

Outsourcing Discrimination

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ABSTRACT

The significant growth in employers' use of labor intermediaries—that is, third parties that stand between the workers and the organizations for whom they complete work—has fundamentally changed how many low-wage workers enter and function in the workplace. Temporary staffing agencies that hire and place workers with companies and organizations have taken on a gatekeeper role to low-wage jobs in many industries. Recent litigation and various reports allege flagrant hiring discrimination by temporary staffing agencies whose clients encourage them not to hire African American workers and hire and send Latinx immigrants instead. This Article explores the discriminatory treatment of low-wage African American workers by temporary staffing agencies and considers potential theoretical explanations for what appears to be not simply the discriminatory acts of an outlier individual or employer, but a business model that accepts racially discriminatory practices as business necessity. This Article proceeds from the descriptive to the prescriptive. It deconstructs the problematic racial narratives that position African American workers at the bottom of the low-wage worker hierarchy and interrogates the normative consequences of these narratives as they manifest in temporary staffing employment. Ultimately, this Article suggests potential legal strategies that would better protect workers from discrimination in this rapidly growing low-wage employment space.

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INTRODUCTION

Beginning in the Fall of 2014, Kevin James sought short-term employment positions through a temporary staffing agency, Most Valuable Personnel (“MVP”), in Chicago, Illinois.¹ He applied for approximately twenty jobs through MVP.² Each day, he sat in the MVP office and watched Latinx³ applicants receive job assignments, while he did not.⁴ The only readily apparent difference between James and those who received assignments was the color of his skin: James is African American.⁵ Despite his belief that he was highly qualified for the positions he sought through MVP, James received only one placement—at a packaging company where he described the supervisors as hostile and “hovering” over him and other African American workers.⁶ James, along with other African American workers who had sought placements through MVP and received similar treatment, filed a class action lawsuit against the staffing agency and its clients.⁷

Upon investigating James’s and other workers’ claims, their counsel discovered a particularly disturbing phenomenon: MVP systematically excluded African American workers from job placements in favor of Latinx workers.⁸ According to a former MVP employee responsible for dispatching laborers to clients, some of MVP’s clients did not want African Americans assigned to work at their companies—and MVP accommodated those requests.⁹ She claimed that representatives from client companies yelled at her when she assigned African

¹ See Complaint ¶ 65, *Hunt v. Pers. Staffing Grp.*, (N.D. Ill. 2016) (No. 1:16-cv-11086), 2016 WL 11678533.

² See Liam Stack, *Black Workers’ Suit Accuses Job Agency of Favoring Hispanic Applicants*, N.Y. TIMES (Dec. 6, 2016), <https://www.nytimes.com/2016/12/06/us/lawsuit-alleges-discrimination-against-blacks-at-national-job-agency.html>.

³ I use the term “Latinx” throughout this Article, unless I am quoting a particular source that uses the term “Hispanic” (in which case I use the term that appears in the original source). The terms technically have different meaning. “Latinx” typically refers to persons of Latin American descent. “Hispanic” typically refers to persons who speak Spanish as a common language. See Sherley E. Cruz, *Coding for Cultural Competency: Expanding Access to Justice with Technology*, 86 TENN. L. REV. 347, 351 n.18 (2019); Adrianna Rodriguez, *‘Latinx’ Explained: A History of the Controversial Word and How to Pronounce It*, USA TODAY (June 29, 2019), <https://www.usatoday.com/story/news/nation/2019/06/29/latina-latino-latinx-hispanic-what-do-they-mean/1596501001/>, archived at <https://perma.cc/7BGG-W3C3>. Scholars often use the terms interchangeably.

⁴ Stack, *supra* note 2.

⁵ Complaint ¶ 9, *Hunt v. Pers. Staffing Grp.*, No. 1:16-cv-11086 (N.D. Ill. 2016), 2016 WL 11678533.

⁶ Stack, *supra* note 2.

⁷ Complaint, *Hunt v. Pers. Staffing Grp.*, No. 1:16-cv-11086 (N.D. Ill. 2016), 2016 WL 11678533.

⁸ *Id.* ¶¶ 89–90.

⁹ Declaration of Rosa Ceja ¶¶ 9, 17, *Hunt v. Pers. Staffing Grp.*, 2018 Fair Empl. Prac. Cas. (BNA) 59 (N.D. Ill. 2018) (No. 1:16-cv-11086), 2018 WL 1014513.

American workers to their job sites and that MVP's managers had warned her not to send African American workers to clients because MVP would lose those clients' accounts.¹⁰ She further stated that she received explicit instructions not to use the terms "Hispanic," "Latino," "black," or "African American," but instead to use code words like "feos,"¹¹ or "bilingues" ("bilinguals") to refer to Latinx workers, and "guapos"¹² or "no bilingues" ("not bilinguals") to refer to African Americans.¹³

Another MVP dispatcher similarly claimed that a client manager told her "not to assign African American laborers to work at [the company] because they were lazy, they were troublemakers and their job performance is poor, or words to that effect, and that he wanted only Hispanic laborers."¹⁴ Other client supervisors and staff echoed this preference for Latinx over African American workers.¹⁵ The dispatcher further claimed that on the rare occasions MVP sent African American workers to the client company, she only assigned them to weekend shifts so the client could avoid paying Latinx workers overtime, or to shorter assignments that were more difficult to fill.¹⁶ She explained that her supervisors trained her to give African American and Latinx job applicants different instructions.¹⁷ When African Americans requested applications, she would tell them she could only give them applications if MVP had open job orders and to return at four a.m. to see if work was available.¹⁸ When they needed extra workers to fill particularly difficult job orders, such as those occurring in severe weather or involving thirteen-hour shifts, she might allow an African American worker to apply for the job.¹⁹ She would, however, immediately give applications to Latinx workers, immediately assign them to jobs, and call other MVP offices to find work for them.²⁰ The dispatcher also received instructions to require African American applicants to complete criminal background checks, but not to require the same of Latinx applicants.²¹

¹⁰ *Id.* ¶ 17.

¹¹ According to the complaint filed in the case, "feos" translates to "dirty ones," as in those who are willing to do work that would get them dirty. Complaint for Plaintiff ¶ 25, *Hunt*, 2018 Fair Empl. Prac. Cas. (BNA) 59 (No. 1:16-cv-11086).

¹² According to the complaint filed in the case, "guapos" translates to "pretty boys," as in those who are unwilling to do dirty work. *Id.*

¹³ Ceja, *supra* note 9, ¶ 19.

¹⁴ Declaration of Pamela Sanchez ¶ 11, *Hunt*, 2018 Fair Empl. Prac. Cas. (BNA) 59 (No. 1:16-cv-11086).

¹⁵ *Id.* ¶ 12.

¹⁶ *Id.* ¶ 13.

¹⁷ *Id.* ¶¶ 12-21.

¹⁸ *Id.* ¶ 21a.

¹⁹ *Id.*

²⁰ *Id.* ¶ 21b.

²¹ Declaration of Pamela Sanchez, *supra* note 14, ¶ 27.

This story mirrors other suits filed in Chicago²² and reflects a phenomenon that plaintiffs' counsel and advocates believe occurs across the country: a business practice predicated on blatant racial discrimination.²³ The legality of these practices is not in question. Temporary staffing agencies' and their clients' exclusion of job applicants based upon their race indisputably violates Title VII, Section 1981, and state and local discrimination laws.²⁴ Nevertheless, advocates and former agency employees allege persistent and widespread discrimination by temporary staffing agencies and their clients.

Moreover, the type of systematic discrimination alleged in the temporary staffing cases challenges common assumptions about the prevailing contours of racial discrimination at a time when many assume discriminatory employment decisions are rare,²⁵ based upon the animus of a rogue decision-maker,²⁶ or rooted in implicit bias.²⁷ What leads employers to engage in overt, systematic workplace discrimination in a society and legal regime that purport to favor

²² See, e.g., Complaint, *Pruitt v. Pers. Staffing Corp.*, No. 1:16-cv-0079 (N.D. Ill. 2017), 2017 WL 1128457; Complaint, *Lucas v. Gold Standard Baking, Inc.*, 121 Fair Empl. Prac. Cas. (BNA) 1488 (N.D. Ill. 2014) (No. 1:13-cv-01524), 2014 WL 518000.

²³ See, e.g., Will Evans, *When Companies Hire Temp Workers by Race, Black Applicants Lose Out*, REVEALNEWS.ORG. (Jan. 6, 2016), <https://www.revealnews.org/article/when-companies-hire-temp-workers-by-race-black-applicants-lose-out>, archived at <https://perma.cc/35YM-M7DF> (discussing allegations that temporary staffing agencies discriminate against African American workers in six states); Kelly Heyboer, *No 'Ghetto People': How Temp Agencies Allegedly Hire Based on Race and Gender*, NEW JERSEY REAL-TIME NEWS (Sept. 19, 2016), <https://www.nj.com/news/index/index.ssf/2016.09/no-ghetto-people-how-temp-agencies-allegedly-hire.html>, archived at <https://perma.cc/W5MT-48MK> (discussing lawsuits alleging widespread discrimination in the temporary staffing industry).

²⁴ Many states and localities have enacted statutes that mirror or expand upon federal civil rights legislation. See, e.g., D.C. CODE §§ 2-1401.01–1411.06; MD. CODE ANN. ART. 49B § 16.

²⁵ See Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1293 (2012) (discussing psychologists' finding of a "pronounced unwillingness" to attribute actions to discrimination).

²⁶ See Llezlie Green Coleman, *Disrupting the Discrimination Narrative: An Argument for Wage and Hour Laws' Inclusion in Antisubordination Advocacy*, 14 STAN. J. C.R. & C.L. 49, 60 (2018) ("The prevalent narrative, and the statutes that attempt to respond to it, cast discrimination as acts a single 'bad' actor commits. Animus against the employee based upon that employee's identity motivates invidious discrimination. This animus is illogical and deviates from accepted societal values. In other words, discrimination, particularly as it is currently conceived, resides in the realm of the outliers."); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1169–86 (2012) (considering strategies for addressing implicit bias in the courtroom).

²⁷ See William M. Wiececk & Judy L. Hamilton, *Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace*, 74 LA. L. REV. 1095, 1100 (2014) ("[T]he cause of racial justice must move beyond the Civil Rights Act's focus on explicit racism and its overt manifestations to grapple with implicit racism and its structural expressions."); see generally Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006) (discussing the ability of the current antidiscrimination framework to address discrimination arising from implicit bias). But see generally Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193 (2018) (challenging the prevalence of the implicit bias narrative and arguing that much of what is defined as implicit bias is actually explicit bias).

formal racial equality²⁸ and, indeed, frequently espouse the belief that the United States is post-racial.²⁹

It is plausible that both the clients and the temporary staffing agencies fulfilling those clients' discriminatory requests to exclude African American workers from their workplaces do not view themselves as racist. Rather, both see themselves as engaging in discrimination as business necessity. The agency clients may claim that the need for a hard-working, pliable workforce to handle quick-moving daily tasks without complaint drives their decision-making, not racial animus.³⁰ Hiring Latinx workers, therefore, is just "good business" because they are the most efficient workers. The temporary staffing agencies, on the other hand, may try to absolve themselves of any moral blame by contending they are simply meeting their clients' needs by supplying the particular workforce requested.³¹ That is, their clients are the social (and legal) deviants, not them. The temporary staffing agencies are simply caught in the middle of an economic quandary — discriminate or lose their clients and their business.³²

The other likely dynamic at play in these decisions, however, is the perceived vulnerability and therefore, exploitability, of the immigrant workforce.³³ Various

²⁸ See Darren Lenard Hutchinson, "Continually Reminded of Their Inferior Position": *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23, 28 (discussing implicit bias as a potential "explanation for the pervasiveness of racial discrimination in a society that favors formal racial equality").

