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"We'd Love to Match Them, But…": How Temporary Employment Agencies Understand and Use Race and Ethnicity

MEGHAN M. SWEENEY[†]

I. INTRODUCTION

This Article is a qualitative, empirical investigation of discrimination by temporary employment agencies. These agencies are important labor market intermediaries. But the ways in which they use race in making decisions about whether and how to place workers—as well as their understanding of anti-discrimination law—have never been studied. Many agencies admit that they make racialized inferences about who would be a good worker. Through my research, I found that formal law does not appear to play a large role in agencies' employment decisions. Agencies spend more time than traditional employers gathering individualized information about job applicants, but they still rely on in-person interviews as the best indicator of an applicant's success as a worker. Temporary agencies are thus little different from ordinary employers in their hiring strategies.

This Article uncovers the ways that employment agencies use race in matching applicants for jobs with employers. Based on structured, in-person interviews with managers at seven temporary employment agencies in a large city in Connecticut,[1] I have found that, although federal and state laws clearly prohibit race discrimination by employment agencies,[2] such agencies use racial stereotypes in describing, analyzing, and matching job applicants with employers. Three of the seven agencies expressly talked about using race or ethnicity in their hiring and placement decisions.[3] Three agencies used words that are social codes for race,[4] and one used

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[1] To preserve respondent confidentiality, agency names and geographical location will remain unnamed.

[2] *See* 42 U.S.C. § 2000e-2(b) (2006); CONN. GEN. STAT. § 46a-60(2) (2011).

[3] *See infra* Part V.

[4] Interview with branch manager, Interview B (Mar. 11, 2010); Interview with managing director, Interview D (Apr. 5, 2010); Interview with branch manager, Interview E (Apr. 6, 2010). Although three agencies did not explicitly mention race, they did use seemingly neutral language to stand in for conscious or unconscious racialized judgments. For example, a branch manager said that job applicants from City X, a predominantly minority area, have worse grammar, speech, and clothing than

neither express nor racially coded language.[5]

While temporary hiring agencies rely on racial stereotypes in much the same way that ordinary employers do, the agencies often deny their own responsibility for discriminatory behavior, suggesting that they are merely complying with the hiring requests of the employers that they serve. At the same time, temporary agencies do gather more individualized and objective information about job applicants through skills tests. More objective information may help minority applicants overcome some obstacles, such as reliance on racial stereotypes, which occur when regular employers do not have enough factual information about applicants' abilities and subsequently fall back on generalizations about the individuals' group membership during interviews. These findings imply that temporary help agencies may play a significant role in perpetuating employment discrimination, despite Title VII's[6] prohibition on such behavior.

Section II briefly reviews the relevant prior research. Section III describes my research methods. Section IV outlines how temporary agencies generally screen and hire job applicants. Section V examines the themes that emerged from the interviews. I focus on how temporary agencies understand their job of "matching" workers and employers, use of coded language, what constitutes discrimination, cognizance of the law, use of objective testing methods, and the role of geography in shaping hiring decisions.

II. LITERATURE REVIEW

Hiring discrimination remains significant, and some have argued that the filing of employment discrimination claims will rise.[7] Nevertheless, it is difficult for victims to detect such discrimination because employers rarely provide explanations for their (non) hiring decisions. Such discrimination can act as a significant roadblock to the economic

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applicants from Suburb Y, an adjacent predominantly white area. Interview with managing director, Interview D (Apr. 5, 2010).

[5] Interview with division director, Interview C (Mar. 25, 2010). The division manager of an international employment agency said that he saw a racial mix of job applicants in his agency. He put each job applicant through at least one of the agency's hundreds of computerized skills tests. He said that the tests give a baseline as to the applicant's skills. As long as an applicant was skills proficient, he said that he could find a job for a variety of personalities.

[6] *See* 42 U.S.C. § 2000e-2(b) (2006) (barring employment agencies from discriminating against an individual because of their "race, color, religion, sex, or national origin").

[7] There were over 1,300 employment discrimination cases filed in federal court in 2006. *See* LAURA B. NIELSEN ET AL., AM. B. FOUND, CONTESTING WORKPLACE DISCRIMINATION IN COURT: CHARACTERISTICS AND OUTCOMES OF FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION 1987–2003, 5–6 fig.1, fig.2.5 (2008), http://www.americanbarfoundation.org/publications/195. *See also* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1017 (1991) (arguing that as minorities and women acquire better jobs, there is a likelihood that the filing of employment discrimination claims will rise).

advancement of traditionally disadvantaged groups.[8] This makes it especially important to understand how and why discrimination in hiring occurs.

Past research suggests that some employers practice "statistical discrimination" (*i.e.*, they use observable job applicant traits, such as race or gender, to infer relevant but unobservable job applicant traits, "soft skills," such as productivity, reliability, or honesty).[9] This practice may work against minority applicants, because those who lack good interview skills may be kept out of jobs that they could perform well in, simply because they do not understand how to dress for an interview or speak differently.[10] The prior literature has identified four main reasons for statistical discrimination: 1) reliance on subjective screening mechanisms;[11] 2) lack of objective individualized applicant information;[12] 3) negative attitudes that employers hold about minority workers;[13] and 4) confounding of cultural differences and stereotypes with perceptions of differences in certain types of skills (personal interaction and motivation skills).[14]

Two studies in particular have documented employer statistical discrimination through face-to-face interviews: Joleen Kirschenman and Kathryn Neckerman's study of employers in Chicago and the subsequent work of Phillip Moss, Chris Tilly, and Harry Holzer in the Multi-City Study of Urban Inequality ("MCSUI").[15]

In their study, Kirschenman and Neckerman found that employers were willing to discuss sensitive racial issues, openly admitting to practices

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[8] Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991 (2004) (finding that individuals with white-sounding names receive more callbacks for interviews and more responsive reactions from employers about their resume quality than black-sounding names. The racial gap is uniform across occupation, industry, and employer size). *See also* MARGERY AUSTIN TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING 48–49 (1991) (data from hiring audits suggests that black job applicants were more likely to experience shorter interviews and receive less favorable treatment at the interview stage than white applicants).

[9] Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659, 659 (1972).

[10] Joleen Kirschenman & Kathryn M. Neckerman, *"We'd Love to Hire Them, But . . . ": The Meaning of Race for Employers*, *in* THE URBAN UNDERCLASS 203, 223 (Christopher Jencks & Paul E. Peterson eds., 1991).

[11] *Id*. at 208–09.

[12] Harry J. Holzer & David Neumark, *Equal Employment Opportunity and Affirmative Action*, *in* HANDBOOK ON THE ECONOMICS OF DISCRIMINATION 260, 271 (William M. Rodgers III ed., 2006).

