotion-based account of racism and misogyny to offset a purely economic analysis of discrimination and antidiscrimination laws).

research and theory on work and race. We need a language not just about emotion in the workplace,²¹ but about racial emotion in the workplace.

The Article proceeds in three parts. Part II sets an empirical groundwork for understanding racial emotion (experienced by whites as well as racial minorities) as a source of discrimination and for unpacking employment discrimination law's role in addressing racial emotion and its behavioral and relational consequences. The part details several lines of social science research and literature on dyadic interracial interaction, interaction between two people of different races. Taken together, this research shows not only that racial emotion exists, but that in most workplaces today it is likely to be negative rather than positive for most individuals and to result in interracial relationships that are strained and awkward, if not overtly acrimonious.

Part III unpacks how the law and organizations currently approach racial emotion in the workplace and details what is wrong with the current approach. It shows that courts developing and applying employment discrimination law tend to channel relations and racial emotion experienced within those relations outside of antidiscrimination concern. Across doctrinal areas, from individual disparate treatment law to retaliation law to hostile work environment law, courts close racial emotion out of antidiscrimination discourse in at least three ways: by ignoring emotion in interracial interaction; by categorizing emotion in interracial interaction, when it is seen, as solely personal and not racial; and by judging emotion in interracial interaction, when it is seen and acknowledged as racial, as unreasonable. By closing racial emotion except in the most extreme circumstances out of antidiscrimination discourse, the law wrongly signals that racial emotion is unimportant for reducing discrimination and advancing equality.

Nor is there reason to believe that organizations are working independently to create conditions for positive racial emotion. Although in recent years organizations have begun to recognize, even capitalize, on employee emotions generally, they continue to neglect emotion in day-to-day interracial relations and to close space for developing positive racial emotion at work. An examination of the managerial literature urging organizational efforts to generate employee commitment, nurture emotional intelligence, and manage diversity in organizations shows some potential

21. For a compelling case for developing a language around emotional engagement more broadly, see Debra E. Meyerson, *If Emotions Were Honoured: A Cultural Analysis*, in *EMOTION IN ORGANIZATIONS*, *supra* note 16, at 167.

for attending to racial emotion, but provides little reason to believe that organizations currently do more than seek to cleanse their workplaces of racial emotion.

The last section of Part III turns to what is wrong with the current legal and organizational stance toward racial emotion. Drawing on the research presented in Part II, this section shows that, most glaringly, the current approach is inconsistent with reality. It simply is not possible to cleanse racial emotion from either interracial interaction or the workplace. With this reality at the forefront, the section identifies two principal problems with the current approach. First, by closing out racial emotion from antidiscrimination concern and discourse, the current approach hides from view the full extent of discrimination at work, disadvantaging individuals who suffer the employment consequences of discrimination and forcing racial minorities to bear the brunt of negative racial emotion. Second, closing space for racial emotion at work negatively affects social justice goals more broadly. It hinders the development of positive emotions in interracial interaction and relationships, reducing the possibility for developing emotions associated with experiences like deep respect, learning, and close human connection. The workplace remains one of the most promising sites for ongoing, positive interracial interaction. Closing space for developing positive racial emotion squanders that promise.

Part IV stakes ground in the law for recognizing racial emotion in the workplace and considers ways that the law might better account for racial emotion as a source of discrimination, while simultaneously triggering conditions within organizations that foster positive over negative racial emotion. I propose several specific changes to the law that will allow courts to better see and address racial emotion as a source of discrimination, particularly in the category of what I call behavior of “racial assault.” I stop short, however, of advocating rigid policing of all racial behavior and language. Indeed, there is an inherent tension between recognizing racial emotion as a source of discrimination to which legal liability attaches and opening space for building positive interactions and relationships across difference. If the law tamps down too hard on all racial behavior, it risks exacerbating whites’ fears of being labeled racist as well as blacks’ perceptions of discrimination and fears of being judged according to stereotypes and biases, thus leading to less rather than more conversation, openness, and learning in interracial interaction. Moreover, there is reason to believe that the best way to foster positive interracial interaction is by shaping the conditions of interaction. One additional challenge for the law,

then, is in triggering these structural and cultural changes to alter conditions for relations in the organizations where people work.

II. GROUNDWORK: RESEARCH ON EMOTION IN INTERRACIAL INTERACTIONS

I use the term “emotion” here to refer to feelings in interracial interaction, as distinguished from cooler, cognitive stereotypes or implicit biases and as distinguished from feelings experienced outside of interaction.²² Although scientists disagree on a precise definition of emotion, a consensus does emerge that emotions are generally context-specific feelings focused on particular causes or objects.²³ Emotions are distinguished from traits, which usually refer to general styles of emotional responses that persist across context and time (for example, a grateful disposition), and moods, which are assumed to last longer than emotions and to be less context-specific (anger, for example, is an emotion; irritability is a mood).²⁴ Emotions are also understood to be social or relational in the sense that they “orient people to respond to ongoing events in their environment,” including other people.²⁵

In this part, I examine some of the research and literature on interracial interaction with the following questions in mind: What types of racial emotions can we expect individuals to experience in interracial interactions? What behavioral responses can we expect individuals to adopt when faced with these emotions? And how are those behavioral responses likely to affect relational outcomes, the nature of interracial relationships at work? I present research relating to these questions with several caveats.

First, my presentation of the research paints in broad strokes. The goal is to provide an overarching sense of the types of racial emotions we should expect on the whole, given the context in which most interracial interaction is likely to occur in most workplaces in the United States.

22. The two, of course, are likely to be intimately intertwined. See *supra* note 7 and accompanying text.

23. Keltner & Lerner, *supra* note 8, at 313. See Neal M. Ashkanasy, Charmine E. J. Härtel & Wilfred J. Zerbe, *Emotions in the Workplace: Research, Theory, and Practice*, in *EMOTIONS IN THE WORKPLACE* 3, 4–11 (Neal M. Ashkanasy et al. eds., 2000) (pointing to evidence of varying definitions of emotion within the field of psychology and possible reasons for the varying definitions).

24. Keltner & Lerner, *supra* note 8, at 318.

25. *Id.* As social psychologists Colin Leach and Larissa Tiedens explain it, emotion should be understood less as an individual response than as “a bridge between the individual and the world.” Colin Wayne Leach & Larissa Z. Tiedens, *Introduction: A World of Emotion*, in *THE SOCIAL LIFE OF EMOTIONS*, *supra* note 9, at 1, 2.

Second, much of the research in this area is as yet on relations between blacks and whites. Interactions between members of other racial groups or between those groups and whites, as well as research on intersectional identity categories, are sorely understudied.²⁶

Third, there is a range of perspectives that one might take in trying to understand racial emotion in the workplace as a source of discrimination. Indeed, research shows that emotion is a group-level as well as an individual-level phenomenon. In this Article I lean decidedly toward the micro side of this range. I emphasize research that acknowledges the influence of group membership on emotions experienced in interracial interaction, but I generally do not examine research on emotions experienced at the group level (for example, experiencing collective pride upon seeing one's group as responsible for an important accomplishment or experiencing anger in response to events harming other ingroup members even if not harming the perceiver personally).²⁷ To say that I take a relatively micro view, however, does not mean that I isolate racial emotion from context. Indeed, substantial research shows that emotion, including racial emotion, and the behaviors exhibited in response to negative emotion are highly context dependent.²⁸

A. COMMON RACIAL EMOTIONS

Research on interracial interaction suggests that we should expect negative emotional experiences in interracial interaction in most workplaces today. We should expect fear, anger, frustration, and anxiety on the part of racial minorities at perceived discrimination and expectations that they will be judged according to stereotypes and biases, and fear, anger, frustration, and anxiety on the part of whites at the prospect of losing group-based advantage and being labeled racist.

26. Toosi et al., *supra* note 1, at 3–4. See also Victoria C. Plaut, *Diversity Science: Why and How Difference Makes a Difference*, 21 PSYCHOL. INQUIRY 77, 78 (2010) (calling for research of groups “beyond the Black-White binary”).

27. See, e.g., Diane M. Mackie, Lisa A. Silver & Eliot R. Smith, *Intergroup Emotions: Emotion as an Intergroup Phenomenon*, in THE SOCIAL LIFE OF EMOTIONS, *supra* note 9, at 227, 227 (“We are thrilled when our national team wins the World Cup against stiff competition, angry when protesters in another country burn our flag, excited as the party we voted for wins the election . . .”); Eliot R. Smith & Diane M. Mackie, *Aggression, Hatred, and Other Emotions*, in ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT, *supra* note 9, at 361, 366–71 (detailing various group-based approaches to emotion in intergroup relations).

28. See *infra* Part II.C.

1. Racial Minorities and Racial Emotion

Racial minorities expect discrimination from whites and perceive as discriminatory an array of behaviors on the part of whites. In his article, *Perceptual Segregation*, Russell Robinson describes the voluminous research and literature that supports this point.²⁹ Robinson shows that blacks are likely to interpret experiences through an informational lens that suggests that discrimination is prevalent and through a definitional lens that includes as discrimination subtle forms of bias and insensitivity in addition to overt racial hostility.³⁰ From this, we can expect blacks to experience anger and frustration, among other possible negative emotions, when interacting with whites whom they perceive as biased and as discriminating against them.³¹

Research also suggests that racial minorities are likely to experience anxiety and fear before and during interracial interactions arising out of concerns about being judged according to stereotypes or otherwise

29. Robinson, *supra* note 13, at 1106–39. I draw in this section from Robinson’s excellent work, but I highlight in particular the research that focuses on emotion in interracial interaction related to perceived discrimination or bias. Overall, I take a relational approach to the research, while Robinson tends to take a cognitive one. He seeks to illustrate the “why” of differing perceptions of discrimination (why, in other words, “both the outsider and insider may be reasonable and yet differ substantially as to the likelihood that discrimination occurred”). *See id.* at 1105. I am interested here in illustrating how perceptions and expectations affect emotion, including anxiety, experienced by whites and racial minorities during interracial interaction. For narratives relating relational encounters involving differing perceptions and racial emotions, see Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989) (using perceptions of black Americans to help explain minorities’ perceptions that nonminority social institutions, such as courts, are capable of bias), and Susan Sturm & Lani Gunier, *Learning from Conflict: Reflections on Teaching about Race and Gender*, 53 J. LEG. EDUC. 515 (2003) (discussing the construction of “multiracial learning communities” in the law school setting).

30. *See* Robinson, *supra* note 13, at 1106–39.

31. *See, e.g.*, Brenda Major, Wendy J. Quinton & Shannon K. McCoy, *Antecedents and Consequences of Attributions to Discrimination: Theoretical and Empirical Advances*, 34 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 251, 253–54 (2002) (reviewing research showing that when the stigmatized believe that negative outcomes linked to stigma are due to prejudice and discrimination, their self-esteem is less likely to suffer than if they attribute the outcome to self, but they are more likely to be angry, anxious, or sad). A substantial body of research shows that members of disadvantaged groups tend to avoid attributing specific negative treatment that they have suffered to discrimination. *See* Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1292–327 (2012) (surveying research on the willingness of whites and members of minority groups to attribute specific events, such as decisions not to promote, to discrimination). This research is not necessarily inconsistent with research showing greater perceptions of discrimination and bias on the part of members of minority groups as compared to whites. Individuals may perceive a relational partner and / or his actions as biased or racially hostile without attributing a specific result to discrimination. *See* Brenda Major & Pamela J. Sawyer, *Attributions to Discrimination: Antecedents and Consequences*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 89, 90 (Todd D. Nelson ed., 2009) (describing the difference between perceiving discrimination and attributing the outcome of specific events to discrimination).

confirming commonly held stereotypes about their group. Blacks, for example, expect whites to view blacks generally as untrustworthy, aggressive, and not hardworking, and they expect whites to apply those stereotypes in interracial interaction.³² These and other group-based expectations—or meta-stereotypes—can lead to anxiety and other negative emotions associated with threat to social identity in interracial interaction.³³

2. Whites and Racial Emotion

Whites also assess behavior in interracial interactions through particular informational and definitional lenses, and these assessments affect emotions experienced during interaction. Whites, in contrast to blacks and other racial minorities, tend to believe that discrimination is not prevalent and to define discrimination narrowly as incidents involving overt expressions of racial hostility.³⁴ Because they perceive less discrimination both generally and in specific situations, they are likely to experience exasperation or frustration when blacks or other racial minorities raise concerns about discrimination.³⁵ Whites may interpret stated discrimination concerns as “playing the race card” or otherwise trying to benefit from racial status.³⁶

32. J. Nicole Shelton, Jennifer A. Richeson & Jacquie D. Vorauer, *Threatened Identities and Interethnic Interactions*, 17 EUR. REV. SOC. PSYCHOL. 321, 327 (2006). Research shows that other minority groups similarly hold meta-stereotypes about outside perceptions of their group. *Id.* at 327 (citing studies showing that Asian Americans are aware that others expect them to be “intelligent but unsociable” and Mexican Americans believe that others perceive them as unintelligent and lacking in character). See also Brenda Major & Laurie T. O’Brien, *The Social Psychology of Stigma*, 56 ANN. REV. PSYCHOL. 393, 398 (2005) (listing studies finding that stigma puts individuals at risk for identity threat).

33. This research falls within the theoretical frame of “social identity threat,” which is defined as any “contextually triggered concerns about being judged negatively because of their identity.” Toosi et al., *supra* note 1, at 1. See also Shelton, Richeson & Vorauer, *supra* note 32, at 322 (“[S]ocial identity threat [is] a concern that one will be judged on the basis of or confirm the stereotypes associated with one’s group . . .”). Early research in this area, spearheaded by Claude Steele, focused more narrowly on “stereotype threat” and its role in understanding underperformance of women and racial minorities in academic settings. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 797 (1995); Claude M. Steele, *Through the Back Door to Theory*, 14 PSYCHOL. INQUIRY 314 (2003) (describing the path of his research on “stereotype threat”). See also Stephan & Stephan, *supra* note 7, at 158–70 (describing intergroup anxiety, a model identifying individual and situational antecedents and consequences of intergroup anxiety for intergroup interaction).

34. Whites are less attentive to race in part because they can afford to be. See Robinson, *supra* note 13, at 1124–25 (“Whites’ relative invulnerability to racial discrimination in most workplaces enables them not to think about race.”).

35. See *id.* at 1109–10 (describing frustration among whites at blacks’ perceived failure to acknowledge improvements in race relations).

36. *Id.* at 1139. There is also research suggesting that this reaction—not seeing discrimination—is used as an identity preservation technique. Jeffrey T. Polzer & Heather M. Caruso, *Identity*

Related to this, whites can also experience fear arising out of group-based perceived threats to social dominance. As Gordon Allport put it back in 1954, “[H]unger for status is matched by a haunting fear that one’s status may not be secure. The effort to maintain a precarious position can bring with it an almost reflex disparagement of others.”³⁷

In addition, whites—like their black relational counterparts—experience negative emotion from social identity threat. In the case of whites, however, the meta-stereotype is that whites are racist or hold discriminatory biases. Whites therefore tend to fear that they will act or be labeled as racist or biased in an interracial interaction.³⁸ According to social identity threat theory, this fear translates into anxiety before and during interracial interaction.³⁹ Aversive racism theory similarly predicts negative emotional experiences by whites in interracial interaction.⁴⁰ Lines of research under these and other theories show a tendency toward high levels of anxiety on the part of whites in interracial interaction.⁴¹ In short, white Americans find interracial interactions uncomfortable; they report experiencing negative affect and anxiety before and during interracial interaction, particularly when interacting with black people.⁴² Indeed, whites are more likely than their black partners to report that an interracial interaction was “uncomfortable, awkward, forced, and strained.”⁴³ A recent meta-analysis of forty years of research on interracial interactions shows that although whites’ express attitudes about their interracial interaction partners have become increasingly egalitarian, whites continue to report experiencing a negative emotional state during interaction.⁴⁴

Negotiation Processes Amidst Diversity, in DIVERSITY AT WORK 89, 111–12 (Arthur P. Brief ed., 2008); Shelton, Richeson & Vorauer, *supra* note 32, at 332–34.

37. GORDON ALLPORT, THE NATURE OF PREJUDICE 371 (unabr. 25th anniversary ed. 1979).

38. Toosi et al., *supra* note 1, at 1.

39. See *supra* text accompanying note 33.

40. See Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM 61, 64 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (discussing the roots of aversive racists’ anxiety in interracial interaction).

41. *Id.*

42. *Id.* at 61–64. See also Stephan & Stephan, *supra* note 7, at 157–60 (discussing intergroup anxiety more generally).

43. Toosi et al., *supra* note 1, at 4 (citing William Ickes, *Compositions in Black and White: Determinants of Interaction in Interracial Dyads*, 47 J. PERSONALITY & SOC. PSYCHOL. 330 (1984)).

44. *Id.* at 17–18.

B. COMMON BEHAVIORAL COPING STRATEGIES AND THEIR EFFECTS ON RELATIONAL OUTCOMES

People experience emotion in interracial interaction as part of a dynamic interchange.⁴⁵ In trying to understand racial emotion and the effect of racial emotion on working relationships, it therefore makes sense to look also at research on behaviors—or coping strategies—adopted in response to negative emotion in interracial interaction and the likely effect of those behaviors on others and on the relationship as it develops over time.⁴⁶

1. Antagonism and Hostility

One behavioral coping response to negative emotions like anxiety and anger experienced in interracial interaction is antagonistic or hostile behavior.⁴⁷ It is not difficult to imagine the negative relational outcomes of antagonism as it emerges from negative racial emotion. Black as well as white participants in interracial interaction can resort to antagonistic and hostile behavior, although research suggests that whites, who are in positions of power greater than blacks in many workplaces, are more likely to engage in such behavior.⁴⁸

45. E. Ashby Plant & David A. Butz, *The Causes and Consequences of an Avoidance-Focus for Interracial Interactions*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 833, 835 (2006) (“[I]nterracial interactions involve a dynamic interchange of both verbal and nonverbal communication between interactants.”).