²⁹ See Charlotte S. Alexander, et al., *Post-Racial Hydraulics: The Hidden Dangers of the Universal Turn*, 91 N.Y.U. L. REV. 1, 11–16 (2016) (discussing the development of post-racial legal norms); Tanya Katerí Hernández, *One Path for "Post-Racial" Employment Discrimination Cases—the Implicit Association Test Research as Social Framework Evidence*, 32 LAW & INEQ. 309, 314 (2014) ("Today the 'post-racial' social norm is that racism is an aberration instigated by consciously malicious individuals.").

³⁰ Indeed, in ethnographic studies, employers often link their racialized preference for certain workers to the need for a compliant workforce that is able to quickly accomplish the necessary tasks, rather than to general preferences for one group over another. See, e.g., Laura López-Sanders, *Trapped at the Bottom: Racialized and Gendered Labor Queues in New Immigrant Destinations* 15 (Ctr. for Comp. Immigr. Stud., Working Paper No. 176, 2009) (Explaining that employers considered Latinx workers more attractive due to "[a]ttributes such as vulnerability, compliance and disposition to submit to managerial control made workers more attractive as replacements.") Cf. Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1175–76 (2008) ("Again and again, in comparative studies, managers characterize new immigrants as desirable employees for their willingness to work long hours at dirty, boring, or dangerous jobs for low wages and for their compliant attitude and work ethic.").

³¹ This argument might absolve them of moral blame, but it would not absolve them of legal liability for selecting workers based upon their race or ethnicity.

³² This quandary is not a new phenomenon. One need only consider the actions of restaurants and other businesses during the Jim Crow era to identify similar circumstances in which establishments argued they could not serve African Americans and maintain their White business clientele.

³³ See KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT 59–60 (2008); JOHN SKRENTNY, AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE 218

articles and reports on the treatment of immigrant workers in the low-wage workplace point to employers' preference for workers who are easily exploitable.³⁴

This Article considers these complicated phenomena as well as how structural and legal barriers to the enforcement of our civil rights laws have left spaces for such a discriminatory business practice to take root. As a litigator, I recognize that litigation plays an important role in enforcing statutes and disincentivizing discrimination. One solution to discrimination in temporary staffing agencies is to increase workers' access to counsel with the resources to bring class action suits and impact litigation across the country to challenge this practice. This solution would involve removing legal and structural barriers to these cases.

The critical race theory inquiry, however, dictates a different approach to legal problem solving. How does a society that continues to propound color-blind and post-racial values³⁵ co-exist with explicit discrimination as a standard operating procedure and a business model? Here, narrative, stock stories, and stereotypes may provide an explanation and animate the need for a solution that changes the narrative about low-wage African American workers.

This Article threads the needle between the realities of discrimination against low-wage African American workers by temporary staffing agencies and their clients, and both the normative and theoretical contexts that support these practices. Part I explains the structure of temporary staffing agencies and places them within the broader context of recent trends that de-couple employer roles, thus destabilizing worker protections. Part II considers John Skrentny's racial realism theory as it manifests in the temporary staffing agency context. Part III explores the dominant narratives about African American and Latinx low-wage workers and discusses those narratives' role in reinforcing class-based racial stereotypes that allow employers to discriminate without ascribing racist animus to themselves. The Article also posits that changing the narrative about the working poor is necessary to address low-wage worker discrimination. Part IV considers the potential for Devon Carbado and Mitu Gulati's "Working Identity" performative identity theory to explain the prevalence of low-wage worker discrimination. Part V then turns to consider the structural and legal barriers to litigating temporary staffing cases and suggests potential opportunities to improve workers' access to justice.

(2013).

³⁴ See, e.g., Laura López-Sanders, *Trapped at the Bottom: Racialized and Gendered Labor Queues in New Immigrant Destinations* 15 (Ctr. for Comp. Immigr. Stud., Working Paper No. 176, 2009).

³⁵ See Coleman, *supra* note 26, at 63–67 (discussing post-racialism and its critics); see also Hutchinson, *supra* note 28, at 27 (“Researchers have tried to explain why racism persists in a society with legal and cultural norms that mandate racial egalitarianism.”).

I. CHANGING WORKPLACE RELATIONSHIPS

In order to contextualize the discrimination discussed in this Article, it is helpful to first consider the expansion of temporary staffing arrangements and its relationship to other significant changes in the employment ecosystem.

A. *Temporary Staffing Agencies and the De-Coupling of Employer Roles*

The standard employment arrangement assumes employees work full-time, for extended periods of time, at the employer's place of business, supervised by the employer.³⁶ In recent years, the employment market has witnessed a decoupling of these responsibilities from the single employer and the sharing of these roles among different workplace actors.³⁷ Various actors often perform the many roles typically associated with vertical employment, including hiring, firing, training, compensation, and supervision: according to Professor Brishen Rogers, “[t]wo or more contractual intermediaries often stand between [unskilled and semi-skilled workers] and the companies whose floors they clean, chickens they catch, vegetables they pick, goods they process, or garments they sew.”³⁸ Corporations, therefore, both maintain control over “the provision of their services and the manufacture of their products,” while also “shed[ding] responsibility for compliance with core labor standards.”³⁹ In this context, employment intermediaries that provide discrete services to businesses have disrupted the traditional workplace.⁴⁰

Temporary staffing agencies are one type of labor intermediary.⁴¹ Temporary staffing agencies typically place workers at temporary jobs in their clients’

³⁶ See generally Arne L. Kalleberg, *Nonstandard Employment Relations: Part-Time, Temporary and Contract Work*, 26 ANN. REV. SOC. 341 (2000) (describing traditional work arrangements).

³⁷ See Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1681 (2016) (“The process of ‘vertical integration,’ wherein firms generate goods and services internally, has drastically declined over the last several decades.”).

³⁸ Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 17 (2010).

³⁹ REBECCA SMITH & CLAIRE MCKENNA, NATIONAL EMPLOYMENT LAW PROJECT & NATIONAL STAFFING WORKERS ALLIANCE, *TEMPERED OUT: HOW THE DOMESTIC OUTSOURCING OF BLUE-COLLAR JOBS HARMS AMERICA’S WORKERS* 3 (2014).

⁴⁰ See Rogers, *supra* note 30, at 17 (noting that unskilled and semi-skilled workers navigating third party intermediaries find themselves excluded from employment law coverage because they are not “employed” by the companies for whom they provide services.)

⁴¹ See SMITH & MCKENNA, *supra* note 39, at 5 (“The Bureau of Labor Statistics classifies the industry encompassing temporary work as ‘Employment Services,’ which includes temporary help services, professional employer organizations (PEOs), and employment placement agencies.”).

workplaces.⁴² These staffing arrangements take a few different forms, primarily temporary employment agencies and contract firms.⁴³ Temporary employment agencies often employ the workers they place. They recruit, screen, and sometimes train the workers they send to clients' job sites.⁴⁴ The agencies set the rate of pay and handle the tax and social security withholdings and workers' compensation coverage.⁴⁵ Finally, the agencies bill their clients for these services.⁴⁶

Temporary staffing agencies have existed for decades and are not new to the employment space.⁴⁷ However, temporary staffing agencies have shifted from operating in largely the administrative staffing space to operating in more blue-collar and manufacturing spaces.⁴⁸ In particular, the number of temporary workers in merchandise warehouses has grown significantly in recent years.⁴⁹ For example, a logistics company manages Wal-Mart's two largest warehouses and "subcontracts to an ever-changing cast of third-party logistics firms and

⁴² See EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE NO. 915.002, APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS 3 (1997).

⁴³ Contract firms operate somewhat differently than temporary employment agencies. These firms typically contract with clients to provide long-term services at the clients' work sites. *Id.* at 4. The firms often handle the same terms of employment described above for staffing agencies, but they also take on the day-to-day supervision of workers at the clients' job sites. *Id.* The Equal Employment Opportunity Commission (EEOC) identifies additional types of staffing firms that do not fit neatly into these two categories:

For example, 'facilities staffing' is an arrangement in which a staffing firm provides one or more workers to staff a particular client operation on an ongoing basis, but does not manage the operation. Under another model, a client of a staffing firm puts its workers on the firm's payroll, and the firm leases the workers back to the client. The purpose of this arrangement is to transfer the responsibilities for administering payroll and benefits from the client to the staffing firm. A staffing firm that offers this service does not recruit, screen, or train the workers. *Id.*

⁴⁴ *Id.* at 3; see also SMITH & MCKENNA, *supra* note 39, at 5 ("Temporary work largely refers to arrangements in which workers are placed with an employer by an agency and are paid by the agency, but generally are not directly supervised by the agency at the worksite.").

⁴⁵ See EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 42.

⁴⁶ *Id.*

⁴⁷ Indeed, in some counties, an even larger percentage of workers are temporary. For example, ProPublica reported in 2013 that one in fourteen workers in Kane County, Illinois, worked a temporary job. Other counties, including Grand Rapids, Michigan; Middlesex County, New Jersey; Memphis, Tennessee; the Inland Empire, California; and Lehigh, Pennsylvania, had similar rates of temporary work. Michael Grabell, *The Expendables: How the Temps Who Power Corporate Giants are Getting Crushed*, PROPUBLICA (June 27, 2013), <https://www.propublica.org/article/the-expendables-how-the-temps-who-power-corporate-giants-are-getting-crushed>, available at <https://perma.cc/S8TB-GGD6>. One in twelve workers in Greenville County, South Carolina, worked in temporary positions. See *id.*

⁴⁸ See SMITH & MCKENNA, *supra* note 39, at 3–4; Grabell, *supra* note 47. ("The overwhelming majority of [temporary work] growth has come in blue-collar work in factories and warehouses, as the temp industry sheds the Kelly Girl image of the past.").