[13] *Id.*; Philip Moss & Chris Tilly, *Why Opportunity isn't Knocking: Racial Inequality and the Demand for Labor*, *in* URBAN INEQUALITY: EVIDENCE FROM FOUR CITIES 444, 477–78 (Alice O'Connor et al. eds., 2001); Phelps, *supra* note 9, at 659.

[14] Moss & Tilly, *supra* note 13, at 455–57.

[15] *See* Kirschenman & Neckerman, *supra* note 10, at 206–07; *see also* Chris Tilly et al., *Space as a Signal: How Employers Perceive Neighborhoods in Four Metropolitan Labor Markets*, *in* URBAN INEQUALITY: EVIDENCE FROM FOUR CITIES 304, 307–08 (Alice O'Connor et al. eds., 2001).

that almost certainly violated antidiscrimination laws.[16] They primarily concluded that employers used race in making hiring decisions, but that race often intersected with other characteristics such as class and geographic location, rather than being relevant strictly on its own.[17] For example, several clerical employers told them that "black" styles of language and presentation—such as braided hair and "black" speech patterns—were inappropriate, signaling sensitivity to class distinctions as well as race.[18] Their Chicago employers believed that applicants' speech, dress, educational attainment, skill levels, and residency were signals of class.[19] Along with race, these markers conveyed important information about attitudes toward work, skills, and productivity.[20]

Kirschenman and Neckerman reported that employers would rarely admit to generalizing about race on its own or to any racial animosity.[21] But they did draw distinctions between "inner city" blacks and suburban blacks.[22] Regardless of whether the respondent employers were motivated by racial animus, they clearly "used" race—often in combination with other observable markers, such as social class, education, and geography—in making employment decisions.[23] Any use of race or sex in making hiring decisions—whether motivated by animus, customer preferences, or the desire to make profit-enhancing decisions via inferences from group membership—is illegal under federal employment discrimination law.[24]

Moreover, researchers have concluded that informal screening devices, such as pre-employment interviews, give space for the racial preferences or

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[16] *See* Kirschenman & Neckerman, *supra* note 10, at 207.

[17] *Id.* at 213–16.

[18] *Id*. at 221–25.

[19] *Id.* at 214–15.

[20] For example, within some discussions of space, respondents mentioned education and applicants' residential addresses. Chicago public schools signaled to employers that an applicant was "black . . . poor, and . . . from the inner city." Some employers indicated that the public schools did not prepare students for the workforce or arm them with the appropriate reading and writing skills. Inner city residence corresponds to public school attendance and signifies deficient work skills and ethic. *Id*. at 215–16.

[21] *Id*. at 212–13. Kirschenman and Neckerman's study did not refute the possibility of animus-based discrimination. Employers might have had good reasons for lying about generalizing about race: it makes the employers appear to be racist and subjects them to potential legal liability. Kirschenman and Neckerman's study demonstrated that employers did not see anything wrong with "using" race to make inferences about productivity and were willing to admit that they did this, as if it did not count as "real" discrimination.

[22] *See* Kirschenman & Neckerman, *supra* note 10, at 215–17.

[23] *Id.* at 206, 211, 225.

[24] *See* 42 U.S.C. § 2000e-2(a) (2006) (it is illegal for an employer to base an employment decision, or otherwise discriminate against an employee, on the basis of race, color, religion, sex or national origin); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (holding that when a plaintiff in a Title VII case proves that his or her gender was a motivating factor in an employment decision the defendant employer can avoid a finding of liability only if it can provide by a preponderance of the evidence that it would have reached the same decision even if it had not considered the plaintiff's gender).

stereotypes of the interviewer to influence hiring decisions. Kirschenman and Neckerman found that black employment was higher at firms that used objective tests, rather than in-person interviews, to screen applicants.[25] Moss and Tilly similarly concluded that pre-employment interviews decreased the rate of black male employment. The interviews created opportunities for the interviewers' subjective views on race to influence their decision-making, confounding skills assessment with stereotyping of different groups.[26]

Interestingly, some researchers have suggested that employment agencies might serve as a counterweight to many employers' subjective assessments of applicants. Harry Holzer and David Neumark speculate that temporary employment agencies would provide employers with more-individualized applicant information than employers themselves would be able to generate.[27] In their view, temporary agencies are positioned to undertake more fact gathering than ordinary employers and to make greater use of objective screening mechanisms, allowing them to assess the skills or readiness of individual applicants, rather than relying on stereotypes or "shortcuts."[28]

While temporary agencies might conduct more information gathering and screening than employers, such agencies may be neither more objective nor more thorough in their assessments of applicants. Moreover, other factors, such as client employers' requests, may be given more weight than applicants' individualized information in the agencies' placement decisions. This study, therefore, seeks to uncover how such agencies actually behave, and in particular, how if at all, they use applicants' racial and ethnic identity in making decisions about placement.

Although there is by now substantial literature studying employers' hiring practices in several cities, the behavior of labor market intermediaries has been much less studied. Temporary employment agencies function differently than employers in the labor market because agencies are "matchmaker" middlemen in a bilateral search market, putting together client employers and job applicants.[29] Employers facing loose labor markets with an excess supply of workers, as in the current recession and two prior ones in the early 1990s and 2001, have increasingly relied on

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[25] Kirschenman & Neckerman, *supra* note 10, at 213–16.

[26] Moss & Tilly, *supra* note 13, at 473.

[27] Holzer & Neumark, *supra* note 12, at 271.

[28] *Id.*

[29] *See* Abdullah Yavas, *Middlemen in Bilateral Search Markets*, 12 J. LAB. ECON. 406, 407 (1994) (characterizing employment agencies as the middlemen that narrow the search set for the firm and the worker); *see also* DAVID H. AUTOR, STUDIES OF LABOR MARKET INTERMEDIATION 1 (David H. Autor ed., 2009).

temporary agencies to relieve cost pressure.[30] Employers have increasingly found it cost-effective to hire on a temporary basis when they are uncertain of the duration of work to be done and to bring in temporary workers until the commitment to permanent hiring can be made.[31]

In the United States, temporary help service agencies employ approximately 3.043 million workers that they send off to client businesses for limited periods of time to supplement the businesses' existing work forces.[32] Temporary help service employees account for nearly 3 percent of total U.S. employment.[33] This figure varies by geographical location, ranging from approximately 2 percent of New York City labor market to 10 percent of the Tampa market.[34] In Connecticut, there are approximately 31,000 persons employed by the employment services industry,[35]

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[30] Louis Uchitelle, *Labor Data Show Surge in Hiring of Temp Workers*, N.Y. TIMES, Dec. 20, 2009, http://www.nytimes.com/2009/12/21/business/economy/21temps.html?fta=y.

[31] Susan N. Houseman et. al, *The Role of Temporary Agency Employment in Tight Labor Markets*, 57 INDUS. & LAB. REL. REV. 105, 106–07 (2003); *see also* Uchitelle, *supra* note 30.