46. Another way of describing this shift in inquiry is as movement from research on individual motivation to research on observable mechanisms of discrimination (or equality) at the relational level. See Barbara F. Reskin, *Including Mechanisms in Our Models of Ascriptive Inequality*, 68 AM. SOC. REV. 1 (2003) (critiquing sociologists for focusing too closely on the level of individual motivation and identifying interpersonal interaction as one mechanism of ascriptive inequality).

47. Martin N. Davidson & Erika Hayes James, *The Engines of Positive Relationships Across Difference: Conflict and Learning*, in EXPLORING POSITIVE RELATIONSHIPS AT WORK: BUILDING A THEORETICAL AND RESEARCH FOUNDATION 137, 145 (Jane E. Dutton & Belle Rose Ragins eds., 2007); Sophie Trawalter, Jennifer A. Richeson & J. Nicole Shelton, *Predicting Behavior During Interracial Interactions: A Stress and Coping Approach*, 13 PERSONALITY & SOC. PSYCHOL. REV. 243, 252 (2009). See also Jennifer Crocker & Julia A. Garcia, *Downward and Upward Spirals in Intergroup Interactions: The Role of Egosystem and Ecosystem Goals*, in HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION, *supra* note 31, at 229, 234 (describing behavior in response to racial emotion as “fight-or-flight” response). There is surprisingly little research in the field of social psychology that focuses on antagonistic behavior in response to negative racial emotion, compared to research on avoidance. See *infra* Part II.B.2.

48. See, e.g., Diane M. Mackie, Thierry Devos & Eliot R. Smith, *Intergroup Emotions: Explaining Offensive Action Tendencies in an Intergroup Context*, 79 J. PERSONALITY & SOC. PSYCHOL. 602 (2000) (describing studies finding that appraisal of one’s in-group as strong was associated with anger toward the out-group and tendency to take action against that group). Related studies show that individuals will resort to “defensive derogation” to protect a threatened identity, and that individuals are especially likely to disparage a person who they believe is the source of their

Reinforcing the importance of focusing on relations in understanding discrimination, research also shows that a person's expectations about whether an interracial interaction partner will be open to interaction can affect that person's emotion and behavior.⁴⁹ In one study, researchers conveyed to black and white participants negative or positive feedback about their partner's openness to an interaction.⁵⁰ Both black and white participants who received negative feedback reported more anger and other-focused blame than did participants who received positive feedback.⁵¹ In a follow-up study, participants receiving the negative feedback about their partners' openness to an interaction also engaged in more hostile behavior—assigning them harder, less useful letters for a word building task in which their partner would earn money for building words—even when they anticipated that their partner would be angry with the letter allocation.⁵²

2. Avoidance

When people feel threatened in or by an interaction, the most common behavioral strategy for reducing the threat—and the anxiety that goes along with it—is avoidance. People avoid interactions that they expect to trigger negative emotions.⁵³ In one study, white Americans who had previously completed a questionnaire measuring intergroup anxiety came to a lab for a study that they were told involved either interracial or same-race interactions.⁵⁴ Once they arrived and after they had been told about the study, the researchers feigned technical difficulties and asked the participants to reschedule their session for a later date.⁵⁵ Participants whose questionnaire results indicated they were highly anxious about interacting with African Americans were three times more likely to be “no shows” the following week when they believed the session involved interacting with

identity threat if the person is from a low-status group. See Shelton, Richeson & Vorauer, *supra* note 32, at 332–34.

49. David A. Butz & E. Ashby Plant, *Perceiving Outgroup Members as Unresponsive: Implications for Approach-Related Emotions, Intentions, and Behavior*, 91 J. PERSONALITY & SOC. PSYCHOL. 1066, 1066 (2006).

50. *Id.* at 1068.

51. *Id.* at 1072.

52. *Id.* at 1076.

53. See ERVING GOFFMAN, *INTERACTION RITUAL: ESSAYS ON FACE-TO-FACE BEHAVIOUR* 15 n.7 (1967) (describing avoidance by “the middle- and upper-class Negro who avoids certain face-to-face contacts with whites to protect the self-evaluation projected by his clothes and manner”).

54. E. Ashby Plant & Patricia G. Devine, *The Antecedents and Implications of Interracial Anxiety*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 790, 795–96 (2003).

55. *Id.*

African Americans than when they believed that the session involved interacting with whites.⁵⁶

Avoidance can also take more subtle forms. Interaction in many settings may be difficult to avoid altogether, but individuals with an underlying desire to avoid or escape the interaction often engage in other avoidance-related behavior, such as decreased eye contact, less smiling, greater fidgeting, more hesitant speech, and physically moving away.⁵⁷ Individuals engaging in avoidance behavior are also more likely to have shorter interactions.⁵⁸ Whites, moreover, are likely to engage in the microsocial strategy of colorblindness, refusing to acknowledge or mention race even when it is relevant.⁵⁹

Avoidance too has disastrous effects on interactions and relationships. Whites who adopt avoidance as their strategy for coping with anxiety in the interaction view the interaction as unpleasant and report that they want to avoid future interactions with their partners.⁶⁰ Ironically, they also come

56. *Id.* at 796–97.

57. John F. Dovidio, Kerry Kawakami & Samuel L. Gaertner, *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 63 (2002); Phillip Atiba Goff, Claude M. Steele & Paul G. Davies, *The Space Between Us: Stereotype Threat and Distance in Interracial Contexts*, 94 J. PERSONALITY & SOC. PSYCHOL. 91, 93–99 (2008) (finding that white Americans positioned their chair farther away from an African American person when they believed they would discuss racial profiling, compared to when they believed they would discuss love and relationships); William Ickes, *Compositions in Black and White: Determinants of Interaction in Interracial Dyads*, 47 J. PERSONALITY & SOC. PSYCHOL. 330, 332, 338 (1984) (finding that whites who were preselected on their displayed tendency to avoid interracial interaction engaged in less smiling and eye contact than those who were preselected on their displayed tendency to engage in interracial interaction). The prevalence of avoidance as a white strategy is consistent with Dovidio and Gaertner's aversive racism theory. See Evan P. Apfelbaum, Samuel R. Sommers & Michael I. Norton, *Seeing Race and Seeming Racist? Evaluating Strategic Colorblindness in Social Interaction*, 95 J. PERSONALITY & SOC. PSYCHOL. 918, 923 (2008) (citing John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 1 (2004)) (“Research suggests that Whites’ tendency to anticipate negative consequences when interacting with Blacks, including the possibility of appearing biased, can result in increased anxiety and avoidant behavior.” (citation omitted)).

58. Plant & Butz, *supra* note 45, at 842 (“[E]ntering the interaction with an underlying desire to avoid it actually resulted in shorter interactions.”).

59. See Apfelbaum, Sommers & Norton, *supra* note 57, at 918 (“We propose that when placed in the ambiguous and often threatening context of race-relevant social interaction, one approach many Whites adopt is *strategic colorblindness*: avoidance of talking about race—or even acknowledging racial difference—in an effort to avoid appearance of bias.”); Michael I. Norton et al., *Colorblindness and Interracial Interaction: Playing the Political Correctness Game*, 17 PSYCHOL. SCI. 949, 949–52 (2006) (showing that when engaging in a photograph identification task with a black confederate, white participants often avoided mentioning race).

60. Plant & Butz, *supra* note 45, at 844; Samuel R. Sommers & Laura G. Babbitt, *On the Perils of Misplaced Assumptions: Appreciating the Need for Diversity Science*, 21 PSYCHOL. INQUIRY 164, 165 (2010) (“Bending over backwards to assert that you do not notice racial difference renders communication less efficient, [and] nonverbal behaviors less friendly . . .”).

across as prejudiced and avoidant to their partners, which in turn can lead to avoidant behavior by the partner.⁶¹ A classic, well-known study of black-white interaction from the 1970s found not only that white experimental subjects who interviewed black job applicants tended to sit farther away, make more speech errors, and end the interviews sooner than those interviewing whites, but also that black interviewees responded with similar behaviors.⁶² Other studies show that even something as simple as priming experimental subjects with black or white faces before an interview affected whites' avoidant behavior and provoked avoidant behavior in their interactional partners.⁶³ Indeed, not only is avoidant behavior more likely to be perceived as biased by black interactional partners; whites and blacks alike are likely to attribute avoidant behavior in others to personal rejection and social exclusion. In one recent study, for example, researchers demonstrated that blacks and whites tended "to explain their own avoidance of interracial interactions in terms of fear of personal rejection due to their race," but to "explain outgroup members' avoidance of interracial interactions as due to lack of interest."⁶⁴ Avoidant behaviors can lead to "downward spirals" into hostility and distrust as each person in the relationship distrusts the other and misinterprets the other's behavior as hostile.⁶⁵

C. ENGAGEMENT: AN ALTERNATIVE COPING STRATEGY

Some individuals who experience anxiety in interracial interactions seek not to antagonize or avoid the interaction, but to engage, and research shows that high levels of engagement can result in more positive impressions in interracial interactions than lower levels of engagement.⁶⁶

61. Plant & Butz, *supra* note 45, at 844. Some studies show, in fact, that whites express more nonverbal anxiety than their black partners in race-related and race-neutral interactions. Trawalter, Richeson & Shelton, *supra* note 47, at 259 (discussing interracial contact among white and black college students).

62. Carl O. Word, Mark P. Zanna & Joel Cooper, *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 J. EXPERIMENTAL SOC. PSYCHOL. 109, 119–20 (1974).

63. Mark Chen & John H. Bargh, *Nonconscious Behavioral Confirmation Processes: The Self-Fulfilling Consequences of Automatic Stereotype Activation*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 541, 548–58 (1997).

64. Plant & Butz, *supra* note 45, at 835 (describing the phenomenon of "pluralistic ignorance" and predicting that "[i]f avoidance-focused individuals appear awkward or nervous in the interaction, their partners may discount other plausible explanations and automatically attribute avoidant behavior to lack of interest or racial antipathy").

65. For a description of such a "downward spiral," see Crocker & Garcia, *supra* note 47, at 234. A similar negative dynamic can occur with the perception of the nonstigmatized person as a starting point. *See id.* at 234–35.

66. Plant & Butz, *supra* note 45, at 843 (finding that high anxiety but low desire to avoid the interaction led to more pleasant interactions for confederates); J. Nicole Shelton et al., *Ironic Effects of*

Individuals vary on their willingness to engage.⁶⁷ Whites who are personally motivated (rather than merely externally motivated) to be nonprejudiced, for example, are more likely to engage and to work hard to control potential racial bias.⁶⁸ Expectations about one's ability to make a desired impression in interracial interactions and about the likelihood of an outgroup member responding positively also influence anxiety and avoidance behavior in interracial interactions.⁶⁹ In particular, people who perceive that their personal resources for coping with a perceived identity threat are high—meaning that they believe they can overcome the meta-stereotype—are more likely to respond by expending effort and energy to achieve a positive outcome.⁷⁰

Contextual or situational factors also influence both the emotions experienced in interracial interaction and the type of response strategy selected. Social psychologists Jennifer Crocker and Julia Garcia, for example, show that getting individuals to frame goals in terms of an ecosystem (in which people focus on their connection to others) rather than in terms of an egosystem (in which people focus on their own desires or needs) can reduce identity threat and lead to engagement as well as more positive emotions toward others, such as feelings of love, compassion, and empathy.⁷¹ Even more promising from an employment perspective is research that shows that the framing of performance goals for an interracial

Racial Bias During Interracial Interactions, 16 PSYCHOL. SCI. 397, 401 (2005) (finding that black participants evaluated whites with higher automatic-bias scores more positively than whites with lower automatic-bias scores).

67. Some studies suggest that there is a gender difference in behavior responding to intergroup anxiety. See, e.g., Littleford, Wright & Sayoc-Parial, *supra* note 1, at 92 (finding that white women responded to intergroup anxiety by acting friendlier toward an other-race partner, while white men acted less friendly).

68. Prior experience with interracial interaction also affects individuals' emotion experienced and behavior exhibited in interracial action. See Jacquie D. Vorauer & Yumiko Sakamoto, "I Thought We Could Be Friends, But . . .": Systematic Miscommunication and Defensive Distancing as Obstacles to Cross-Group Friendship Formation, 17 PSYCHOL. SCI. 326, 330–31 (2006) (studying the effects of high and low prior contact on signal amplification and the development of interracial friendships).

69. Plant & Butz, *supra* note 45, at 834; Shelton, Richeson & Vorauer, *supra* note 32, at 337 ("Two related factors that are likely to play pivotal roles in determining which response individuals use to negotiate a threatened identity in interethnic interactions are motivation and self-efficacy."). Contextual factors are also likely to influence motivation and beliefs about self-efficacy. Shelton, Richeson & Vorauer, *supra* note 32, at 337 (discussing various contextual factors).

70. See Plant & Butz, *supra* note 45, at 834–43 (explaining the role of "self-efficacy" expectancies and detailing studies showing a "causal link between expectancies regarding responding with racial bias in interracial interactions and anxious / avoidant responses to such interactions").

71. Crocker & Garcia, *supra* note 47, at 229; Jennifer Crocker, Marc-Andre Oliver & Noah Nuer, *Self-Image Goals and Compassionate Goals: Costs and Benefits*, 8 SELF & IDENTITY 251, 252–55, 261–62 (2009).

interaction can affect relational behavior during the interaction.⁷² In one recent study, researchers asked whites “to focus either on learning about their partner during their interaction (i.e., ‘Focus on learning about your partner, her thoughts, ideas and opinions’), or on presenting themselves to their partner (i.e., ‘Focus on presenting yourself to your partner, your thoughts, ideas and opinions’).”⁷³ The researchers then observed and coded participants’ nonverbal behavior during an interaction with either a white or black confederate partner.⁷⁴ Particularly when discussing a race-sensitive topic with a cross-race partner, “participants who were instructed to focus on learning maintained longer eye contact, averted their gaze less often, used fewer speech dysfluencies (e.g. ‘like,’ and ‘umm’), and exhibited fewer fidgeting behaviors than those who were instructed to focus on how they present themselves to their partner.”⁷⁵ This research dovetails with a rich literature on learning and performance goals as they relate to achievement.⁷⁶ In addition, having available a structured script for interaction can ease anxiety and other negative emotions experienced during interaction,⁷⁷ as can a task focus over a social focus.⁷⁸

Taken together, the social science research on emotion in interracial interaction suggests that negative racial emotion and common coping strategies of antagonism and avoidance are likely to yield negative relational outcomes. Moreover, given the stark power and status divisions along racial lines in the United States, the research suggests that conditions for interracial interaction in most workplaces today will be structured

72. See, e.g., Goff, Steele & Davies, *supra* note 57, at 99–104 (describing studies suggesting that a learning-goal orientation leads participants to perceive their situation as less evaluative, thereby protecting them from stereotype threat concerns and reducing their avoidance behavior).

73. Katya Migacheva, Linda R. Tropp & Jennifer Crocker, *Focusing Beyond the Self: Goal Orientations in Intergroup Relations*, in MOVING BEYOND PREJUDICE REDUCTION: PATHWAYS TO POSITIVE INTERGROUP RELATIONS, *supra* note 9, at 99, 105.

74. *Id.*

75. *Id.*

76. See generally Heidi Grant & Carol S. Dweck, *Clarifying Achievement Goals and Their Impact*, 85 J. PERSONALITY & SOC. PSYCHOL. 541 (2003) (detailing the positive achievement effects of learning goals relative to some performance goals).

77. See Derek R. Avery et al., *It Does Not Have to Be Uncomfortable: The Role of Behavioral Scripts in Black-White Interracial Interactions*, 94 J. APPLIED PSYCHOL. 1382, 1389 (2009) (finding that white participants found interracial interactions more discomfoting than same-race interactions “only when participants occupied relatively unscripted roles”).

78. Laura G. Babbit & Samuel R. Sommers, *Framing Matters: Contextual Influences on Interracial Interaction Outcomes*, 37 PERSONALITY & SOC. PSYCHOL. BULL. 1233, 1240 (2011). Research on the use of scripting in employment interviews buttresses this point. See generally Michael A. Campion, David K. Palmer & James E. Campion, *A Review of Structure in the Selection Interview*, 50 PERSONNEL PSYCHOL. 655 (1997) (identifying and analyzing fifteen components of interview structure and discussing their impacts on interview effectiveness).

toward negative rather than positive relational experiences. In the next part, I take a closer look at current conditions for interracial interaction by examining the approach to racial emotion taken by the law as implemented by courts and by organizations. I argue that the prevailing approach not only closes racial emotion out of antidiscrimination discourse; it closes space for developing positive racial emotion at work. In the last section of Part III, I put this argument together with the empirical research surveyed in Part II to explain why the current approach to racial emotion in the workplace is problematic and why it should be understood as an employment discrimination concern, rather than merely as a concern of personal relations or societal difficulty.

III. THE PREVAILING APPROACH: LAW AND ORGANIZATIONS

Discrimination has long been understood to involve a substantial emotion component. Prejudice, after all, has animus as its affective taproot.⁷⁹ Even as social psychologists began to learn about the cognitive roots of prejudice in the human need to categorize, though, they nonetheless retained an emotion component. As social psychologist Gordon Allport, who is credited as the founder of the cognitive approach to prejudice, stated in his book *The Nature of Prejudice*, even when “[d]efeated intellectually, prejudice lingers emotionally.”⁸⁰

Despite this understanding of prejudice as involving an emotion component, courts and commentators have tended to conceptualize the emotion in prejudice as a relatively static personal state—revolving around antipathy⁸¹ or group-based animus—rather than as potentially involving multiple emotions that can emerge and change in the process of interracial

79. See ALLPORT, *supra* note 37, at 6–9 (discussing various definitions of prejudice and its emotional component).

80. *Id.* at 328.