⁴⁹ See Grabell, *supra* note 47.

staffing companies.”⁵⁰ A recent report by the National Employment Law Project (“NELP”) decries a shift from temporary staffing agencies merely existing to their institutionalization as the companies’ norm.⁵¹

Over the last three decades, the number of workers employed through temporary staffing agencies has increased steadily and significantly.⁵² In fact, in 1997 the EEOC reported that temporary employment agencies employed more than 2.3 million workers—twice the number reported in 1991.⁵³ Since then, others have placed the number of temporary workers closer to three million.⁵⁴ Furthermore, “[s]ince 2010, the staffing industry has added more jobs to the U.S. economy than any other sector.”⁵⁵ Indeed, the American Staffing Association contends that each year, a tenth of all workers find employment through temporary staffing agencies.⁵⁶

Moreover, while temporary staffing is not a new phenomenon in the workplace, in recent years it has developed into a “core business strategy for many companies.”⁵⁷ Companies that may have previously used temporary staffing to meet specific, narrow, and genuinely *temporary* needs now contract with agencies for temporary workers to perform central tasks for their companies.⁵⁸ In 2013, 42 percent of temporary workers engaged in material moving jobs, production jobs, and assembly and fabrication jobs, while only 21 percent held office and administrative jobs.⁵⁹ The recent recession and economic instability may have exacerbated this shift. Companies experiencing significant economic uncertainty searched for ways to cheaply produce products and provide services, and they appreciated the flexibility a temporary work force provided.⁶⁰

⁵⁰ *Id.*

⁵¹ See SMITH & MCKENNA, *supra* note 39, at 4.

⁵² See Rogers, *supra* note 38, at 15. (“In the past thirty years . . . temporary labor agencies and labor-only subcontractors have grown significantly as an overall proportion of the workforce.”); see also Louis Uchitelle, *Labor Data Show Surge in Hiring of Temp Workers*, N.Y. TIMES (Dec. 21, 2009), <https://archive.nytimes.com/www.nytimes.com/learning/students/pop/articles/21temps.html>, archived at <https://perma.cc/7UNW-E7BY>.

⁵³ See EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 42, at 3.

⁵⁴ See Browning-Ferris Indus. of Cal., 362 N.L.R.B. 1599, 1609 (2015) (“As of August 2014, the number of workers employed through temporary agencies had climbed to a new high of 2.87 million, a 2 percent share of the nation’s work force.”). A Bureau of Labor Statistics report forecast an increase in the number of persons employed through employment services industry (of which temporary staffing agencies are a subset) to almost four million by 2022. See *id.*

⁵⁵ Cunningham-Parmeter, *supra* note 37, at 1682.

⁵⁶ CATHERINE RUCKELSHAUS, ET AL., NAT’L EMP. L. PROJ., WHO’S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK 19 (2014) (citing Grabell, *supra* note 4747).

⁵⁷ SMITH & MCKENNA, *supra* note 39, at 4.

⁵⁸ *Id.*

⁵⁹ *Id.* at 6.

⁶⁰ See Katherine S. Newman, *The Great Recession and the Pressure on Workplace Rights*, 88

The structure and size of staffing companies has also diversified. They now “range from national and multinational firms that contract with hundreds of host employers to smaller, often undercapitalized, local firms.”⁶¹ The growth of smaller, undercapitalized firms creates particular challenges to the enforcement of employment laws. Professor Cunningham-Parmeter observes that “nearly all cases in which workers seek to hold end-user firms liable for wage violations begin with the discovery that intermediaries have no assets to satisfy judgments.”⁶² Furthermore, smaller companies more easily file for bankruptcy or disappear and reorganize under a different name in order to avoid paying any significant judgments.⁶³ Assuming a low-wage worker overcomes the structural and procedural hurdles to enforcing her substantive legal rights,⁶⁴ a finding of liability and damages without the ability to enforce the judgment may prove a hollow victory.

With the growth of the temporary worker market, the types of jobs have also diversified.⁶⁵ Indeed, the market now includes “janitorial and security services, garment manufacturing, agriculture, unskilled construction, and warehouse work.”⁶⁶ According to a recent NELP report, three occupations make up the largest share of the staffing industry employment: material-moving workers, other production occupations, and assembly line workers and fabricators.⁶⁷ This is consistent with the report’s assertion that 77 percent of Fortune 500 companies contract with third-party logistics firms to move their products.⁶⁸ Their temporary workers “unpack, load, and ship goods to retail facilities across the country.”⁶⁹ The tiered employment structure often becomes more pronounced as corporations contract with multiple temporary staffing

CHI-KENT L. REV. 529, 533 (2013) (discussing the cost advantages of temporary staffing as “particularly valuable in the Great Recession when consumer demand was down and profit margins were squeezed.”).

⁶¹ SMITH & MCKENNA, *supra* note 39, at 3.

⁶² Cunningham-Parmeter, *supra* note 37, at 1690.

⁶³ *Id.* (“Because many contractors are smaller in scale and can exit the market more easily than end-user firms, they can nimbly dodge enforcement actions in ways that their customers cannot.”).

⁶⁴ See Llezlie Green Coleman, *Wage Theft in Lawless Courts*, 107 CAL. L. REV. 1303, 1307 (2019).

⁶⁵ See *supra* note 54 (discussing the expansion of temporary work into a wider range of occupations); see also, Rogers, *supra* note 38, at 16. (“Thus as manufacturing has migrated overseas, as technological innovations have rendered supply-chain management less expensive, and as the economy has shifted toward service rather than production industries, the number of domestic jobs which require no firm-specific skills and little monitoring has grown in both absolute and relative terms, and entire industries have come to be organized around the spot market for labor.”).

⁶⁶ Rogers, *supra* note 38, at 16.

⁶⁷ See SMITH & MCKENNA, *supra* note 39, at 6.

⁶⁸ See *id.* at 7.

⁶⁹ *Id.*

agencies to provide workers to the same job site where a third-party logistics firm supervises the workers.⁷⁰

The growth in temporary staffing jobs shows no signs of slowing and aligns with a steady increase in the contingent work force. As such, evidence of rampant racial discrimination within the sector merits significant concern and attention.

B. Worker Exploitation in De-Coupled Workplaces

Scholars and advocates have expressed concerns about increases in worker exploitation where de-coupled employment practices and labor intermediaries have proliferated.⁷¹ Employers typically engage labor intermediaries as a cost-saving measure. Indeed, paying for a contractual relationship with an independent contractor is less expensive than taking on the various human resources expenses associated with directly employing workers.⁷²

In their report *Temped Out*, NELP posited that staffing agency employment creates confusion for workers about who actually employs them and therefore, workers may be less likely to assert their labor and employment protections.⁷³ According to the report, staffing agencies also engage in a fiercely competitive market, which reduces worker protections:

Because staffing agencies' profits are based on the "markup" they charge host employers, they almost automatically must provide lower wages and fewer benefits than the lead firm. Cutthroat competition in the industry can induce companies to cut corners, by underpaying workers, exposing them to safety and health risks, committing

⁷⁰ *Id.*

⁷¹ See Cunningham-Parmeter, *supra* note 37, at 1689. The growth of outsourced employment is occurring within the broader context of changing dynamics in the workplace. Another significant shift in the employment relationship—the development of the “gig” economy—has also resulted in challenges to regulation and protection of workers. See, e.g., Naomi B. Sunshine, *Employees as Price-Takers*, 22 LEWIS & CLARK L. REV. 105, 110 (2018) (assessing the viability of creating a formal intermediate category of employees in response to the rapid emergence of the sharing or “gig” economy); Veena B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 745–48 (2017) (assessing recent litigation concerning gig economy workers and the potential impact of those cases); Wendi S. Lazar & Nantiya Ruan, *Is There a Future for Work?*, 25 GEO. J. ON POVERTY L. & POL'Y 343, 345 (2018) (expressing concern for the rise in job insecurity resulting from the “gig economy”). The massive and rapid growth of platforms like Lyft and Uber, which claim to retain independent contractors rather than hire employees, has created a growing space in which companies operate outside employment and labor laws. See Ruckelshaus, *supra* note 56, at 27–31.

⁷² See SMITH & MCKENNA, *supra* note 39, at 1 (“Staffing agencies may take over all of the former employer’s responsibilities for wages, health and safety, compliance with discrimination laws, and provision of workplace benefits.”).

⁷³ *Id.* at 11.

unlawful discrimination, and defrauding state workers' compensation funds.⁷⁴

Scholars and advocates echo these concerns, pointing to depressed wages where labor intermediaries employ workers⁷⁵ and to temporary workers typically earning 25 percent less than permanent workers.⁷⁶

This interest in cost-savings also reduces protections and creates an atmosphere that is ripe for exploitation. According to Professor Cunningham-Parmeter, the drive to reduce costs leads labor intermediaries to engage in unlawful employment practices like failing to pay for unemployment or workers' compensation insurance.⁷⁷ As Cunningham-Parmeter explains, “[b]y cutting corners in these areas, labor intermediaries can pass the cost-savings of regulatory noncompliance to larger firms who can avoid the reputational harm associated with these violations.”⁷⁸

In a second report, NELP described a “race-to-the-bottom” in which outsourcing leads to increased violations of workers' substantive employment rights.⁷⁹ According to NELP: “In at least some segments of key industries, competing firms cannot survive unless they violate workers' compensation laws, skimp on their unemployment insurance taxes, and pay less than the required minimum or prevailing wages”⁸⁰

While scholars have considered the impact of outsourcing on wages and violations of wage, hour, and workplace health and safety statutes, its impact on the proliferation of employment discrimination has received little attention. Where temporary staffing agencies—particularly small, under-capitalized agencies—face significant challenges to remaining competitive, it follows that those pressures would make them more likely to engage in racially discriminatory practices. In the cases discussed herein, the plaintiffs allege—and the signed affidavits from temporary staffing agency employees confirm—that agencies discriminated against African American workers at their clients' instruction. Workers allege that staffing agencies and clients subscribed to

⁷⁴ *Id.*

⁷⁵ See Cunningham-Parmeter, *supra* note 37, at 1689.

⁷⁶ See Grabell, *supra* note 47.

⁷⁷ See Cunningham-Parmeter, *supra* note 37, at 1689–90.

⁷⁸ *Id.* at 1690.

⁷⁹ See RUCKELSHAUS, *supra* note 56, at 27.

⁸⁰ *Id.* A news article reports:

The temp system insulates the host companies from workers' compensation claims, unemployment taxes, union drives and the duty to ensure that their workers are citizens or legal immigrants. In turn, the temps suffer high injury rates, according to federal officials and academic studies, and many of them endure hours of unpaid waiting and face fees that depress their pay below minimum wage.

