VOLUNTEER DISCRIMINATION

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INTRODUCTION

Being the target of certain kinds of race discrimination can be understood, in a perverted way, as a matter of "choice." As this Essay will detail, a person can "volunteer" for race discrimination by choosing to remain complicit with structures of group subordination. Nothing demonstrates this point more than the debate regarding the new NBA dress code, in particular the way in which comments by some Blacks have been used to refute claims of race discrimination through the dress code by other Blacks.

In this Essay, I focus on the ongoing dispute concerning the alleged racial motivations behind the new NBA dress policy. Specifically, I consider whether the defense of the newly instituted NBA dress policy by some Blacks[1]—as pure business, free from racial discrimination—should be viewed as action negating other Blacks' claims of improper racial motivation behind the policy. In so doing, I argue that the comments and actions that some Blacks have made in defense of the code do not

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[1] Throughout this Essay, I capitalize the word "Black" or "White" when used as a noun to describe a racialized group. I do not capitalize these terms when used as an adjective. Also, I prefer to use the term "Blacks" to the term "African-Americans" because the term "Blacks" is more inclusive. Additionally, "[i]t is more convenient to invoke the terminological differentiation between black and white than say, between African-American and Northern European-American, which would be necessary to maintain semantic symmetry between the two typologies." Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1073.

necessarily cancel out allegations of racial discrimination by other Blacks. In fact, I contend that, rather than negating allegations of racism, the reactions of the policy-defending black NBA athletes and leaders only highlight the immense pressures that Blacks have in our society to perform their identity in a way that is racially palatable[2]—in other words, accommodating of cultural norms that place what is perceived as being white at the top of the social hierarchy and what is perceived as being black at its bottom.[3]

As Professors Devon Carbado and Mitu Gulati have taught us, "[w]orking within an organization necessarily entails negotiating and performing identity," and for racial minorities, such performances require "extra" work in order to counter negative stereotypes that are attached to minority groups.[4] Furthermore, Professor Frank Rudy Cooper has explained in his article *Against Bipolar Black Masculinity: Intersectionality,*

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[2] *See* Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1658 (2004) ("A person is racially palatable if she is perceived to be peripherally or unstereotypically nonwhite; she is racially salient if she is perceived to be centrally or stereotypically nonwhite."); *see also* Emily Houh, *Toward Praxis*, 39 U.C. DAVIS. L. REV. 905, 910 (2006) (noting that "members of outsider groups in the workplace often feel compelled to perform and signal loudly against negative identity-related stereotypes in order to prevent discrimination based on those stereotypes").

[3] Carbado & Gulati, *supra* note 2, at 1676-77 (asserting that businesses prefer to hire Blacks "who are phenotypically but unconventionally black—that is to say, people who 'look' but do not 'act' black"). Professors Devon Carbado and Mitu Gulati have written about the work people of color do to counter harmful stereotypes of minority identities that operate in employment environments and have also more generally addressed the notion of race as a "performative identity," which may allow the person of color to "fit within" the corporate culture more easily but never challenges the underlying racial assumptions about minority workers' abilities, attitudes, and commitment. *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1279-1308 (2000) [hereinafter Carbado & Gulati, *Working Identity*] (describing how women and people of color attempt to alter their racial identities in order to prevent discrimination and preempt stereotyping in the workplace). Their claim is that "the social meaning of, for example, a black person's racial identity is a function of the way in which that person performs (presents) her blackness" such that Blacks can choose to accept or reject societal expectations of behaving "conventionally"—that is, in accordance with predominant stereotypes. Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory: Crossroads, Directions, and a New Critical Race Theory*, 112 YALE L.J. 1757, 1771-72 (2003) (reviewing FRANCISCO VALDES, ET AL., CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (2002)).

[4] Carbado & Gulati, *Working Identity*, *supra* note 3, at 1260-61, 1277-79.

Assimilation, Identity Performance, and Hierarchy[5] how outsider groups in society have incentives to perform their identities in ways that help to maintain their place within society's hierarchies of race, gender, class, and sexuality.[6] For example, middle-class heterosexual black men—who are caught between the bind of the socially constructed images of the assimilationist "Good Black Man" and the dangerous "Bad Black Man"[7]— receive incentives to perform their identity in a way that fits the assimilationist ideal of the "The Good Black Man" by downplaying their race and highlighting their social class in order to maintain their place in the hierarchy above heterosexual black women and gay black men.[8]

Finally, as Professor Barnes and I clarified in our article *By Any Other Name? On Being "Regarded As" Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*,[9] racial identity performance by Blacks who wish to be included in the mainstream "carries with it [also] the need to . . . distance one's self from persons who can challenge one's identity performance."[10] In fact, I believe that what has occurred in response to the NBA dress code by some black players and leaders (even black

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[5] Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006).

[6] *See* Cooper, *supra* note 5, at 859-60.

[7] According to Cooper, the "Good Black Man" and the "Bad Black Man" are defined as follows: "The Bad Black Man is animalistic, sexually depraved, and crime-prone. The Good Black Man distances himself from black people and emulates white views." Cooper, *supra* note 5, at 857.

[8] Cooper, *supra* note 5, at 853, 859-70, 874-88; *see also* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) (describing how outsiders downplay or "cover" their difference to make insiders feel comfortable).

[9] Angela Onwuachi-Willig & 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 WISC. L. REV. 1283.

[10] *Id.* at 1308 n. 101.

journalists) fits within three different categories of behavior that result in what I call "volunteer discrimination,"[11] a phenomenon which helps to prove my point that some Blacks' comments and actions in support of the new NBA dress code do not in themselves negate the presence of racism within the policy. I argue that these three different categories of behavior, which I identify as the acts of accommodating, distancing, and resigned modeling,[12] are actually further evidence of discrimination against minorities based on social constructions of race because these performative actions are designed to and used by outsiders—here, Blacks—for the specific purpose of ensuring acceptance within dominant society or, at least, the opportunity for traditional success, without any challenge or work to defeat hierarchical, racialized social norms.[13]

Part I of this Essay describes the new NBA dress code and then lays the framework for the discussions that ensued after the implementation of the code. Part II examines how the defense by some Blacks of the allegedly discriminatory NBA dress policy does not in itself negate claims of racial discrimination by explicating the various ways in which Blacks are pressured to perform their racial identity in order to advance in society—in particular, the ways in which outsiders must conform to traditional standards of appearance and must distinguish themselves from the "bad outsiders" or the "bad Blacks" to succeed within the dominant culture. As a background for understanding the phenomenon of "volunteer discrimination," Part II.A analyzes and explains how race is

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[11] This term is, in part, inspired by the book JILL NELSON, VOLUNTEER SLAVERY: MY AUTHENTIC NEGRO EXPERIENCE (1994). In her book, Nelson details her experiences as a black woman working for the *Washington Post*, where she often found herself in the dilemma of wanting to promote short-term individual progress within the rules while at the same time wanting to change the rules themselves. *See infra* Conclusion (discussing this same dilemma within the context of dress codes).

[12] *See infra* Part II.B.

[13] *See* Carbado & Gulati, *Working Identity*, *supra* note 3, at 1278 (asserting that identity performances, though not all of them, are a "function of conscious strategic choices")

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socially constructed by markers for racial identity, which include not only skin color, but more importantly, characteristics that revolve around how one performs his or her race, such as hairstyle, dress, and voice. Part II.B then explores and probes the three separate behaviors that I refer to as "volunteer discrimination" to demonstrate how these distinct acts of accommodating, distancing, and resigned modeling not only do not contradict claims of racial discrimination but actually work to reify and stabilize racial hierarchies. Part III highlights the importance of understanding the various incentives behind the three behaviors I have identified as "volunteer discrimination" when evaluating or weighing testimony that fits within these behaviors by some Blacks against other Blacks within the context of an employment discrimination case. Finally, this Essay concludes by highlighting the dangers of using "voluntary" submission to discrimination by some outsiders to support claims of non-discrimination against others and stresses the importance of considering race in a way that acknowledges, understands, and evaluates claims of racial discrimination with as much complexity as the actual functioning of racism within our society.

I. Business Casual, or Casualties of Business As Usual?

In October of 2005, Commissioner David Stern issued a new dress code for players in the National Basketball Association (NBA),[14] an organization of athletes that is nearly eighty percent black.[15] The new code, which specifies appropriate league-business

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[14] *See* John Eligon, *In NBA, Clothes Dress Up the Image*, N.Y. TIMES, Oct. 19, 2005, at 5; Dennis Hans, *When Mr. Blackwell Meets Mr. Shaqwell*, N.Y. TIMES, Oct. 16, 2005, at 9.

[15] Frank Deford, *Suiting Up: NBA Dress Code Draws Criticism From Many Corners*, SI.COM, Oct. 26, 2005, *available at* http://sportsillustrated.cnn.com/2005/writers/frank_deford/10/26/dress.code; Angela I. Onwuachi-Willig, *Bird Creates Buzz About Race in the NBA: The Importance of Role Models is Evident Even in Pro Basketball Careers*, SACRAMENTO BEE, Jul. 6, 2004, at B7. The high percentage of black players in the NBA is remarkable given that the NBA did not become a desegregated league until 1950,

dress styles for NBA athletes, requires players to wear "Business Casual attire whenever they are engaged in team or league business," meaning (1) a long or short-sleeved dress shirt (collared or turtleneck) and/or a sweater; (2) dress slacks, khakis, or dress jeans; and (3) appropriate shoes and socks, which do not include sneakers, sandals, flip-flops, or work boots.[16] The code also directly prohibits players from wearing certain types of clothing, in particular, clothing that society links to hip-hop culture, which has been negatively stereotyped and racialized as black.[17] Specifically, the code prohibits the wearing of sleeveless shirts, shorts, t-shirts, jerseys or sports apparel, chains, pendants, medallions, sunglasses while indoors, headphones, and headgear of any kind, while a

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which was after both baseball and football. *See* Dr. Harry Edwards, *The End of the "Golden Age" of Black Sports Participation?*, 38 S. TEX. L. REV. 1007, 1012-13 (1997) (detailing the history of racism in sports). *But see* Timothy Davis, *Racism in Athletics: Subtle Yet Persistent*, 21 U. ARK. LITTLE ROCK L. REV. 881, 882 (1999) ("Notwithstanding increased participation opportunities for African-American athletes in professional baseball, football, and basketball, black Americans' access to management and ownership positions in those sports remains negligible."); Craig T. Greenlee, *In Sports, Those Making the Off-Field Decision Remain Overwhelmingly White*, BLACK ISSUES IN HIGHER EDUC., Apr. 16, 1998, at http://www.findarticles.com/p/articles/mi_0DXK/is_n4_v15/ai_20565509/print (also discussing the low number of minorities in coaching and management in professional sports leagues, such as the NBA).