81. *Id.* (defining prejudice as “an antipathy based upon a faulty and inflexible generalization”). Social scientists have critiqued Allport’s emphasis on antipathy as his “fundamental blindspot.” John F. Dovidio, Peter Glick & Laurie A. Rudman, *Introduction: Reflecting on The Nature of Prejudice: Fifty Years After Allport*, in ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT, *supra* note 9, at 1, 10.

interaction.⁸² The result is a static notion of prejudice as residing, even calcifying, in individual mindsets.⁸³

Current conceptions of discrimination prohibited by Title VII continue this trend, focusing on states of mind at discrete moments in time and on cool, cognitive processing over hotter emotional impulse and feeling. Courts have developed and applied the law of employment discrimination in ways that reflect this narrow view, placing racial emotion outside of antidiscrimination concern.⁸⁴ By closing racial emotion out of antidiscrimination discourse, courts signal that addressing racial emotion is not important to reducing discrimination. The organizational approach to racial emotion mirrors this frame. An examination of the managerial literature suggests that organizations do little to address racial emotion in the workplace. Indeed, they are likely to close space for the conversation and learning needed for developing positive racial emotion and relationships by seeking to cleanse the workplace of racial emotion, even as they seek to capitalize on their employees' emotions and on diversity more generally.⁸⁵

A. THE LAW AND COURTS: CLOSING RACIAL EMOTION OUT OF ANTIDISCRIMINATION CONCERN

Except when it takes form as expressly stated group-based animus, courts have great difficulty recognizing racial emotion as something worthy of antidiscrimination concern. In this section, I identify three interrelated ways in which courts today tend to close racial emotion out of antidiscrimination discourse: by ignoring emotion in interracial interaction; by categorizing emotion in interracial interaction, when it is seen, as solely personal and not racial; and by judging emotion in interracial interaction,

82. See, e.g., *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 257 (1981) (describing the ultimate inquiry in an individual disparate treatment case as whether the employment decision at issue was motivated by "discriminatory animus"). See also *Smith v. City of Jackson*, 544 U.S. 228, 253–54 (2005) (distinguishing age-based discrimination prohibited by the Age Discrimination in Employment Act as "qualitatively different from the types of discrimination prohibited by Title VII" on the ground that the ADEA was not based on evidence "that age discrimination resulted from intolerance or animus toward older workers").

83. See *Smith & Mackie*, *supra* note 27, at 363 (describing how during the time that the cognitive revolution took off in North American psychology, research shifted away from emotion, save as an attitude toward a group or its members). Even research in social identity theory lacked attention to emotions. *Id.*

84. See *infra* Part III.A.

85. See *infra* Part III.B.

when it is seen and acknowledged as racial, as unreasonable.⁸⁶ I present several case examples involving racial behavior and strong emotional and behavioral reaction. Although my proposals in Part IV will address these more extreme cases, the cases illustrate a much broader and deeper problem of failing to appreciate the consequences of emotion in interracial interaction for workplace equality.

1. Refusing to See Emotion in Interracial Interaction: Isolated Conduct and Narrow Inquiries

Courts in applying employment discrimination law often refuse to see the relations, including emotion involved in relations,⁸⁷ that lead up to an individual's conduct, whether, for example, a supervisor's decision not to recommend a subordinate for promotion, or a subordinate's decision to engage in verbal or physical altercation with a coworker or supervisor. Courts do this by narrowing the legal inquiry to isolate the conduct—a state of mind at the moment of promotion decision in the first scenario, the altercation conduct in the second—from the relations that gave rise to that conduct.

a. A Narrow Focus on the State of Mind of a Specific Decisionmaker at a Moment in Time

Title VII makes it an unlawful employment practice for an employer or its agents to discriminate in the hiring, pay, promotion, or terms and conditions of employment because of an employee's race.⁸⁸ Courts applying Title VII tend to focus their inquiry on the state of mind of an identified decisionmaker or decisionmakers at the moment in time that a specific employment decision was made.⁸⁹ Viewing facts through this narrow lens, courts close emotion experienced in day-to-day interaction (racial or otherwise) out of antidiscrimination discourse.

86. Many of the judges in the cases that I review are white men and therefore may be prone to seeing emotion as nonracial, just as they fail to acknowledge generally (and prefer not to acknowledge) race. *See supra* Part II.

87. This is also true of cognitive biases in relations, as several scholars have pointed out. *See supra* note 6 and accompanying text.

88. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006).

89. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 113–19 (2003) (describing the law's narrow focus on identifiable decisions made at a discrete moment in time); Tristin K. Green, *Insular Individualism: Employment Discrimination Law After Ledbetter v. Goodyear*, 43 HARV. C.R.-C.L. L. REV. 353, 356–65 (2008) [hereinafter Green, *Insular Individualism*] (describing the Court's current view that individuals discriminate isolated from the larger organizational context and contrary to the interests of the organizations for whom they work).

One prominent example of this practice is the “stray remarks” doctrine. Under this doctrine, courts reject statements made by decisionmakers that reflect bias against members of particular groups when those statements are not “proximate in time” to the specified adverse employment action or “related to the employment decision at issue.”⁹⁰ The well-known case of *Ash v. Tyson Foods, Inc.* nicely illustrates the Court’s use of the doctrine,⁹¹ although understanding how the doctrine serves as a means of ignoring emotion requires a richer description of the facts and the complex procedural history of the case than is ordinarily portrayed.

Anthony Ash, a black man, worked as a superintendent at a Tyson Foods poultry plant.⁹² He and another black man, John Hithon, applied for two open shift manager positions.⁹³ The positions were filled by two white men.⁹⁴ Ash and Hithon sued Tyson Foods alleging that they had been denied promotions because of their race.⁹⁵ In support of his claim, Ash submitted evidence that Hatley, Ash’s supervisor and the person responsible for the promotion decision, called Ash “boy” several times in the course of their working relationship.⁹⁶ On one occasion, Ash’s wife, who also worked at Tyson Foods, overheard Hatley use “boy” to refer to Ash in the workplace cafeteria; when she responded to Hatley that her husband was not a “boy,”⁹⁷ Hatley laughed, or “smirk[ed],” and walked away.⁹⁸

In granting judgment as a matter of a law in favor of Tyson Foods on Ash’s claim, the district court held that “[e]ven if Hatley made these statements, it cannot be found, without more, that they were racial in

90. *Rubinstein v. Adm’rs of Tulane Educ. Fund*, 218 F.3d 392, 402 (5th Cir. 2000) (quoting *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996)). *See also* *Scheitlin v. Freescale Semiconductor, Inc.*, 465 F. App’x. 698, 699 (9th Cir. 2012) (mem.) (stating that comments made by the defendant’s Chief Executive Officer eight months prior to termination of the plaintiff’s employment were “stray remarks unrelated to the challenged actions”); *Gullett v. Town of Normal*, 156 F. App’x. 837, 839 (7th Cir. 2005) (holding that evidence that plaintiff’s supervisor stated that he would “never hire that ‘fucking bitch’” five months before the promotion decision in question was merely a “stray remark” and insufficient evidence to defeat summary judgment).

91. *Ash v. Tyson Foods, Inc.* 546 U.S. 454 (2006) (per curiam).

92. *Id.* at 455.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 456. There was also evidence that Hatley called Hithon “boy.” *Ash v. Tyson Foods, Inc.*, No. 96-RRA-3257-M, 2004 U.S. Dist. LEXIS 30236, at *17 (N.D. Ala. Mar. 26, 2004), *aff’d in part and rev’d in part*, 129 F. App’x 529 (11th Cir. 2005), *vacated*, 546 U.S. 454 (2006).

97. *Ash*, 2004 U.S. Dist. LEXIS 30236, at *17.

98. *Ash v. Tyson Foods, Inc.*, 664 F.3d 883, 896 (11th Cir. 2011) (internal quotation marks omitted) (describing Ash’s wife’s testimony that Hatley “just looked at [her] with a smirk on his face like it was funny and then he walked off” (alteration in original) (internal quotation marks omitted)).

nature.”⁹⁹ Ash appealed, and the Eleventh Circuit affirmed, stating, “While the use of ‘boy’ when modified by a racial classification like ‘black’ or ‘white’ is evidence of discriminatory intent, the use of ‘boy’ alone is not evidence of discrimination.”¹⁰⁰ The Supreme Court reversed, remanding to the court of appeals for further consideration. As the Court explained: “The speaker’s meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court’s decision is erroneous.”¹⁰¹

On remand, the Eleventh Circuit again affirmed the district court decision. The court reasserted its view that the “usages were conversational” and “non-racial,” and then it moved to the stray remarks doctrine, adding that “[e]ven if somehow construed as racial, we conclude that the comments were ambiguous stray remarks not uttered in the context of the decisions at issue and are not sufficient circumstantial evidence of bias to provide a reasonable basis for a finding of racial discrimination in the denial of the promotion[.]”¹⁰²

Through application of the stray remarks doctrine, the court narrowed the inquiry to focus on an isolated decision at a precise moment in time. In doing so, it closed the relationship between Ash and Hatley—and any emotion experienced as part of that relationship—outside of the discrimination inquiry.¹⁰³ The following testimony by Ash in the second trial in the case reveals perceptions and some of the emotions that might have been involved in the interactions between Ash and Hatley:

[Ash:] [I]t was break time, it was lunch time. And we were just sitting in the cafeteria having lunch. And Mr. Hatley walks up to the table without saying anything, but he just said, “Boy, you better get going.” So I looked at him. I was shocked that he said it, because, you know, I felt like he said it in a mean and derogatory way.

Ash [also] testified that Hatley’s use of the word was offensive to him:

99. *Ash*, 2004 U.S. Dist. LEXIS 30236, at *17.

100. *Ash v. Tyson Foods, Inc.*, 129 F. App’x 529, 533 (11th Cir. 2005) (citations omitted), *vacated*, 546 U.S. 454 (2006).

101. *Ash*, 546 U.S. at 456.

102. *Ash v. Tyson Foods, Inc.*, 190 F. App’x 924, 926 (11th Cir. 2006).

103. The court of appeals later affirmed a judgment in favor of the plaintiff, explaining that additional evidence that emerged at the retrial permitted a different result. *Ash v. Tyson Foods, Inc.*, 664 F.3d 883, 896–97 (11th Cir. 2011). For another case involving use of the word “boy” in which white employees overtly resisted being told not to use the term, insisting that it was nonracial, see *Bailey v. USF Holland, Inc.*, 526 F.3d 880, 882–84 (6th Cir. 2008).

A[sh:] Because, you know, being in the South, and everybody know[s] being in the South, a white man says boy to a black man, that's an offensive word.

Q[uestion:] What do you equate that to, using the word "boy" to a black man?

A[sh:] I equate that to just a racial comment because you might as well use the "N" word if you are going to say that.¹⁰⁴

We cannot know with certainty what specific emotions Ash and Hatley experienced in this interchange or in future interactions, but from this testimony, we might expect that Ash experienced anger and frustration at the use of the term while Hatley may have even experienced something close to racial pleasure at his use of the subordinating and racially charged term.¹⁰⁵

The stray remarks doctrine is used regularly by courts in cases involving racial language or language reflecting racial bias, like *Ash v. Tyson Foods, Inc.*,¹⁰⁶ but the same narrow inquiry closes out the many more interracial relations that do not involve racial language. The narrow focus on state of mind at a discrete moment in time ignores the reality that most employment decisions are based on working relationships that are ongoing and have developed over time.

Moreover, the stray remarks doctrine is but one example of a broader tendency on the part of courts to isolate specific employment decisions from the web of workplace relationships and the contexts in which those relationships and employment decisions arise.¹⁰⁷ Even if commentators (and courts) agree in theory that disparate treatment law requires only a showing that the adverse employment action was taken "because of" membership in a protected group¹⁰⁸ and not a showing of purpose or conscious motivation on the part of a specific decisionmaker, the prevailing

104. *Ash*, 664 F.3d at 896 (second alteration in original).

105. See Neil Gotanda, *Beyond Supreme Court Anti-Discrimination: An Essay on Racial Subordinations, Racial Pleasures and Commodified Race*, 1 COLUM. J. RACE & L. 273, 288–95 (2012) (describing racial pleasure—the idea that racial subordination can give pleasure to its participants—and the contexts in which it can arise).

106. See, e.g., *Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 933–34 (8th Cir. 2006) (using the stray remarks doctrine when analyzing racially offensive comments).

107. E.g., Green, *Insular Individualism*, *supra* note 89, at 380–82 (discussing how courts' adherence to the concept of "insular individualism" isolates individual decisions from their workplace contexts).

108. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2006). Or that a protected factor was a "motivating factor" in the employment decision. *Id.* § 2000e-2(m).

conception of discrimination as involving a decision at a precise moment in time tends to close racial emotion out of antidiscrimination concern.¹⁰⁹

b. A Narrow Focus on the Nature of the Plaintiff's Conduct

Courts also ignore emotion in interracial interaction when it results in verbal or physical threat or altercation instigated by the plaintiff. Behavior that is deemed unreasonable in the abstract is then conceptually severed by courts from the emotion and relations giving rise to the behavior.

In *Edwards v. Foucar, Ray & Simon, Inc.*,¹¹⁰ plaintiff Donald Edwards alleged that he had been fired because of his race in violation of Title VII. The discharge evolved out of the working relationship between Donald Edwards, a black man, and Donald Johnson, a white man and the plant manager at the manufacturing plant where Edwards worked. Edwards and Johnson had a difficult relationship. Edwards had complained several times that Johnson was harassing him by “criticizing the manner in which he worked, unfairly allotting overtime, and unfairly assigning routes.”¹¹¹ Nine months before Edwards’s discharge, Johnson referred to Edwards as “sunshine,” and Edwards “told Johnson not to address him by that name again.”¹¹² On the day of the discharge, Edwards entered the coffee room of the plant, where Johnson was having coffee with another employee, and Johnson greeted Edwards, “Good morning, sunshine.”¹¹³ Edwards responded, “Don’t call me ‘sunshine,’ you motherfucker. My name is Donald Edwards.”¹¹⁴ Johnson responded, “You’re fired. You’re fired for gross insubordination. Go home.”¹¹⁵ Johnson and Edwards proceeded to Johnson’s office, where Johnson said to Edwards, “I finally got you, you nigger bastard.”¹¹⁶ The Vice President of the company, Edward Andersen, next saw Edwards come out of Johnson’s office hurling Johnson around.

109. See *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1190–92, 1194 (2011) (describing the relevant inquiry under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), which uses “motivating factor” language like Title VII, as one that requires a finding that the same person both acted on discriminatory bias and had the “specific intent” to cause the ultimate action at issue).

110. *Edwards v. Foucar, Ray & Simon, Inc.*, No. C-79-0313-SC, 1980 U.S. Dist. LEXIS 13748 (N.D. Cal. Aug. 19, 1980).

111. *Id.* at *4–5 (“There were at least two meetings in which the NAACP and Local Union 85 [of which Edwards was a member] participated along with Foucar’s President, John Lauger, and Vice-President Andersen. The recommendations from these meetings were that Johnson and Edwards should attempt to work out their problems.”).

112. *Id.* at *5.

113. *Id.* at *3.

114. *Id.*

115. *Id.*

116. *Id.*

Edwards threw Johnson against a wall, over a desk, and onto the floor. Andersen fired Edwards directly after the incident.¹¹⁷

The court found that Edwards was discharged for a nonracial reason, attacking a superior at work, and not because of his race.¹¹⁸ Under the union contract, Edwards could not be fired for uttering the obscenity to Johnson, and the president of the company testified at trial that he would have reversed Johnson's decision if he had been given the opportunity.¹¹⁹ But, according to the court, "[P]laintiff did not give defendant an opportunity to review Johnson's initial action because instead of following normal grievance procedures as he was required to do, plaintiff attacked Johnson within minutes after he was fired by him."¹²⁰ The court held that Edwards had not presented evidence to demonstrate that the "nonracial" reason, attacking a superior at work, was a pretext for discrimination, and judgment was entered for the defendant.¹²¹

Courts take a similar approach in cases involving retaliation. Section 704 of Title VII protects employees from retaliation for opposing discriminatory practices.¹²² However, most courts require that the plaintiff's opposing conduct be "reasonable" in order for retaliation in response to that conduct to be unlawful.¹²³ The courts are unwilling to inquire into the relationship that led to "unreasonable" conduct.

Edwards and the retaliation cases demonstrate the ease with which courts close out relations—and emotion arising from those relations—from antidiscrimination discourse by analytically isolating a behavioral action—

117. *Id.*

118. *Id.* at *7–8. The magistrate judge heard evidence in the case and made fact-finding recommendations to the district court judge, who adopted those findings with minor modifications.

119. *Id.*

120. *Id.* at *8.

121. *Id.* at *7–8.

122. Civil Rights Act of 1964 § 704, 42 U.S.C. § 2000e-3 (2006).

123. *See, e.g., Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 721 (6th Cir. 2008) (quoting *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 580 (6th Cir. 2000)). Some courts frame the inquiry in terms of balancing the employee's interest against the employer's interest. *See, e.g., Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259–60 (4th Cir. 1998). Terry Smith argues that Donald Edwards would have had a better chance of succeeding in his discrimination suit had he framed his claim in terms of retaliation instead of disparate treatment. Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 531–33 (2003). Although Smith rightly emphasizes the frequently overlooked importance of retaliation claims for many plaintiffs (and rightly points out the potential of retaliation law to better capture relations as they play out in the workplace), it is still unlikely, as described above, that Edwards would have fared better on a retaliation claim. Indeed, Smith recognizes the limited scope of retaliation law when he urges a change in the law to focus on the question: "Would the totality of the employee's experience with his employer cause a reasonable employee of the same race to behave in the same fashion?" *Id.* at 566.

engaging in a physical altercation—from the relations giving rise to the action.