Grabell, *supra* note 47.

negative racial stereotypes and that those stereotypes were the basis of wrongful employment actions. Moreover, the allegations point to a willingness to engage in explicit violations of various civil rights statutes as a business practice in the temporary agency space.⁸¹

II. RACIAL REALISM

While the racially discriminatory exclusion of African Americans from temporary staffing positions may shock the conscience, the allegations are consistent with social scientists' assessment of race in the low-wage workspace. Traditionally, antidiscrimination laws and programs largely discourage or forbid the use of race in employment decisions.⁸² However, sociologist John Skrentny argues that, despite the legal constraints on considering race in employment decisions, racial considerations continue to manifest in the workplace in meaningful ways, many of which he considers positive.⁸³ He terms this process "racial realism."⁸⁴

Skrentny identifies three strategies he argues decision-makers employ in managing race in employment, law, and politics. First, the classical liberal strategy seeks a color-blind workplace.⁸⁵ Its adherents contend that justice depends on race having no significance and, therefore, no utility in the workplace.⁸⁶ He contends the second strategy, which he terms affirmative action

⁸¹ News articles on the practice reference its occurrence across industries and in various cities across the country. *See, e.g.*, Evans, *supra* note 23 (discussing one company's alleged gender discrimination in Tennessee and California); Heyboer, *supra* note 23.

⁸² *See* RUCKELSHAUS, *supra* note 56, at 27. Affirmative action programs are the obvious exception, although the courts have significantly narrowed their use, particularly outside of higher education. *See, e.g.*, City of Richmond v. Croson, 488 U.S. 469, 505 (1989) (finding unconstitutional an affirmative action program in city government contracting); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 732 (2007) (finding unconstitutional a city's efforts to create racially diverse schools through the consideration of race in the elementary school lottery program).

⁸³ *See generally* SKRENTNY, *supra* note 33. Workplace diversity programs are a second example of race-conscious employment programs. These efforts are characterized by "policies and practices designed to expand opportunities for and inclusion of all persons in the workplace" and especially those in underrepresented communities. Stacy L. Hawkins, *The Long Arc of Diversity Bends Toward Equality: Deconstructing the Progressive Critique of Workplace Diversity Efforts*, 17 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 61, 64–65 (2017).

⁸⁴ Professor Derrick Bell first coined the phrase "racial realism" to describe the futility of efforts to achieve racial equality in the United States, given the permanence of racism. *See* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373 (1992). Skrentny's "racial realism" takes a decidedly different approach in his discussion of race in the workplace. *See, e.g.*, Gilda R. Daniels, *Voting Realism*, 104 KY. L. J. 583, 588–90 (2016) (contrasting Bell and Skrentny's theories).

⁸⁵ *See* SKRENTNY, *supra* note 33, at 4.

⁸⁶ *Id.*

liberalism, assumes we must see race in order to move beyond race.⁸⁷ Here, “race has meaning for employment, but only to ensure the goal of justice and specifically, equal opportunity.”⁸⁸ Affirmative action realism assumes that race is significant, but not particularly useful.⁸⁹ The third strategy, racial realism, assumes race has both significance and usefulness, by “mak[ing] a frank assessment of the utility of race for organizational goals.”⁹⁰ Indeed, racial realism promotes “organizational effectiveness” over equal opportunity.⁹¹ It recognizes the importance of race to worker identity and argues that business, government, and institutions can and should use racial differences to advance their organizations’ goals.⁹² Skrentny argues that racial realism is entrenched or supported in various workplaces despite the lack of “explicit legal authorization in almost all of them.”⁹³

Skrentny’s analysis of racial realism in various employment sectors, including skilled private employment, politics and government, and media and entertainment, suggests employers use race in ways that both advance the employer’s objectives and enhance employees’ opportunities.⁹⁴ Skrentny characterizes the use of race in these sectors as largely positive.

However, Skrentny’s research on low-wage workplaces reveals a more troubling form of racial realism. In what he describes as the “darkest corner of American racial realism,”⁹⁵ Skrentny traces the use of racialized stereotypes of low-wage workers that advantage Latinx, white, and Asian workers over African American workers.⁹⁶ He relies upon various studies, many discussed in further detail below, to reach the conclusion that low-wage employers apply their negative perceptions of African American low-wage workers to exclude them from the workplace.⁹⁷ Therefore, unlike in other employment spaces, racial realism in low-wage work relies upon problematic stereotypes that lead to the exclusion of African Americans and preference for immigrant workers.⁹⁸ This

⁸⁷ *See id.* at 18.

⁸⁸ *See id.* at 6.

⁸⁹ *See id.* at 8.

⁹⁰ *See id.* at 10.

⁹¹ John D. Skrentny, *Have We Moved Beyond the Civil Rights Revolution?*, 123 YALE L.J. 3002, 3011 (2014); *see also* Daniels, *supra* note 84, at 589.

⁹² *See* SKRENTNY, *supra* note 33, at 10.

⁹³ *Id.* at 18.

⁹⁴ *Id.* at 38–215.

⁹⁵ *Id.* at 218.

⁹⁶ *Id.* at 216–45.

⁹⁷ *See id.* at 222–27.

⁹⁸ In this scenario, however, all immigrants are not created equal. Indeed, Skrentny points out employers often grouped Latinos from island nations with African Americans. *See id.* at 222. He also points to sociologist Margaret Chin’s study of immigrant-owned businesses in New York City, in which she found employers expressed an aversion to both African Americans and black immigrants. *See id.* at 229 (citing MARGARET M. CHIN, *SEWING WOMEN: IMMIGRANTS AND THE NEW YORK CITY GARMENT INDUSTRY* 86 (2005)).

racial realism is deeply entrenched, despite clearly violating civil rights laws.⁹⁹ The distinction between this and other sectors is clear:

While all of the racial realism explored in this book prizes the usefulness of certain racial backgrounds and tends to exclude the less-favored backgrounds, it is only in this sector that we see the familiar American pattern of African-Americans consistently winding up at the back of the preference queue, while employers valorize other groups.¹⁰⁰

This modern-day version of Upton Sinclair's "jungle"¹⁰¹ takes form in the ways low-wage workplaces, through their temporary staffing agencies, create racialized workplaces that either exclude African American workers altogether, or limit them to the least desirable assignments. This Article next explores more specifically the power of narratives in creating the stereotypes that drive low-wage employers to prefer Latinx workers and exclude African American workers.

III. LOW-WAGE WORKER NARRATIVES: STOCK STORIES AND STEREOTYPES

In our daily lives, we process information as narratives or stories.¹⁰² Stock stories are narratives that take root in culture and inform the way we interpret the world.¹⁰³ Whether rooted in truth, half-truths, or "alternative facts," stock stories are powerful motivators in our everyday decision-making. According to Professor Gerald P. López, we interpret the world through stock stories, which "help us to make choices about asserting our own needs and responding to other people."¹⁰⁴

Stock stories often become stereotypes about particular groups of people. Stereotypes "are widely shared understandings about the features of categorically distinct groups" that respond to our cognitive need to categorize

⁹⁹ See SKRENTNY, *supra* note 33, at 219 ("Another critical feature of racial realism in low-skilled jobs is that it appears to be deeply entrenched even though it is often quite clearly in violation of the most basic principle of equal opportunity and discrimination law: that we should not judge individuals based on stereotypes.").

¹⁰⁰ *Id.* at 263.

¹⁰¹ UPTON SINCLAIR, *THE JUNGLE* (1906). Skrentny titled his chapter on low-wage workers, "The Jungle Revisited? Racial Realism in the Low-Skilled Sector." SKRENTNY, *supra* note 33, at 216.

¹⁰² According to Anthony Amsterdam and Jerome Butler: "So predisposed is the human mind to narrative that we even experience the events of everyday life in narrative form and assign them to categories derived from some particular kind of story." ANTHONY G. AMSTERDAM & JEROME BUTLER, *MINDING THE LAW* 30–31 (2000).

¹⁰³ See Gerald P. López, *Lay Lawyering*, 32 *UCLA L. REV.* 1, 3 (1984).

¹⁰⁴ *Id.*

things and people in our world.¹⁰⁵ Statistical confirmation of some portions of stereotypes may be possible, but they typically also possess aspects that are not amenable to empirical testing.¹⁰⁶ Perhaps most troubling, they are difficult to dispel because they “possess the property of proving resistant to contradictory evidence, even while consistent evidence is seen as confirmatory”¹⁰⁷ This phenomenon has led scholars to describe stereotypes as “resilient.”¹⁰⁸

In his effort to explain the presence of racism without racists, Eduardo Bonilla-Silva conducted a post-Civil Rights era ethnography.¹⁰⁹ He identifies racial stories that drive judgments.¹¹⁰ Bonilla-Silva’s discussion of what he terms “story lines” is particularly useful here. He defines story lines as “socially shared tales that are fable-like and incorporate a common scheme and wording.”¹¹¹ Story lines, he explains, are “often based on impersonal, generic arguments, with little narrative content.”¹¹² Significantly, Bonilla-Silva characterizes the storylines that he identified in his study as ideological in nature. He explains:

What makes these story lines “ideological” is that storytellers and their audiences share a representational world that makes these stories seem factual. Hence, by telling and retelling these storylines, members of a social group (in this case, the dominant race) strengthen their collective understanding about how and why the world is the way it is; indeed, these stories tell and retell a moral story agreed upon by the participants. These racial narratives, therefore, do more than assist dominant (and subordinate) groups to make sense of the world in particular ways; they also justify and defend (or challenge, in the case of oppositional stories) current racial arrangements.¹¹³

Bonilla-Silva’s theory of the power of storylines is particularly significant when applied to stock stories and stereotypes of low-wage workers that seem to drive discriminatory decision-making in the temporary staffing industry.

The acceptance of racial stereotypes and narratives may explain the “racial arrangements” in temporary staffing that prefer Latinx workers over African American workers. It may also explain why the agencies and clients making discriminatory hiring decisions may feel less guilty or culpable for racially

¹⁰⁵ ROGER WALDINGER & MICHAEL I. LICHTER, *HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR* 149 (2003).

¹⁰⁶ *See id.*

¹⁰⁷ *Id.*

¹⁰⁸ PHILIP MOSS & CHRIS TILLY, *STORIES EMPLOYERS TELL: RACE, SKILL, AND HIRING IN AMERICA* 87 (2001) (describing stereotypes as resilient because people remember things that confirm them more readily than facts that contradict them and tend to view behavior that challenges a stereotype as exceptional or situational).

¹⁰⁹ *See* EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS* 123–49 (4th ed. 2014).

¹¹⁰ *See id.*

¹¹¹ *Id.* at 124 (italics omitted).

¹¹² *Id.*

¹¹³ *Id.* at 124–25.

discriminatory hiring. An analysis of the racial narratives associated with low-wage African American and Latinx workers follows below and contextualizes this assertion.