[32] The 3.043 million statistic accounts for the number of individuals that are on the payrolls of temporary help service establishments during any part of the pay period which included the 12th of March, June, September, and December. This statistic includes individuals on paid sick leave, paid holidays, paid vacations, and salaried officers and executives of a corporation. U.S. CENSUS BUREAU, AMERICAN FACTFINDER, 2007 ECONOMIC CENSUS, SECTOR 00: EC0700A1: ALL SECTORS: GEOGRAPHIC AREA SERIES: ECONOMY-WIDE KEY STATISTICS: 2007, 2007 NAICS CODE 561320, http://factfinder.census.gov/servlet/IBQTable?_bm=y&-ds_name=EC0700A1&-NAICS2007=561320&-_lang=en (last visited Nov. 19, 2011). A problem with the sampling methodology used to construct the employment numbers is that it will understate the true number of temporary service employees there are because some of them were not employed on the 12th of March, June, September, and December. Thus it is possible that there were more people employed in May who were not counted during the sample periods.

Temporary help services industry consists of "establishments primarily engaged in supplying workers to clients' businesses for limited periods of time to supplement the working force of the client. The individuals provided are employees of the temporary help service establishment. However, these establishments do not provide direct supervision of their employees at the clients' work sites." Jobs include help supply services; labor (except farm) contractors (i.e., personnel suppliers); manpower pools; model supply services; and temporary employment or temporary staffing services. U.S. CENSUS BUREAU, NAICS, 2007 NAICS DEFINITION, 561320 TEMPORARY HELP SERVICES, http://www.census.gov/cgi-bin/sssd/naics/naicsrch (enter code 561320 into the search box) (last visited Nov. 19, 2011).

The annual payroll for the temporary help services industry is over $70.05 billion, equating to an average annual income of $23,020 per person in the temporary help services industry. *See* U.S. CENSUS BUREAU, AMERICAN FACTFINDER, 2007 ECONOMIC CENSUS, SECTOR 00: EC0700A1: ALL SECTORS: GEOGRAPHIC AREA SERIES: ECONOMY-WIDE KEY STATISTICS: 2007, 2007 NAICS CODE 561320, http://factfinder.census.gov/servlet/ IBQTable?_bm=y&-ds_name=EC0700A1&-NAICS2007=561320&-_lang=en (last visited Nov. 19, 2011).

[33] Nik Theodore & Jamie Peck, *The Temporary Staffing Industry: Growth Imperatives and Limits to Contingency*, 78 ECON. GEOGRAPHY 463, 464 (2002).

[34] *Id.*

[35] Jungmin Charles Joo, *Employment Services Industry: a Harbinger of the Economy*, CONN. ECON. DIGEST (Conn. Dept. of Lab. & Dept. of Econ. & Cmty. Dev.) May 2006, at 1, 2. *available at* http://www1.ctdol.state.ct.us/lmi/ctdigest.asp. The employment services industry, defined by NAICS 5613, is comprised of employment placement agencies, defined by NAICS 561311, and temporary help services, defined by NAICS 561320. Employment placement agencies are "establishments primarily engaged in listing employment vacancies and in referring or placing applicants for employment. The

comprising just less than 2 percent of the total employment in the state.[36] But in general, the number of job seekers contacting employment agencies has been on the rise: on average, 7 percent of job seekers contacted private employment agencies and 19.1 percent of job seekers contacted public employment agencies from 1994 to 1999.[37]

Temporary employment agencies are increasingly important labor market institutions, placing millions of Americans in jobs each year. If these agencies implicitly or explicitly rely on racial or other stereotypes, as prior research has shown to be the case for employers, this could pose serious social problems. Discrimination by temporary hiring agencies would be particularly problematic for two reasons. First, although temporary agencies are subject to Title VII, they may be largely immune from suit because any discrimination in their screening and referral practices is almost impossible for individuals to detect.[38] Second, minority job seekers are especially reliant on temporary agencies as a primary job search method.[39]

III. METHOD[40]

The evidence that I present is based on seven in-person interviews, roughly forty-five minutes each, with hiring and branch managers at seven temporary employment agencies in and near City X during March and April 2010. This research was conducted pursuant to a human subjects protocol approved by the University of Connecticut Institutional Review Board (IRB). I interviewed individuals who screen and match job

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individuals referred or placed are not employees of the employment agencies." U.S. CENSUS BUREAU, NAICS, 2007 NAICS DEFINITION: 561311 EMPLOYMENT PLACEMENT AGENCIES, http://www.census.gov/cgibin/sssd/naics/naicsrch?code=561311&search=2007%20NAICS%20Search.

[36] Joo, *supra* note 35, at 2.

[37] Peter Kuhn & Mikal Skuterud, *Job Search Methods: Internet Versus Traditional*, 123 MONTHLY LAB. REV. 3, 10 Table 8 (2000).

[38] *See* Donohue & Siegelman, *supra* note 7, at 1012 ("Without reference groups against which blacks or women can judge their own treatment by employers, discrimination is more difficult both to detect and to prove.") Donohue and Siegelman's research suggests that in the context of temporary hiring service agencies, detecting discrimination will be next to impossible: job applicants are completely unaware of more favorable treatment that may be afforded to comparable other-race applicants. And employers themselves would also lack the ability—and possibly the motivation—to detect discrimination in referrals by the temporary employment agency.

Furthermore, agencies often place job applicants in a database and match applicants to available jobs at a later date. Once the applicant is in the database, the applicant could believe that he or she is hired. The process by which an agency funnels an applicant to a particular job goes unseen to the applicant. The applicant simply learns when and where he or she has been placed.

[39] *See* Luis M. Falcon & Edwin Melendez, *Racial and Ethnic Differences in Job Searching in Urban Centers*, *in* URBAN INEQUALITY: EVIDENCE FROM FOUR CITIES 341, 348 Table 7.2 (Alice O'Connor et al. eds., 2001). In Boston, 10.9 percent of white respondents used temporary agencies in their last job searches, while 25.4 percent of blacks and 12.7 percent of Latinos used them. In Los Angeles, 21 percent of whites, compared to 30.2 percent and 16.5 percent of blacks and Latinos, respectively, used temporary agencies in their last job searches. *Id*.

[40] *See infra* Appendix A for information on the participating temporary employment agencies.

applicants to client employers. Although I cannot claim that this small number of cases is fully representative of temporary agencies in the third-party hiring sector, I drew my participants from directories in the public domain, such as the online Yellow Pages. These are the same sources that a job applicant would commonly use to find an agency. The agencies in my study varied in size and geographical scope: some were local, while others operated in dozens of other states.