[16] NBA Player Dress Code, *available at* http://www.nba.com/news/player-dress_code_051017.html. There are three exceptions to this Business Casual policy. The first exception is stricter than the usual policy and requires players who are in attendance at games but not in uniform to wear a sports coat, dress shoes or boots, and socks while seated on the bench or in the stands. The second exception allows players to wear either Business Casual attire or neat warm-up suits that are issued by their teams as they are leaving a basketball arena. The third and final exception permits players to wear attire that is not Business Casual at special events or player appearances where other attire would be appropriate, such as at basketball clinics. *Id.*

[17] *See* 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, 49-50 (1994) ("For example, seemingly inconsequential acts like listening to rap and wearing hip hop fashions constitute a means of racial affiliation and identification."); Tricia Rose, *"Fear of a Black Planet": Rap Music and Black Cultural Politics in the 1990s*, 60 J. NEGRO EDUC. 276, 279-80 (1991) ("The social construction of rap and rap-related violence is fundamentally linked to the social discourse on Black containment and fears of a Black planet. . . . The terms of the assaults on rap music . . . are part of a long-standing sociologically based discourse that positions Black influences as a cultural threat to American society."). *But see* Paul Butler, *Much Respect: Toward a Hop-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 986 & n.10 (2004) (noting that while most hip-hop artists are black, "[t]he consumers are mainly non-black"—around 75% non-black); *see also* Jeffrey A. Williams, *Flagrant Foul: Racism in "The Ron Artest Fight,"* 13 UCLA ENT. L. REV. 55, 75 (2005) ("Most saliently, middle-class whites form a significant chunk of the revenue base behind the hip-hop industry.").

player is placed on the bench, seated in the stands at a game, or making an appearance for media interviews or a team or league event.[18]

The announcement of the new NBA dress code sparked a number of claims from players and journalists, including one controversial claim that the implementation of the policy is racially motivated.[19] Commentators and players alike argued that the code is targeted at media-driven images of young black men, who make up the vast majority of the league.[20] For example, Indiana Pacers guard Stephen Jackson asserted the following in response to the newly instituted dress code: "I have no problem dressing up . . . because I know I'm a nice-looking guy. But as far as chains, I definitely feel that's a racial statement. Almost 100 percent of the guys in the league who are young and black wear chains."[21] Jackson further stated, "When we're talking about big chains and stuff,

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[18] NBA Player Dress Code, *available at* http://www.nba.com/news/player-dress_code_051017.html; *see also* Rose, *supra* note 17, at 279-80 (describing "fly" hip-hop gear as including chunk jewelry and baggy pants).

[19] *See, e.g.*, Adrian Wojnarowski, *Editorial*, THE RECORD (Bergen County, NJ), Oct. 20, 2005, at S1. One author wrote:

> '[W]hite America had grown so disillusioned with the NBA, so wary of its young, black players with the understood uniform of hip-hop—cornrows, tattoos and do-rags. . . . We know who the league is going after right now, and it isn't Steve Nash and Mark Cuban,' one NBA official laughed on Wednesday. No, this desire for a so-called professional dress code isn't about the MVP's thrift-store wardrobe, nor the Dallas owner's T-shirt and blue jeans ensemble. . . . After all, those NBA stars aren't mildly foreboding to people. They don't frighten them. They don't make them change the channel, and tell their kids to change the channel and find something else to watch. This is the commissioner's target. This is about a generation of NBA stars immersed in the hip-hop culture, inspiring a disconnect with the paying public.

Id.

[20] *See, e.g.*, Bob Kravitz, *Voicing Protest, No Matter the Issue, Is a Critical Right*, INDIANAPOLIS STAR, Oct. 26, 2005, *at* http://www.indystar.com/apps/pbcs.dll/article?AID=/20051026/COLUMNISTS01/510260433/1088/SPORTS04; Mark Montieth, *Wardrobe Rules Leave Players Unfazed*, INDIANAPOLIS STAR, Oct. 19, 2005, *available at* http://www.indystar.com/app/pcbs.dll/article?Date=20051019&Category=SPORTS04&ART (quoting Indiana Pacers guard Stephen Jackson).

[21] *See* Montieth, *supra* note 20; *see also* Marc Stein, *Pacers' Jackson Calls Ban on Chains 'Racist Statement,'* ESPN.COM, Oct. 18, 2005, at http://sports.espn.go.com/espn/print?id=2197001&type=story

it's obvious who wears those. Not Austin [Croshere]. Not Jeff [Foster],"[22] both of whom

are white. Boston Celtics forward Paul Pierce, who willingly complies with the code,

agreed with Jackson, proclaiming, "[W]hen I saw the part about chains, hip hop and

throwback jerseys, I think that's part of our culture. The NBA is young black males."[23]

One commentator even referred to Jackson's comments as he highlighted how the policy

seemingly targeted young black basketball players, stating:

> [T]ell me though, what kind of card [other than the 'race card'] is Jackson
> going to play to protest a policy that prohibits the use of heavy chains, do-
> rags, and throwback jerseys? You think Steve Nash's closet is bursting
> with bling? Can you picture Dirk Nowitizki with a do-rag without
> cracking up?[24]

It is difficult to deny the racial overtones of the NBA's new dress code, especially

in light of the league's racial composition[25] and the comments that players, coaches, and

pundits have made while debating the merits of the policy.[26] For example, Los Angeles

Lakers head coach Phil Jackson made the following comment, which essentially displays

the way in which young black men, hip-hop, and criminality have become so linked in

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(quoting Jackson as saying, "but it's one thing to [enforce a] dress code and it's another thing if you're attacking cultures, and that's what I thinking they're doing").

[22] Kravitz, *supra* note 20 (quoting Jackson as stating that he will follow the new dress policy). Jackson engaged in a short protest against the new NBA dress code by wearing four chains at the Pacers' exhibition game against the San Antonio Spurs on October 18, 2005. *See* Michael Lee, *New Dress Code Draws a Few Threads of Protest*, WASH. POST, Oct. 20, 2005, at E3. Jackson, however, has since abided by the dress code because, as he states, he is not fond of "giving money back" in fines. *See* Stein, *supra* note 21.

[23] Cliff Brunt, *Pacer's Jackson Leads the Chorus,* USA TODAY, Oct. 19, 2005, *available at* http://www.usatoday.com/sports/basketball/nba/2005-10-19-sjackson_xhtm.

[24] *See* Kravitz, *supra* note 20. The natural questions are: Why did the NBA find it necessary to include a list of items that are specifically prohibited after the league had already clearly defined "Business Casual" wear? Why target specific items in the policy at all?

[25] *See supra* note 15 and accompanying text.

[26] *See generally* Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URBAN L.J. 615 (1995) (arguing that subtle racism pervades sports such as basketball).

the minds of the American public:[27] "The players have been dressing in prison garb the last five or six years. All the stuff that goes on, it's like gangster, thuggery stuff."[28] Similarly, black columnist Jason Whitlock declared, "Too many young, black professional athletes have too closely aligned themselves with the hip-hop culture, which in reality is nothing more than prison culture."[29] One comedian even joked about the policy—in a way that worked only to entrench further the media images that have so often linked black men, especially those who are athletes, with crime and criminality— when he ribbed, "Players can [now] go straight from the locker room to the courtroom without having to change clothes."[30]

But the fact remains that, just as some black basketball players have spoken out against the policy as racially motivated, other black players, both former and current, have argued in its favor. For example, former Dallas Mavericks guard Derek Harper remarked, "I applaud the commissioner [on the new dress code]. . . . I just think if you

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[27] *See* Dwight L. Greene, *Naughty by Nurture: Black Male Joyriding—Is Everything Gonna Be Alright?*, 4 COLUM. J. GENDER & L. 73, 74-75 (1994) ("Often, a young Black male is suspected of being a criminal simply based on his status as a young Black male, rather than because of any act he may have committed."); Katheryn Russell-Brown, *Black Protectionism as Civil Rights Strategy*, 53 BUFF. L. REV. 1, 3 (2005) (asserting that "the prevailing image of Blackness as something loathsome, marginal, and deviant—the criminalblackman—persists"); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 598 (2003) (noting that "[t]he association of blacks with criminality may even contribute to the tendency to associate other negative characteristics with blacks as well"); *see generally* Cooper, *supra* note 5; N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Man*, 25 CARDOZO L. REV. 1315 (2004).

[28] Daniel Wood, *NBA Players Cry Foul Over New Dress Code*, CHRISTIAN SCIENCE MONITOR, Oct. 26, 2005 , *available at* http://search.csmonitor.com/2005/1026/p01s04-ussc.html.

[29] Jason Whitlock, *NBA Players Should Learn Stern Is on Their Side*, MERCURY NEWS, Nov. 3, 2005, *available at* http://www.mercurynews.com/mld/mercurynews/sports/13076488.htm. There is one aspect of hip-hop culture that is closely related to prison culture—the wearing of loose baggy jeans. *See* John L. Mitchell, *Baggin' and Saggin': Parents Wary of a Big Fashion Trend*, L.A. TIMES, Sept. 28, 1992, at B1 (noting that the trend of saggy jeans in hip-hop culture began with people "emulating the garb of prison inmates whose pants perpetually sag because prisoners are not issued belts").