A. African American Worker Narrative

As discussed above, Skrentny points to the role of negative stereotypes in low-wage employers' aversion to African American workers.¹¹⁴ William Julius Wilson's groundbreaking research on the inner-city black working class also revealed rampant stereotyping.¹¹⁵ As Wilson explains, "the available research does suggest that African Americans more than any other major racial group or ethnic group, face negative employer perceptions about their qualifications and their work ethic."¹¹⁶

Prevalent narratives about African American workers are the result of a complicated web of historical, sociological, and structural factors. In my prior work, I identified some of the complex dynamics that have created consistently negative stock stories about African American workers.¹¹⁷ Specifically, I argue that the degradation of the war on poverty and the subsequent racialized criminalization of poverty have resulted in the prevalence of problematic narratives of low-wage African American workers.¹¹⁸ Sociologists Kathryn Neckerman and Joleen Kirschenman have likewise argued that "[w]idespread publicity, emphasizing poor schools, drug use, crime, and welfare dependency, shapes the way city residents view the inner society and whom they associate with it."¹¹⁹

Much of employers' critique of African American workers focuses on what social scientists have termed "soft skills." Skrentny argues that in a largely de-skilled workplace more reliant on mechanization, employers are no longer focused on a potential employee's concrete skills as traditionally understood, "but [on] . . . hard-to-measure qualities such as attitude, work ethic, and reliability."¹²⁰ Indeed, Skrentny points to studies that show employers make hiring decisions based upon ethnic stereotypes like "punctuality, reliability, [and

¹¹⁴ See SKRENTNY *supra* note 33, at 15–16.

¹¹⁵ WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 111 (1996).

¹¹⁶ *Id.*

¹¹⁷ Llezlie Green Coleman, *Rendered Invisible: African American Low-Wage Workers and the Workplace Exploitation Paradigm*, 60 *HOW. L.J.* 61, 92–100 (2016).

¹¹⁸ *Id.* at 92–95.

¹¹⁹ Kathryn M. Neckerman & Joleen Kirschenman, *Hiring Strategies, Racial Bias, and Inner-City Workers*, 38 *SOC. PROBS.* 433, 433 (1991); see also SKRENTNY, *supra* note 33, at 226 (explaining that employers described African American workers as lacking a work ethic, due to their over-reliance on the welfare system).

¹²⁰ See SKRENTNY, *supra* note 33, at 221.

the] willingness to work hard.”¹²¹ Within this rubric, “the antithesis of the good Latino or Asian worker is the American-born black.”¹²²

Indeed, Wilson notes that employers appeared to differentiate between skilled and unskilled workers and more readily stereotype the latter. For example, when asked about his opinions of African Americans as workers, a manufacturer responded: “The black work ethic. There’s no work ethic. At least at the unskilled. I’m sure with the skilled . . . as you go up, it’s a lot different.”¹²³ Various other studies likewise discuss employers’ tendency to distinguish between the assessment of African American workers’ hard skills and soft skills.¹²⁴ For example, Moss and Tilly explain that respondents to their surveys framed concerns about African American low wage-workers’ hard skills as based upon differences in the education they received, rather than a difference in their capacity to obtain the skills.¹²⁵ Professors Jennifer Gordon and Robin Lenhardt describe social scientists’ studies that found that employers systematically stereotype African Americans as undesirable workers¹²⁶ who are “unstable, uncooperative, dishonest, and uneducated,” as well as unreliable and lazy.¹²⁷

These narratives are based largely on stereotypes, rather than the concrete racial animus that characterizes our historical understanding of discrimination.¹²⁸ According to Moss and Tilly, “Not one employer told us, ‘I don’t like Blacks’ or ‘I prefer to hire someone from my own ethnic group.’ But many, many managers made statements like ‘Blacks are less reliable’ or ‘Immigrants work harder.’”¹²⁹

¹²¹ *Id.* at 223 (quoting Philip Kasinitz and Jan Rosenberg, *Missing the Connection: Social Isolation and Employment on the Brooklyn Waterfront*, 43 SOC. PROBS. 180, 189 (1996)).

¹²² SKRENTNY, *supra* note 33. Scholars have criticized and complicated the “good Latino” worker narrative that presumes worker docility and compliance, and enables the employer to more freely violate employment laws, including the wage and hour laws and OSHA regulations. See, e.g., Leticia Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-Ized Occupations*, 80 NOTRE DAME L. REV. 303, 314–17 (2004).

¹²³ WILSON, *supra* note 115, at 113.

¹²⁴ See MOSS & TILLY, *supra* note 108, at 96.

¹²⁵ *Id.* (“Managers more often identified shortcomings in interaction skills and, especially, motivation than deficits in hard skills among black workers.”).

¹²⁶ See Gordon & Lenhardt, *supra* note 30, at 1175 (“Social scientists who show have studied employer attitudes toward African Americans concur that employers have considerable prejudice against native-born black workers.”).

¹²⁷ *Id.* (quoting Joleen Kirshcenman & Katheryn M. Neckerman, “*We’d Love to Hire Them, But...*”: *The Meaning of Race for Employers*, in 203 THE URB. UNDERCLASS 204 (Christopher Jencks & Paul E. Peterson eds., 1991)); See also MOSS & TILLY, *supra* note 108, at 100–03. Indeed, these narratives of the lazy African American worker echo many stereotypes that have existed since their ancestors arrived on these shores in chains. Professor Ibram Kendi’s work tracing the history of racist ideas in America discusses the ironic characterization of slaves as lazy and slothful. See generally IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA (2016).

¹²⁸ See Llezlie Green Coleman, *Disrupting the Discrimination Narrative: An Argument for Wage and Hour Laws’ Inclusion in Antisubordination Advocacy*, 14 STAN. J. C.R. & C.L. 49, 59–60 (2018).

¹²⁹ See MOSS & TILLY, *supra* note 108, at 4.

In other words, employers stated that African American low-wage workers are not bad people; they are just lousy employees.¹³⁰

As the studies above demonstrate, employers maintain overwhelmingly negative narratives of African American low-wage workers' performance in the workplace. These problematic narratives co-exist with startlingly different narratives about immigrant Latinx workers.

B. The Immigrant Latinx Worker Narrative

The stock story of the immigrant Latinx low-wage worker differs significantly from that of the African American worker. The hard-working, compliant Latinx worker narrative stands in direct contrast to the negative stereotypes of African American workers. In the same work discussed above,¹³¹ Professor John Skrentny identifies stereotypes of Latinx workers that sharply contrast with those of African American workers. Citing a variety of reports and books, Professor Skrentny explains that employers expressed largely positive opinions about Latinx workers.¹³² A number of other studies have found that employers apply a hard-working, compliant worker narrative to Latinx workers. In López-Sanders's study, she found that employers described Latinx workers as "hard workers,' 'reliable,' and 'dependable.'"¹³³

Professor Leticia Saucedo's work speaks directly to the prevalence and power of Latinx worker narratives. She argues that Latinx low-wage workers have accepted and adopted certain narratives, often wearing them as a badge of pride in the workplace. For example, between 2006 and 2008, Professor Saucedo and Professor Maria Cristina Morales interviewed Latinx male construction workers in Las Vegas about their border crossing and work experiences.¹³⁴ They discovered that the workers had adopted three specific narratives rooted in masculinity and common to both experiences: (1) endurance, (2) family provider, and (3) family order.¹³⁵ In the workplace context, "the endurance narrative is characterized by an acceptance of substandard working conditions," and the inability to contest workplace exploitation due to their immigration status.¹³⁶ The family provider narrative focused on the centrality of the worker's family-breadwinner role to his identity and his willingness to sacrifice for

¹³⁰ *See id.*

¹³¹ *See* SKRENTNY, *supra* note 33, at 221–22.

¹³² *See id.* at 222 (stating that employers typically "place[ed] mostly positive meanings on Mexicans, Guatemalans, and others of Central and South American origin"). He also noted, however, that employers grouped Latino workers from island nations like Puerto Rico and the Dominican Republic with African American workers. *Id.*

¹³³ López-Sanders, *supra* note 34, at 14.

¹³⁴ Leticia Saucedo and Maria Cristina Morales, *Voices Without the Law: The Border Crossing Stories and Workplace Attitudes of Immigrants*, 21 CORNELL J.L. & PUB. POL'Y 641, 642 (2012).

¹³⁵ *Id.* at 649–53.

¹³⁶ *Id.* at 649.

others.¹³⁷ Finally, the family order narrative indicated the worker's acceptance of hierarchical family structures, which perhaps made him reticent to challenge hierarchical structures in the workplace.¹³⁸

In other work, Professor Saucedo identifies additional masculinity narratives attributed to and adopted by Mexican workers, including the “structure of no complaints,” where “[w]orkers are expected to put up with harsh conditions, and even harassment.”¹³⁹ She contends that workers accept this narrative and choose to perform their identity in conformance with this expectation of “hard work, subservience, and complacency.”¹⁴⁰

Professor Saucedo argues that while these narratives reflect what many would consider “positive” attributes of the immigrant Latinx worker, the reality is more nuanced. She posits, for example, that reliance on these narratives subjects immigrant workers to exploitation by their employers who assume they will withstand substandard work conditions and treatment without complaint.¹⁴¹ Saucedo contends that employers thus create “brown-collar” workplaces that offer low-wage Latinx immigrant workers depressed wages and fewer benefits, and demand higher productivity than from white (and sometimes African American) workers.¹⁴² In other words, while employers may claim to prefer Latinx workers due to their strong work ethic, they also exploit them based upon their perceived vulnerability. In doing so, employers create workplace conditions that bear little resemblance to the ones that may have existed ten years ago.¹⁴³ These so-called brown-collar workplaces, despite hiring Latinx workers, actually engage in their further subordination.

Laura López-Sanders' 2009 ethnographic study of low-wage workers in a manufacturing facility in South Carolina provides an example of how a low-wage employer's racial stereotyping can shape a workforce. She contends that the manufacturing facility systematically used temporary staffing agencies to replace

¹³⁷ *Id.*

¹³⁸ *Id.* at 650.

¹³⁹ Leticia M. Saucedo, *The Three Theories of Discrimination in the Brown Collar Workplace*, 1 U. CHI. LEGAL F. 345, 367 (2009) (citing KRIS PAAP, WORKING CONSTRUCTION: WHY WHITE WORKING-CLASS MEN PUT THEMSELVES—AND THE LABOR MOVEMENT—IN HARM'S WAY 143–48 (2018)).

¹⁴⁰ *Id.* at 370.

¹⁴¹ Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 976–80 (2006). Similarly, Professor Jayesh Rathod has examined the life-threatening workplace safety violations tied to the Latinx immigrant narrative of enduring dangerous conditions. Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 479, 493 (2009) (discussing the “familiar narrative of immigrant agricultural workers who toil under dangerous, sometimes deadly conditions”).

¹⁴² Saucedo, *supra* note 141, at 979–80.