A. Sampling Strategy

I used the online Yellow Pages[41] under "temporary employment agencies" near City X, Connecticut, which provided seventeen unique agencies to contact. I sent each of the seventeen agencies a letter and then called each to follow up. One agency's listed phone number was no longer in service. Seven agencies refused to participate. I secured five interviews with people at five different agencies this way. I also conducted a Google search for "Temporary Staffing Agencies City X." Google generated a list of "Local Business Results" for "Temporary Staffing Agencies near City X, Connecticut." I called the first seven agencies that Google listed that were not on the prior online Yellow Pages list and secured two more interviews. My overall response rate was 29 percent, or seven participating agencies out of twenty-four agencies contacted.

B. Interview Questions

I developed a semi-structured set of questions for each interview. None of the interviews were tape-recorded. During the in-person interviews, I used a modified and abbreviated form of the questionnaire from the MCSUI Qualitative Employer Survey,[42] with questions adapted to fit the temporary staffing industry.

The temporary staffing agencies placed individuals in jobs that required varying levels of education and experience. Because agencies differed in the types of jobs that they handled, I chose not to focus on a "sample job" as prior researchers have done. Instead, I asked respondents to limit their discussions to applicants applying for jobs that require no more than a high school diploma. These are the kind of jobs that semi-skilled workers would want and be qualified for.

An important issue not dealt with in the MCSUI is the role of law and the legal system in shaping employer behavior. I thus added questions at

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[41] YELLOW PAGES, http://www.yellowpages.com/ (last visited Nov. 19, 2011).

[42] *Multi-City Study of Urban Inequality, 1992–1994: [Atlanta, Boston, Detroit, and Los Angeles]*, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/02535/documentation (follow "Codebook-pdf" hyperlink for DS2: Employer Telephone Survey Data File).

the end of the interview to get at the question of how, if at all, the law impinged on hiring managers' decision-making. I designed the questions to get at the criteria that they used for temporary jobs, how they evaluated those characteristics, and how perceptions of race and other prohibited characteristics factored into their hiring decisions and evaluation of "hard" and "soft" traits.[43] After the first two interviews, I began asking the manager whether client employers asked them for workers based on race or other illicit characteristics. I had realized that the interviewees appeared to become more comfortable talking about race and hiring when they could share what other people asked them to do first. To encourage candor, I did not make audio recordings of any of the seven interviews. Instead, I took handwritten notes while the respondents spoke. Within a few hours of each interview, I typed up my notes and added as many further details that I could remember concerning the manager's statements that I did not have time to write down during the interview. The basic descriptive statistics of the participating employment agencies are in Appendix A.

IV. SCREENING AND HIRING PROCESSES IN TEMPORARY EMPLOYMENT AGENCIES

Based on the hiring managers' own accounts of how they screened applicants, a basic model of the process can be described. First, an applicant contacts a temporary agency, either in person or by the Internet, and fills out a formal application that requests basic data. The application typically includes work history, educational level, special skills, references, criminal history, and ability to pass a drug test. Next, the applicant undergoes resume and phone pre-screening, if he or she applied via the Internet. Often, there will be a required test, either skills or personality based, during the next stage of the process, which typically culminates in an in-person interview with the agency. After the in-person interview, the agency creates a file for the applicant in its database. The file includes the completed application, the agency's notes from the in-person interview, and any skills test results. Finally, the agency instructs the applicant to frequently contact it to inquire about new job opportunities.

The agency prefers, and remembers, an applicant who calls because he or she signals to the agency that the he or she wants to work. If the agency has a job opening the day of the interview that the applicant matches, the agency will often send the applicant. Otherwise, the agency either waits for employment requests to come in from existing client employers or solicits new employers to become clients and to submit requests. After the

[43] "Hard" skills or traits are measured by educational attainment or test scores. "Soft" or social traits cannot be easily measured or observed, such as productivity, reliability, or ability to get along with others.

agency receives a staffing request, the request goes through the applicant database to narrow down individuals with the requisite skills, availability, other variable traits, and regular contact with the agency.

Only three out of the seven agencies that I contacted accepted walk-in job applicants.[44] Those that did differed from those that did not in several dimensions. A walk-in applicant usually goes through the entire screening process during a single visit between set hours. Only 5–10 percent of walk-ins "wash out" of the screening process before their in-person interview. This is due to disqualifying factors, such as criminal record or failure of a required test. In contrast, the five agencies that required, or strongly preferred, job applicants to apply via the Internet reported that only approximately 20–30 percent remain in the screening process after the initial application and resume screening.[45] These agencies reject the remaining 70–80 percent of applicants prior to an interview, usually because their resumes display insufficient skills or work histories, or contained long, unexplained gaps.

Contrary to Holzer and Neumark's speculations, the seven temporary agencies that I studied did *not* perform much detailed individualized screening. Instead, the agencies weeded out many job applicants on the basis of crude indicators, such as criminal record and education level, which are no different than the indicators that many employers themselves use. Holzer and Neumark's theory that temporary agencies would gather more individualized information about applicants does not seem to apply to the temporary agencies that I studied.[46] If their theory is wrong, the selection process might disparately impact racial minorities, removing them at higher rates because of criminal conduct or lower educational level.

V. DISCUSSION OF EMERGENT THEMES FROM INTERVIEWS

Six common themes emerged from the interviews about temporary employment agencies' behavior. First, the respondents viewed themselves as matchmakers trying to find the proper "fit" between a job applicant and an employer.[47] This self-definition is important, because it means that, at least in their own minds, respondents could deflect any blame for their own discriminatory behavior onto the client employers with whom they were placing workers.

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[44] Interview with branch manager, Interview A (Mar. 9, 2010); Interview with division director, Interview C (Mar. 25, 2010); Interview with manager, Interview G (Apr. 8, 2010).

[45] Interview with branch manager, Interview A (Mar. 9, 2010); Interview with division director, Interview C (Mar. 25, 2010); Interview with managing director, Interview D (Apr. 5, 2010); Interview with branch manager, Interview E (Apr. 6, 2010); Interview with co-owner, Interview F (Apr. 6, 2010).

[46] Holzer & Neumark, *supra* note 12, at 271.

[47] *See infra* Part V. A.

Second, respondents often used ambiguous language when explaining their hiring criteria. Terms, such as "good communication skills" and "appearance," may be racially coded and, in some contexts, clearly meant that a job applicant needed to present him or herself and communicate in ways acceptable to the majority white culture.[48]

Third, respondents had varying conceptions of what constituted discrimination and ethical lines that they were willing to draw in the hiring process.[49] Importantly, these lines do not correspond to the legal definitions of discrimination.

Fourth, the respondents thought differently, including not at all, about the role of anti-discrimination law in their jobs.[50] Overall, however, employment discrimination law does not seem to play a significant role in the way that most respondents carried out their jobs. They were willing to honor discriminatory preferences of a client employer and even anticipated them based on a client employer's permanent workforce.