[30] Argus Hamilton, *Bush Has a Certain Way with Torture Victims*, WISCNEWS.COM, *available at* http://www.wiscnews.com/pdr/opinion/index.php?ntid=69481&ntpid=206.

can check into the Ritz-Carlton, it's a five-star hotel, so you should have to be a five-star individual going in there."[31]

Many other commentators have pointed to statements such as Harper's to support their argument that no connection lies between racism and the new NBA dress code. For example, Sports Illustrated columnist Frank Deford argued that former NBA star Charles Barkley's comments in support of the dress code were evidence of no racism behind the policy; Deford declared that "[e]ven Charles Barkley, famously on record for telling children not to look up to NBA players as role models, says the new code is 'fantastic,' for it shows young African American males how best to dress in the wider world."[32] Moreover, Deford argued, in light of the fact that teams headed by former black basketball players themselves have implemented more restrictive dress codes than the league's general policy,[33] the new NBA dress code cannot and should not be considered to be racially motivated. In fact, a number of these commentators include both former and current black NBA athletes and journalists, who have essentially expressed their support of the new clothing policy and have cited each other and comments by other outspoken Blacks to deny any racial motivations behind the dress code.[34] Indeed, such action is a strategy that is regularly employed in attempts to defeat or discredit claims of

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[31] Jeff Caplan, *NBA Dress Code Wears Out Its Welcome with Some*, STAR TELGERAM.COM, Jan. 19, 2006, *available at* http://www.dfw.com.mld/dfw/sports/basketball/13666673.htm?template=content.

[32] Deford, *supra* note 15.

[33] *Id.* (asserting that teams such as the New York Knicks and the Atlanta Hawks, which are run by former black NBA stars such as Isiah Thomas and Billy Knight, respectively, enforce more stringent dress policies than the NBA's policy).

[34] *See, e.g.*, Whitlock, *supra* note 29 (asserting, as a black columnist, that "[i]t's comical to listen to [NBA players] call Stern's dress code racist when black-owned nightclubs have been enforcing similar dress codes (and using metal detectors) for years just to keep hip-hop thugs out").

racism or discrimination by racial minorities—and often persuasively so.[35]   The persuasiveness of such comments, however, is overrated, and in the next two Parts of this Essay, I explain exactly why.

II. Understanding "Volunteer Discrimination"

A. The Social Meaning of Race

In order to understand how and why black support of the new NBA dress code does not necessarily negate allegations of racism behind the policy, one must first appreciate and comprehend how race is defined and how the practice of race operates within our society.   As Professor Barnes and I detailed in an earlier article in the *Wisconsin Law Review*, "race, although considered primarily in terms of physical features, carries different meanings based upon societal understandings of particular groups."[36] Race is socially constructed.[37] It is formed through human interactions and commonly held notions of what it means to belong to a certain racial group.[38] In other words, in our society, markers other than just one's skin color, including factors such as

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[35] *See, e.g.*, Ellison v. Best Foods, 598 F. Supp. 159 (E.D. Ark. 1984) (relying on positive testimony from other black employees as persuasive evidence that the allegations of discrimination by other Blacks were untrue).

[36] *See* Onwuachi-Willig & Barnes, *supra* note 9, at 1295.

[37] *See* Haney López, *supra* note 17, at 11, 27-28; *see also* Jacquelyn L. Bridgeman, *Defining Ourselves for Ourselves*, 49 SETON HALL L. REV. 1261, 1267-74 (2005).

[38] *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 55-60 (2d ed. 1994) (introducing racial formation theory, which refers to the "sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed" and analyzing how race is an evolving set of social meanings that are formed and transformed under a constantly shifting society); Angela P. Harris, *The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 774 (1994) ("'[R]ace' is neither a natural fact simply there in 'reality,' nor a wrong idea, eradicable by an act of will."); Mary Coombs, *Interrogating Identity*, 11 BERKELEY WOMEN'S L.J. 222, 233 (1996) (reviewing JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY (1995)) ("Identity is not fixed or absolute; rather, it is determined by particular persons for particular purposes at particular times in a process in which the person identified participates with varying degrees of freedom.").

dress, hairstyle, and voice, define race.[39] As we have learned from Professors Carbado and Gulati, when it comes to discrimination, how one performs their racial identity in the post-Civil Rights era matters almost as much as how one looks.[40]

In fact, the way in which race is socially constructed is most evident in reporters' comments regarding the differences between Michael Jordan's generation of NBA players and today's hip-hop branded basketball players. For example, one writer noted in favor of the new NBA dress code, "[L]et's be honest, in a very short period of time, the snapshot of an NBA player off the court has gone from the impeccable and classy Michael Jordan to what Phil Mushnick of the *New York Post* calls 'looking like recruitment officers for the Bloods and the Crips.'"[41] As this interlocutor's statement demonstrates, the problem for those who want to impose the new dress code is not that the players have black skin—not that they are black as that term is physically defined— but rather that they are acting like the "wrong kind" of Blacks.[42] As Professor Kenji Yoshino explained in his book *Covering: The Hidden Assault on Our Civil Rights*, the

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[39] *See* Onwuachi-Willig & Barnes, *supra* note 9, at 1297-1312 (discussing how people become racialized as black despite their actual skin color based on name and voice); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1166-71, 1194-99 (2004) (arguing that courts should hear "claims concerning discrimination based on voluntarily chosen physical traits or 'performed' behaviors that communicate racial or ethnic identity").

[40] *See* Carbado & Gulati, *Working Identity*, *supra* note 3, at 1262 ("Racial conduct discrimination derives, not simply from the fact that an employee is, for example, phenotypically Asian American . . . but also from how she performs her Asian-American identity in the workplace."); *see also* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 21-22 (2006); Angela Onwuachi-Willig, *Undercover Other*, 94 CALIF. L. REV. 873, 885-94 (2006); Rich, *supra* note 39, at 1158-66.

[41] Deford, *supra* note 15. The irony is, as Professor Timothy Davis has highlighted, that black NBA players are "both scorned and loved" by the American public, a "dual existence . . . [that] represents 'a microcosm of the contradictions of a segregated society.'" Timothy Davis, *Who's In and Who's Out: Racial Discrimination in Sports*, 28 PAC. L.J. 341, 347 (1997) (reviewing KENNETH SHOPSHIRE, IN BLACK AND WHITE: RACE AND SPORTS IN AMERICA (1996)).

[42] *See* Onwuachi-Willig & Barnes, *supra* note 9, at 1314-16; Carbado & Gulati, *supra* note 2, at 1675-78.

face of discrimination and racial acceptability has changed.[43] "We are at a transitional moment in how Americans discriminate. . . [I]ndividuals no longer need[] to *be* white, male, straight, Protestant, and able-bodied; they need[] only to *act* white, male, straight, Protestant, and able-bodied."[44] In essence, being a racially palatable Michael Jordan, who in many ways has been given the status of an "honorary White,"[45] is acceptable, but even looking like a person who is outside of that "classy" image is unacceptable.[46] Today, it is not the black man himself who is not worthy of inclusion, but rather just the black man who fails to conform to traditional notions of white, middle-class masculinity.[47]

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[43] YOSHINO, *supra* note 40, at 21-22.

[44] *Id.* at 22; *see also* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 387-88 (explaining that "stereotypes arise most often not from immutable traits but from negative associations with those traits").

[45] *See* TODD BOYD, YOUNG, BLACK, RICH, AND FAMOUS 16 (2003) (noting the way in which Michael Jordan transcends race for much of the public); *see also* Cheryl I. Harris, *Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith—Spectacles of Our Times*, 35 WASHBURN L.J. 235, 236 (1996) (discussing how African Americans who are accorded the status of honorary Whites have a type of racial invisibility).

[46] *See* Williams, *supra* note 17, at 65 ("It was not simply that so many of the athletes were black; it was that they dressed the part; and sold those shoes, their shorts, those shirts and their voices."); *see also* BOYD, *supra* note 45, at 53 ("America seemed ready to accept Black celebrities if they conformed to the prevailing standards prescribed for them."); *cf.* Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111, 1120 (2006) ("There may be, especially in the case of the NBA, an aspect of the dispute that is about discrimination in the way that people perform racial or gender identity, but there is a larger sense in which the disputes are not about discrimination, they are about the power to project an image.").

[47] YOSHINO, *supra* note 40, at 135. In his new book, Professor Yoshino quotes John T. Molly, the author of the book NEW DRESS FOR SUCCESS, where Molloy explained the following about why racial minorities should engage in appearance-based covering, which is dressing in a style that downplays their racial identity:

> It is an undeniable fact that the typical upper-middle class American looks white, Anglo-Saxon and Protestant. He is of medium build, fair complexion, with almost no pronounced physical characteristics. He is the model of success; that is, if you run a test, most people of all socioeconomic racial and ethnic backgrounds will identify him as such. . . . Anyone not possessing his characteristics will elicit a negative response to some degree, regardless of whether that response is conscious or subconscious.

The fact is that people of color have incentives to act on these social understandings of race as a means of avoiding or minimizing the discrimination that they may encounter in their daily lives. For example, many professional black men make a special effort to wear suits or traditional professional clothing when they are in public settings in order to minimize the discrimination that they may experience just based on appearance—their skin color, height, and other physical characteristics. After all, the black man in the Brooks Brother suit is less likely to be followed in a department store than the black man in jeans or sweats, though both are likely to be viewed as suspicious despite their dress.[48] Likewise, women of all races are less likely to cross the street or clutch their purses when they see a black man in a Prada suit versus one in Phat Farm[49]

Id. (quoting JOHN T. MOLLOY, NEW DRESS FOR SUCCESS 234 (1988)). In fact, as Molloy describes in his book, when he wrote a report to advise a group of black executives in Chicago about dress at work, he gave the report the title of "Dress White." MOLLOY, *supra* at 233. That title was later changed to "Dress Very White" after one of the black executives informed Molloy that most of the workshop attendees already understood that they must dress white. *Id.* at 234. Such understandings by these black executives would also help to explain why black men such as Isiah Thomas and Billy Knight would adopt even more stringent dress codes for their teams than the general NBA code. Perhaps, Thomas and Knight understand that their players, who are primarily black, must not just "dress white" but must "dress very white." *See supra* note 33 and accompanying text.