2. Categorizing Emotion in Interracial Interaction: It's Personal, Not Racial

In many cases, of course, courts do see emotion in interracial interaction. In cases involving evidence of very high emotional responses and exchanges (for example, yelling or name calling) it would be difficult not to. But when these courts see emotion in interracial interaction, they are nonetheless likely to categorize the emotion as solely personal and not racial. Legal scholars have amply documented a growing reluctance on the part of courts to infer discrimination based on plaintiffs' evidence showing that the reason for the adverse employment action put forward by the employer is false.¹²⁴ The decisions of the district court and the court of appeals in *Ash v. Tyson Foods, Inc.* evince a similar unwillingness on the part of courts to construe use of the term "boy" as racial.¹²⁵ Categorizing emotion in interracial interaction as personal and not racial fits this basic mold. But judicial assumptions about emotion go even further than a reluctance to characterize emotion as racial and therefore to see it as evidence of discrimination. When courts see emotion, particularly negative emotion as it spills over into friction and acrimonious relationships, they tend to construe that negative emotion as evidence of nondiscrimination.¹²⁶

The case of *St. Mary's Honor Center v. Hicks* arguably set the foundation for judicial willingness to categorize emotion as personal rather than racial.¹²⁷ *Hicks* is best known for the Court's holding that the plaintiff must ultimately prove that discrimination was the reason for an adverse decision; in other words, it is not enough for the plaintiff to prove that the reasons proffered by the defendant are false.¹²⁸ The evidence underlying the case, however, and the trial court's and Supreme Court's reaction to that evidence, tell a deeper story about courts' willingness (or unwillingness) to see emotion in interracial interaction as racial.

124. See, e.g., Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 343–55 (2010) (detailing how courts have limited the various routes that a plaintiff can use to prove that a nondiscriminatory justification is pretextual); Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539, 546–52 (2001) (providing recommendations on how to modify the current rule in pretext cases to eliminate confusion among federal courts and minimize federal judges' ability to inject their own misgivings about employment discrimination laws into cases).

125. See *supra* text accompanying notes 91–104.

126. See *supra* text accompanying notes 118–21.

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

128. *Id.* at 510–11.

The case involved a claim by Melvin Hicks, a black man, alleging that he had been demoted in his position and later discharged because of his race in violation of Title VII.¹²⁹ In 1978, Hicks was hired as a correctional officer at St. Mary's Honor Center, a minimal-security correctional facility operated by the Missouri Department of Corrections and Human Resources ("MDCHR").¹³⁰ Hicks was promoted to a supervisory position in 1980. In 1984, in an effort to improve conditions at the facility, the assistant director of adult institutions at the MDCHR implemented several supervisory changes that resulted in placement of John Powell, a white man, as Hicks's immediate supervisor and Steve Long, another white man, as the new superintendent.¹³¹ After Powell and Long came on board, Hicks's disciplinary record took a downward turn. He was cited for several violations, and was demoted.¹³² When Hicks was notified of his demotion, he "was shaken by the news and requested the rest of the day off."¹³³ His request was granted, but as he was leaving, Powell and Hicks got into a heated exchange, which resulted in Hicks asking if Powell wanted to "step outside."¹³⁴ On the basis of this incident, Hicks was discharged.¹³⁵

The district court sitting as factfinder in the case found that the reasons put forward for Hicks's demotion were fabricated by Powell and Long, and that Powell provoked the threat that formed the basis of the discharge.¹³⁶ Nonetheless, the court found in favor of St. Mary's.¹³⁷ According to the court, Hicks had "proven the existence of a crusade to terminate him," but he had not "proven that the crusade was racially rather than personally motivated."¹³⁸ The court cited no evidence suggesting a nonracial source of the acrimonious relationship between Hicks and Powell.¹³⁹ Indeed, Powell had testified that he harbored no personal animus against Hicks.¹⁴⁰

In their article, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, Chad Derum and

129. *Id.* at 504–05.

130. *Id.* at 504.

131. *Id.* at 504–05.

132. *Id.* at 505.

133. *Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1247 (E.D. Mo. 1991), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *vacated*, 509 U.S. 502 (1993).

134. *Id.* (internal quotation marks omitted).

135. *Id.* at 1248.

136. *Id.* at 1250–51.

137. *Id.* at 1252.

138. *Id.*

139. *Id.*

140. *Hicks v. St. Mary's Honor Ctr.*, 90 F.3d 285, 290 (8th Cir. 1996).

Karen Engle argue that courts since *Hicks* have shifted from applying a presumption of discrimination in individual disparate treatment cases in which the plaintiff has evidence that the defendant's proffered reason is false to a presumption of "personal animosity."¹⁴¹ Derum and Engle deftly critique the personal animosity presumption through the lenses of cognitive bias research and at-will employment. They show that personal animosity is often tied to race and sex in relations at work and also that courts are likely to view evidence of personal animosity as safely within the realm of business prerogative in at-will employment.¹⁴²

What Derum and Engle miss, however, is that the personal animus presumption is also tied to judges' beliefs about the role of emotion in discrimination at work. When courts see emotion in a relationship, they are more likely to find that no discrimination has taken place than if they see no emotion at all.¹⁴³ The emotion itself signals to courts that the relationship at issue belongs in the realm of the personal, a realm presumably not governed by laws regulating discrimination in the public sphere of work.¹⁴⁴

In *Sweezer v. Michigan Department of Corrections*, for example, the plaintiff Judith Sweezer, a black woman, alleged that she had been

141. Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1179–83 (2003). Scholars have also made a compelling argument that the "personality clash" excuse that emerged out of *Hicks* rests on an inaccurate assumption that discriminatory bias is overt and conscious and that personal dislike or bias can be easily distinguished and separated from racial dislike or bias. Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary's Honor Center v. Hicks, Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 215–29 (1997). Brodin also rightly points out that discrimination can affect personality and commitment to work. *Id.* at 219.

142. Derum & Engle, *supra* note 141, at 1241–47.

143. See, e.g., *Benuzzi v. Bd. of Educ.*, 647 F.3d 652, 663–64 (7th Cir. 2011) ("It is clear even from the cold record that Benuzzi and Watkins harbored a heated dislike for one another, but Benuzzi has not presented evidence supporting the inference that Watkins' antipathy toward her stemmed from her sex."); *Bradley v. Widnall*, 232 F.3d 626, 632 (8th Cir. 2000) ("[A] close scrutiny of the record reveals that the majority of the problems encountered by Bradley stemmed from inter-office politics and personality conflicts rather than race based animus."); *Kenfield v. Colo. Dep't of Pub. Health & Env't*, 837 F. Supp. 2d 1232, 1241–42 (D. Colo. 2011) (stating, in a reverse discrimination case, that evidence that a supervisor was "unfriendly" with whites and not with nonwhites was not sufficient evidence of discrimination).

144. Derum and Engle make an interesting, related point: judges may presume nondiscrimination because they see all personal relationships as uniquely within the realm of employer control. See Derum & Engle, *supra* note 141, at 1243–45 (pointing to the rationale behind the small business exception and Richard Epstein's expansion of that rationale to include all business decisions). Under this view, the personal is excluded from nondiscrimination laws because it is within business prerogative, not because it is nondiscriminatory. Cf. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e) (2006) (stating a bona fide occupational qualification ("BFOQ") defense (justification) for facially discriminatory policies).

subjected to a racially hostile work environment.¹⁴⁵ Among other evidence of hostile work environment, including evidence that her subordinates refused to follow her orders and that her supervisors refused to back her up, Sweezer presented evidence of harassment by subordinate officer Wayne Allen.¹⁴⁶ In one incident, Allen saw Sweezer at a local restaurant and called out, “Hey, there’s a new colored woman in town.”¹⁴⁷ Back at the workplace, Allen recounted this incident in Sweezer’s presence to officers who were supervised by Sweezer.¹⁴⁸ Several months later, Sweezer took disciplinary action against Allen for abusing an inmate.¹⁴⁹ After a hearing on the disciplinary action, Allen and others harassed Sweezer by calling her “bitch” and “nigger” and “making other remarks.”¹⁵⁰ Allen also blocked Sweezer in the parking lot with his truck and spit at her several times when she walked by.¹⁵¹ When Sweezer arrived at work, Allen would “follow her to where she parked her car, block her in with his car, display weapons, and follow her or try to hit her with his vehicle.”¹⁵²

The district court granted summary judgment to the defendant on Sweezer’s claim, and the Sixth Circuit affirmed. As to Sweezer’s experiences with Allen, the court explained its view that while “[i]ndisputably improper, Allen’s comments were brief and isolated, and [were] more indicative of a personality conflict than of racial animus.”¹⁵³

Like the district court in *Hicks*, the court in *Sweezer* seemed to be looking for generalized group-based hostility, what it called “racial animus.”¹⁵⁴ When the relationship between Allen and Sweezer is isolated from historical and societal context in which blacks and black women are expected to remain in their place, the relationship begins to look “personal”

145. *Sweezer v. Mich. Dep’t of Corr.*, No. 99-1644, 2000 U.S. App. LEXIS 21251, at *2 (6th Cir. Aug. 11, 2000) (per curiam) (unpublished table decision).

146. *Id.* at *5, *9.

147. *Id.* at *4 (internal quotation marks omitted).

148. *Id.*

149. *Id.* at *4–5.

150. *Id.* at *5 (internal quotation marks omitted).

151. *Id.* at *9.

152. *Id.*

153. *Id.* at *15–16. According to the court, “Sweezer’s . . . confrontations with Allen . . . bespeak an acrimonious relationship and not racial tension.” *Id.* at *16.

154. In *Hicks*, the district court pointed to the demographic makeup of the defendant’s workforce as support for its finding that the animosity behind the “crusade” was personal rather than racial. *Hicks v. St. Mary’s Honor Ctr.*, 756 F. Supp. 1244, 1252 (E.D. Mo. 1991), *rev’d*, 970 F.2d 487 (8th Cir. 1992), *vacated*, 509 U.S. 502 (1993). This suggests that the court was looking for hostility by the entity toward members of plaintiff’s group. Unlike the district court in *Hicks*, the *Sweezer* court was not sitting as the factfinder; it granted summary judgment against the plaintiff on this evidence. *See Sweezer*, 2000 U.S. App. LEXIS 21251, at *1.

rather than racial. This story will sound familiar to some readers. A male supervisor repeatedly comments on a female subordinate's dress or appearance and asks her out on dates or for sexual encounters. For years, the supervisor's behavior in this relationship was considered "personal," stemming from emotions related to sexual desire and attraction rather than being considered a form of sex-based discrimination.¹⁵⁵ Only when courts began to view the relationship in light of the long history of women being expected to serve men at work rather than to work as their equals—and in light of the work environment that it created for the victim and for women as a group—did they begin to see the behavior as discriminatory.¹⁵⁶

The tendency of courts to view an emotionally charged, acrimonious relationship as solely "personal" and therefore "nonracial" is arguably reinforced by prevailing conceptions of modern discrimination as the product of cool, unconscious bias and stereotyping rather than the product of hotter emotion in interaction and relations.¹⁵⁷ Racial animus in this account is often seen as consistent and group-based. It is not seen to drive acrimony in individualized relationships. In one case, the court pointed to the fact that the plaintiff "admitted" in his EEO precomplaint counseling form that the supervisor who he alleged had discriminated against him had been "very very mean" to the plaintiff.¹⁵⁸ The court seemed to think that the plaintiff's acknowledgement that his supervisor was "mean" to him amounted to an admission that the supervisor was mean simply because he "disliked" the plaintiff, and not for reasons involving race.¹⁵⁹

155. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 25 (1979) ("These events have seldom been noticed, much less studied; they have almost never been studied as sexual harassment.").

156. Even today, courts struggle with these cases. *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (accepting a formal equality view of sex harassment such that "desire-based" man-on-woman harassment is considered because of sex); *Henthorn v. Capitol Comm'ns, Inc.*, 359 F.3d 1021, 1027–28 (8th Cir. 2004) (holding that a supervisor asking out the plaintiff every day and calling late at night were not sufficiently severe or pervasive so as to alter conditions of employment). For more on the use of the severe or pervasive requirement in hostile work environment law as a filter for unreasonable emotion, see *infra* notes 171–74 and accompanying text.

157. The tendency to separate discrimination from emotion might also be tied to popular frames and language of emotion. *See, e.g.*, Vincent R. Waldron, *Relational Experiences and Emotion at Work*, in *EMOTION IN ORGANIZATIONS*, *supra* note 16, at 64, 65 (urging researchers to "broaden the vocabulary of emotion at work").

158. *Taylor v. Potter*, No. 99 Civ. 4941 (AJP), 2004 U.S. Dist. LEXIS 15992, at *23 (S.D.N.Y. Aug. 16, 2004) (internal quotation marks omitted), *aff'd*, 148 F. App'x 33 (2d Cir. 2005).

159. *Id.* at *53. *See also* *Roberts v. Potter*, 378 F. App'x 913, 914–15 (11th Cir. 2010) ("[Plaintiff] offered no evidence of discriminatory animus and conceded in her opposition to summary judgment that [her supervisor] 'had a personal problem' with [her].").

3. Judging Emotion in Interracial Interaction: Granted, It's Racial, but It's Unreasonable

The Supreme Court has recognized that a hostile work environment can build over time and can amount to a Title VII violation without culminating in an identifiable, discrete adverse employment action.¹⁶⁰ The extended temporal frame of hostile work environment theory arguably offers greater potential than existing individual disparate treatment law for recognizing the role of racial emotion in discrimination, whether emotion in the person or persons creating the hostile environment or in the person or persons experiencing the hostile environment. Nonetheless, hostile work environment theory also leaves much racial emotion outside of antidiscrimination concern.

Emotion on the part of the harasser or harassers seems a natural component of a hostile work environment, particularly in the sex context, for emotion is often tied in American culture to sexual acts. Courts are willing to assume that sexual male-on-female harassment, at least, is sex-based.¹⁶¹ In the race context, however, courts tend to require evidence of emotion—specifically group-based emotion or animus—on the part of the person or persons creating the hostile work environment. Courts are quick to deem harassing conduct in race cases (for example, use of “boy”) nonracial and to separate that “nonracial” conduct for purposes of legal analysis from racial conduct.¹⁶² Nooses, use of the word “nigger,” and KKK signs are not assumed by all courts to be racial.¹⁶³ The *Sweezer* case from above also exemplifies this tendency.¹⁶⁴

160. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (“[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances.”).

161. *Oncale*, 523 U.S. at 80 (“Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity . . .”).

162. *See, e.g.*, *Roberts v. Fairfax Cnty. Pub. Sch.*, 858 F. Supp. 2d 605, 609–11 (E.D. Va. 2012) (holding that an African-American teaching assistant had failed to state a hostile work environment claim despite two distinct uses of racial epithets against her at work); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1713–20 (1998) (discussing disaggregation in the sexual harassment context). Plaintiffs in racial harassment cases often cite less favorable treatment in work assignments and conditions as part of a hostile work environment. *See* Pat K. Chew, *Freeing Racial Harassment from the Sexual Harassment Model*, 85 OR. L. REV. 615, 626–27 (2006) (finding that 65.8 percent of plaintiffs in one study cited less favorable treatment in work assignments and conditions as a form of harassment).

163. *See, e.g.*, *Sweezer v. Mich. Dep’t of Corr.*, No. 99-1644, 2000 U.S. App. LEXIS 21251, at *5–6, *16 (6th Cir. Aug. 11, 2000) (per curiam) (unpublished table decision) (affirming the district court’s grant of summary judgment for defendant on the plaintiff’s claim involving allegations of a racial hostile work environment, including being called a “colored woman,” “bitch,” and “nigger” and comments that the plaintiff, a prison guard, was sleeping with black prisoners with her “inhumane ass,” on the ground that the plaintiff had failed to link the subordinates’ refusal to follow the plaintiff’s orders

Emotion on the part of those experiencing a hostile work environment is also expected in hostile work environment law. *Rogers v. EEOC*, the first case in which a court articulated the concept of a hostile work environment as a violation of Title VII, involved an optometrist's segregation of patients along national origin and racial lines.¹⁶⁵ The Fifth Circuit held in *Rogers* that segregating patients could violate an employee's rights under Title VII, explaining that "employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse."¹⁶⁶ The Supreme Court later adopted this view in *Meritor Savings Bank v. Vinson*,¹⁶⁷ a sexual harassment case. But the Court elaborated that in order to succeed on a hostile work environment claim, a plaintiff must show that the discriminatory conduct was "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."¹⁶⁸ An employee's terms and conditions are altered, as the Court held several years later in *Harris v. Forklift Systems*, "[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive."¹⁶⁹ To succeed in a claim of hostile work environment, therefore, a plaintiff must show not only that she was subjectively offended, but also that a reasonable person would have found the environment hostile or abusive.¹⁷⁰

The requirement from *Harris* that the environment "would reasonably be perceived . . . as hostile or abusive" works as a filter against what the courts think of as unreasonable emotional responses to mildly offensive conduct or "mere offensive utterance."¹⁷¹ Courts applying the reasonable person, severe or pervasive requirement set a high bar for recognizing

and the management's failure to back her up "to racial animus"); *Smith v. Leggett Wire Co.*, 220 F.3d 752, 760 (6th Cir. 2000) (holding that "racial animus cannot be inferred" from evidence of a racial slur, a racially offensive cartoon passed around, a racist joke, and a supervisor's reference to black employee as a "gorilla"). *But see* *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1141-42 (10th Cir. 2008) (reversing the district court's grant of summary judgment for the defendant in part because a reasonable jury could find that a noose hanging from a clock at work "stemmed from racial animus").