¹⁴³ *Id.* at 975 (“Once brown collar workers occupy a job, employers will devalue the position and its function, pay rate, terms and conditions, and advancement ladder.”).

its largely African American workforce with immigrant Latinx workers.¹⁴⁴ López-Sanders argues that “[t]he temporary status of workers proved to be a central factor facilitating the replacement of one ethnic group with another.”¹⁴⁵ She notes that employers’ stereotypes about ethnic and racial groups created a hierarchical ranking of workers that led to the decision to replace one group with another. Specifically, “native-born white male workers stood at the top, followed by Hispanic male workers, Hispanic female workers, white American females and, at the bottom, native-born African Americans.”¹⁴⁶ Furthermore, these employers preferred foreign-born Latinx immigrants to native-born Latinx workers, and undocumented Latinx people above all.¹⁴⁷ Ultimately, the manufacturing facility shifted the racial demographics of their facility to reflect these racialized worker preferences.¹⁴⁸

Stock stories and stereotypes about African American and Latinx workers create a racial hierarchy of workers: native-born whites at the top, followed by immigrant whites, then immigrant Latinxs, and African Americans at the bottom.¹⁴⁹ Employers then weaponize those stereotypes by “using the ascribed characteristics of groups viewed through the filter of inaccurate stereotypes to predict individual behavior on the job.”¹⁵⁰

IV. WORKING THEIR IDENTITY IN RESPONSE TO THE NARRATIVE

Performative theories of identity may also shed light on the persistence of discrimination in the temporary worker space. Performative theories have their origins in the work of feminist scholar Judith Butler, who contends that gender identity is not fixed, but rather is constantly constructed and reconstructed based

¹⁴⁴ López-Sanders, *supra* note 34, at 7–12.

¹⁴⁵ *Id.* at 12.

¹⁴⁶ *Id.* at 14.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 24–27.

¹⁴⁹ *Id.* at 14 (describing a company’s systematic replacement of workers based upon “employers’ prejudgments and stereotypes about different ethnic/racial groups [that] created a system of discrimination that generated a specific rank ordering of workers”); *see* WALDINGER & LICHTER, *supra* note 105, at 142 (discussing Professors Joleen Kirschenman and Kathleen Neckerman’s research of Chicago-area employers’ views of about hiring different racial and ethnic groups). Not all studies, however, found employers preferred white workers to Latinx workers. For example, Professors Roger Waldinger and Michael I. Lichter assert that employers in their study of the low-skilled labor market in Los Angeles opined that white workers did not really want to work the low-skilled jobs, complained and whined about the job, and were unwilling to remain in the positions for long. *Id.* at 157–60 (Indeed, an employer stated, “overall Latinos are much better workers. They have a loyalty towards the company that white workers don’t have.”).

¹⁵⁰ WALDINGER & LICHTER, *supra* note 105, at 142.

upon actions.¹⁵¹ As Butler explains, “[t]he view that gender is performative sought to show that what we take to be an internal essence of gender is manufactured through a sustained set of acts, posited through the gendered stylization of the body.”¹⁵² As such, we all perform aspects of our gender identity on a daily basis—we make choices about how to present ourselves that either conform with or differ from particular norms. We are not simply a gender because of our sex organs, but because we choose to demonstrate that gender on a daily basis.

The performative nature of gender is the perhaps not-so-distant relative of the social construction of race. A central tenet of critical race theory is the assertion that race is socially constructed, rather than biologically determined.¹⁵³ Scientists have found that race is not determined by a gene or gene cluster and is not dependent upon the rate of appearance of certain gene types.¹⁵⁴ Moreover, “greater genetic variation exists *within* the populations typically labeled Black and White than *between* these populations.”¹⁵⁵ Critical race theorists view race as not as biologically determined, but rather as socially constructed by societal institutions and further defined and reinforced by legal institutions.¹⁵⁶ Accordingly, race is not absolute and only has meaning because of definitions and understandings that powerful institutions and structures attribute to it.¹⁵⁷

¹⁵¹ JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY xv (Linda J. Nicholson ed., 1999).

¹⁵² *Id.*

¹⁵³ See generally Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

¹⁵⁴ *Id.* at 11.

¹⁵⁵ *Id.* at 12.

¹⁵⁶ López describes the law as the “prime instrument in the construction and reinforcement of racial subordination.” *Id.* at 3.

¹⁵⁷ The judiciary, however, seems to lag behind in its understanding of race, often applying seemingly biological definitions. Courts’ earlier conceptions of race made determinations based largely on physical or biological understandings. For example, in 1806, the Virginia Supreme Court determined that three generations of enslaved women were free based upon their ancestor’s straight, long hair. *Id.* at 2–3 (discussing *Hudgins v. Wright*, 11 Va. (1 Hen. & M.) 134 (Va. 1806)). Indeed, the court in *Hudgins* reasoned that “one is Black if one has a single African antecedent, or if one has a ‘flat nose’ or a wooly head of hair.” *Id.* at 5. Recent court cases echo this biological understanding of race. For example, in *Rogers v. American Airlines* and *EEOC v. Catastrophe Management Solutions*, the Southern District of New York and the Eleventh Circuit found that employers’ policies prohibiting employees from wearing cornrows or dreadlocks do not constitute racial discrimination because they do not implicate employees’ immutable characteristics. See *Rogers v. American Airlines*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981); *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1030 (11th Cir. 2016). Professor Wendy Greene explains that the immutability doctrine “is a consequence of judicial understanding of identity, namely racial and gender identity, as constitutive of fixed, biological characteristics—despite scholars’ persuasive arguments to the contrary.” D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit’s Take on Workplace Bans Against Black Women’s Natural Hair* in *EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987, 1028 (2017).

Performative identity then considers how we demonstrate or “perform” our socially constructed identities. Scholars have long decried the potentially discriminatory nature of employers’ expectations that employees conform their behavior to particular assumptions, tropes, or stereotypes.¹⁵⁸ Racial identity performance in the workplace thus provides necessary insight into workplace racial dynamics.

A. “*Working Identity*” Theory

Critical race theorists Devon Carbado and Mitu Gulati have drawn upon Butler’s and others’ work to consider the performative aspects of racial identity in the workplace.¹⁵⁹ They argue that workers engage in a form of racial identity gymnastics in the workplace in order to navigate stereotypical narratives that may hinder their success.¹⁶⁰

Carbado and Gulati posit:

Anti-discrimination law and the reputational harms of maintaining all-white work environments substantially diminish the likelihood that employers will discriminate against *all* blacks. Employers who want to discriminate are likely to do so by discriminating against a subset of blacks based on their Working Identity. This creates an incentive for black prospective employees to signal that they are ‘good’ by adopting precisely some of the strategies Michael Luo’s New York Times articles mentioned.¹⁶¹

In response to this tension, they argue, African American employees attempt to avoid association with stereotypes they believe will hinder their professional success and advancement by distancing themselves from the problematic narratives.¹⁶² They describe this process as starting with four stages of “racial

¹⁵⁸ See Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 487–503 (1990) (discussing the problematic use of gender stereotypes in the workplace). See generally Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990) (challenging stereotypes in sex discrimination cases that alleged the lack of interest argument).

¹⁵⁹ See generally Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); DEVON CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN “POST-RACIAL” AMERICA* 19 (2013).

¹⁶⁰ See Carbado & Gulati, *Working Identity*, *supra* note 159, at 1276 (“[O]utsiders subject to negative stereotypes have greater than normal incentives to put effort and thought into constructing their workplace identity.”); see also CARBADO & GULATI, *ACTING WHITE?*, *supra* note 159, at 19.

¹⁶¹ CARBADO & GULATI, *ACTING WHITE?*, *supra* note 159, at 19.

¹⁶² *Id.* at 24 (“[B]ecause people of color often perceive themselves to be the subjects of negative stereotyping, they are likely to feel the need to do significant amounts of identity work to counter those stereotypes.”).

negotiation.”¹⁶³ In the first stage, the employee distinguishes between identity-affirming conduct that comports with their sense of self and identity-negating conduct that does not.¹⁶⁴ In the second stage, they determines what criteria the institution (their workplace) values.¹⁶⁵ In the third stage, they identifies a tension between his sense of self and the institution’s values.¹⁶⁶ In the fourth stage, they engages in a “negotiation” by deciding whether to take actions in response to this tension by adjusting how they “performs” in the workplace.¹⁶⁷

Carbado and Gulati proffer six ways this identity performance takes place. First, the employee may engage in “racial comforting” where they work their identity to make members of the dominant culture—the “Insiders”—more comfortable with their “Outsider status.”¹⁶⁸ Second, they may engage in “strategic passing” where they work their identity “to modify the stereotypical assumptions about or otherwise suppress the salience of” their Outsider status.¹⁶⁹ Third, they may exploit the stereotypes associated with their identity if doing so could actually create an advantage in the workplace.¹⁷⁰ Fourth, they may opt to create discomfort by emphasizing their Outsider status “in a way that makes Insiders uncomfortable” in order to push for change in the workplace.¹⁷¹ Fifth, they may decide to “sell out” by making “arguments that work to the advantage of Insiders so that Insiders can then claim that their arguments are not self-interested or even racial.”¹⁷² Finally, if they believe their chosen identity performance has been costly to their community, they may try to make amends by engaging in what Carbado and Gulati term “buying back.”¹⁷³ This process may involve, for example, taking specific actions to support other Outsiders in the workplace.¹⁷⁴

This additional “work” described by Carbado and Gulati enables employees to navigate the minefields of implicit and explicit bias and stereotypes in order to succeed in the workplace. Indeed, they describe it as identity work that goes

¹⁶³ *Id.* at 25–26.

¹⁶⁴ *Id.* at 25.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ CARBADO & GULATI, ACTING WHITE?, *supra* note 159, at 25.

¹⁶⁸ *Id.* at 26–27.

¹⁶⁹ *Id.* at 29. Carbado and Gulati discuss both “complete passing”—where the employee’s appearance permits them to pretend to literally be a member of the Insider culture—as well as the “partial passing” discussed here. *Id.* Complete passing is very rare given that it requires the employee possess a phenotype that causes members of the Insider culture to believe they employee is a member of that culture. *Id.*

¹⁷⁰ *Id.* at 33. As an example, Carbado and Gulati describe a Korean American stereotyped as “hardworking, technically advanced, uncreative, and lacking in leadership skills” who plays into this stereotype in order to obtain a particular position or assignment he seeks. *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 34.

¹⁷³ CARBADO & GULATI, ACTING WHITE?, *supra* note 159, at 34–35.

¹⁷⁴ *Id.* at 34.

unrecognized and uncompensated, thus creating unfair burdens for diverse employees.

B. Working Low-Wage Worker Identity?

Carbado and Gulati's theory of "working identity" focuses exclusively on white-collar workers.¹⁷⁵ Indeed, each example they provide draws from the experiences of diverse employees working in an office setting.¹⁷⁶ Blue-collar workers' experiences are largely absent from their analysis. Do low-wage workers "work their identity" differently than white collar workers? Are there sufficient differences in the workplace dynamic and workers' engagement with one another and their supervisors that performative identity manifests differently? Finally, do these potential differences help to explain scholars' repeated findings that racial stereotypes, particularly negative stereotypes about African American workers, permeate low-wage workspaces?

For my purposes here, I will assume that low-wage workers generally do not possess the social and economic capital to work their identities in the ways Carbado and Gulati propose.¹⁷⁷ This does not mean that they do not engage in any performative identity work, just that it may manifest differently and perhaps less effectively. If low-wage workers do not regularly engage in the type of identity performance Carbado and Gulati suggest is necessary to counteract workplace bias, this might explain the prevalence of accepted African American low-wage worker stereotypes reported in the literature.