[48] *See* Mary Jo Wiggins, *Race, Class, and Surburbia: The Modern Black Suburb as a 'Race-Making Situation,'* 35 U. MICH. J.L. REFORM 749, 797-98 (2002) (detailing how even professionally dressed Blacks are routinely followed in stores); *see also* Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 344 (2003) ("Racial profiles punish, embarrass, and humiliate innocent people, whose skin color is used as a proxy for criminal conduct."). Professor Patricia Williams related her story of being informed by a white store clerk in Benetton, who had looked her over, that the store was closed when another customer, who was white, was inside shopping. *See* PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 45-46 (1991). Also, billionaire Oprah Winfrey was reportedly prevented from entering a Hermes store in Paris because the store had been having problems with North African women. *See* James Ragland, *Black Shoppers Feel They're Unwelcome*, DALLAS MORNING NEWS, Aug. 12, 2005, at 2005 WLNR 12818808 ("The Oprah incident renewed talk about racial profiling in stores. The study found that 56 percent of black respondents sensed that store clerks or security guards were watching them more closely than other customers. By comparison, 40 percent of Hispanic and 17 percent of white respondents say the same thing."); *see also* Mary Mitchell, *In Paris, Not Even Oprah Can Escape the Reality of Being Black*, CHI. SUN TIMES, Jul. 3, 2005, at 14; Ragland, *supra* (noting that Latina/os reported feeling the most discomfort in stores, Blacks reported feeling discomfort in stores at nearly the same percentage rate as Latina/os, and that Whites reported feeling discomfort in stores at a significantly lower percentage than Latino/as and Blacks).

[49] Phat Farm is a clothing company and brand born out of the hip-hop style that was created by Russell Simmons, the founder of Def Jam Records.

sweats, though women are likely to cross the street and clutch their purses in either situation.[50] Famously, Larry Mungin, the subject of the book *The Good Black: A True Story of Race in America*,[51] dressed in traditional, professional clothing as often as he possibly could in his former suburban neighborhood in Alexandria, Virginia in order to signal to his white neighbors that he was a "good Black"—a safe Black.[52] As Mungin explained, when he was wearing a suit, his neighbors would greet him with nods, but when he was dressed to work out at the gym, those same people would "visibly tense up," and "[o]n the elevator, some women would punch the control panel and get off on the next floor, or clutch their handbag to their chest."[53] In essence, Mungin understood that, unlike white men, he had to dress in a certain manner—for example, wear a suit—in

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[50] *See* Regina Austin, *Beyond Black Demons and White Devils: Anti-Black Theorizing and the Black Public Sphere*, 22 FLA. ST. U. L. REV. 1021, 1024-25 (1995) ("The effect of the demonization is also apparent in myriad mundane examples; for instance when white people encounter black males on the street, the men often clutch their women while the women clutch their purses."); Martha R. Mahoney, *Whiteness and Women, In Practice and Theory: A Response to Catherine MacKinnon*, 5 YALE J.L. & FEMINISM 217, 243 n.135 (1993) (describing the racialized social meanings behind the actions of [white] women who clutch their purses when a black man is walking toward them, actions which exhibit "a pattern of social treatment of these men as dangerous, dishonest, criminal"); *see also* ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS 5 (1993) (describing how black professional men experience these daily microaggressions); Devon W. Carbado, (*E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 949-50 (2002) (describing how women have clutched their purses or crossed the street upon seeing him).

[51] PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (1999).

[52] BARRETT, *supra* note 51, at 41-42.

[53] BARRETT, *supra* note 51, at 42. While describing his experiences in Alexandra to Barrett, Mungin proclaimed the following strong words:

> I'm black, so they think I'm going to rob or rape them. But I'm the same person who walks in with the Armani suit. Don't they see me? The answer is no. They see a black man. *I* am the one who is robbed. I am robbed of my reputation because of the color of my skin.

Id. Upon moving to a different job in a different area that did not require professional clothing, Mungin described his experience as follows: "No more am I in Georgetown, dressed like a professional and at least getting some respect on the street. . . . I'm out in Chantilly, Virginia, or wherever, and the secretaries are afraid I'm going to attack them as they go to get in their cars." *Id.* at 148.

order to ease his white neighbors' tensions—to show that them that he was one of the "good Blacks" or rather, he was just like them, an honorary White.

Likewise, many black women choose not to wear their hair in Afros, braids, or dreadlocks to avoid the perception that they are "too ethnic," are "angry black women," and are unworthy of inclusion.[54] Black men, too, are subject to stereotyping for these hairstyles, only they, along with being perceived as militant and angry, are also viewed as unkempt, drug-using, and lazy based on such styles.[55] In fact, at the Tenth Annual Latino Critical Theory conference, one junior professor revealed his story about how he entered the law teaching market twice with long dreadlocks, only to end up with no offers for an academic job at the end of his searches, but received an academic job offer the next year after he had completely cut off his dreadlocks.[56]

Other Blacks have masked their accent on phones, speaking in what they and others perceive to be white standard English and with a "white" accent, even if that is not their usual tone, to avoid discrimination. For example, Professor Randall Kennedy has described how his mother used her standard English voice over the phone to pass as

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[54] *See* Sandi Farrell, *Toward Getting Beyond the Blame Game: A Critique of the Ideology of Voluntarism in Title VII Jurisprudence*, 92 KY. L.J. 483, 525-27 (2003/2004) (explaining why a black woman may choose to straighten her hair, "the most assimilative choice"); Mary Ellen Maatman, *Listening to Deaf Culture: A Reconceptualization of Difference Analysis Under Title VII*, 13 HOFSTRA LAB. L.J. 269, 296-97 (1996) (noting that "many employers admit that they regard a nonethnic, straightened hairstyle as 'professional,' and braids as unacceptable") *cf.* Caldwell, *supra* note 44, at 367 (discussing a case in which the Hyatt hotel prohibited "'extreme and unusual hairstyles,'" which included braided hairstyles).

[55] *See* Kimberly Jade Norwood, *The Virulence of Blackthink and How Its Threat of Ostracism Threatens Those Not Deemed Black Enough*, 93 KY. L.J. 147, 164 n.54 (2004/2005) (noting, for example, that a tavern in St. Louis would not allow two black men with dreadlocks in their establishment on the ground that one cannot wash dreadlocks and the tavern owner did not want "stinky" people in his establishment).

[56] D. Aaron Lacy, Works in Progress Session—*Hair Today, Gone Tomorrow: Conforming for Hire*, Tenth Annual Latina/o Critical Theory Conference, October 6-10 2005.

white and receive proper treatment.[57] Likewise, *The Good Black*'s Larry Mungin often made sure that he spoke "with a precision that guaranteed his being described as 'very articulate'" as a means of demonstrating to Whites that he is "a black person who doesn't use street vernacular"[58]—again, not one of the "bad Blacks," but rather one who fits in, one who is accommodating.

The fact is that race has a greater meaning than skin color or tone; it is also about performance—how one displays his or her racial identity.[59] Blacks who wish to be accepted by mainstream white society and do not want to be discriminated against have a tremendous incentive to perform their racial identities in ways that place them in closer proximity to whiteness.[60] Unfortunately, the end result is that such incentives force Blacks to submit themselves to what I have defined to be "volunteer discrimination."

B. The Roles of Black Folks

But one may ask, "What is the harm of this 'volunteer discrimination' if it ultimately means inclusion for those who conform to commonly held notions of middle-

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[57] *See* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 290 (2003) (describing how his mother would "pass" over the phone because listeners imagined she was white); *see also* Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1144-45 (2000) ("This is similar to what happened in my Tennessee roommate anecdote, in which the telephone veiled my race."); Thomas Purnell et al., *Perpetual and Phonetic Experiments on American English Dialect Identification*, 18 J. LANGUAGE & SOC. PSYCHOL. 10, 11, 22 (1999) (conducting a study that measured the impact of Chicano English, African American Vernacular English, and Standard American English dialects on access to rental housing in four San Francisco and Bay Area communities and showing that qualified black and Chicano renters were discriminated against based on dialect on the rental market in certain white residential areas).

[58] BARRETT, *supra* note 51, at 41.

[59] *See* Carbado & Gulati, *Working Identity*, *supra* note 3, at 1279-1308 (describing how the actions of women and people of color in attempting to alter their perceived racial identities is a form of discrimination); *see also* Catherine Smith, *Queer as Black Folk?*, 2007 WISC. L. REV. (forthcoming) (manuscript at 23-24, on file with author) (describing how Blacks are complimented when their identity performance interferes with the socially constructed stereotypes of Blacks).

[60] *See* Carbado & Gulati, *supra* note 2, at 1676-77. *But see* Frank Rudy Cooper, "Who's the Man?": Performing Masculinity in *Terry v. Ohio* (manuscript at 18-19, on file with author) (noting how some gang members seek to be intimidating in their identity performance and thus may "invite" discrimination).

class whiteness?" Why should we not accept supportive comments by the Blacks who have conformed to these norms as clear evidence of no racism behind the new NBA dress policy? After all, the argument that some Blacks' support of the new NBA dress code negates claims of racism has broad appeal for many reasons. First, in a time and age when the American public, especially white Americans, are uncomfortable talking about race,[61] it is much easier to point to non-complaining minorities as rational and discount complaining minorities as ultrasensitive or, as the saying goes, of "playing the race card."[62] Additionally, analyzing the imposition of the new NBA dress code as a clear issue of non-discrimination allows one to ignore the full complexity of racism. For example, it allows one to avoid the difficult task of grappling with the notion that arguments against the policy as racially driven also can, in a way, play into racist notions that Blacks do not dress professionally or can never look professional. As Philadelphia 76ers forward Chris Webber eloquently argued, "For everybody to say that [the code] is racist, what you're saying to me is that a black man can't be fresh or flower, can't have a suit on. . . . to say that we can't wear suits, . . . that's racial."[63]

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[61] *See* Clarence Page, *Essay: Left Behind*, ONLINE NEWSHOUR, Sept. 22, 2005, *available at* http://www.pbs.org/newshour/essays/july-dec05/page_9-22.html ("Americans are uncomfortable with talk about race and even less comfortable talking about class.").

[62] According to Wikipedia, "*Playing the race card* is an idiomatic phrase, referring to an allegation often raised against a person who the accuser feels has unnecessarily brought the issue of race or racism into a debate so as to obfuscate a matter of debate. It is a metaphorical reference to card games in which a trump card may be used to gain an advantage." WIKIPEDIA, THE FREE ENCYCLOPEDIA, available at http://en.wikipedia.org/wiki/Race_card.

[63] Joe Juliano, *Black Men Can Wear Suits, Too*, PHILADELPHIA INQUIRER, Oct. 23, 2005, *available at* http://www.philly.com/mld/inquierer/sports/12975658.htm?template=contentModules/printst; *see also* Fisk, *supra* note 46, at 1133 ("The essentialism of discrimination analysis is its reliance on the idea that certain appearance conventions are 'white' or 'black' or 'male' or whatever. Some whites and some blacks can wear their hair in an Afro, some of both races cannot.").