Fifth, all of the respondents emphasized the importance of an applicant's face-to-face interview with the agency over skills tests.[51] They trusted their subjective impressions of an applicant to determine whether an applicant would be a good worker, rather than more objective measures.

Sixth, the geography of both the agency office and the applicants' place of residence played important roles in structuring the hiring process.[52] Agencies in different locations saw exceedingly different kinds of applicants, and even being located on or near a bus route made a substantial difference to the kinds of applicants who applied for positions.

A. Temporary Agencies as Matchmakers: Relationship Between Fit and Discrimination

Temporary agencies judged which job applicants were the proper "fit" for a client employer by assessing the applicant from their application and interview; what was best for the applicant; and what the client employer wanted, which may have included specific illegal requests. But even the respondents who claimed to be comfortable filling illicit requests weighed these requests against other factors, such as experience, instead of filling the requests without any thought. Respondents evaluated the applicant to determine proper "fit" through both objective and subjective testing methods–application and interview, respectively–leaving ample discretion for interviewers to determine how to weigh these factors and whether to discriminate.

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[48] *See infra* Part V. B.
[49] *See infra* Part V. C.
[50] *Id.*
[51] *See infra* Part V. K.
[52] *See infra* Part V. N.

Most of the respondents described their roles as "matchmakers" or as looking for the best "fit." The respondents wanted to place a job applicant who has the requisite skill set with a client employer who has a similar "personality," the definition of which varied by respondent. Furthermore, most of the agencies wanted to find job applicants who mimicked the employer's work culture.

While the temporary agencies used objective measures, such as a formal application to review an applicant's skill set, five of the seven agencies relied on their in-person interviews with the job applicants to determine who an applicant "really is."[53] One respondent, a branch manager who worked at an international temporary agency and had been in the staffing industry for eighteen years, had found the in-person interview to be the most important part in the hiring process because "people sell themselves in those interviews. . . . If a person comes into the office and talks to the staffing specialist nicely, she will want to help the person find a job."[54] Another respondent, a co-owner of an agency, which had six locations in various states and focused on job placements in trade work and light industrial jobs, felt that the interview was key because it gave the agency a chance to "see the personality and appearance" of the applicant.[55] A third respondent, a branch manager who had four years experience in the staffing industry and primarily staffed manufacturing/light industrial jobs, believed that he could "tell during those interviews who really wants to work."[56]

Most respondents found the in-person interview useful—and often decisive—in determining an applicant's character and work ethic.[57] This implies that temporary employment agencies rely on subjective impressions as much as the employers with whom they place workers. Even among the four temporary agencies that gave applicants a skills test, three still told me they found the interview to be the most important factor in the hiring decision.[58] Temporary employment agencies do not seem to operate as Holzer and Neumark had hoped that they would—finding and

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[53] Interview with branch manager, Interview B (Mar. 11, 2010); Interview with managing director, Interview D (Apr. 5, 2010); Interview with branch manager, Interview E (Apr. 6, 2010); Interview with co-owner, Interview F (Apr. 6, 2010); Interview with manager, Interview G (Apr. 8, 2010).

[54] Interview with branch manager, Interview E (Apr. 6, 2010).

[55] Interview with co-owner, Interview F (Apr. 6, 2010).

[56] Interview with manager, Interview G (Apr. 8, 2010).

[57] Interview with managing director, Interview D (Apr. 5, 2010); Interview with branch manager, Interview E (Apr. 6, 2010); Interview with co-owner, Interview F (Apr. 6, 2010); Interview with manager, Interview G (Apr. 8, 2010).

[58] Interview with branch manager, Interview B (Mar. 11, 2010); Interview with managing director, Interview D (Apr. 5, 2010); Interview with branch manager, Interview E (Apr. 6, 2010). The division director from Interview C gave skills tests but did not specify the most important part of the process in making a hiring and placement decision. Interview with division director, Interview C (Mar. 25, 2010).

providing more individualized applicant information to employers.[59] Their heavy reliance on in-person interviews means that temporary agencies are unlikely to be realistic vehicles for overcoming statistical discrimination.

All of the respondent managers relied in part on their gut feeling about an applicant upon meeting him or her in the matchmaking process. All of the temporary agencies relied on short (ten to twenty minute) in-person interviews to learn about applicants and match them to an employer. Several respondents told me that as soon as they meet with a job applicant, they could "read the person right off the bat"[60] or "get a vibe"[61] about the applicant. They chalked up their abilities to understand people to their years of experience in the staffing industry. For example, one branch manager told me that within a few minutes, she knows when "people are good workers or not" and "get[s] a vibe or a feeling about how compatible [a person] would be for the employer and the likelihood of the [person] showing up on the first day of work."[62] Another respondent, a female managing director with eighteen years experience in staffing, told me that she "get[s] a gut reaction about people."[63]

Both of these women relied on an applicant's openness in answering questions as a key indicator of compatibility and reliability.[64] The first respondent explained, "when [someone] gives one-word answers, I feel that [the person] is hiding something."[65] The second described when she gets an initial bad gut feeling: "If something seems off [or] questionable or that the applicant is lying about an issue, I will ask questions in varied ways to get at the truth or to the point."[66] She asserted that there were times that she was successful in either "finding out the truth or satisfying her doubts this way."[67] In both cases, respondents' snap judgments did not seem to be based on substantive information about job applicants, but rather on readily observable traits and behavioral characteristics filtered through their own "expertise." Of course, one person's expertise is another person's stereotyping, and the heavy emphasis on subjective assessment certainly leaves open the possibility that unconscious, personal biases, or stereotypes will factor into a respondent's hiring decisions.

To figure out "who an applicant is" during the interview, respondents

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[59] Holzer & Neumark, *supra* note 12, at 271.
[60] Interview with managing director, Interview D (Apr. 5, 2010).
[61] Interview with branch manager, Interview A (Mar. 9, 2010).
[62] *Id.*
[63] Interview with managing director, Interview D (Apr. 5, 2010).
[64] Interview with branch manager, Interview A (Mar. 9, 2010); Interview with managing director, Interview D (Apr. 5, 2010).
[65] Interview with branch manager, Interview A (Mar. 9, 2010).
[66] Interview with managing director, Interview D (Apr. 5, 2010).
[67] *Id.*

looked at an applicant's work history and personality.[68] Most respondents described work history as a strong indicator of the skill set that the applicant possesses, the type of work environment that the applicant may be most comfortable in, the applicant's reliability, and the overall quality as a worker. To a male branch manager with eighteen years in the industry, "work history indicates how likely [the person] is to show up for work."[69] According to a female managing director, client employers do not want to hire applicants with "jumpy work histories," or applicants who were not at one job for more than six months, because it signals that "something is wrong, even if the person can explain the circumstances."[70] But a few respondents did seem sensitive to layoffs caused by the current economic recession.[71]

In addition to reliability, one respondent, an agency co-owner who staffed trade and light industrial jobs, tried to infer from a work history what an applicant can "handle" and his or her skill level.[72] For example, he assumed that a carpenter from City X will have done work in lower priced homes and thus will not possess the skills to do high-end work in towns such as Suburb Z, where incomes are much higher and homes are substantially more expensive.[73] The majority of these inferences seem reasonable (at least from the respondents' point of view). But they are not necessarily correct, even on average, and certainly leave room for racial or other motives to play a role in the respondents' decisions.