V. NORMATIVE RESPONSES OR CRITICAL RACE PRAXIS

While a theoretical understanding of the development of what advocates consider a widespread, discriminatory industry business practice is critical to considering potential solutions, critical race theory also demands a consideration of praxis. Praxis is the practical, structural, and legal considerations that bridge theory and practice.¹⁷⁸ Accordingly, this Article now proceeds to consider

¹⁷⁵ Professor Lisa R. Pruitt argues that Carbado and Gulati seem to conflate race and class in their descriptions of whiteness by ignoring the plight of the working-class whites who might also find themselves as outsiders in the "white institutions" discussed therein. See Lisa R. Pruitt, *Acting White? Or Acting Affluent? A Book Review of Carbado & Gulati's Acting White? Rethinking Race in "Post-Racial" America*, 18 J. GENDER, RACE & JUST. 159, 161 (2015).

¹⁷⁶ See CARBADO & GULATI, *ACTING WHITE?*, *supra* note 159, at 136–40 (describing the various decisions a law professor and an outsider law firm associate might make to insulate themselves from bias in the workplace).

¹⁷⁷ Of course, none of this assumes that workers should have to engage in performative identity strategies in order to insulate themselves from stereotypes and bias in the workplace.

¹⁷⁸ See, e.g., Adrien Katherine Wing, *Civil Rights in the Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 735 (2003) ("Another tenet that

potential prescriptive legal shifts that would better enable employees to hold both the temporary staffing agency and their clients jointly liable for discriminatory employment practices.

Low-wage workers are less likely to pursue discrimination claims in court. Indeed, Skrentny opines that “it is not cost effective for individuals to litigate for access to low-skilled jobs, and the judge-made legal rules for invoking the law limit its usefulness even to those whom employers deem lacking in ability because of their race or national origin.”¹⁷⁹ Certain changes to the antidiscrimination laws, however, would better position workers, through counsel, to challenge discrimination by temporary staffing agencies and their clients.

A. *Litigation Strategies*

When temporary workers allege discrimination by the temporary staffing agency at the instruction of their client, workers typically seek to hold both entities responsible.¹⁸⁰ The worker’s ability to hold the client accountable may be critically important where the staffing agency is small, undercapitalized, and therefore ill-positioned to make the worker financially whole.¹⁸¹ When more than one employer may be liable for the discrimination, however, the potential for either party to litigate the question of whether it employed the worker increases substantially. Where any uncertainty in the law exists, parties will frequently litigate those issues, thus increasing the time and expense associated with bringing the case. The prospect of lengthy and complicated litigation typically discourages poor workers from pursuing their rights and therefore creates a barrier to justice. As such, it is critically important to explore potential statutory reform that would simplify the litigation of these cases.

First, the record-keeping provisions of Title VII should require more specific record-keeping practices from temporary staffing agencies. Title VII requires that employers maintain and preserve records relevant to determining whether the employer has engaged in discriminatory practices.¹⁸² To comply

Critical Race Theorists espouse involves the necessity to engage in praxis, the combining of theory and practice.”).

¹⁷⁹ SKRENTNY, *supra* note 33, at 251.

¹⁸⁰ *See supra* note 10 and the cases cited therein, all of which include allegations against the temporary staffing agencies and their clients.

¹⁸¹ *See* RUCKELSHAUS, *supra* note 56, at 8 (discussing multiple layers of contractors and often undercapitalized subcontractors).

¹⁸² 42 U.S.C. § 2000e–8(c) (1986) (“Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder.”).

with this requirement, employers typically collect and maintain data regarding the race of their job applicants. Temporary employment agencies' policies and procedures, however, create a potential compliance loophole. In *Hunt v. Personnel Staffing Group*,¹⁸³ one of the staffing agency's former employees explained that the agency only required that potential applicants sign in to indicate their interest in being placed.¹⁸⁴ An applicant would only provide explicit information about his race after the agency selected him from the sign-in list to fill out an application.¹⁸⁵ In a related case, the same agency admitted to shredding the sign-in sheets that would have tracked the actual potential applicants.¹⁸⁶ It thus destroyed evidence that could have potentially demonstrated the agencies' refusal to consider African American workers for certain placements.¹⁸⁷

Employment discrimination statutes should require that temporary staffing firms gather and maintain demographic information about all of the workers that come through their doors to inquire about positions, regardless of whether they ultimately place them in positions. The practice of requiring workers to sign in when they arrive but only to complete an application that solicits demographic information at the agency's request obscures important data about the race (and gender) of everyone who expresses interest in positions. By requiring temporary staffing agencies to collect demographic information about every worker who expresses interest in employment, potentially important evidence for workers' allegations of racial discriminatory hiring may be preserved. The use of a sign-

¹⁸³ See generally Complaint for Plaintiff, *Hunt v. Pers. Staffing Grp.*, 2018 Fair Empl. Prac. Cas. (BNA) 59 (N.D. Ill. 2018) (No. 1:16-cv-11086), 2018 WL 1014513.

¹⁸⁴ See, e.g., Declaration of Pamela Sanchez, *supra* note 14, at ¶ 20 (“[L]aborers who walked into the office in the morning would sign in on a sign-in sheet” that the agency would throw away at the end of each day.).

¹⁸⁵ *Id.*

¹⁸⁶ See Deposition of Lisette Robles at 55–56, *Lucas v. Gold Standard Baking*, 121 Fair Empl. Prac. Cas. (BNA) 1488 (N.D. Ill. 2014) (No. 1:13-cv-01524), 2014 WL 518000. Federal statute requires that certain employers retain demographic information about their job applicants, not potential job applicants. See 29 C.F.R. § 1602.14 (“Any personnel or employment record made or kept by an employer (including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later.”).

¹⁸⁷ Although, presumably, the sheets by themselves would only have the names of the workers, not their demographic information. Plaintiffs could reasonably argue that the names reflect the racial identities of the workers—e.g., assuming that those with Spanish surnames were Latinx and others were African American, particularly if only members of those two groups ever sought jobs at the agency—the information provided on the sign-in sheets would not be dispositive of the discrimination claim. Nevertheless, such circumstantial evidence would likely strengthen the claim.

in list operates as a loophole in Title VII's record-keeping obligations, and corrective measures are necessary.¹⁸⁸

Second, Congress should amend Title VII to create a presumption of a joint-employer relationship between temporary staffing agencies and their clients in addition to joint and several liability for statutory violations. The 1997 Equal Employment Opportunity Commission Guidance on Temporary Staffing Agencies took steps in this direction, but did not go so far as to mandate joint employment and joint and several liability.¹⁸⁹ For example, the policy guidance explicitly addressed staffing agencies' and their clients' obligations to hire in a nondiscriminatory manner and to take steps to remedy known discrimination committed by one another.¹⁹⁰ While explicit guidance in this area is important, the creation of a presumptive joint-employer relationship would further strengthen the protections against discrimination in this industry.

The 2014 amendments to the District of Columbia's wage and hour laws provide an instructive example. This legislation sought to respond explicitly to rampant statutory violations within the temporary staffing industry. The Wage Theft Prevention Amendment Act of 2014 and its temporary 2016 Correction and Clarification Act provide:

(f) When a temporary staffing firm employs an employee who performs work on behalf of or to the benefit of another employer pursuant to a temporary staffing arrangement or contract for services, both the temporary staffing firm and the employer shall be jointly and severally liable for violations of this chapter . . . to the employee and to the District . . . except as otherwise provided in a contract between the

¹⁸⁸ Illinois's Day and Temporary Labor Services Act mandates that temporary staffing agencies gather and maintain for three years information on the race and gender of the persons they send to work as day or temporary workers. However, this requirement only explicitly applies to workers that the agencies place with clients. Therefore, it falls short of capturing the data that would demonstrate the discrimination alleged in cases discussed here. Day and Temporary Labor Services Act, 820 ILL. COMP. STAT. ANN. 175/1 et. seq. (West 2003).

¹⁸⁹ A policy guidance, however, does not change or create law. Moreover, it is subject to change at the whim of a new administration or agency leadership.

¹⁹⁰ The policy guidance explains:

A staffing firm is obligated, as an employer, to make job assignments in a nondiscriminatory manner. It also is obligated as an employment agency to make job referrals in a nondiscriminatory manner. The staffing firm's client is liable if it sets discriminatory criteria for the assignment of workers If a worker is denied a job assignment by a staffing firm because its client refused to accept the worker for discriminatory reasons, the staffing firm is liable *The fact that a staffing firm's discriminatory assignment practice is based on its client's requirement is no defense.* See EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 42

It is particularly interesting that the EEOC found the final sentence necessary to state and emphasize as "my client told me to discriminate" has never shielded an employer from liability for employment discrimination.

temporary staffing firm and the employer in effect on the effective date of the Wage Theft Prevention Amendment Act of 2014, effective February 26, 2015.¹⁹¹

The creation of joint and several liability between temporary staffing firms and their clients creates significant protections for workers who experience exploitation or discrimination. It removes any concern about who technically employs the worker and creates an incentive for temporary staffing agencies and their employers to monitor one another's activities to make sure neither violates critical workplace law statutes. While the D.C. statute above applies to wage and hour laws, the adoption of a similar law within the employment discrimination context would likewise protect workers from the often precarious nature of temporary employment and the potential for discriminatory treatment.

Creating the political momentum for significant changes in federal employment discrimination laws can be incredibly difficult, particularly given current political dynamics. Accordingly, an exploration of potential changes to legal doctrine that would better position workers to pursue claims against temporary staffing agencies and their clients merits serious consideration.

B. Joint-Employer Doctrine

The de-coupling of the employment relationship creates increased ambiguity about temporary agencies' and the clients' legal obligations to workers. Where the temporary staffing agencies and their clients overlap in the regulation of workers' terms of employment, they may both deny their roles as the workers' employers in an effort to avoid liability for discrimination. In such circumstances, the joint-employer doctrine under Title VII provides workers the opportunity to hold both the agencies and their clients responsible. Given the ways in which staffing agencies and their clients often share the practical day-to-day responsibilities for temporary workers, counsel can often craft strong arguments for joint liability.¹⁹² Nevertheless, the existence of varying tests and a combination of factors (none of which are dispositive) creates a complicated, fact-based litigation hurdle that may pose a barrier to workers' ability to pursue successful claims against both the temporary staffing agency and their clients.¹⁹³

¹⁹¹ D.C. CODE § 32-1303 (1956), amended by Wage Theft Prevention Amendment Act of 2014, 61 D.C. REG. 10157 (Feb. 26, 2015) and Wage Theft Prevention Correction and Clarification Temporary Amendment Act of 2016, 63 D.C. REG. 12600 (Nov. 30, 2016).