Although Webber is correct to assert that the implication that a black man cannot wear a suit is racist, he is incorrect in saying that labeling the code as racially motivated necessarily suffers from that same implication. One can certainly acknowledge and understand the fact that many black men may feel more comfortable or "at home" in a Brooks Brothers suit than in Russell Simmons wear without implying that no black man can really wear a suit. To argue that the implementation of the code is improperly influenced by race is not to say that "real black men" do not wear Brooks Brothers clothing, but to highlight the fact that society generally views only black men in suits as "good black men" and those in hip-hop gear as "bad black men"—dangerous, criminal, and uneducated.

More to the point of this Essay, to argue that support by some Blacks of the controversial policy counteracts any claims of racial discrimination misses the very danger in today's new form of discrimination. For one thing, it ignores the fact that Blacks who wish to be deemed "good" have every incentive to accept dominant cultural norms as "right" and to distance themselves from those within their group who challenge those norms. Furthermore, it ignores a broad history of "volunteer discrimination" by Blacks who have engaged in the acts of accommodating, distancing, and resigned modeling for the very purpose of proving that they are worthy of inclusion in mainstream circles.

This Part of the Essay defines and describes the acts of accommodating, distancing, and resigned modeling and the reasons why Blacks may engage in these forms of behavior to avoid discrimination for themselves or to help prevent it for younger Blacks who may look up to them. First, Part II.B(1) considers the behavior of

accommodating, in which actors simply assume or accept the merit behind definitions of culturally acceptable standards without challenge. Actors who "accommodate" encourage others to conform their behavior to socially acceptable appearance standards, regardless of their racialized meanings or, rather, in spite of their racialized meanings. Part II.B(2) explores the action of distancing, which in a sense is a required extension of the act of accommodating, in that it requires those who fit the mold—at least as much as outsiders can—to distance themselves from those who are even further outside the societal norm. Blacks who engage in distancing may or may not accept the merit of what are culturally defined as acceptable standards but they recognize the need to adhere to such standards to succeed, especially in a way that publicly displays their difference from those who do not perform such socially acceptable behaviors. Part II.C then analyzes the work of resigned modeling, in which actors may reject mainstream cultural definitions of socially acceptable performance or, at least, recognize the way in which socially acceptable norms can be racialized, but resign themselves to conformity for the sake of modeling behavior to members of their outside group who may look to them as role models for success. These actors do not buy into culturally acceptable norms as defined by society, but they, like their accommodating and distancing counterparts, "volunteer" themselves for such discrimination because they see no way around performing their identity in a way that adheres to these norms.

1. Accommodating

One of the reasons why some Blacks' support of the new NBA dress code is not necessarily convincing evidence of the absence of improperly driven racial motives is the incentive that many Blacks have to engage in the act of accommodating, or what I define

as a practical acceptance of dominant cultural norms for the sake of advancement and inclusion.[64] What is at issue for the accommodating individual is acceptance from the dominant racial group or at least a tolerance that can enable traditional success by Blacks who are willing to conform. The accommodating individual cares only about how to achieve that acceptance or tolerance, not about whether those norms are right or improperly racialized or about how one should proceed in questioning those norms. These actors are strategic, asking first only what is deemed appropriate by societal standards and then shaping their behaviors in ways that fit into these socially acceptable molds.

The act of accommodating has long historical roots within the black community. For example, Booker T. Washington, who emerged as a leader of the black community during the post-Reconstruction era,[65] adopted the philosophy of accommodation or accommodating as a means of survival and encouraging the advancement of black people.[66] As I explained in a previous article, "The ideology of Washington . . . was as follows: 'If [Blacks] play by [Whites'] rules, and prove [their] worthiness according to [white] standards, [Whites] will have no choice but to accommodate [Blacks]."[67]

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[64] *See supra* Introduction.

[65] *See* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 825 (asserting that Washington rejuvenated black nationalism during the post-Reconstruction era); August Meier, *Negro Class Structure and Ideology in the Age of Booker T. Washington*, 23 PHYLON 258, 258 (1962) (describing Washington's philosophy as being that "[o]nce Negroes had proven their ability to help themselves, to acquire wealth and respectability, it was believed, prejudice and discrimination would wither away").

[66] Angela Onwuachi-Willig, *Just Another Brother on the SCT? What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 941-42 (2005); *see also* Jeffrey Louis Decker, *The State of Rap: Time and Place in Hip-Hop Nationalism*, 34 SOCIAL TEXT 53, 56 (1993) ("The key, as technocrat Booker T. Washington understood it, was to imitate white institutions within the black community.").

Likewise, as one commentator asserted about David Stern's "Eureka moment" on the new NBA dress code, the idea for the code was that "[if] the players dress[ed] better and look[ed] more responsible in public, they [would] be more appealing across the board and in the board rooms of Corporate America."[68]

In other words, in our society, it does not matter if the accommodating individual truly believes in the defined acceptable norms; rather, what is critical is that the accommodating individual understand and know that the onus is on him or her to conform to those norms to advance. As Professor Kenji Yoshino explained about how John T. Molloy's book *New Dress for Success* revealed Blacks' incentives to "accommodate" in order to succeed:

> Success, it seems, is white and bland. Molloy describes the continuing vitality of white supremacy in American culture, a supremacy that requires racial minorities to bend behavior toward Anglo conformity. Indeed . . . racial minorities must go 'somewhat overboard' to compensate for immutable differences from the white mainstream.[69]

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[67] Onwuachi-Willig, *supra* note 66, at 941 (quoting Peter Eisenstadt, *Introduction*, in BLACK CONSERVATISM: ESSAYS IN INTELLECTUAL AND POLITICAL HISTORY xv (Peter Eisenstadt ed., 1999); *see also* Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as a Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1662-63 (2005) (describing how many former slaves during the post-bellum period acted on "[t]he desire to prove themselves worthy of membership in society as truly free citizens by conforming to white marriage laws and customs").

[68] Tim Kawakami, *Dress Code Isn't the Answer for NBA's Image Problem*, MERCURY NEWS, Oct. 27, 2005, at http://www.mercurynews.com/mldmercurynews/13009200.htm?template+contentModules.

[69] YOSHINO, *supra* note 40, at 135 (quoting MOLLOY, *supra* note 47, at 233) (also noting that Molloy, based on his research of grooming in corporate America, reported "that 'blacks had not only to dress more conservatively, but also more expensively than their white counterparts if they wanted to have an equal impact"); *see also* Gowri Ramachandran, *Intersectionality as "Catch 22": Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 336 (2005-2006) (noting that unlike minority professionals, white employees are free from the constraint of having to dress "hyper-professionally"); Carbado & Gulati, *Working Identity*, *supra* note 3, at 1276 (noting, for example, that law firms promote those people who "will not threaten the status quo").

It is the outsider individual who must be accommodating, not those within the dominant culture.[70]   As a consequence, for the accommodating individual or group, racialized norms are never truly challenged.

One especially poignant example of accommodating behavior by Blacks that fails to question the potential racism behind societal norms on appearance is the hair policy that Hampton University, a prestigious historically black university in Virginia, implemented for students in its five-year Bachelor of Arts/Masters of Business Administration program. The policy, which was created in 2000, provides that "[b]raids, dreadlocks and other unusual hairstyles are not acceptable."[71]   The idea behind the policy is that students at Hampton need to learn and abide by the appearance standards of a predominantly white corporate world—so that "[w]hen they get into corporate America, the transition will be easier."[72]

[70] See John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 283 (1997) ("The consequence of this power dynamic is that the dominant group, Whites, can exercise preferences in deciding how to look or express themselves, whereas people of color are limited to either conforming to an imposed White standard or rejecting it.").

[71] Ieesha McKinzie, *Hampton Business School Sticks by Requirement for "Conservative" Hairstyles*, BLACK COLLEGE WIRE, Mar. 27, 2006, *available at* http://www.blackcollegewire.org/news/060327_hampton-hair/.

[72] Tamara Dietrich, *HU Policy Might Be Better with a Trim*, DAILYPRESS.COM, Apr. 23, 2006, at http://www.dailypress.com/news/columnists/dp-09662cm0apr23,0,417307.column?coll=dp-news-columnists (quoting the Dean of Hampton's Business School).

Despite resistance from students, faculty, and staff on campus[73] and even Susan Taylor, editorial director of black women's magazine *Essence*,[74] the Dean of the business school at Hampton, Sid Credle, has refused to change the policy. Instead, he has strongly expressed support for the policy, arguing that a "clean-cut" look is an asset for any student who seeks advancement in the corporate world.[75] Again here, much like the arguments made by black NBA dress code supporters, the arguments in favor of Hampton Business School's hairstyle policy are that the students must change to accommodate corporate norms, not that corporate norms must be open to clean and well-groomed, ethnic hairstyles that may be primarily worn by Blacks or other minority racial groups.[76] Vincent Vaughn, a senior in the program, proclaimed, "At the time when I cut

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[73] For example, Sean Linder, a sophomore in the program, described the policy as "a way of making African Americans assimilate to the mainstream standards 'what is professional and what is not.'" *See* McKinzie, *supra* note 71. Linder, who was initially asked to sit in the back of the classroom when he did not comply with Hampton Business School's hairstyle policy by wearing his hair in twists, opted to complete extra work and assignments in order to make up missed seminars for classes he was not allowed to attend because of his violations of the policy. *Id.* (quoting Linder as saying "I noticed everyone back there [in the classroom] had ethnic hairstyles."

The fact that a historically black university—schools that normally espouse great pride in African and African American culture and heritage—has instituted a policy that targets black ethnic hairstyles is very strong proof of the great incentives that Blacks have to engage in the act of accommodating.

[74] *See* Allen Johnson, *A Hair-Raising Debate*, News-Record.com, Apr. 13, 2006, at http://blog.news-record.com/staff/outloud/archives/2006/04/a_hairraising_d.html (noting that Taylor had "balked at a speaking engagement at historically black Hampton University over the school's ban of certain hairstyles in its MBA program").

[75] *See* McKinzie, *supra* note 71; *see also* Dietrich, *supra* note 72 (noting that Dean Credle said that the policy is "to help groom [the students] for the button-down, clean-cut corporate world to which they were headed").