164. *See supra* text accompanying notes 145-53.

165. *Rogers v. EEOC*, 454 F.2d 234, 238-39 (5th Cir. 1971).

166. *Id.* at 238.

167. *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 65-67 (1986).

168. *Id.* at 67 (alteration in original) (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)) (internal quotation marks omitted).

169. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

170. *Id.* at 21.

171. *Id.* at 22-23. According to *Harris*, the inquiry requires consideration of "all the circumstances" from the standpoint of a reasonable person: "These [circumstances] may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 22.

racial emotion in antidiscrimination discourse through hostile work environment law. In the recent case of *Pratt v. Austal, U.S.A., L.L.C.*, for example, the plaintiff testified that he overheard three white coworkers saying “[h]ow him and the nigger got into it yesterday, and he’ll hang that nigger and shoot that nigger, and all that kind of stuff. Just going on and on. And . . . calling them ‘monkeys’ and stuff like that.”¹⁷² He also presented evidence that several white workers wore t-shirts and bandanas bearing the Confederate flag to work and that he saw racial epithets in graffiti on the bathroom walls and stalls and toolboxes, including things like “how many niggers do you see here wearing white hats” and “why don’t niggers use aspirin, because they don’t want to pick the cotton out of the top.”¹⁷³ The court held that although there was sufficient evidence that the plaintiff subjectively perceived his work environment to be racially hostile, the plaintiff’s perception was not objectively reasonable.¹⁷⁴

Similarly, in *Barrow v. Georgia Pacific Corp.*,¹⁷⁵ the Fifth Circuit affirmed the district court’s grant of summary judgment on plaintiff Curtis Green’s race-based hostile work environment claim. Green testified that he had seen “displays of the rebel flag on tool boxes and hard hats, the letters ‘KKK’ on a bathroom wall and on a block-saw console, and a noose in another employee’s locker.”¹⁷⁶ He also testified that a superintendent “called [him] ‘nigger’ three times in one year, repeatedly called him ‘boy,’ and told him two or three times that he was going to kick Green’s ‘black ass,’” and that another supervisor “called him a ‘nigger’ and told him that if he looked at ‘that white girl’ he would ‘cut’ him.”¹⁷⁷ According to the court, although these incidents were “discriminatory and offensive,” Green had not presented sufficient evidence that the workplace was “permeated with ‘discriminatory intimidation, ridicule, and insult’ that [was] ‘sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment.’”¹⁷⁸

172. *Pratt v. Austal, U.S.A., L.L.C.*, No. 08-00155-KD-N, 2011 U.S. Dist. LEXIS 82736, at *9 (S.D. Ala. July 27, 2011) (alteration and ellipses in original) (internal quotation marks omitted).

173. *Id.* at *11–12 (internal quotation marks omitted).

174. *Id.* at *15.

175. *Barrow v. Ga. Pac. Corp.*, 144 F. App’x 54 (11th Cir. 2005).

176. *Id.* at 57.

177. *Id.*

178. *Id.* at 57–58 (second alteration in original) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). See also *White v. Gov’t Emp. Ins. Co.*, 457 F. App’x 374, 380–81 (5th Cir. 2012) (stating supervisor’s reference to African American client as a “nigger” and to office in which the plaintiff worked as a “ghetto” or “FEMA trailer” did not rise to the level of severity required for a hostile work environment); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1257 (8th Cir. 1981) (holding that racial slurs did not rise to the level of a hostile work environment and stating that “[s]uch racial slurs . . . were largely the result of individual attitudes and relationships which, while certainly not to be condoned,

Across areas of employment discrimination law, courts developing and applying the law close racial emotion out of antidiscrimination discourse. The cases discussed in this part are extreme, involving racial emotions that are likely to be highly charged as well as antagonistic and hostile behavior. Nonetheless, the cases and the courts' reactions to the racial emotions exhibited in the cases also suggest a deeper reluctance on the part of courts and the law to acknowledge the role that much more common subtle anxieties and negative emotions can play in fostering discrimination and inequality at work.

Closing racial emotion out of antidiscrimination discourse is problematic, among other reasons,¹⁷⁹ because it serves as a signal to regulated entities that racial emotion and resulting workplace relations are unimportant to the project of reducing discrimination and inequality. The next section shows that there is reason to believe that organizations are doing little, if anything, to create conditions for positive racial emotion at work. Instead, they tend to close space for developing positive racial emotion by seeking to cleanse the workplace of emotion generally and by failing to identify conditions for positive relations as a diversity imperative.

B. ORGANIZATIONS: CLOSING SPACE FOR RACIAL EMOTION

If the law tends not to see or account for relations and racial emotion, what about organizations? Is there reason to expect that organizations are providing space and conditions for positive racial emotion and relations in the workplace? Intuitively, it seems reasonable to expect that most employers would prefer positive racial emotion and interracial relations to negative. The turn toward organizational culture in the managerial literature in the 1980s and the more recent rise of the business case for valuing and managing diversity starting in the 1990s might also lead one to expect that organizations are already attentive to developing conditions for positive interracial relationships at work. This section takes a closer look at the organizational approach to racial emotion at work, concluding that even

simply [did] not amount to violations of Title VII"); *Chavez v. City of Osceola*, 324 F. Supp. 2d. 986, 997 (S.D. Iowa 2004) (quoting *Johnson*, 646 F.2d at 1257, and requiring a "steady barrage of opprobrious racial comment"); Pat K. Chew, *Seeing Subtle Racism*, 6 STAN. J. C.R. & C.L. 183, 195–98 (2010) (describing additional cases in which courts concluded that incidents of racist acts did not rise to the level of racial harassment). Outside of the South where nooses and use of the term "nigger" are less frequent courts nonetheless take a similar high-bar approach to race-based hostile work environment claims. Cf. Chew, *supra* note 162 (providing a comparative analysis of outcomes of sexual harassment and racial harassment proceedings showing that plaintiffs in sexual harassment cases fare better than plaintiffs in racial harassment cases).

179. See *infra* Part. III.C.

as they increasingly seek to capitalize on worker emotion and to manage diversity in their workforces, organizations have not expanded their equality or business concerns to include interracial relations and emotion within those relations. On the contrary, organizations continue to close space for developing positive racial emotion at work by seeking to cleanse the workplace of emotion, racial emotion included.

1. The Backdrop: Emotion and Work

Historically, since at least the early 1900s when the organizational theory of scientific management took hold, leaders of organizations have seen emotion as something that properly lays outside the firm.¹⁸⁰ Work is seen as the realm of rational order, workers the cogs that turn the machine.¹⁸¹ As Max Weber famously described the virtue of bureaucracy:

Its specific nature . . . develops the more perfectly the more bureaucracy is “dehumanized,” the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational, and emotional elements which escape calculation. This is the specific nature of bureaucracy and it is appraised as its special virtue.¹⁸²

Rationality juxtaposed against and valued over emotion still prevails in organizational theory and managerial literature.¹⁸³ Nonetheless, since the early 1980s, management theory has taken a marked turn toward attending to the human side of workers. Two best-selling books, *Theory Z: How American Business Can Meet the Japanese Challenge* (1981) by William Ouchi, and *In Search of Excellence: Lessons from America's Best-Run Companies* (1982) by Thomas J. Peters and Robert Waterman, Jr., set off a swell of managerial interest in organizational culture as a way of influencing workers by enhancing their emotional commitment to the

180. See generally ROBERT KANIGEL, *THE ONE BEST WAY: FREDERICK WINSLOW TAYLOR AND THE ENIGMA OF EFFICIENCY* (1997) (describing the influence of Frederick Winslow Taylor on organization of work and management of workers). Some accounts suggest that even Frederick Winslow Taylor sought to harmonize management and worker interests with his scientific management approach. See Lucy Taksa, *Scientific Management: Technique or Cultural Ideology?*, 34 J. INDUS. REL. 365, 374–75 (1992).

181. For a detailed description of this view and an argument that the view is tied to organizational efforts to cleanse the workplace of sex and sexuality, see Schultz, *supra* note 20, at 2072–74.

182. *Id.* at 2073 (ellipses in original) (quoting MAX WEBER, *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 215–16 (H.H. Gerth & C. Wright Mills eds. and trans., Routledge 1991) (1948)). For another, similar account, see JON ELSTER, *ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS* 284 (1999) (describing the traditional view that emotions interfere with rational choice, that they were “sand in the machinery of action”).

183. See Fineman, *supra* note 16, at 10–12 (discussing differing views of the interplay between emotion and rationality).

firm.¹⁸⁴ These books predicted that more emotionally committed workers would exhibit more organizational citizenship behavior, which would lead to a better bottom line.¹⁸⁵ The authors emphasized that humans, and not just businesses, must be managed.¹⁸⁶ Indeed, Ouchi may have borrowed the term “Theory Z” from the work of humanistic psychologist Abraham Maslow, who used it to refer to the highest levels of personal satisfaction that an individual can achieve.¹⁸⁷

The focus on emotion in the managerial press spawned by the organizational culture revolution, however, seems neither to have diluted the image of the act of work itself as passionless and relationless, nor opened pathways for greater focus on conditions for relations as they are experienced at work. The focus instead has been and continues to be primarily on emotion as it relates to the firm, particularly its effect on individualistic notions of job satisfaction and firm commitment, rather than on emotion as it is experienced in day-to-day interpersonal interaction at work.¹⁸⁸

2. The Search for Emotional Intelligence

In the 1990s, the managerial literature turned to emotion in a different way. It began to urge organizations to pay attention to emotion through assessment and nurturing of their employees’ “emotional intelligence.” Emotional intelligence became popular in mainstream and managerial literature with the publication of Daniel Goleman’s book, *Emotional Intelligence*,¹⁸⁹ which hit the New York Times bestseller list in 1996.¹⁹⁰ An

184. WILLIAM G. OUCHI, *THEORY Z: HOW AMERICAN BUSINESS CAN MEET THE JAPANESE CHALLENGE* (1981); THOMAS J. PETERS & ROBERT H. WATERMAN, JR., *IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA’S BEST-RUN COMPANIES* (1982).

185. See OUCHI, *supra* note 184, at 98; PETERS & WATERMAN, *supra* note 184, at 73–86.

186. OUCHI, *supra* note 184, at 4 (“[I]nvolved workers are the key to increased productivity.”); PETERS & WATERMAN, *supra* note 184, at 39, 67–86 (“Treating people—not money, machines or minds—as the natural resource may be the key to it all.”).

187. MARTIN PARKER, *ORGANIZATIONAL CULTURE AND IDENTITY: UNITY AND DIVISION AT WORK* 14 (2000).

188. See Sigal G. Barsade & Donald E. Gibson, *Why Does Affect Matter in Organizations?* *ACAD. MGMT. PERSPECTIVES*, Feb. 2007, at 36, 39–42 (describing research on emotion in organizations with no mention of emotion in interracial interaction).

189. DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* (1995).

190. See GERALD MATTHEWS, MOSHE ZEIDNER & RICHARD D. ROBERTS, *EMOTIONAL INTELLIGENCE: SCIENCE AND MYTH* xv (2003) [hereinafter *SCIENCE & MYTH*]. In the same year, *Time* magazine devoted an article to the topic. Nancy Gibbs, *Emotional Intelligence: The EQ Factor*, *TIME*, Oct. 2, 1995. Numerous books followed, as well as an explosion of academic research on the concept. See Stephen Fineman, *Commodifying the Emotionally Intelligent*, in *EMOTION IN ORGANIZATIONS*, *supra* note 16, at 101; Con Stough, Donald H. Saklofske & James D.A. Parker, *A Brief Analysis of 20*

explosion of managerial and business literature as well as features in the popular presses and the academic community followed. Indeed, the wave of attention to emotional intelligence continues to this day.¹⁹¹

The concept of emotional intelligence is a promising one for workplace relations, including interracial relations and racial emotion. By one account, emotional intelligence refers to “the competence to identify and express emotions, understand emotions, assimilate emotions in thought, and regulate both positive and negative emotions in oneself and others.”¹⁹² From this, improving emotional competence and emotional understanding in self and others seems like it could go a long way toward improving racial emotions experienced in interracial interactions and ultimately interracial relationships at work.

However, scientists have expressed serious reservations about the concept, certainly as it has been portrayed in the popular and managerial literature, and even as it is developed in more scientific realms.¹⁹³ As one commentator recently concluded, “Despite the important role attributed to a wide array of emotional competencies in the workplace, there is currently only a modicum of research supporting the meaningful role attributed to

Years of Emotional Intelligence, in ASSESSING EMOTIONAL INTELLIGENCE: THEORY, RESEARCH, AND APPLICATIONS 3–8 (Con Stough et al. eds., 2009) (discussing the rise in the term’s use).

191. See, e.g., TRAVIS BRADBERRY & JEAN GREAVES, EMOTIONAL INTELLIGENCE 2.0 (2009).

192. SCIENCE & MYTH, *supra* note 190, at xv. For Goleman, those with emotional intelligence know their emotions, manage their emotions, motivate themselves, recognize emotions in others, and handle relationships. GOLEMAN, *supra* note 189, at 43–44.

193. See SCIENCE & MYTH, *supra* note 190, at 28–29 (“[T]here are significant problems in the conceptualization and assessment of EI. We cannot even be sure that different measures of EI are assessing the same underlying construct. The personal attribute that is the target of measurement efforts is hazily defined, largely in terms of everyday ‘implicit’ qualities, rather than constructs explicitly derived from psychological theory.”); Adrian Furnham, *The Importance and Training of Emotional Intelligence at Work*, in ASSESSING EMOTIONAL INTELLIGENCE: THEORY, RESEARCH, AND APPLICATIONS, *supra* note 190, at 137, 137–38 (arguing that the claims that emotional intelligence is a better predictor than IQ of success at work is unsupported by evidence and that emotional intelligence can and should be trained at work); Moshe Zeidner, Gerald Matthews & Richard D. Roberts, *Emotional Intelligence in the Workplace: A Critical Review*, 53 APPLIED PSYCHOL. 371, 372 (2004) (emphasizing the “scant, and sometimes highly controversial, empirical evidence used to support the importance of EI in the workplace”). Other academic commentators have been less critical and have seen more potential for emotional intelligence. See, e.g., Peter J. Jordan, Jane P. Murray & Sandra A. Lawrence, *The Application of Emotional Intelligence in Industrial and Organizational Psychology*, in ASSESSING EMOTIONAL INTELLIGENCE: THEORY, RESEARCH, AND APPLICATIONS, *supra* note 190, at 171, 184 (linking emotional intelligence with employee behavior and work performance, and recommending more rigorous empirical research). For a scholarly review of studies from 1990 to 2007 on emotional intelligence, defined as the ability to carry out accurate reasoning about emotions and the ability to use emotions and emotional knowledge to enhance thought, and description of the scope of the field of emotional intelligence today, see John D. Mayer, Richard D. Roberts & Sigal G. Barsade, *Human Abilities: Emotional Intelligence*, 59 ANN. REV. PSYCHOL. 507 (2008).

[Emotional Intelligence] (and nested emotional competencies) in determining occupational success.”¹⁹⁴

Moreover, the business literature paints emotional intelligence as a personal attribute for individual work success and well-being rather than placing positive relationships with others as a goal directly.¹⁹⁵ Emotional IQ tests have been developed, and personnel departments are urged to screen for emotional intelligence.¹⁹⁶ Although we might expect that individuals who are socially adept will be more likely to manage interactions in ways that result in positive relationships (at least in some circumstances), the literature makes no mention of interracial interaction or what is to be done with negative emotion when it does arise out of difference or otherwise in day-to-day relations. Devoting organizational resources to identifying individuals with high levels of “emotional IQ” seems likely to do little on its own to create conditions for positive racial emotion in interracial interaction, and may actually lead to institutionalized value systems that are more critical of those individuals who express or experience negative emotions in relationships at work.

3. Managing Diversity with Diversity Narratives

Employers have also begun to acknowledge the reality of racial diversification in the American workforce by instituting measures to manage diversity in ways that reflect an organizational approach to racial emotion. Among organizational measures responsive to increased diversity is the adoption of an express diversity narrative that states an organization’s message about how best to approach—and experience—diversity in the workplace.¹⁹⁷ The two most prevalent narratives in the American

194. Zeidner, Matthews & Roberts, *supra* note 193, at 393.

195. For a critique of the movement as focused on individuals and individual control of emotion, see Fineman, *supra* note 190, at 102–05.

196. See SCIENCE & MYTH, *supra* note 190, at 15–20 (describing these tests). In this way, emotional intelligence follows the path of IQ. See Fineman, *supra* note 190, at 109 (“IQ labelling has been accused of causing ‘immense damage to individuals and groups who are stigmatized as intellectually inferior by psychological tests that are given more credibility than they deserve.’ Emotional intelligence falls into IQ’s shadow. Its mixed, often vague measures, are employed as a ‘discourse technology,’ where appropriated social scientific, or quasi-scientific, knowledge is used to powerfully disseminate a particular creed about emotions.” (citations omitted)).

197. Flannery G. Stevens, Victoria C. Plaut & Jeffrey Sanchez-Burks, *Unlocking the Benefits of Diversity: All-Inclusive Multiculturalism and Positive Organizational Change*, 44 J. APPLIED BEHAV. SCI. 116, 119–22 (2008). Firms often express their diversity narrative through human resources, training, and promotional materials. *Id.* An organization’s diversity narrative not only communicates to individuals; it serves as a framework for policies and practices and as a guiding ideology about how people should behave in diverse settings. *Id.* Of course, an organization’s diversity narrative may also change in implementation. *Id.*

workforce today are colorblindness and multiculturalism.¹⁹⁸ Although research suggests that the multiculturalism narrative has substantially more benefits for equality than the colorblindness narrative,¹⁹⁹ neither of the prevailing narratives acknowledges racial emotion, or even relations; nor does either adequately set conditions for developing positive racial emotion at work.