¹⁹² See e.g., *Butler v. Drive Auto. Indus. Of Am.*, 793 F.3d 404, 415-16 (4th Cir. 2015) (applying the hybrid test and finding the temporary staffing agency and client employer joint employers for the purposes of Title VII); *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 228-29 (5th Cir. 2015) (finding the staffing agency and joint-employer client liable for discrimination in violation of the ADA); *Nicholson v. Securitas Sec. Servs. USA, Inc.*, 830 F.3d 186, 188-89 (5th Cir. 2016) (finding the staffing agency was potentially liable for their client's discrimination).

¹⁹³ See e.g., *Watson v. Adecco Emp't Servs.*, 252 F.2d 1347, 1356 (M.D. Fla. 2003) (finding

This Article now identifies the joint-employer doctrine developed in both Title VII and Fair Labor Standards Act (“FLSA”) case law and proposes the adoption of the more flexible standard that would best capture discrimination in the temporary worker space.

Title VII

Courts have adopted two different tests to determine whether a joint-employer relationship exists under Title VII. Some courts employ the common law test defined by the Supreme Court in *Nationwide Mutual Insurance Co., v. Darden*.¹⁹⁴ There, the relevant factors include, but are not limited to:

the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.¹⁹⁵

Other courts have adopted a two-step hybrid economic realities/common law control test that relies heavily on a determination of the right to control the employee’s conduct.¹⁹⁶ That component depends upon “whether the alleged employer has the right to hire, fire, supervise, and set the work schedule of the employee”¹⁹⁷ while “[t]he economic realities component of the test focuses on ‘whether the alleged employer paid the employee’s salary, withheld taxes, provided benefits, and set the terms and conditions of employment.’”¹⁹⁸

The existence of multiple multi-pronged tests, each element of which is non-dispositive, to determine joint-employer liability under Title VII creates uncertainty about when the liability attaches. As a result, defendants in these cases will almost certainly decide to litigate this issue, resulting in a prolonged

the staffing agency failed to qualify as an employer because it was not in control of the employee’s duties or responsibilities after assignment); *Lima v. Addeco*, 634 F. Supp. 2d 394, 401 (S.D.N.Y. 2009) (granting the staffing agencies’ summary judgment motion because they could not and should not have known about the client’s unlawful discriminatory conduct); *McQueen v. Wells Fargo Home Mortg.*, 955 F. Supp. 2d 1256, 1272–73 (N.D. Ala. 2013) (granting the staffing agency’s summary judgment motion because there was no adverse action attributable to the staffing agency).

¹⁹⁴ 503 U.S. 318 (1992).

¹⁹⁵ *Id.* at 323–24; *see also* *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 214 (3d Cir. 2015) (using *Darden* relevant factors in analysis).

¹⁹⁶ *See* *Muhammad v. Dall. Cty. Cmty. Supervision & Corr. Dep’t*, 479 F.3d 377, 380 (5th Cir. 2007).

¹⁹⁷ *Id.* (internal quotations omitted).

¹⁹⁸ *Id.* (quoting *Deal v. State Farm Cty. Mut. Ins. Co.*, 5 F.3d 117, 119 (5th Cir. 1993)).

litigation process that may discourage workers (and, perhaps, their potential lawyers)¹⁹⁹ from pursuing claims. Moreover, both tests involve highly fact-specific inquiries that likely occur after discovery. Therefore, the litigation costs in both time and financial resources are significant.

Fair Labor Standards Act

Judicial interpretation of the FLSA which establishes wage and hour protections, has generated a different set of multi-factor tests to determine if a joint-employer relationship exists.²⁰⁰ The tests draw from a more expansive interpretation of the employee-employer relationship than the narrower interpretation courts construe from Title VII.²⁰¹ Title VII defines “employee” as “an individual employed by an employer,”²⁰² while the FLSA defines employment as “to suffer or permit to work,”²⁰³ and employer as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”²⁰⁴ This broader understanding of the employee-employer relationship has led to the development of a more expansive understanding of the joint-employer relationship under the FLSA.

Courts have found that the existence of joint-employer liability under the FLSA turns on the “economic realities” of the employment relationship.²⁰⁵ Circuit courts, however, have adopted and applied different related factors that drive this analysis.²⁰⁶ In the first economic realities test articulated by the Ninth Circuit in *Bonnette v. California Health & Welfare Agency*, the court relied upon four factors: whether the employer “(1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of

¹⁹⁹ While large, well-staffed class action firms might take on the larger cases and can absorb the costs and added risk associated with prolonged litigation, smaller firms may be more risk-averse and shy away from these more complicated cases.

²⁰⁰ The Department of Labor’s regulations implementing FLSA also explicitly recognize employers’ ability to jointly employ an employee. *See* 29 C.F.R. § 791.2(a) (“A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer.”).

²⁰¹ *See* Benjamin F. Barry, *Testing Economic Reality: FLSA and Title VII Protection for Workfare Participants*, 1 U. CHI. LEGAL F. 561, 562–63 (2009) (comparing FLSA and Title VII definitions of “employee”).

²⁰² 42 U.S.C. § 2000e(f) (1986).

²⁰³ 29 U.S.C. § 203(g) (1938).

²⁰⁴ 29 U.S.C. § 203 (1938).

²⁰⁵ *See, e.g., Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

²⁰⁶ *See Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 135 (4th Cir. 2017) (“[C]ourts’ attempts to distinguish separate employment from joint employment have spawned numerous multifactor balancing tests, none of which has achieved consensus support.”).

employment; (3) determined the rate and method of payment, and; (4) maintained employment records.”²⁰⁷

Since *Bonnette*, the circuit courts have articulated different sets of factors that further interrogate the relationship between the potential joint employers and the employee. The Second Circuit has articulated six factors relevant to determining whether joint employment exists:

- (1) Whether the manufacturer’s premises and equipment were used for the plaintiffs’ work;
- (2) Whether the contractors had a business that could or did shift as a unit from one putative joint employer to another;
- (3) The extent to which the workers perform a line-job integral to the joint entity’s process of production;
- (4) Whether responsibilities under the contracts could pass from one subcontractor to another without material changes;
- (5) The degree to which the putative employer supervises the employee’s work; and
- (6) Whether the workers’ work is exclusively and predominantly for the putative employer.²⁰⁸

Most recently, the Fourth Circuit articulated yet another set of factors. In *Salinas v. Commercial Interiors, Inc.*, the court argued that a determination of joint employment should focus on the relationship between the two putative employers, rather than the employee and each of the putative employers.²⁰⁹ The court proffered six, non-exhaustive factors:

- (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;
- (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker’s employment;
- (3) The degree of permanency and duration of the relationship between the putative joint employers;
- (4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;

²⁰⁷ *Bonnette*, 704 F.2d at 1470 (internal quotation omitted).

²⁰⁸ *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 72 (2d Cir. 2003).

²⁰⁹ *See Salinas*, 848 F.3d at 139. Specifically, the court argued the joint employment inquiry “requires courts to determine whether the putative joint employers are not wholly disassociated or, put different, share or codetermine essential terms and conditions of a worker’s employment.” *Id.*

- (5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
- (6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.²¹⁰

In April 2019, the Department of Labor (“DOL”) further complicated the debate about the appropriate joint-employer test under the FLSA. The DOL issued a proposed rule interpreting the joint-employer standard that narrowed the test to four factors that are substantially similar to those articulated in *Bonnette*.²¹¹ However, the DOL’s proposal construes the joint-employer test more narrowly than *Bonnette* because it requires that the potential employer have actually exercised its power to hire and fire the worker, not just possess the power to do so.²¹² Thus, the DOL seeks to employ a more restrictive understanding of joint-employer liability than most circuit courts.

While courts have thus far refused to construe the joint-employer relationship under Title VII similarly to the FLSA, the latter’s tests—excluding the DOL’s proposed rule—would better serve workers’ efforts to demonstrate joint employment in the temporary staffing industry. For example, the Second Circuit’s six-factor test in *Zheng v. Liberty Apparel Co.* focuses on the relationship between the work completed and the employer’s business, rather than simply the relationship between the employer and the employee. Temporary staffing agencies’ clients would find it difficult to argue, for example, that workers did not use their equipment and perform jobs integral to their productivity, and that the clients did not supervise the workers’ day-to-day activities. Moreover, the five-factor test articulated by the Fourth Circuit in *Salinas* centers its analysis on the relationship between the alleged joint employers such that the day-to-day activities of each employee do not dictate whether liability attaches. By removing the need for individualized analysis of any particular employee’s relationship with the agency or its clients and focusing instead on the relationship between the employers, this test better positions workers to establish a joint-employer relationship.

²¹⁰ *Id.* at 141–42.

²¹¹ See Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. 14043, 14044 (Apr. 9, 2019). The proposed test would assess whether the potential employer: (1) “[h]ires or fires the employee;” (2) “[s]upervises and controls the employee’s work schedule or conditions of employment;” (3) “[d]etermines the employee’s rate and method of payment; and” (4) “[m]aintains the employee’s employment records.” *Id.*

²¹² *Id.*

Neither the Title VII tests nor the FLSA tests are optimal, however. Under both laws, the need to litigate a multi-pronged test creates barriers to enforcement. The creation of automatic joint liability for temporary staffing agencies and their client is necessary to sufficiently deter discriminatory employment practices in this growing and evolving employment space.

CONCLUSION

The rapidly changing low-wage workplace has evolved to frequently include temporary staffing agencies and other labor intermediaries that complicate the employment relationship. Various studies identify the myriad ways in which the prevalence of temporary staffing arrangements is detrimental to the protection of workers' rights. Less studied and discussed, however, are the ways in which these relationships create vehicles for discriminatory employment practices. Furthermore, ethnographies of racial dynamics in the low-wage workplace reveal rampant stereotypical beliefs about workers that consistently characterize African Americans as the least desirable workers and often characterize immigrant Latinxs as the most desirable. The collision of the structural changes to the workplace with rampant, widely accepted stereotypes yields what advocates allege is significant racial discrimination in the temporary staffing industry.

Racial realism, narrative, and performance identity theories help to explain the persistence of explicitly racially discriminatory dynamics in the temporary staffing work space, despite scholars' insistence that racial discrimination in employment has shifted into more implicit or structural forms.²¹³ Carbedo and Gulati's "working identity" theory is particularly instructive. If African Americans in the white-collar workplace engage in specific identity performance to avoid stereotypical treatment by their colleagues while African Americans in the low-wage worker sector are less likely to engage in this performative process, perhaps the persistence of negative stereotypes and the resulting discriminatory employment practices are the predictable results. The addition of a labor intermediary such as temporary staffing agencies may then shield companies from liability for discriminatory hiring by complicating the employment relationship and making more difficult any potential litigation of discrimination claims.

Accordingly, employment discrimination statutes should contemplate joint and several liability for temporary staffing agencies and their clients and require that staffing agencies maintain demographic data on every worker who

²¹³ See, e.g., Angela Onwuachi-Willig and Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283, 1284 (2005) (discussing the effectiveness of Title VII "especially as employment discrimination has evolved into different forms").

expresses interest in applying for a position through their agency. In the alternative, courts should greatly simplify the test for determining whether a joint-employer relationship exists in cases involving temporary staffing agencies.