[76] *See* McKinzie, *supra* note 71. Junior marketing major Chris Roy argued, "Even though we [Blacks] made a lot of progress as far as social norms, I still think dreads or a 'fro will make it more difficult to be viewed in the same light as an applicant that fits the mold . . . . Your hair has nothing to do with your intelligence, but there are preconceptions that people may have about you." *Id.* According to Roy, "African Americans need to be a step ahead of their competition, even if it means sacrificing a hairstyle." *Id.*

[my dreadlocks], I figured there has to be some sacrifice in order to progress."[77] Likewise, Dean Credle has repeatedly declared that these acts of accommodating are necessary for fitting into and succeeding within the corporate culture. As Dean Credle contended, "Braids and cornrows could set you back. . . . The first thing they (interviewers) see is your appearance."[78] Many students in the program continue to make similar statements in support of what I define as an act of accommodating through the hair policy. For example, Tuesday Tibbs, a junior, said it best when she proclaimed that she simply "follows the 'When in Rome, do as the Romans do' philosophy."[79] To put it simply, outsiders—here, Blacks—must accommodate if they want to advance.

Unfortunately, while the act of accommodating may allow mainstream success for conforming Blacks, one must ask at what cost does this success come to those Blacks who find such accommodation to be a negation of self.[80] As Susan Taylor explained, "Trying to transform [ourselves] to fit into hardly welcoming environments has scarred countless numbers of Black people."[81] Thus, for those Blacks who find these acts of

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[77] *See* McKinzie, *supra* note 71; *see also* Carbado & Gulati, *Working Identity*, *supra* note 3, at 1264-68 (describing how workers may compromise their sense of identity). Another commentator described his friend's argument in favor of Hampton's policy, stating:

> [My friend] countered that the business world does not see either [tastefully styled braids or dreadlocks] as standard-issue hairstyles. When in the business world, she added, you do as the business people do. *That's how you get a job and it's how you get ahead.*

Johnson, *supra* note 74.

[78] *See* McKinzie, *supra* note 71. One anonymous blogger noted the following about the policy: "Now define professional—my definition might include dreads and braids, but how many black owned corporations are out there really? Reality check—we live in a white man's world." *The Polls: Opinions and Comments on Issues*, SOULCITI.COM, at http://www.soulciti.com/poll.php?view=1&pollid=70.

[79] *See* McKinzie, *supra* note 71.

[80] *See* Carbado & Gulati, *Working Identity*, *supra* note 3, at 1260-68, 1277-79. Of course, there are some Blacks for whom such behavior is not self-negating, but just the act of being one's self. *See* YOSHINO, *supra* 40, at 189 (explaining that "the covering concept might assume too quickly that individuals behaving in 'mainstream' ways are hiding some true identity, when in fact they might just be 'being themselves'").

accommodation to be self-negating but necessary for inclusion, the end result for them becomes nothing other than "volunteer discrimination." Indeed, one commentator argued the following about the Hampton policy: "To categorically deny males the right to wear dreads or braids smacks of cultural suffocation."[82] In light of these effects and the racial undertones driving the need for some Blacks to engage in accommodating, it makes little sense for commentators to then turn around and use what essentially may be cultural suffocation for many Blacks as determinative ammunition against claims of racism behind a policy, whether instituted by Whites or by Blacks[83]—in this case, not only the NBA dress code, but also Hampton Business School's hairstyle policy.

2. Distancing

Another reason for not using black support of the new NBA dress code as proof of no racism behind the policy is the attraction for some Blacks to engage in a behavior I call "distancing." Distancing involves actions or comments by outsiders—again, here Blacks—that are made or done to demonstrate to the dominant group that the outsider is a "good Black," not a "bad Black"—in fact, one who speaks, dresses, and acts unlike those Blacks who are negatively stereotyped. The philosophy of the person who engages in distancing is same as that which was announced by *The Good Black*'s Mungin, who described his past thinking as follows: "I wanted to show that I was like white people: 'Don't be afraid. I'm one of the *good* blacks.'"[84]

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[81] Richard Prince, *Hair Wars*, MAYNARD INSTITUTE, Apr. 12, 2006, at http://www.maynardij.org/columns/dickprince/060412_prince/.

[82] McKinzie, *supra* note 71.

[83] *See* Norwood, *supra* note 55, at 164 n.52 (noting that "Blacks can negatively stereotype Blacks as well").

[84] BARRETT, *supra* note 51, at 6. As Professor Yoshino explained, "In Barrett's analysis, Mungin strove to join a select group of individuals of African-American ancestry—including Tiger Woods, Colin Powell,

Blacks who engage in distancing realize that mere conformity is not enough for success; one must actually actively distinguish himself or herself from those Blacks who are deemed to be outside of the acceptable mainstream. To these people, failure to distance one's self from negative racialized connotations is in fact "bad for business"—a hindrance to advancement.[85]

One good example of how some Blacks have incentives to distance themselves from other Blacks who have been deemed less desirable by societal standards are the actions that many first and second generation Caribbean Blacks in the United States—a group that has been designated as the "model black minority"[86]—take in working to

and Arthur Ashe—who are seen 'not as unblack but as not merely, not primarily, black.'" Yoshino, *supra* note 8, at 884 (quoting BARRETT, *supra* note 51, at 282); *see also* Devon W. Carbado & Mitu Gulati, *The Fifth Black Women*, 11 J. CONTEMP. LEGAL ISSUES 701, 719-20 (2001) (noting in a hypothetical involving a black woman at a law firm that "[s]he might avoid contact with other employees with negative workplace standing (signaling that she is not really 'one of them')"); Carbado & Gulati, *Working Identity*, *supra* note 3, at 1287-88 (explaining how the colorblind norm requires "people of color to avoid other people of color (the negative racial duty) and to associate with whites (the affirmative racial duty)").

[85] Whitlock, *supra* note 29 (noting that the hip-hop style of dress for many young black NBA players "makes people who are uninterested in or sickened by prison culture uncomfortable"). The incentives to engage in distancing are evident in the life of Larry Mungin, the subject of THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (1999). As Professor David Wilkins explained about Mungin's strategy to succeed in America prior to his lawsuit, "Mungin interpreted this admonition [from his mother to be human first, American second, and third black] to mean that the best way for him to prove that he was indeed first and foremost 'a human being' *was to cut himself off from anything that might tie him in the eyes of whites to blacks—especially 'those blacks' who might offend whites*." David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924, 1953 (1999) (emphasis added) (reviewing, BARRETT, *supra* note 51).

[86] MARY C. WATERS, BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES 116-23 (1999); *see also* Angela Onwuachi-Willig, The Admission of Legacy Blacks (2006) (manuscript on file with author) (discussing how first and second generation Caribbean and African Blacks are perceived differently in the United States by Whites than native black Americans with long-term roots in the United States). For example, in comparing West Indian Blacks to African-Americans, one white manager explained:

> They [Caribbeans] tend to shy away from doing all of the illegal things because they have such strict rules down in their countries and jails. And they're nothing like here [African-Americans]. So like, they're really paranoid to do something wrong. They seem to be very, very conscious of it. No matter what they have to do, if they have to try and work three jobs, they do. They won't go into drugs or anything like that.

Malcolm Gladwell, *Black Like Them*, NEW YORKER, Apr. 29, 1996, *available at* http://www.gladwell.com/1996/1996_04_29_a_black.htm (citing to and quoting from a study by Professor Mary Waters of Harvard University).

distinguish themselves from black Americans who descend from slaves in this country, a group that as a whole has been negatively stereotyped as lazy, uneducated, and incompetent.[87]   As several scholars have noted, some first and second generation Caribbean Blacks make a special effort to distinguish themselves from these native-born black Americans as a means of avoiding the full sting and stigma of American blackness.[88] For example, one woman of Jamaican descent, who believed that Whites would treat her better if they knew that she was not a native black American, admitted that she had her mother teach her a Jamaican accent to use when she applied for jobs so that she could distinguish herself from native black Americans.[89]

Indeed, the incentives that some Blacks have to engage in distancing by conforming to the NBA dress code are readily apparent. Throughout the entire debate regarding the code, those in favor of the policy have repeatedly highlighted the need for the league's black players to distance themselves from what are perceived to be the bad

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[87] *See* Norwood, *supra* note 55, at 163 (asserting that there are "negative stereotypes that depict Blacks as poor, lazy, criminal, promiscuous, unintelligent, and/or incompetent"); Michele Goodwin, *Race As Proxy: An Introduction*, 53 DEPAUL L. REV. 931, 933 (2004) ("Color is linked with laziness, incompetence, and hostility, as well as disfavored viewpoints, such as a lack of patriotism and disloyalty to the United States.").

[88] *See* WATERS, *supra* note 86, at 5, 64-76; M. Patricia Fernandez-Kelly & Richard Schauffler, *Divided Fates: Immigrant Children in a Restructured U.S. Economy*, 28 INT'L MIGRATION REV. 662, 675 (1994) (noting that the success of study subjects, including second generation black students with roots in Haiti, was "rooted in deliberate attempts [by the students] to disassociate themselves from the stigma imposed upon black populations in the United States through an affirmation of their national identity and their religious fervor").

Malcolm Gladwell has explained that "West Indians cannot escape the fact that their success has come, to some extent, at the expense of American blacks, and that as they have noisily differentiated themselves from African-Americans—promoting the stereotype of themselves as the good blacks—they have made it easier for whites to join in." Gladwell, *supra* note 86. As Professor Mary Waters of Harvard University asserted, in some instances, it is immigrant Blacks who "voice some of the worst stereotypes and negative perceptions of American blacks imaginable." Mary C. Waters, *The Role of Lineage in Identity Formation Among Black Americans*, 14 QUALITATIVE SOCIOLOGY 57, 69 (1991).