The colorblindness narrative of diversity is exemplified by the idea of the “melting pot” in American society.²⁰⁰ It emphasizes that people are at core the same, that racial categories should be ignored or avoided, and that differences should be assimilated into an overarching unifying category, usually that of an employee of the particular company. Recognition of race and racial identities under this narrative is viewed as negative and to be avoided.²⁰¹ Research shows that the colorblindness narrative is often perceived as exclusionary by racial minorities and is also associated with higher levels of racial bias on the part of whites.²⁰²

The multiculturalism narrative explicitly acknowledges differences among groups and “promotes the notion that differences associated with social identities should be valued and even celebrated.”²⁰³ Numerous studies show that a multiculturalism narrative can result in lower racial bias and greater acceptance of others than a colorblindness narrative, as well as an increase in perspective-taking.²⁰⁴ Nonetheless, multicultural initiatives are often met with resistance by whites, who feel excluded.²⁰⁵ Some research suggests, moreover, that multiculturalism narratives can lead to increased stereotyping and normative expectations that racial minorities behave according to those stereotypes.²⁰⁶

198. Victoria C. Plaut et al., “What About Me?”: *Perceptions of Exclusion and Whites’ Reactions to Multiculturalism*, 101 J. PERSONALITY & SOC. PSYCHOL. 337, 338–39 (2011) (describing the two dominant diversity models).

199. *Id.* at 338.

200. *Id.*

201. *Id.* See also Christopher Wolsko et al., *Framing Interethnic Ideology: Effects of Multicultural and Color-Blind Perspectives on Judgments of Groups and Individuals*, 78 J. PERSONALITY & SOC. PSYCHOL. 635, 649 (2000) (“When operating under a color-blind set of assumptions, social categories are viewed as negative information to be avoided . . .”).

202. Plaut et al., *supra* note 198, at 338; Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. EXPER. SOC. PSYCHOL. 417, 421–22 (2004); Stevens, Plaut & Sanchez-Burks, *supra* note 197, at 120.

203. Plaut et al., *supra* note 198, at 338.

204. See Victoria C. Plaut, *Diversity Science: Why and How Difference Makes a Difference*, 21 PSYCHOL. INQUIRY 77, 88–89 (2010) (describing studies).

205. See Plaut et al., *supra* note 198, at 339.

206. See, e.g., Angelica S. Gutiérrez & Miguel M. Unzueta, *The Effect of Interethnic Ideologies on the Likability of Stereotypic vs. Counterstereotypic Targets*, 46 J. EXPERIMENTAL SOC. PSYCHOL.

Most importantly for organizational conditions for racial emotion and interracial relations, multicultural narratives tend to frame diversity as a matter of celebrating static identity states rather than of relational experience that requires attention to and understanding of others and their perspectives.²⁰⁷ Multiculturalism, in other words, does little to break through an overarching organizational approach that seeks to close emotion, including racial emotion, out of the workplace.

C. WHAT IS WRONG WITH THE PREVAILING APPROACH

The current approach to racial emotion misses discrimination and disadvantage at work, and thus is likely to leave racial minorities worse off in terms of employment success than their white counterparts (making it a matter of concern for employment discrimination law). The current approach is also problematic in a broader sense because it is likely to leave society worse off by fostering negative rather than positive racial emotion and interracial relations at work.

1. Missed Discrimination and Disadvantage

To the extent that racial emotion is likely to produce discrimination and inequality at work, closing emotion out of antidiscrimination concern will leave racial inequality harms unaddressed. Because whites dominate positions of power in most workplaces, strained interracial relationships at work are likely to lead to fewer advancement opportunities for racial minorities. Social scientists have long documented a tendency on the part of individuals to prefer members of their own socially salient group,²⁰⁸ and the negative relational outcomes that result from strained interracial relations seem only likely to widen the gap created by this preference.

775, 779 (2010); Wolsko et al., *supra* note 201, at 648. Multiculturalism can also obscure power and structural inequality. See Joyce M. Bell & Douglas Hartmann, *Diversity in Everyday Discourse: The Cultural Ambiguities and Consequences of "Happy Talk"*, 72 AM. SOC. REV. 895, 905–07 (2007); Valerie Purdie-Vaughns & Ruth Dittmann, *Reflection on Diversity Science in Social Psychology*, 21 PSYCHOL. INQUIRY 153, 156–57 (2010) (critiquing multiculturalism on multiple grounds, including its tendency to reify social categories and its inconsistency with “on the ground” strategies individual African Americans use to achieve equality).

207. See Purdie-Vaughns & Dittmann, *supra* note 206, at 157 (“Multiculturalism risks reifying social categories—treating people as members of a group first and as individuals second.”); Bell & Hartmann, *supra* note 206, at 907–09 (finding that assimilationist assumptions and white normativity underlie multiculturalism and diversity talk in survey respondents).

208. See, e.g., Charles W. Perdue et al., *Us and Them: Social Categorization and the Process of Intergroup Bias*, 59 J. PERSONALITY & SOC. PSYCHOL. 475, 475, 482–83 (1990) (describing experimental subjects’ preference for in-group members over out-group members).

Moreover, the prevailing approach means that colorblindness, a prevailing microsocial avoidance strategy taken by whites, will dominate the relational frame for most interracial interactions at work, thus burying racial privilege and pushing the brunt of negative racial emotion onto racial minorities. Whites may experience anxiety in interracial interaction,²⁰⁹ but their strategy of colorblindness (refusing to see race or to publicly acknowledge racial difference or disadvantage) allows them to reduce that anxiety and, in most circumstances, to avoid more extreme racial emotions, like shame or embarrassment.²¹⁰ Racial minorities are left to raise racial issues, whether delicately or indelicately, and to face the negative consequences of doing so.²¹¹ Indeed, in this way racial emotion at work may operate much like gender emotion at work in that racial minorities, like women, are expected to do most of the emotional labor and to follow a script, here of colorblindness, that eases others' discomfort in cross-group interaction.²¹²

The negative racial emotion borne by racial minorities can take a material toll, both as it translates into poor relationships that can result in employment disadvantage and discrimination,²¹³ and also as it impacts health and performance on the job.²¹⁴ Research suggests that negative

209. See *supra* text accompanying notes 39–44.

210. There is also reason to believe that colorblindness extends from microsocial identity preservation to dominance. See EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 2–4, 123–25 (2003); Ryan Light, Vincent J. Roscigno & Alexandra Kalev, *Racial Discrimination, Interpretation, and Legitimation at Work*, 634 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 43 (2011) (describing the use of meritocracy—and formal meritocratic procedures and rhetoric—as an institutionalized cloak for inequality).

211. See, e.g., Cheryl R. Kaiser, *Dominant Ideology Threat and the Interpersonal Consequences of Attributions to Discrimination*, in *STIGMA AND GROUP INEQUALITY: SOCIAL PSYCHOLOGICAL PERSPECTIVES* 45, 47–50 (Shana Levin & Colette van Laar eds., 2006) (“[L]aboratory experiments showing that people who publicly attribute events to prejudice are disliked are consistent with retrospective survey research.”). Often, as in the introductory hypothetical, concerns about discrimination are raised indelicately, both because of pent-up emotion and lack of experience with conversation across difference.

212. HOCHSCHILD, *supra* note 16, at 7, 162–64 (discussing gendered emotional labor). For related arguments involving performance of identity, see generally Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000), and Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379 (2008) (considering the effects of workplace assimilation demands on the social equality goal of antidiscrimination law).

213. See Brodin, *supra* note 141, at 219–25 (describing cases involving judgments of personality and attitude).

214. See Major & O’Brien, *supra* note 32, at 406–11 (finding that the involuntary stress responses and voluntary coping efforts undertaken by stigmatized individuals lower self-esteem, achievement, and health); Toosi et al., *supra* note 1, at 4 (“Concerns about being a target of prejudice have grave consequences, not just for emotional well-being, but also for physical health and academic performance.”).

emotion in interracial interaction depletes cognitive functioning²¹⁵ and reduces performance of racial minorities who expect to be judged according to stereotypes.²¹⁶ Numerous studies have similarly documented the health-related consequences of experiencing (and perceiving) discrimination.²¹⁷ Perceived discrimination is associated with stress and mental health problems and also with physical ailments, such as headaches, gastrointestinal problems, and higher incidence of breast cancer and coronary artery calcification.²¹⁸ The reduced performance and health effects of negative racial emotion borne by racial minorities are likely to result in even greater disadvantage and discrimination at work as specific employment decisions are perceived as meritocratic and legitimate, based on poor(er) performance or health-related distractions. Moreover, the effects are likely to be felt well beyond the workplace, extending to the lives of working individuals, their families, and their communities.

2. Missed Opportunity

The current paradigm also misses an opportunity for organizations to create conditions that will generate positive racial emotions in whites and blacks alike and productive interracial working relationships. It simply is not possible to cleanse the workplace of racial emotion. Rather, as the research discussed in Part II reveals, closing racial emotion out of antidiscrimination discourse and seeking to cleanse the workplace of racial emotion is likely to inhibit positive racial emotion and connection. Unpleasant interactions, in turn, are likely to affect the ongoing relationship: awkward, strained interactions are likely to strengthen negative expectations regarding interracial interactions and accordingly increase anxiety as well as antagonistic and avoidant behavior in future interactions.²¹⁹

215. Shelton, Richeson & Vorauer, *supra* note 32, at 340–41.

216. Major & O'Brien, *supra* note 32, at 408–09.

217. See, e.g., Vickie M. Mays, Susan D. Cochran & Namdi W. Barnes, *Race, Race-Based Discrimination, and Health Outcomes Among African Americans*, 58 ANN. REV. PSYCHOL. 201, 209–10 (2007) (reviewing many emerging studies that suggest that health disadvantages in the African-American community are caused in part by discrimination's effect on brain functioning and physiological response).

218. Luisa N. Borrell et al., *Self-Reported Health, Perceived Racial Discrimination, and Skin Color in African Americans in the CARDIA Study*, 63 SOC. SCI. & MED. 1415, 1419–25 (2006) (linking racial discrimination with worse self-reported physical and mental health in African Americans); Teletia R. Taylor et al., *Racial Discrimination and Breast Cancer Incidence in US Black Women: The Black Women's Health Study*, 166 AM. J. EPIDEMIOLOGY 46, 48–52 (2007).

219. See Plant & Butz, *supra* note 45, at 835.

There is reason to believe, however, that racial emotion can be directed toward the positive by shaping the conditions in which interracial interaction takes place. For example, several lines of social science and organizational research suggest that, in contrast to the colorblind or multicultural narratives, there is an approach to diversity that can create conditions for developing positive racial emotion at work: one that focuses on integration and learning from difference.²²⁰ The idea behind this perspective toward diversity is that varied cultural backgrounds offer fertile material for thinking about how to organize and to carry out work together.²²¹

Diversity under this approach is not valued apart from its effect on others and on the organization as an opportunity to learn from difference.²²² In their work studying organizational approaches to diversity, David Thomas and Robin Ely identify an “integration-and-learning” perspective as most likely to enhance group functioning.²²³ Valerie Purdie-Vaughns, Claude Steele, and others have advanced a similar emphasis on creating an organizational environment of “identity safety” to reduce identity threat for racial minorities.²²⁴

This and other research on the performance of racially diverse teams expose the importance of organizational conditions that attend to power

220. See Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 ADMIN. SCI. Q. 229, 240 (2001) (defining an “integration-and-learning” approach as one that “links diversity to work processes—the way people do and experience the work—in a manner that makes diversity a resource for leaning and adaptive change”). Other researchers have studied similar approaches under different names. See, e.g., Lynn M. Shore et al., *Inclusion and Diversity in Work Groups: A Review and Model for Future Research*, 37 J. MGMT. 1262, 1279–80 (2011) (emphasizing the development of conditions for inclusion as involving belonging and uniqueness in part for its effect on relations); Purdie-Vaughns & Ditlemann, *supra* note 206, at 157 (proposing an approach that creates conditions for “identity safety,” which “emphasizes that people from different social groups and backgrounds can experience the same social contexts in similar ways”); Stevens, Plaut & Sanchez-Burks, *supra* note 197, at 116, 124 (proposing an “all-inclusive multiculturalism” that focuses on the formation of “high-quality relationships among dissimilar others—that is, relationships that engender positive affect, encourage ongoing learning, are resilient, have longevity, and create ‘the capacity for individuals to engage, challenge, and support one another with clarity and confidence’” (internal citations omitted)).

221. See, e.g., Ely & Thomas, *supra* note 220, at 242–43 (discussing the central tenets and advantages of an integration-and-learning approach to diversity).

222. See Stevens, Plaut & Sanchez-Burks, *supra* note 197, at 119.

223. See Ely & Thomas, *supra* note 220, at 240–43.

224. See Purdie-Vaughns & Ditlemann, *supra* note 206, at 157; Valerie Purdie-Vaughns et al., *Identity Contingency Threat: How Diversity Cues Signal Threat or Safety for African-Americans in Mainstream Settings*, 94 J. PERSONALITY & SOC. PSYCHOL. 615, 615–17, 626–27 (2008).

dynamics in race relations.²²⁵ Research shows that racially diverse groups often have more negative outcomes than racially homogeneous groups, but that they do not consistently experience more express conflict.²²⁶ This suggests that behaviors more subtle than outright antagonism are affecting the productivity and efficacy of the group. In one recent study of a diversified financial services company, for example, Ely and her colleagues showed that creating conditions in which racial minorities in particular view the learning environment as supportive can lead to better team performance.²²⁷ Because the identity threat to racial minorities is task-relevant (for example, fear of being the target of prejudice, being assessed according to low-status stereotypes), and the identity threat to whites is not (for example, fear of being seen as biased), the researchers hypothesized that racial minorities would be less likely than their white counterparts to speak up about task-related matters in a learning environment that they viewed as unsupportive.²²⁸ Further, they predicted that this outcome would negatively affect team performance regardless of whether whites in the group viewed the learning environment as supportive.²²⁹ They also hypothesized that when both minority and white team members viewed the learning environment as supportive, the relationship between racial diversity and performance would be positive.²³⁰ The results of their study supported these predictions.²³¹

Moreover, Ely and colleagues found that racial diversity magnified the positive effect.²³² In other words, the most racially diverse teams in which team members viewed the learning environment as supportive were the most productive teams. The researchers hypothesized that the magnified effect might have been due to “process gains: the experience of cross-racial

225. See Erica Gabrielle Foldy, Peter Rivard & Tamara R. Buckley, *Power, Safety, and Learning in Racially Diverse Groups*, 8 ACAD. MGMT. LEARNING & EDUC. 25, 25 (2009) (theorizing the importance of understanding power as it operates in group dynamics). Specifically, it is important to see power dynamics in society and within the workplace. See Ely & Thomas, *supra* note 220, at 231.

226. Foldy, Rivard & Buckley, *supra* note 225, at 25.

227. Robin J. Ely, Irene Padavic & David A. Thomas, *Racial Diversity, Racial Asymmetries, and Team Learning Environment: Effects on Performance*, 33 ORG. STUD. 341, 355 (2012).

228. *Id.* at 344–47.

229. *Id.*

230. *Id.*

231. *Id.* at 353. The researchers assessed employees' views on the team's learning environment by including the following four items in the annual employee attitude-satisfaction survey conducted at the company: “(1) ‘My work group has a climate in which diverse perspectives are valued,’ (2) ‘I feel encouraged to come up with new and better ways of doing things,’ (3) ‘My supervisor encourages a diversity of styles and approaches,’ and (4) ‘Sufficient effort is made to get the opinions and thinking of people who work here.’” *Id.* at 348. Employees rated each item on a five-point scale. *Id.*

232. *Id.* at 353.

learning itself may result in a boon to performance . . . because overcoming the racial divisiveness endemic to the wider society may strengthen members' relationships, which should increase the team's general resilience in the face of conflict and other stressors."²³³

This research, taken together with other research on the effects of context on experience of racial emotion and relational outcomes,²³⁴ sets important groundwork for law and organizations seeking to create conditions for equal employment opportunity and improved interracial relations.

IV. OPENING SPACE FOR RACIAL EMOTION

To open space for developing positive racial emotion in the workplace, the law needs both to recognize racial emotion as a source of discrimination and to trigger structural and cultural changes within organizations that will create conditions for conversation and learning across difference. Yet there are practical limits to existing individualized legal theories. Moreover, there is an inherent tension between recognizing racial emotion as a source of discrimination to which legal liability attaches and opening space for building positive interactions and relationships across difference. In this part, I propose a shift in overarching conceptual frame as well as several relatively modest specific doctrinal changes to individualized theories under Title VII with the aim of drawing attention to racial emotion as it operates in ongoing relations to produce discrimination in the workplace. I stop short, however, of advocating for expanded individualized legal theories that would tamp down on all or even most racial behavior and instead urge a turn to systemic theories of discrimination.

A. SEEING AND ADDRESSING RACIAL EMOTION AS A SOURCE OF DISCRIMINATION

1. Expanding the Conception of Discrimination to Include Relations and Racial Emotion

There are a number of ways in which the law can better see and address racial emotion as a source of discrimination in the workplace. In this section, I propose several changes that would usher in a new approach

233. *Id.* at 355. The data, however, did not allow the researchers to adjudicate between the process gains possibility and the possibility that the magnified effect resulted from a "greater range of ideas made available by virtue of team members' varied racial group experiences." *Id.*

234. *See supra* text accompanying notes 71–78.

to racial emotion in the workplace. The overarching goal is conceptual. Judges, lawyers, members of the media, and laypeople can better conceptualize discrimination as a problem not just of biases that operate in the minds of specific, identifiable decisionmakers at discrete moments in time, but as also a problem of relations that are capable of being derailed by negative racial emotions as well as cognitive biases. Acknowledging that relations can be a root of discrimination and group-based disadvantage is an important first step in addressing racial emotion and opening opportunities for developing positive racial emotion in the workplace. Acknowledging racial emotion, and not just cognitive biases, as a source of disadvantage and inequality within those relations is the next step.