Respondents generally did not consider a particular personality to be essential in creating a fit, although not surprisingly, they preferred applicants with positive attitudes. Several respondents told me that a job applicant does not have to have a particular personality; instead, the proper personality depended upon the job that needed to be filled and the client employer's work environment.[74] For instance, the female managing

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[68] Interview with branch manager, Interview A (Mar. 9, 2010); Interview with branch manager, Interview B (Mar. 11, 2010); Interview with division director, Interview C (Mar. 25, 2010); Interview with managing director, Interview D (Apr. 5, 2010); Interview with branch manager, Interview E (Apr. 6, 2010); Interview with co-owner, Interview F (Apr. 6, 2010); Interview with manager, Interview G (Apr. 8, 2010).

[69] Interview with branch manager, Interview E (Apr. 6, 2010).

[70] Interview with managing director, Interview D (Apr. 5, 2010).

[71] Interview with division director, Interview C (Mar. 25, 2010); Interview with managing director. Interview D (Apr. 5, 2010).

[72] Interview with co-owner, Interview F (Apr. 6, 2010).

[73] *Id*. City X is a majority-minority city where approximately 68 percent of the city's population is not white. So the assumption that City X-based carpenters lack the skill to work on higher-priced homes in Suburb Z could be a proxy for a racialized inference. It could also be a mask for simple animus. Regardless, because geography is closely linked to race, the respondent's matching based on location of prior experience could well have an illegal disparate impact under Title VII. U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY, 2005–2009 AMERICAN COMMUNITY 5-YEAR ESTIMATES, CITY X, CONNECTICUT (exact citation not provided to protect the anonymity of City X).

[74] Interview with division director, Interview C (Mar. 25, 2010); Interview with managing director, Interview D (Apr. 5, 2010).

director explained that for a data entry job where the person is silent all day, a job applicant does not need to be outgoing. But for a job where customer service is involved, she looked for a "people person."[75] Another respondent, a male division director, entered all applicants whom he interviewed in the agency's database because "there will be a job for everyone. A job applicant with a slightly bad attitude might have the perfect skill set that a certain employer wants. Sometimes an employer wants someone to do the job in a backroom—cares only about accuracy—not fitting in with the rest of the work culture."[76] In that situation, the temporary agencies looked at hard skills to determine which job applicant would be the best worker in that position. In part, temporary agencies' emphasis on soft or hard skills seemed to hinge on how important personality was to the client employer.

Respondents described that they wanted to place the job applicant in an environment that was the same as the applicant's personality—quiet/outgoing or slow/fast paced—as the respondent perceived it during the short interview.[77] This may have a filtering effect as to which job applicants are placed in clerical jobs compared to industrial/manufacturing jobs. For example, a male division director stated that he would not place a louder job applicant in a professional environment because the applicant would not seamlessly blend with the quieter, restrained work culture.[78] Another male branch manager with eighteen years of experience echoed the previous sentiment, stating: "I would not want to put a shy person into a job where there is a ton of personal interaction with customers."[79] In another instance, a female managing director told me that she looks at where an applicant has previously worked to determine the type of environment, fast or slow paced, that the applicant had been in.[80] She stated that she "tries to match the applicant and the employer work environment because she does not want to set up the applicant for failure" and wants to keep both "the applicant and employer happy."[81] She gave the following example: "some employers have work environments where everyone works at 100 miles per hour," but there are other atmospheres "where an applicant has to be comfortable going to work, bringing a book, and reading until work comes to him/her."[82]

The respondents also described using the interviews to make decisions

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[75] Interview with managing director, Interview D (Apr. 5, 2010).

[76] Interview with division director, Interview C (Mar. 25, 2010).

[77] Interview with division director, Interview C (Mar. 25, 2010); Interview with managing director, Interview D (Apr. 5, 2010).

[78] Interview with division director, Interview C (Mar. 25, 2010).

[79] Interview with branch manager, Interview E (Apr. 6, 2010).

[80] Interview with managing director, Interview D (Apr. 5, 2010).

[81] *Id.*

[82] *Id.*

about whether the applicant is a good "fit" for the workplace, which respondents justified as serving the applicant's own interests as well as the employer's interests.[83] When the aforementioned male division director justified not placing a loud construction worker in a corporate environment, he expressed his belief that the job applicant would not want to be in an environment where he could not be himself.[84] This kind of reasoning allows considerations of race or gender to affect placement decisions; persons who do not match the demographics of the employer's workforce can easily be seen as not fitting in. In an overt example, a female branch manager of a local temporary agency said that even after meeting a job applicant, she would not place a female in a job in an all male warehouse because she wanted "to keep the firm's temp workers happy."[85]

These are examples of a paternalistic use of "fit"; respondents presume that a female or minority applicant would not feel comfortable in a homogeneous workforce where the applicant does not resemble everyone else.[86] The respondents were keenly aware of the required loyalty to both client employers and applicants and tried to resolve that tension to both groups' benefit.[87] Their use of paternalistic "fitting" achieved just that, at least in their own minds. The respondents wanted to feel that their decisions were benefiting *both* the client employers and job applicants, avoiding responsibility for any troublesome tradeoffs between what was good for one party and what was good for the other.[88]

Although the respondents described both job applicants and employers as clients, many of them told me that they actively thought about who paid their bills, and thus cared most about pleasing the employer.[89] They wanted to *feel* that they were being balanced to both applicants and employers, but they *knew* that they would be out of business if they did not please client employers.[90] As a male co-owner of an agency that staffed

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[83] Interview with branch manager, Interview B (Mar. 11, 2010); Interview with division director, Interview C (Mar. 25, 2010).

[84] Interview with division director, Interview C (Mar. 25, 2010).

[85] Interview with branch manager, Interview B (Mar. 11, 2010). Note that unless sex is a bona fide occupational qualification (an onerous standard which seems certain not to apply to the jobs in question), using sex to match workers to jobs is a clear violation of Title VII. 29 C.F.R. §§ 1604.2–1604.3 (2010).

[86] *See* Interview with branch manager, Interview B (Mar. 11, 2010); Interview with division director, Interview C (Mar. 25, 2010).