[89] Waters, *supra* note 88, at 70.

elements of black society—specifically, the hip-hop community.[90] For example, one

commentator explicitly argued that NBA players need to distance themselves from

negative images that are associated with blackness or have been negatively racialized,

when he asserted:

> I believe there is a race component to all of this . . . but the fact is that when black players get into violent incidents like this one, scads of white people recoil in horror and regard them as thugs. . . . If [the new dress code will] play a tiny part in keeping some kid out of the slammer or the morgue, I'd be willing to do it. The league doesn't need to get completely away from hip-hop, *but to distance itself from the negative connotations of hip-hop.*[91]

Likewise, black columnist Jason Whitlock advised young black NBA players to engage

in what Professor Regina Austin defined as the "politics of distinction"[92] within the

context of criminal law, stating: "I can't find fault with the NBA for wanting to rid itself

of prison culture. You guys should be asking yourself why you're embracing prison

culture. *You want to be 50 Cent?*"[93] In other words, the players should not want to be

associated with a person who has been deemed to be a "bad Black," such as 50 Cent;[94]

instead, they must distance themselves from him.[95] The key is to highlight one's

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[90] *See* Tom Strattman, *Pacers' Jackson Leads Chorus of Players Against Dress Code*, USA TODAY, Oct. 19, 2005, *available at* http://www.usatoday.com/sports/basketball/nba/2005-10-19-sjackson_x.htm (quoting Golden State guard Jason Richardson as saying about the NBA policy: "They want to sway away from the hip-hop generation. You think of hip-hop right now and think of things that happen like gangs having shootouts in front of radio stations.").

[91] Emmett Shaw, *A Coming NBA Dress Code*, HOOPS WORLD, Oct. 7, 2005, *available at* http://www.hoopsworld.com/cgi-bin/news/exec/view.cgi?archive=54&num=14487.

[92] Regina Austin, *The Black Community, Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1772 (1992) (defining the phrase as highlighting "the difference that exists between the 'better' elements of 'the community' and the stereotypical 'lowlifes' who richly merit the bad reputations the dominant society accords them").

[93] Whitlock, *supra* note 29 (emphasis added).

[94] *See* Butler, *supra* note 17, at 993 (noting how 50 Cent is viewed by some as a gangsta rapper).

difference from those who carry the label of "bad Blacks." As NBA veteran Charles Oakley succinctly put it, "I'm not trying to sound like some old guy who says this is the way we used to do it. Why not look professional instead of looking like you belong on a street corner?"[96]

Because the act of distancing is, in many ways, merely a necessary extension of accommodating, it, too, fits within the rubric of "volunteer discrimination." As a consequence, arguments that emphasize, in support of the new NBA dress policy, the need for NBA players to "distance" themselves from the negative, racialized elements that the league is currently associated with also lack some persuasiveness as proof of no racial motives behind the policy.

3. Resigned Modeling

Even for those outsiders who question the propriety of culturally defined acceptable norms or who view those norms as steeped in racism or racialized thinking, there is still a tremendous incentive to simply resign one's self to those standards, if not for one's self, then for the sake of the youth who look up to you. Thus, much like with accommodating and distancing, the incentives that many Blacks have to engage in this act—what I call resigned modeling—work only to negate claims by supporters of the new dress code that the policy is not racially motivated. Indeed, in this debate concerning the racial overtones of the new NBA dress code, some commentators, such as Charles Barkley, openly concede that the new NBA dress policy is racially driven,[97] but

[95] *See* Norwood, *supra* note 55, at 164 n.52 (noting that "Blacks can negatively stereotype Blacks as well").

[96] Frank Isola, *Oakley Knows*, N.Y. DAILY NEWS, *available at* http://www.nydailynews.com/sports/basketball/knicks/story/360363p-307064c.htmlasp (quoting Oakley).

[97] Mike Wise, *Opinions on the NBA's Dress Code Are Far from Uniform*, WASH. POST, Oct. 23, 2005, at A1 (noting that Charles Barkley "acknowledged that there are racial subtexts connected to the new dress

still argue in its favor. The rationale of those who engage in the act of resigned modeling is not that the racial sentiments behind the new dress policy are appropriate, but rather that the players, or more important, the young children who look up to the players must abide by culturally acceptable norms to get ahead and thus the players have an obligation to these children to resign themselves to model conforming behavior. For instance, Barkley argued the following, even though he conceded that the implementation of the new dress code is racially motivated:

> All these black kids do every single thing [the NBA players] do. [The players] make 10 to 15 million dollars, and they can do what they want to. Unfortunately, all of these young black kids, when they go out dressed like that, they're going to be discriminated against and not get good jobs. . . . If a well-dressed white kid and a black kid wearing a do-rag and throwback jersey came to me in a job interview, I'd hire the white kid. That's reality. That's the No. 1 reason I support the dress code.[98]

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code"). I note that, in many instances, Charles Barkley fits better under the "accommodating" role or bracket of behavior. In this debate about the NBA dress code, however, Barkley's actions and comments best display the act of resigned modeling; for this reason, I use his comments as an example in this section on resigned modeling, even though in other instances of his life, Barkley is better described as an accommodator. Moreover, one could argue that, given Barkley's political ambitions to be the governor of Alabama, he also has strong incentives to engage in distancing as a means of obtaining cross-racial votes. These points I have made about Barkley's placement as one who engages in accommodating, distancing, and resigned modeling highlight an important point about the various strategies I have identified as "volunteer discrimination": that these behaviors are, experientially, often mixed together and at least in part in the eye of the beholder (as performances always are). One can think he or she is "distancing" but may then be read by others as "accommodating." Consequently, despite the appearance of three different strategies, these categories in fact may be more like a paintbox from which individual people choose and combine, and then, like art, can become other than what the author intended.

[98] Langston Wertz, Jr., *NBA Has A Right to Set Dress Code for its Players*, CHARLOTTE.COM, available at http://www.charlotte.com/mld/charlotte/sports/basketball/nba/charlotte_bobcats/12998025.htm. Of course, this statement also implies that Barkley would not hire the white kid wearing a do-rag either, but as Professor Barnes and I have argued, this action, too, is a form of race discrimination based on blackness. Here, the white kid is discriminated against for being the "'wrong kind' of White," meaning one who performs their identity as a black person or can be identified by markers heavily associated with black people—a white person who is too black. *See* Onwuachi-Willig & Barnes, *supra* note 9, at 1301, 1319, 1341; *see also* Emily M.S. Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455, 472-73 (2005) (noting, however, that the key difference between "an aligned outsider and 'immutable' outsiders, is that [the aligned outsider's] conduct dictates his designated status as outsider, rather than his status dictating his conduct").

In essence, Blacks, like Barkley, who engage in the act of resigned modeling, "volunteer" themselves for such discrimination, not because they see no discrimination at all, but instead because they see no way around it.[99]

In this sense, the use of comments such as Barkley's are the most damaging when people cite to them in order to negate claims of racism within the policy because such comments rely upon an explicit acceptance of racism.[100] They not only acknowledge the improper racial motives behind the policy, but they actually allow and accept defeat

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[99] Another good example of resigned modeling is shown through the position that some Blacks have taken in the debate over whether black parents should give their children ethnic-sounding names. Scholars Marianne Bertrand and Sendhil Mullainathan conducted a study, "*Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*," which revealed that simply having an African American sounding name significantly decreased one's opportunity to receive a job interview, regardless of occupation or industry. Based upon an experiment that involved sending identical, fictitious resumes with an African American sounding name, such as Jamal, and a white sounding name, such as Greg, to the same employers in Boston and Chicago, Bertrand and Mullainathan found that resumes with white sounding names received fifty percent more callbacks for interviews. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, Working Paper 9873, *available at* http://www.nber.org/papers/w9873 (July 2003).

In the debate over black names, some Blacks take the position that, although it is unfair for Blacks to be limited in naming their children because of discrimination that may ensue from having a racially identifiable name, it is necessary for black parents to give their children common, non-racially identifiable names, such as Cody or Greg, as a means of improving their children's chances of avoiding discrimination on the job market. *See* Dan Woog, *Do 'Black' Names Matters?*, DIVERSITY & INCLUSION, at http://diversity.monster.com/afam/articles/names/. During this debate, one black journalist Bill Maxwell echoed comments that were strikingly similar to Charles Barkley's comments on the NBA dress code:

> The reality is, white people joke about those names. . . . They have a reaction when they see the name Loquisha or Tyrone. I suppose it's OK for entertainers. If you want to call yourself Ice Cube or Snoop Dogg, go ahead. But most kids are not going to go into entertainment, so I don't think we should be putting up unnecessary barriers to employment among our kids.

Id. Additionally, one black mother named Tiqua Gator "named her son Derek to help him get by in white America." *Can a 'Black' Name Affect Job Prospects?*, ABC NEWS, Aug. 20, 2004, at http://abcnews.go.com/2020/print?id=124232. She explained, "If I was to have more children, it wouldn't be any Tiquas or it wouldn't be any Tamikas or Aishas. It would be something common. . . . I wouldn't want my child to go through the same thing I've went through." *Id.*

[100] *See* Carbado & Gulati, *Working Identity*, *supra* note 3, at 1291 ("[R]emaining silent can become not only a denial of that sense of self, but also a legitimation of and acquiescence to the implicit racial terms under which the outsider is expected to work . . . .").

based upon other racially harmful factors—in particular, what Blacks who engage in resigned modeling see as the inevitability of racially discriminatory standards.

III. THE DANGERS OF MISUNDERSTANDING VOLUNTEER DISCRIMINATION

The dangers in not understanding the incentives that many Blacks have to engage in accommodating, distancing, and resigned modeling extend beyond the NBA. In Title VII employment cases, courts and juries routinely cite to and rely upon contradicting testimony by black witnesses against a black plaintiff as extremely strong or conclusive evidence that discredits the plaintiff's race discrimination claim at trial.[101] For example, in upholding a district court's finding that a black plaintiff was not a victim of discrimination in *Williams v. Tallahassee Motors, Inc.*,[102] the Fifth Circuit noted the following about the persuasiveness of the testimony by the defendant's black witness Early Harris, Jr. to the district court, stating:

> As to the fact of discrimination, the [district] court *was particularly impressed* with the testimony of Early Harris, Jr., a *black* employee of the defendant, who testified that he had personally experienced no discrimination and had witnessed no discrimination against other black employees at Tallahassee Motors because of race.[103]

Indeed, the Fifth Circuit noted how the district court found this testimony by black witness Early Harris, Jr. to be particularly convincing despite the fact that Harris was an old Air Force friend and a recruit of the white sales manager whom the plaintiff had accused of discriminating in his recruiting efforts, a friendship that normally would make

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[101] *See, e.g.*, Ellison v. Best Foods, 598 F. Supp. 159 (E.D. Ark. 1984) (relying on positive testimony from other black employees as persuasive evidence that the allegations of discrimination by other Blacks were untrue).

[102] 607 F.2d 689 (5th Cir. 1979).