Following from this conceptual shift, courts should resist the temptation to assume (or presume) that an acrimonious workplace relationship is solely personal, and therefore nonracial. Racial emotion is personal and racial. It is experienced by people in interracial interaction and can result in relationships that exhibit emotionally laden, hostile behavior. Absent evidence that an acrimonious or otherwise emotionally laden relationship is nonracial, such as evidence that hostility developed after a specific, nonracial incident,²³⁵ courts should permit an inference of discrimination to follow from animosity in interracial relations.²³⁶

To say that racial emotion should be conceptualized as a source of workplace inequality or discrimination, however, is not to say that racial emotion itself should be actionable in all circumstances, or even that doctrinal tools used within existing individual disparate treatment law that serve to close racial emotion out of antidiscrimination discourse (such as the stray remarks doctrine) can or should be categorically set aside. Individual disparate treatment theory, even as most broadly understood, requires a showing of causation—that race was a motivating factor in an identified adverse employment decision—and this reality is likely to set a practical limit on many cases involving racial emotion.²³⁷

235. See, e.g., *Pipkins v. City of Temple Terrace*, 267 F.3d 1197, 1200–01 (11th Cir. 2001) (holding that evidence of motivation by failed consensual sexual relationship and “disappointment [with the] failed relationship” suggested a nondiscriminatory reason for any different treatment).

236. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147–49 (2000) (holding that a prima facie case of discrimination under *McDonnell Douglas*, together with evidence from which a reasonable factfinder can find the employer’s proffered reason for the decision false, will be sufficient in most cases to support an inference of discrimination).

237. The plaintiff must be able to show that her race was at least a motivating factor in an adverse employment decision. See, e.g., *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006) (requiring a “material” adverse employment action).

2. Addressing Racial Emotion Through Behavior of Racial Assault

The overarching conceptual shift described above would nonetheless be aided by a simple categorical recognition of the relational behaviors that are most likely to trigger negative racial emotion, acrimonious relationships, and workplace inequality. These are the behaviors that are most disastrous to interracial relationships. I call this category of behavior “racial assault.” The next three proposed changes all involve behavior of racial assault, and they are all aimed at cabining the judicial tendency to ignore, categorize, and judge racial emotion in ways that render it invisible and outside of antidiscrimination concern.

What is behavior of racial assault? Behavior of racial assault should be defined legally as behavior that is expressively subordinating. Use of racially subordinating language, such as “nigger” or “boy” to refer to blacks,²³⁸ statements reflecting normative and / or descriptive race-based stereotypes about a person’s ability to do a job, such as “black people should stay in their place”²³⁹ or “that’s a lot of money for a black to count,”²⁴⁰ and other behavioral expressions of subordination and dominance, such as construction or display of nooses, would all be considered behaviors of racial assault.²⁴¹ The legal inquiry would turn not on state of mind of the person exhibiting behavior of racial assault, but on the message of subordination that it sends and the racial emotion that is likely to result.²⁴²

238. This would include many of the cases discussed in Part III.A.

239. *Slack v. Havens*, 522 F.2d 1091, 1092–93 (9th Cir. 1975) (involving statements such as “[c]olored people should stay in their places” and “[c]olored people are hired to clean because they clean better” (internal quotation marks omitted)).

240. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (involving a statement to a prospective African-American bank teller that counting a large sum of money was a big responsibility and “a lot of money . . . for blacks to have to count” (ellipses in original) (internal quotation marks omitted)).

241. Racial assault can be understood as a form of microaggression. *See* Davis, *supra* note 29, at 1565–68; Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCHOL. 271, 274 (2007) (describing “microassaults” as a form of “microaggression”). Although some scholars seem to incorporate an intent element into the definition of racial assault, *see* Sue et al., *supra*, at 274, the legal test for whether a certain behavior is a racial assault should depend on the social and historical context of a particular phrase or behavior, *see* D. Wendy Greene, *Pretext Without Context*, 75 MO. L. REV. 403, 420–22 (2010) (emphasizing the importance of context), and not on the intention or state of mind of the particular person exhibiting the behavior. *Cf.* *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1110 n.3, 1116 n.9 (9th Cir. 2004) (considering whether racial assault behavior was “motivated by racial hostility”).

242. The category of racial assault would not include all behavior that can be reasonably perceived as an expression of subordination or dominance, *see infra* Part IV.B., but rather would be limited to a relatively static list of extreme behaviors that tend to involve (and are generally perceived as involving) assault to subordinate or harm. The EEOC may have an important role to play in

The law should treat racial assault behavior as presumptively discriminatory and as constituting a hostile work environment.²⁴³ Behaviors of racial assault are presumptively racial and the emotion experienced by racial minorities subjected to these behaviors is presumptively reasonable, as a matter of policy as much as a matter of fact.²⁴⁴ Courts should not be permitted to substitute their own judgment about what the actor “intended” for a legal presumption in these cases.²⁴⁵

Further, the law should presume that adverse employment decisions made by someone who has exhibited racial assault behavior as to any individuals against whom the behavior was directed were motivated at least in part by race. The presumption should apply no matter how remote in time from the decision at issue the behavior was exhibited.²⁴⁶ Only if the employer can show that it would have made the same decision anyway should the relief available to the plaintiff be limited.²⁴⁷

Finally, these presumptions should extend to cases involving a victim’s responsive behavior, even when that behavior is deemed “unreasonable.” If the plaintiff’s behavior—including behavior of physical threat or altercation—was prompted by racial assault, and the employer took an adverse employment action in response to the plaintiff’s behavior, the employment action should be presumed to be motivated at least in part

developing a specific (nonexhaustive) list. *See, e.g.*, EEOC, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), <http://www.eeoc.gov/policy/docs/caregiving.html> (describing specific instances of caregiver bias).

243. The defendant in cases involving these behaviors, in other words, would bear the burden of demonstrating that the behavior was nonracial or that given all of the circumstances, the behavior could not have been perceived objectively or subjectively as hostile or abusive.

244. Russell Robinson makes a persuasive case that blacks’ perception of discrimination or a hostile work environment is reasonable as a matter of fact (or reality), as “a reasonable outsider might perceive discrimination based on facts that would not persuade a reasonable insider.” *See* Robinson, *supra* note 13, at 1101. I argue that the law should make the same determination as a matter of policy. Certain behavior is inherently subordinating and likely to trigger negative racial emotion and the kind of hostile behavior that leads to acrimonious relationships. This behavior deserves a presumption of being race based and of being objectively perceived as hostile and abusive so as to alter the terms and conditions of employment.

245. *See supra* Part III.A.

246. Admittedly, this presumption is likely to be both too narrow and too broad. In other words, it is likely to miss some circumstances in which discrimination is likely (for example, involving an adverse action made as to someone against whom racial assault behavior was not directed), and to encompass other circumstances in which discrimination is less likely (for example, racial assault behavior exhibited in a one-time interaction without on-going relationship and substantially removed in time). The presumption, however, works broadly to give weight to the legal prohibition on behavior of racial assault. Moreover, it will not inhibit an inference of discrimination in circumstances not covered by the presumption.

247. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

by race. In other words, courts should not be permitted to isolate the victim's behavior from the racial assault that triggered the behavior.²⁴⁸

The suggestion that courts see racial emotion as a source of discrimination follows from research showing that it frequently is a source of discrimination and disadvantage.²⁴⁹ It makes no sense to continue conceptualizing discrimination as exclusively a discrete state of mind when social science tells us that it is also relational. These doctrinal changes together would force courts to see relations and racial emotion consistently as a source of discrimination in at least the most obvious and extreme of circumstances.

Moreover, organizations and individuals working and interacting within organizations would be provided with clear rules about behaviors that are considered presumptively discriminatory: those behaviors are prohibited and assumed to reflect bias that affects decisionmaking. Racial assault is racial behavior that is relationally divisive, inherently subordinating, and disastrous to interracial relationships. It is often meant to harm, although as stated above the law should not require courts to undertake a specific inquiry of purpose. Clarity around racial assault behavior should help ease anxiety arising out of situational ambiguity and at the same time drive the elimination of the most obvious forms of relational subordination from the workplace.

B. MAKING SPACE FOR POSITIVE RACIAL EMOTION

Seeing and addressing racial emotion as a source of discrimination by policing racial assault behavior is important not only because it should reduce incidents of racial assault, but also because it would set a normative frame for organizations seeking to manage diversity. The law's acknowledgment of racial emotion and relations as a source of discrimination can push organizations to see the benefits of fostering

248. For this reason, the defendant should not be entitled to argue, either to avoid liability or to alter remedies, that it would have made the same decision anyway based on the behavior. Relief might nonetheless be limited by equitable doctrines if the plaintiff's conduct was unreasonable. *See, e.g., Ostrowski v. Azzara*, 545 A.2d 148, 156 (N.J. 1988) (describing the doctrine of "avoidable consequences," which can in some circumstances be applied to reduce damages owed to injured plaintiffs). In cases not involving racial assault, courts should follow the law established in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). *Desert Palace* involved facts strikingly similar to *Foucar*, although it involved allegations of sex-based discrimination. The Supreme Court held that "direct evidence" is not required for a plaintiff to obtain a "motivating factor" jury instruction based on § 703(m) of Title VII. *Id.* at 98–102. *Desert Palace* thus should instruct lower courts that a plaintiff can succeed in establishing liability under Title VII even when he or she was involved in a physical altercation on the job.

249. *See supra* Part III.C.1.

positive interracial relations, benefits both for equal opportunity and for business.²⁵⁰

Most racial emotion, however, at least the racial emotion that this Article is principally concerned with, does not involve behavior of racial assault. Rather, racial emotion is often kept beneath the surface; it is the low-grade anxiety that leads to avoidance over outright hostility or verbal expression of emotion. The next question, then, is what approach the law should take to regulating behavior that does not amount to racial assault. Take, for example, the scenario from the introduction:

After a long day at work, a white woman sits down for a late-afternoon team meeting next to a black woman, whose binders and other materials are spread out on the table around her. The white woman nudges the black woman's materials aside to make space for her own. The black woman says, "Why are you moving my stuff?" The white woman responds, "Why are you being so aggressive? I was just sitting down." The black woman, now visibly angry, says, "Aggressive, do you even know you're being racist right now?" The white woman, near tears, approaches their supervisor and asks to be moved to another team.

How should the law approach an interaction like this? What can the law do to encourage organizations to open space for turning negative emotion to more positive, while still acknowledging relations and racial emotion as a source of discrimination in the workplace?

In this section, I first explain why it is a mistake to include all individual behavior that may reasonably be perceived by racial minorities as discriminatory or racist as a basis, standing alone, for legal liability. I then sketch several possible ways that the law might nonetheless trigger organizational attention to racial emotion and change in organizational conditions to open space for developing positive racial emotion at work, while still acknowledging the role that relations and racial emotion can play in disadvantage and discrimination at work.

250. See *supra* Part III.C. See also Robin J. Ely & Laura Morgan Roberts, *Shifting Frames in Team-Diversity Research: From Difference to Relationships*, in *DIVERSITY AT WORK*, *supra* note 36, at 175, 196 ("[E]ngaging productively across potentially divisive group differences begets satisfaction, further engagement, success, and so on."); Barbara L. Frederickson, *The Role of Positive Emotions in Positive Psychology: The Broaden-and-Build Theory of Positive Emotions*, 56 *AM. PSYCHOL.* 218, 218 (2001) (describing research supporting the "broaden-and-build theory" of positive emotions, which posits that "experiences of positive emotions broaden people's momentary thought-action repertoires, which in turn serves to build their enduring personal resources, ranging from physical and intellectual resources to social and psychological resources").

1. Resisting Individualized Policing Through Hostile Work Environment Law

Social scientists have identified a range of behaviors that can be perceived (reasonably) by racial minorities as racist or discriminatory.²⁵¹ In addition to behavior of racial assault, discussed above, researchers also include racial insults and racial invalidations in this range of behaviors.²⁵² Racial insults are behaviors that are insensitive to or inconsiderate of a person's racial identity.²⁵³ For example, certain questions about hair, telling a racial minority that she does not "seem black," mistaking a person of color for a service worker or other more subordinate employee, mistaking one person of color for another, and laughing at a racial joke all might be perceived as discriminatory.²⁵⁴ Racial invalidations are behaviors that "minimize[] the psychological thoughts, feelings, or experiences of targets."²⁵⁵ These behaviors might include suggestions that concerns expressed by racial minorities about perceived discrimination or bias are overblown or exaggerated.²⁵⁶

As Russell Robinson demonstrates in *Perceptual Segregation*, these behaviors often fall within a perceptual gap between whites and racial minorities such that members of different racial groups may each be reasonable and still differ substantially in their perceptions about the likelihood that discrimination has occurred or is occurring.²⁵⁷ One reaction to this reality might be to propose that the law close this gap by holding employers liable for discrimination whenever a reasonable racial minority would perceive discrimination.²⁵⁸

251. See Eden B. King et al., *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 PSYCHOL. PUB. POL'Y & L. 54, 56–57 (2010) (describing a microaggression classification system); Sue et al., *supra* note 241. The concept of microaggressions has also been developed in critical race scholarship, including legal scholarship. See, e.g., Davis, *supra* note 29; Reginald Leamon Robinson, *Teaching from the Margins: Race as a Pedagogical Sub-Text: A Critical Essay*, 19 W. NEW ENG. L. REV. 151 (1997); Smith, *supra* note 123.

252. King et al., *supra* note 251, at 56–57.

253. *Id.*

254. *Id.* at 56.

255. *Id.*

256. *Id.*

257. Robinson, *supra* note 13, at 1117.

258. Robinson's proposal focuses on retaliation law and hostile work environment law. See *id.* at 1156–59. I address retaliation law below, proposing elimination of a requirement that the opposition conduct be in response to behavior that is reasonably believed to be unlawful. As to hostile work environment law, Robinson's proposal builds on longstanding calls for adapting the reasonable person standard in hostile work environment law to account for minority perspectives, including those of women. See, e.g., Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1202–15 (1989).

The social science research on racial emotion suggests, however, that taking this approach would be a mistake.²⁵⁹ Assuming that the law could close the gap by requiring courts to take the perspective of the reasonable racial minority, and accepting Robinson's persuasive case that the perceptual gap is quite large and that racial minorities will reasonably perceive racial insults and racial invalidations as discriminatory, then those behaviors in individual relationships, standing alone, could give rise to legal liability for employers. We can expect that employers, to reduce their risk of legal liability, would enhance policing of individual behavior to reduce behavior that might be perceived by racial minorities as discriminatory. Even if the law cannot actually close the gap in this way (research suggests, at least in the sex context, that merely changing the language of the reasonable person standard to a reasonable woman standard has little effect on jury and judge decisions²⁶⁰), organizations may nonetheless respond to a change in the law by punishing all or most racial behavior.²⁶¹

Yet, as Robinson and others acknowledge, what is really needed in most workplaces is more conversation across groups about perceptions, ambiguities, and discomfort in interracial interaction as well as openness to making mistakes and to learning from difference.²⁶² Two social scientists recently put it this way:

[I]n our concern about not wanting to appear insensitive (or worse, *prejudiced*), we manage to disrupt not only our behavior in the interaction, but our ability to identify relatively obvious solutions to our dilemmas What if we admitted ignorance when it exists and confessed our desire to learn and understand? True, much will still depend on our interaction partner. But this approach may be a better starting point for alleviating tension than trying to fake it through the interaction and worrying the whole time about what we're doing wrong. Almost certainly, it is preferable to withdrawing from intergroup contact altogether because the challenges are too daunting.

259. See *supra* Part II.A. I say this only for behavior of racial insult and racial invalidation, not behavior of racial assault.

260. See Jane Goodman-Delahunty, *Pragmatic Support for the Reasonable Victim Standard in Hostile Workplace Sexual Harassment Cases*, 5 PSYCHOL. PUB. POL'Y & L. 519, 549 (1999).

261. See Schultz, *supra* note 20, at 2090–103 (arguing that organizations have responded to sexual harassment law by seeking to eliminate all romantic relationships from the workplace).

262. See, e.g., Crocker & Garcia, *supra* note 47, at 240–41 (explaining that research and theory on ecosystem goals suggests that individuals can create upward spirals in relationships by communicating concerns in a constructive and vulnerable way). Research also supports the idea that outward-focused goals and responses to identity threat in relationships can enhance team resilience and efficacy. See Ely, Padavic & Thomas, *supra* note 227, at 342 (urging a shift in frame in organizational research on racial diversity in teams from difference to relations).

Perhaps the single most important problem facing us over time is that we are afraid to communicate. So many people are afraid to say “I don’t know how to do it.” They tell their friends about the difficulties they encounter, but they don’t tell minority group members. Many minority group members are reluctant to try to educate majority group members. These are issues that we have to put on the table and try to work through as interaction partners if we are ultimately going to solve the problem of intergroup tension. Then we can learn, together, to navigate this rocky road.²⁶³

Instead of fostering openness to learning and conversation, using the law to tamp down on all behavior that falls within the perceptual gap is likely to exacerbate whites’ fears and to trigger coping strategies like avoidance and colorblindness that, in turn, are likely to lead to strained relations.