[87] Interview with branch manager, Interview B (Mar. 11, 2010); Interview with division director, Interview C (Mar. 25, 2010); Interview with co-owner, Interview F (Apr. 6, 2010); Interview with manager, Interview G (Apr. 8, 2010).

[88] Interview with branch manager, Interview B (Mar. 11, 2010); Interview with division director, Interview C (Mar. 25, 2010).

[89] Interview with co-owner, Interview F (Apr. 6, 2010); Interview with manager, Interview G (Apr. 8, 2010).

[90] Interview with managing director, Interview D (Apr. 5, 2010); Interview with co-owner, Interview F (Apr. 6, 2010); Interview with manager, Interview G (Apr. 8, 2010).

trucking and trade jobs put it, he is a matchmaker for his employers; he is not paid by the state of Connecticut.[91] Another respondent, a male branch manager who primarily staffed manufacturing/light industrial jobs, made it clear "that the employer is the client, pays the bills, and the one who the firm needs to satisfy."[92]

Respondents reported that most client employers asked for applicants who had the requisite skills to perform the job and to get along with the existing workforce, which is what one would expect.[93] But the goals of satisfying the employer and "mimicking"[94] the existing workforce led several respondents to take account of race, ethnicity, or gender without an employer even asking them to. One example, discussed earlier, was the manager who refused to place a woman in an all-male work environment.[95] A male division director stated that he tours the employer's facilities and sees for himself who currently works there in order to determine what type of temporary worker is appropriate for the job opening.[96] Temporary agencies did not need client employers to discriminate; they often did so without discussing the matter with the client employers.

In some cases, client employers *did* implicitly or explicitly ask temporary agencies for job applicants based on an illegal trait, as discussed in greater detail below.[97] For instance, general contractors on multi-million dollar homes in Fairfield County have "flat out asked" a co-owner of an agency that filled truck driver and tradesmen positions for a white person or "a very clean person," which he took to mean the same thing.[98] Another male branch manager gave the following example: "An employer might let me know that there are three women who work on the third shift who are pretty close. If you find a qualified man, that's fine. But it would be best [for the workforce] if you send another woman."[99]

When employers did make such requests, the agencies typically had no problem with filling them. In fact, the agencies in my study generally understood their roles as largely passive and just gave employers what they wanted.[100] However, even the respondents who wanted to give employers

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[91] Interview with co-owner, Interview F (Apr. 6, 2010).

[92] Interview with manager, Interview G (Apr. 8, 2010).

[93] *See* Interview with branch manager, Interview A (Mar. 9, 2010); Interview with branch manager, Interview B (Mar. 11, 2010); Interview with division director, Interview C (Mar. 25, 2010); Interview with managing director, Interview D (Apr. 5, 2010); Interview with branch manager, Interview E (Apr. 6, 2010); Interview with manager, Interview G (Apr. 8, 2010).

[94] Interview with division director, Interview C (Mar. 25, 2010).

[95] Interview with branch manager, Interview B (Mar. 11, 2010).

[96] Interview with division director, Interview C (Mar. 25, 2010).

[97] *See infra*, Parts V.C-J.

[98] Interview with co-owner, Interview F (Apr. 6, 2010).

[99] Interview with manager, Interview G (Apr. 8, 2010).

[100] *See* Interview with division director, Interview C (Mar. 25, 2010); Interview with managing director, Interview D (Apr. 5, 2010); Interview with branch manager, Interview E (Apr. 6, 2010);

the applicants that they asked for did seem to take individual skill level into account. For example, the aforementioned agency co-owner had a client, a shredding company, that asked for a "clean cut" guy to fill a job opening.[101] The co-owner read through the lines and interpreted the shredding company's request to mean "a white male J.Crew model."[102] While the respondent wanted to accommodate the request, he also needed to find applicants who could do the job. He had found two qualified Latino men and one white man. He intended to place one of the Latino men in the position because he was "clean cut enough" and the most qualified.[103] The agency co-owner seemed to genuinely want to give the client what it asked for, but he faced a dilemma because his professional duty required him to provide the client with a worker with the requisite skills and availability. His failure to honor the employer's perceived discriminatory preference had nothing to do with any perceived moral or legal problem with the employer's desire for a white employee.

In the best-case scenario, temporary hiring agencies would serve as a significant counterweight to the discriminatory impulses of the employers, as Kirschenman and Neckerman and subsequent researchers have documented.[104] As Holzer and Neumark have suggested, temporary agencies could conduct more careful, individualized applicant screenings of the type that employers may lack the time, expertise, or inclination to undertake themselves.[105] In turn, temporary agencies could place less emphasis on group membership as a signal of productivity and other "soft" skills because the agencies would presumably have better and more accurate measures on which to rely. Such individualized screenings would, in theory, work to the advantage of at least some minority group members.

However, my interviews suggest that temporary agencies found the in-person interview with job applicants to be the most revealing and useful way to assess candidates, even over test scores. Moreover, agencies often

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Interview with co-owner, Interview F (Apr. 6, 2010); Interview with manager, Interview G (Apr.8, 2010).

[101] Interview with co-owner, Interview F (Apr. 6, 2010).

[102] *Id*. The respondents appear to make a reasonable conclusion in interpreting an employer's request for someone who is "clean-cut" to mean that an employer wants someone who is "white," in part because of the historic social connotations of the phrase. The phrases "clean-cut" and "all American" look are rooted in images of the 1940s and 1950s white male. Patricia K. Durso, *Bringing Whiteness "Home": Exploring the Social Geography of Race in Mary Gordon's* The Other Side, 32 MOD. LANGUAGE STUD. 85, 92 (2002). In seemingly homogenized contexts, whiteness often becomes the "norm" or "natural" way of being and the point of comparison for other behavior. *Id.* at 89;.Peter Kolchin, *Whiteness Studies: The New History of Race in America*, 89 J. AM. HIST. 154, 160 (2002). Historically, Americans conceived of *whiteness* as the key ingredient separating the civilized and uncivilized worlds. *Id.* at 163.

[103] Interview with co-owner, Interview F (Apr, 6, 2010).

[104] Holzer & Neumark, *supra* note 12, at 271.

[105] *Id*.

seemed to have their own biases against, or stereotypes about, minority group members. Even if they did not discriminate themselves, temporary agencies were often willing to act on the discriminatory preferences of their client employers, the only party paying for the agencies' services. Furthermore, in situations where employers asked for a "clean-cut" worker, respondents assumed (without asking) that the client employer meant someone "white."[106] Even if the client employer had not meant to use racially coded language, the respondent interpreted it that way, thereby possibly perpetuating more discriminatory behavior than the employer actually intended. In short, temporary agencies in the City X area did not operate as Holzer and Neumark had imagined; instead, they used subjective, and at times illegal, measures when making hiring and placement decisions.