[103] *Williams*, 607 F.2d at 693 (emphasis added). When discussing witnesses, the Firth Circuit noted only Harris's race. The court did not even mention the race of any other witnesses. *Id.* at 693-94.

Harris's testimony suspect (especially if Harris himself had been white or had this case been a non-race discrimination case).[104]

The point of this Essay, however, is not to say that such testimony by Harris was irrelevant, was not convincing, or entirely should have been disregarded, but only to highlight how such evidence by black witnesses against black plaintiffs is often given significant weight in the evaluation of a case without any critical analysis into the motives of the contradicting black witnesses. To the contrary, at trials, judges and other arbiters, like the district court in *Williams*, often assume that, if the contradicting witness in a black employee's race discrimination case is black, the witness lacks any motives for giving his or her opposing testimony. Although the black witness and the black plaintiff in these cases are usually unrelated—other than the fact that they work together, the assumption by arbiters is one of black solidarity between the two or of no bias on part of the black witness; accordingly, the testimony of the contradicting black witness is given tremendous weight. The decision-makers presume that, if discrimination were present, the black witness would identify it and agree that it was present. There is never any consideration of how identity performances may have influenced such witness's testimony.

For example, in *Ellison v. Best Foods*,[105] the district court evaluated the merits of the race discrimination claims of seven black employees at Best Foods. The employees alleged, among other things, that the employer's method of operating its plants had a

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[104] *Id.* at 693-94; *see also Cummings v. Retzer v. Retzer, Inc.*, 646 F. Supp 400, 406 (N.D. Miss. 1986) (noting how allegations of discrimination by Blacks were "discredited by the testimony of disinterested *black* witness, Fred Atkins") (emphasis added).

[105] 598 F. Supp. 159 (E.D. Ark. 1984).

disparate impact on black employees.[106] "According to the plaintiffs, black employees advance[d] less rapidly, [were] disciplined more often, and [were] discharged at a greater rate, than their white counterparts" under Best Foods' "self-regulated work force system," a system in which employees were broken down into small teams that were "empowered through democratic processes to make certain decisions regarding employee discipline, working scheduling and assignment, training, etc."[107] The plaintiffs alleged that the system allowed an amount of subjectivity in decision-making that was disparately harmful to Blacks, who made up only thirty percent of the work population at the company.[108] In issuing its ruling that the plaintiffs' race discrimination claims had successfully been refuted, the district court emphasized that "several black employees testified that they did not feel blacks were, or are, treated less favorably than whites under the system" and that "[i]n fact many of the black employees including some plaintiffs praised the system in terms of its general operation."[109] Indeed, the district court found the testimony of these black witnesses to be so compelling as to refute the testimony of George McCarty, a white employee who testified "that he was offended by racist jokes that circulated the plant"[110] even though he himself admitted "that from time to time he also told racial jokes."[111]

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[106] *Ellison*, 598 F. Supp. at 160.

[107] *Id.* at 160, 164-65. Disciplinary decisions were first considered by the small groups or teams and then considered by the Plant Review Board. *Id.* at 165-66.

[108] *Id.* at 164, 166-67.

[109] *Id.* at 168.

[110] *Id.*

[111] *Id.* at 168 n.2.

Again, my intent here is not to suggest that the *Ellison* court reached the wrong determination in weighing the evidence or that the case was wrongly decided, but only to highlight how such evidence was given significant weight and relied upon without any consideration of what incentives the contradicting black witnesses had to engage in accommodating and distancing in order to ensure their jobs and their well-being within the workplace, especially in this environment where group consensus of co-workers was important to one's status within the work arena. In fact, under this self-regulated work system at Best Foods, consistent proof that one was a team player was critical to a worker's success at the company, and as Professors Carbado and Gulati's article *Working Identity* suggests, for the black employees in *Ellison*, who already were likely viewed as outsiders because of their race status, the pressures to perform their identities in ways that showed them as belonging to the inner group, as non-threatening, and, most of all, as accommodating were immense.[112] Furthermore, what better way for "good Blacks" in *Ellison* to distance themselves from the "bad Blacks" at Best Foods—to ensure that they would not be excluded from inner circles within this self-regulated work force system— than to testify against the complaining Blacks, and to do so in a way that not only declares there was no race discrimination in workplace but that praises the employer and his work system. The fact is that various incentives were present in *Ellison* for each black witness employee at Best Foods to show as, the ultimate "good Black" Larry Mungin often hoped to do, that he or she was an acceptable Black, a "safe Black." For this reason, it was improper for the court to rely on these witnesses' testimonies as though they were conclusive of the question of race discrimination without further examination

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[112] *See* Carbado & Gulati, *Working Identity*, *supra* note 3, at 1260-61, 1277-1308.

into the pressures behind their identity performances. In other words, while it is not clear that the black employees who testified to no discrimination in *Ellison* were engaged in "volunteer discrimination," the possibility that they were so engaged was present; thus, the evaluation of their testimony without further scrutiny of these potential, race-based influences was incomplete and dangerous.

CONCLUSION

In sum, while I understand the appeal of using comments from black players and journalists who support the new NBA dress code as a means of negating claims of racism, I wish to highlight the dangers in using them in a forceful way to defeat other Blacks' claims of racism. After all, many of these comments and actions themselves may be influenced by racism. In particular, they may be the result of race-based incentives that Blacks have not only to prove themselves worthy of inclusion by conforming to racialized norms of appearance, but also to distance themselves from those who do not conform. In this sense, such comments and action only work to reinforce racialized hierarchies and norms.[113]

Moreover, the use of such comments and actions as determinative proof of no racial motivations ignores the fact that some of the Blacks who have made these comments in support of the policy (not all of them) may be "victims" of racial discrimination themselves precisely because of the immense incentives they may have, both consciously and unconsciously, to engage in the acts of accommodating, distancing,

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[113] *See* Cooper, *supra* note 5, at 902-03.

and resigned modeling.[114] In this sense, Blacks who perform these acts become prisoners of their own racial performances, locking themselves into roles of perpetual accommodation and distancing while locking themselves away from other Blacks who choose to challenge what may be racialized appearance standards or workplace norms.

In fact, in many ways, I relate to this impulse to engage in resigned modeling as a black professional. Although I believe that the new NBA dress code itself is racially motivated, I do not question whether it is wise, in our society, for the league to impose the policy or for the players to follow it, precisely because I, too, feel the impulse to resign myself to model conforming behavior. In fact, I understand and even acknowledge the great impulse for me and other Blacks to engage in accommodating or distancing, but the fact that I feel and understand these impulses and even engage in these acts does not mean they are not premised upon racism. I, too, submit myself to "volunteer" discrimination nearly every day of my life. Yet again, that reality does not militate in favor of using my behaviors or those of other conforming Blacks as proof of no discrimination, but instead the exact opposite.[115]

The irony here is that the hip-hop culture that so many of us, including the NBA, wish to distance ourselves from does not "practice a politics of respectability" but instead challenges it.[116] As Professor Paul Butler has explained, "[u]nlike civil rights culture, hip-hop . . . is as concerned with fairness for drug sellers as for the law-abiding middle

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[114] *See* Carbado & Gulati, *Working Identity*, *supra* note 3, at 1262 (arguing that "the kinds of work outsiders often feel pressured to do because of negative assumptions about their identities . . . is a form of employment discrimination").

[115] *See* Caldwell, *supra* note 44, at 393 (explaining that "[w]hat appears to be merely an aesthetic judgment" for people of color is "part of the[ir] subordination").

[116] *See* Butler, *supra* note 17, at 1015 ("Unlike civil rights culture, hip-hop . . . champions the human rights of criminals as enthusiastically as the rights of the falsely accused. ").

class people who are stopped by the police for "driving while black' or 'driving while brown."[117]   In this sense, there may be a lesson to be learned from the hip-hop community about resistance to mainstream norms, and given the commercial success of hip-hop culture, perhaps resistance to these norms is not futile.

At the least, the claim by some Blacks that the NBA dress code is good or is not improperly motivated by race is not a slam dunk in favor of a finding of no discrimination. In order to truly combat racism, one must examine these claims of race discrimination separate and apart from the actions of the policy's black supporters and focus on the way in which appearances in general have been racialized—the way in which race generally infects our judgments about professionalism, including appearance standards.[118] Even Commissioner David Stern acknowledged the way in which race may affect judgments of the NBA in general (although not within the context of the dress code) when he stated:

> I think it's fair to say that the NBA was the first sport that was widely viewed as a black sport. And whatever the numbers ultimately are for the other sports, the NBA will always be treated a certain way because of that. Our players are so visible that if they have Afros or cornrows or tattoos—

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[117] *Id.*

[118] *See* MOLLOY, *supra* note 47, at 233 ("It is unfortunate but true that our society has conditioned us to look upon [Blacks] as belonging to the lower classes, and no matter how high a minority individual rises in status or achievement he is going to have some difficulty being judged by his success rather than his background."); Caldwell, *supra* note 44, at 381 (questioning how companies arrive at their "conception of a business-like image" and considering the role of race and sexuality in building those conceptions); *see also* Houh, *supra* note 2, at 911 ("That a non-minority insider need not negotiate his racial status by altering his conduct in the workplace, that he need not do the extra identity work that an outsider is expected to do, demonstrates just how normalized his culture and experiences in the workplace are, and the extent to which workplaces can function as materially and ideologically colonized and colonizing spaces."); Peller, *supra* note 65, at 762 ("I believe that the failure of the progressive and liberal white community to comprehend the possibility of a liberating rather than repressive meaning of race consciousness has distorted our understanding of the politics of race in the past and obscures the ways that we might contribute to a meaningful transformation of race relations in the future").

white or black—our consumers pick it up. So, I think there are always some elements of race involved that affect judgments about the NBA.[119]

In sum, what is critical here is that we analyze the policy in a way that comports with the realities of race and its functions in our society—that we look at race as it is broadly defined, not only through skin color but other markers such as dress and clothing. We need to understand racism as a set of interlocking social institutions and norms rather than as a mere attitude. Otherwise, we just may be using one form of "volunteer discrimination" to then impose a clearly involuntary form of discrimination upon others—either in the NBA or other workplace environments.

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[119] Michael Lee, *NBA Fights to Regain Image; One Year Later, Brawl Leaves a Mark Throughout League*, WASH. POST, Nov. 19, 2005 at E01