Learning and openness, too, are needed on the part of both parties to the interaction.²⁶⁴ As Robinson explains, a “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.”²⁶⁵ Research shows that many whites have difficulty distinguishing between black faces.²⁶⁶ Even understanding that the phenomenon is rooted in segregation and insufficient interracial contact, there is no reason to believe that a white person who makes a mistake like this is acting with a purpose to discriminate or subordinate.²⁶⁷ Indeed, face identification is not a skill that whites are likely to be able to improve simply with greater effort.²⁶⁸ To police whites by attaching legal liability to the employer for mistaking black faces is likely to serve only to

263. Patricia G. Devine & Kristin A. Vasquez, *The Rocky Road to Positive Intergroup Relations*, in *CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE* 234, 261–62 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998).

264. See Robinson, *supra* note 13, at 1162 (urging education efforts, including “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”).

265. *Id.* at 1163.

266. See Kareem J. Johnson & Barbara L. Fredrickson, “*We All Look the Same to Me*”: *Positive Emotions Eliminate the Own-Race Bias in Face Recognition*, 16 *PSYCHOL. SCI.* 875, 875 (2005) (citing research showing that people are less able to recognize and distinguish between people of a different race than to recognize and distinguish between people of their own race, but that the effect is most pronounced for whites viewing members of racial minority groups).

267. The legal definition of discrimination requires no element of purpose, but it nonetheless makes sense for individuals in interaction to distinguish between purpose and more subtle or implicit forms of bias.

268. Some research actually suggests that positive emotions experienced prior to facial identification can reduce and even eliminate the own-race bias in facial recognition. See Johnson & Fredrickson, *supra* note 266, at 875.

exacerbate anxiety in interaction. The same is true for many, although certainly not all, of the examples that Robinson and others provide.²⁶⁹ Better than rigid policing would be opportunity for education and learning by blacks and whites alike about biases and the role of systems and structures in perpetuating those biases.

Of course, micro-insults and invalidations can be powerful means of group-based subordination.²⁷⁰ The inquiry for hostile work environment law regarding specific relationships, however, should be less one of whether a particular incident is perceived (subjectively or objectively) as severely or pervasively hostile rather than whether the work environment more broadly is perceived as subordinating or hostile. Existing hostile work environment inquiry, at least with careful attention to broader context (for example, how frequent and how widespread the behavior and related behaviors are, even if they are not expressly racial), may be able to identify these cases, once seen through this less-individualized lens.²⁷¹

The point here is not that the perceptions of racial minorities should be ignored by the law (Robinson and others are right to point out the importance of taking the perspective of racial minorities in understanding racial behavior at work).²⁷² It is that ratcheting up hostile work environment law as it regulates individual working relationships by looking only at individualized perceptions of discrimination in particular relationships may actually backfire by increasing anxiety and negative racial emotion in interaction. Instead of triggering more policing of

269. See, e.g., Robinson, *supra* note 13, at 1163 n.349 (describing a story of a white person asking an Asian American person “[W]here are you from?”).

270. See *supra* note 210 and accompanying text.

271. Indeed, this is what *Harris* suggests, although it has led to problems in the area of racial assault. See *supra* text accompanying notes 160–64; L. Camille Hebert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819, 863–66 (1977) (arguing that the *Harris* standard has led courts to reject single incidents of racial harassment, even use of racial epithets, as capable of amounting to a hostile work environment). Courts should not be permitted to compare cases involving behavior of racial insult or racial insubordination to those involving behavior of racial assault in determining whether it is severe or pervasive. Cf. *White v. Gov’t Emp. Ins. Co.*, 457 F. App’x 374, 381 (5th Cir. 2012) (reasoning that race-based comments alleged by plaintiff “pale[d] in comparison, both in severity and frequency” to other cases involving extreme behavior of racial assault (quoting *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007))).

272. For a case where taking the perspective of a racial minority to evaluate a work environment might have made a difference, see *White*, 457 F. App’x at 380–81 (listing behaviors that “might cause offense or indicate strife” between the plaintiff and her coworkers and supervisors but isolating each behavior and rejecting as “isolated remarks,” “not involv[ing] physically threatening or humiliating conduct”). See also Melissa K. Hughes, Note, *Through the Looking Glass: Racial Jokes, Social Context, and the Reasonable Person in Hostile Work Environment Analysis*, 76 S. CAL. L. REV. 1437 (2003) (arguing in favor of considering social and historical context in applying hostile work environment law to a work environment that involves racial jokes).

individual relationships, at least beyond behavior of racial assault, the law might better acknowledge the role of racial emotion and relations in discrimination and trigger the opening of space for conversation and learning within organizations by enhancing policing at the systemic, workplace level.

2. Opening Space for Conversation: Individuals and Organizations

a. Individuals and Retaliation

Before turning to the role of systemic theories, it is worth noting one simple way that the law at the individual level could, if amended, open space for conversation and learning. Currently, retaliation law discourages conversation about race and racial biases and perceptions by protecting employees who expressly oppose perceived discriminatory behavior from retaliation only if the employee at least reasonably believed the perceived discriminatory behavior to be unlawful.²⁷³ In other words, if a racial minority reasonably perceived a micro-insult (for example, someone telling her that she did not seem like she would like math) as discriminatory and said as much, she would nonetheless not be protected from retaliation unless she reasonably believed that the remark amounted to a legally actionable form of discrimination.²⁷⁴ Take again the initial scenario: A black woman perceives a white woman's behavior as racist and says so; the white woman could retaliate, and the law would not protect the black woman from that retaliation because she is unlikely to have had a reasonable belief (or even a subjective belief) that the white woman's behavior amounted to a legally actionable hostile work environment.

This is problematic because it closes opportunity for conversation and learning. Research shows that employees are already reticent to raise

273. The statute provides that an employee may obtain relief for retaliation "because he has opposed any practice made an unlawful employment practice by this subchapter." Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a) (2006). Although the language suggests that the challenged practice must actually be unlawful under Title VII in order for the victim of retaliation to be protected, courts have uniformly included "practices that the employee could reasonably believe were unlawful." *See Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270–71 (2001) (declining to rule on the propriety of extending retaliation protection to include practices reasonably believed to be unlawful, but holding that the plaintiff lacked a claim because "no reasonable person could have believed" that the incident involved in the case violated Title VII).

274. Under the prevailing view, without a tie to an adverse employment action, such as refusal to hire, discharge, or other materially adverse action, the person opposing discriminatory conduct will have to reasonably believe it to amount to a hostile work environment that altered the terms or conditions of employment. *See Minor v. Centocor, Inc.*, 457 F.3d 632, 634–36 (7th Cir. 2006) (limiting actions actionable under Title VII to those that involve "material difference in the terms and conditions of employment").

concerns about discrimination at work.²⁷⁵ If they do so, after all, they are likely to be labeled as troublemakers. The very real possibility of retaliation is but one additional barrier, and it is not justified by competing concerns. Retaliation law has other doctrinal guards against overenforcement, such as requiring the retaliatory conduct be such that it would dissuade a reasonable person from objecting to discriminatory conduct,²⁷⁶ and requiring plaintiffs to establish a causal connection between the opposition and retaliatory conduct.²⁷⁷ Moreover, it has the added safeguard of limiting protection to reasonable opposition conduct, which should protect employers from undue workplace disruption.²⁷⁸

Accordingly, any opposition to actions that are subjectively believed to be biased or discriminatory, even if not believed to be legally actionable, should be protected from retaliation. Many racial insults and racial invalidations will not be legally actionable until they result in a specific employment decision, such as a failure to promote or denial of a pay raise, or until they accumulate and rise to the level of a hostile work environment. Protecting employees from retaliation for raising concerns about bias and discrimination before the insults and invalidations become legally actionable will open more space for developing positive racial emotion through conversation and learning across difference, and will also serve Title VII's prophylactic goal of reducing discrimination by allowing for earlier intervention.

b. Using Systemic Theories to Trigger Meaningful Change

Although this part has detailed several specific changes to individualized theories that might open up conceptualizations of discrimination to include racial emotion or otherwise open space for developing positive racial emotion in the workplace, legal pressure for developing space for positive interracial relations at work is most likely to come not from individualized theories of discrimination that focus on individual decisions or individual relations, but from systemic legal theories that can monitor organizations for patterns of discriminatory outcomes, such as systemic disparate treatment theory.²⁷⁹ Of course,

275. See, e.g., Brenda Major & Pamela J. Sawyer, *Attributions to Discrimination: Antecedents and Consequences*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION, *supra* note 31, at 89, 91–92.

276. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

277. See *Clark Cnty. Sch. Dist.*, 532 U.S. at 272–74.

278. See *supra* note 123 and accompanying text. This will hold at least for opposition conduct that opposes behavior other than racial assault. See *supra* Part IV.A.

279. See, e.g., *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307–12 (1977) (explaining and applying systemic disparate treatment theory). Plaintiffs proving claims of systemic disparate

identifying patterns of discriminatory outcomes will not tell us exactly what is causing an observed discriminatory outcome, or even whether negative racial emotion and negative interracial relationships are among the causes of that outcome. It can tell us, however, when discrimination is likely to be operating within an organization and can put pressure on the organization to make changes to the structures and cultures that shape the conditions for interaction as a means of improving the outcome. The law is currently capable of undertaking this task.²⁸⁰

Indeed, to say that we need to better understand—and address—how discrimination operates in the workplace does not mean that we should necessarily develop legal theories that focus directly on those operations. Assuming otherwise has been a recent, serious mistake by advocates seeking to translate knowledge from the social sciences into the law. Instead of seeing what social science experts can tell us about how and under what conditions biases are likely to operate in order to buttress an inference that discrimination within an organization explains an observed racial disparity, rather than an external force outside of the organization, courts and commentators have begun to see plaintiffs' reliance on social science experts as advocating or requiring a new legal theory of discrimination.²⁸¹

And there are good reasons why the law might do a better job addressing racial emotion as a source of discrimination principally at the level of systemic monitoring than at the level of individualized monitoring. As argued above, policing individuals through individualized rights is unlikely to open space for the conversation and learning needed for developing positive racial emotion in the workplace. Moreover, a legal framework that focuses the inquiry at the systemic level may encourage organizations to develop better systems for managing diversity—processes for integration and learning in relations—that adequately tie tensions in

treatment frequently rely on, for example, evidence of statistical disparities in pay or promotion (controlling for all legitimate variables) to create an inference that discrimination is widespread within the organization. See Tristin K Green, *The Future of Systemic Disparate Treatment Theory*, 32 BERKELEY J. EMP. & LAB. L. 395, 407 n.47 (2011) (describing the statistical evidence submitted in the *Wal-Mart v. Dukes* case). Numbers therefore serve as a signal in these cases that something is going on within a defendant's organization.

280. See Green, *supra* note 279 (arguing that existing systemic disparate treatment law identifies organizations that are likely to be producing disparate treatment through their structures, systems, and cultures).

281. See, e.g., *Pippen v. Iowa*, No. LACL107038, 2012 WL 1388902 (Iowa Dist. Ct. Apr. 17, 2012) (granting summary judgment for the employer on plaintiffs' disparate impact claim and labeling plaintiffs' reliance on social scientist testimony about implicit bias as part of a push for a "unique legal theory").

specific relationships to broader, systemic equal-opportunity concerns. Research suggests that the grievance processes as currently designed and implemented by most organizations do a poor job of redirecting negative interracial relations; to the contrary, most grievance procedures have a negative effect on the success of minority group members.²⁸² Grievance procedures could, however, be restructured to foster conversation and learning over entrenchment and denial, thus leading to more positive relationships that translate into better success rates for racial minorities.

C. OBJECTIONS AND CONCERNS

Aside from pointed objections to specific contours of the doctrinal proposals presented, I anticipate a number of objections to my proposal as a whole. Some will think that I have gone too far in even raising the issue of racial emotion as a source of discrimination and disadvantage at work: “Law professor says employers must make sure that employees feel good in interracial interaction!” Of course, the proposal is more nuanced than that, but the point is well taken. We are habituated to thinking of discrimination as anything from a state of mind to a state of affairs, and on either end we tend not to include emotion in our schema. An account of employment discrimination that seeks to recognize and to address racial emotion—and the barriers to developing positive racial emotion—challenges entrenched notions of fault and causality, and will accordingly meet substantial resistance. That said, challenging entrenched notions—particularly those that tend to absolve whites from responsibility—has never been easy.

Others will think that I have not gone far enough, that I have not adequately emphasized the continued role of power and the desire to remain in power on the part of whites in shaping relational conditions.²⁸³ I

282. See Frank Dobbin, Daniel Schrage & Alexandra Kalev, *Someone to Watch Over Me: Coupling, Decoupling, and Unintended Consequences in Corporate Equal Opportunity* 30–31 (unpublished manuscript), available at http://www.wjh.harvard.edu/~dobbin/cv/workingpapers/Someone_to_Watch_Over_Me.pdf. Research also shows that grievance procedures as currently structured and implemented do not reduce public charges. See Lauren B. Edelman, Christopher Uggen & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 419–32 (1999). Relatedly, current grievance processes tend to be untethered from broader equal opportunity concerns. Racial conflict tends to be personalized (and nonracialized) in these processes and, consistent with the current legal approach, conceptually severed from the employer’s nondiscrimination obligation. See Anne Donnellon & Deborah M. Kolb, *Constructive for Whom? The Fate of Diversity Disputes in Organizations*, in *USING CONFLICT IN ORGANIZATIONS* 161, 164–65 (Carsten K.W. De Dreu & Evert Van de Vliert eds., 1997).

283. See, e.g., BONILLA-SILVA, *supra* note 210, at 10; John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 812–13 (2008) (describing structural

am sensitive to this critique. The Article does take a decidedly micro-interactive approach to discrimination and inequality, and one that is tinged with hope—even confidence—that we can make change through improved micro-social-relations. This effort should be understood, however, as one piece in a broader agenda to better understand organizational and institutional mechanisms as well as individual and relational mechanisms of discrimination and inequality at work.²⁸⁴

A related concern might also be that I have too narrowly cabined my approach within an equality paradigm generally, and within employment discrimination law more specifically. Kenji Yoshino, for example, has argued that efforts aimed at easing rigid rules of identity performance are better suited to a universal liberty paradigm than to an equality paradigm.²⁸⁵ And Katie Eyer, surveying an impressive body of research showing a universal psychological resistance in Americans to attributing negative events to discrimination, recently argued that even equality-based projects may be best achieved through “extra-discrimination remedies,” or remedies that do not require an attribution of discrimination, however defined.²⁸⁶

The response to this concern is twofold. First, as a practical matter, it is important to frame the problem of racial emotion as a matter of equality and not just personal autonomy not only because it is an equality concern, but also because it offers resistance to the tendency to label racial emotion as personal and nonracial and thus to squelch conversation and learning across difference. Second, it is quite likely that doctrinal moves within employment discrimination law like the ones proposed in this Article will be but the first step in thinking about a comprehensive regulatory scheme that best accounts for discrimination as it operates in the modern workplace. Indeed, the overarching recommendation that the law needs to rely less on individualized theories and more on systemic theories of discrimination aligns with this reality. Putting the two concerns together, it seems quite possible that seeing relations and racial emotion at work as a source of discrimination and inequality will be the beginning of a bigger conceptual shift toward creating conditions for positive relations across

influences not merely on opportunity but on identity, conceptions of self, which are contextual and relational).

284. CHARLES TILLY, *DURABLE INEQUALITY* 16–25 (1998) (arguing for an understanding of inequality that ties relations to broader structures); Barbara Reskin, *Including Mechanisms in Our Models of Ascriptive Inequality*, 68 AM. SOC. REV. 1 (2003) (discussing empirically verifiable mechanisms that contribute to variations in ascriptive inequality).

285. YOSHINO, *supra* note 1, at 189.

286. Eyer, *supra* note 31, at 1341–52.

difference that can be attained through a combination of workplace laws and norms.

Finally, and most fundamentally, some readers will worry that I open Pandora's Box. Even if politically, or even morally, inclined to agree that the law and organizations need to better see and address racial emotion as a source of discrimination, these readers will wonder whether one implication of my proposal is the surfacing of racial emotion in ways that will make our lives more difficult and more complex. These readers will have understood that this Article seeks to do more than alter the shape of employment discrimination law, or even of interracial relationships within work. It seeks to fundamentally alter the way that we think about the role of emotion, particularly racial emotion, in our daily lives. One aspect of emotion generally and racial emotion specifically to which this Article has given short shrift is that it—and our regulation or management of it—is socially constructed.²⁸⁷ Racial emotion should be thought of not as a nuisance, even a nuisance built out of an unfortunate reality of longstanding discrimination and segregation, but as an opportunity. We should engage our racial emotions, rather than suppressing them, and develop new norms of emotional labor around interracial relations, whether at work, at school, in church, or in our neighborhoods.²⁸⁸ This is a tall task, and one that these readers will have sensed is open ended and, for many of us, quite frightening.

V. CONCLUSION

Research tells us that racial emotion exists in the workplace, and that in most workplaces it is likely to be negative, leading to strained relations, discrimination, and inequality more broadly. It tells us that generating positive racial emotion at work will require more integration—not less—and conditions for conversation and learning over colorblindness and multiculturalism. The workplace remains one of the most promising sites for ongoing, positive interracial interaction. We need to begin difficult conversations, both on a micro level in our relationships and on a macro level in devising our laws and in shaping our organizations. This Article

287. See Keltner & Lerner, *supra* note 8, at 321–23, 333–34 (describing ways in which emotion and the communication of emotion are socially constructed). Indeed, emotion and our emotional reactions in interracial relations are also likely to play a role in how race and racial identity are constructed.

288. Exactly how we engage racial emotion (in addition to engaging in interracial interaction despite racial emotion) is a project for another day. For recent work theorizing emotion and strategies for engaging emotion in judging, see Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485 (2011).

sets groundwork for those conversations and makes proposals to get us started on the right path.