B. Temporary Agencies and Racially Coded Language

Soft skills are increasing in importance to employers, even in the low skill jobs that this research targeted for investigation. Soft skills appear to bunch along the dimensions of interaction skills and motivational skills.[107] Employers are valuing both more highly, as illustrated by the importance that the respondents placed on the in-person interview. Kirschenman and Neckerman found that the less "observable" a hiring criterion is, such as productivity, the more subjective screening becomes because employers try to figure out those non-observable traits during the in-person interview, creating more room for discrimination.[108]

Kirschenman and Neckerman found that race affected hiring decisions in varying ways depending on the "observability" of certain job requirements.[109] For example, they discovered that sales and service employers who responded that they valued "communication skills" or an "ability to deal with the public" hired fewer blacks and Hispanics than employers who did not value those skills, suggesting that they did not want black or Hispanic people who did not speak "standard" or unaccented English.[110] Facially neutral language, such as "articulate" and "well-groomed," can often stand in for conscious or unconscious racialized judgments, and these judgments may lead to racially disparate results.

During in-person interviews, respondents evaluated job applicants on their skills, work history, appearance, communication skills, personality, and fit with client employer's culture. To some respondents, "appearance"

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[106] Interview with co-owner, Interview F (Apr. 6, 2010).

[107] Philip Moss & Chris Tilly, "*Soft" Skills and Race: An Investigation of Black Men's Employment Problems*, 23 WORK AND OCCUPATIONS 252, 260 (1996).

[108] Kirschenman & Neckerman, *supra* note 10, at 218, 221.

[109] *Id.* at 218.

[110] *Id.* at 221.

meant having good hygiene, such as no body odor.[111] Most temporary agencies did not expect job applicants to dress up because of the nature of the temporary jobs. One respondent suggested that it was acceptable for job applicants to "come into the office primarily in jeans."[112] Another respondent mentioned that "job applicants come into the in-person interview dressed casually because [it was] a staffing agency, not [a meeting with] the client."[113] A third respondent commented that she saw "many people come in wearing jeans or business casual. Occasionally, [she will] see a man wear a tie but never a suit because of the caliber of jobs [that the firm is] filling for."[114]

Some respondents who employed clerical staff cared more about dressing professionally. A female managing director said that she tried to counsel job applicants when their attire was too casual or revealing.[115] A white, male branch manager for an international employment agency said, in a critical tone, while furrowing his brow that he would not place an applicant who comes in with "jeans falling off."[116] The latter comment may be coded language because the "sagging" pants style, popularized in the early 1990s by hip-hop artists, is particularly popular among young black men.[117] The branch manager did not have a blanket dislike of black workers, as evidenced by his hiring choice for the staffing specialist in his own office – a young, black female. Similar to Kirschenman and Neckerman's description, the branch manager would not make a blanket statement about disliking all black job applicants, because he was willing to hire black applicants who "project" the proper image.[118] For instance, he hired an outgoing, black female to be a staffing specialist in his agency, stating: "I make judgments about people from how they look, what they say, and the image they project."[119] If a job applicant came in with his or her "jeans falling off," the branch manager would "think certain things… [like] that the person is a temp for a reason."[120] The branch manager believed that job applicants who were part of a black, poorer culture lacked precisely the skills that he considered increasingly important. Inferences were not based on race alone. Instead, temporary agencies used "race-plus," a doctrine to understand intra-race discrimination, as a source of

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[111] Interview with branch manager, Interview A (Mar. 9, 2010); Interview with managing director, Interview D (Apr. 5, 2010).

[112] Interview with manager, Interview G (Apr. 8, 2010).

[113] Interview with branch manager, Interview A (Mar. 9, 2010).

[114] Interview with branch manager, Interview B (Mar. 11, 2010).

[115] Interview with managing director, Interview D (Apr. 5, 2010).

[116] Interview with branch manager, Interview E (Apr. 6, 2010).

[117] Niko Koppel, *Are Your Jeans Sagging? Go Directly to Jail*, N.Y. TIMES, Aug. 30, 2007, at G1.

[118] Interview with branch manager, Interview E (Apr. 6, 2010); *see* Kirschenman & Neckerman, *supra* note 10, at 221.

[119] Interview with branch manager, Interview E (Apr. 6, 2010).

[120] *Id*.

information about job candidates: race as it interacts with appearance and diction, for instance.[121]

When respondents talked about "communication skills," they seemed to understand this to mean the ability to speak and understand standard English and the use of good grammar.[122] Temporary agencies seemed sensitive to job applicants' speech patterns. A male branch manager, who worked for an international employment agency and had been in the industry for eighteen years, told me, "When you speak, you reveal your true self. Speech is an indicator of who we are."[123] His attitude implies that he could tell what kind of worker the applicant would be based on the applicant's speech.

Only one respondent, a Latina branch manager in City X, explicitly tied space and class to grammar when she noted that she would not send "job applicants with 'ghetto' or 'hood' speak" to client employers.[124] Her comment suggests that she was concerned about accent and vocabulary because these are readily observable characteristics that convey an image or signal to the client employer about the agency, or to others about the client employer. Unlike any of the other respondents, her agency was south of downtown City X, next to a homeless shelter, and in a predominantly Latino area. She made it clear that accents in general did not turn her off to job applicants because "they can't change their accent if they're an immigrant."[125] Her visible discomfort came from looking as if she used race, specifically one's accent, in her hiring and placement decision when she actually did not. It was that misunderstanding that made her uncomfortable.

In addition to communication and appearance, temporary agencies looked for a positive attitude and honesty, which they typically described using the term "personality." Although honesty is an unobservable trait, respondents in my research tried to gauge job applicants' honesty through their responsiveness and openness to questions. Multiple factors may have affected an applicant's openness during an interview, such as the applicant's comfort with an interviewer and the interviewer's opinion of

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[121] For an additional discussion on the Race-Plus doctrine, see Enrique Schaerer, *Intragroup Discrimination in the Workplace: The Case for "Race Plus,"* 45 Harv.C.R.-C.L. L. Rev. 57 (2010).

[122] Interview with branch manager, Interview A (Mar. 9, 2010); Interview with branch manager, Interview B (Mar. 11, 2010); Interview with managing director, Interview D (Apr. 5, 2010); Interview with branch manager, Interview E (Apr. 6, 2010); Interview with co-owner, Interview F (Apr. 6, 2010); Interview with manager, Interview G (Apr. 8, 2010).

[123] Interview with branch manager, Interview E (Apr. 6, 2010).

[124] Interview with branch manager, Interview A (Mar. 9, 2010) (It is worth noting that after she said "ghetto," she became visibly uncomfortable. Her eyes widened, and she became silent. This may have reflected a sense on her part that the use of the term "ghetto" implied some kind of racialized judgment that was either morally or legally wrong, although there may have been other explanations for her discomfort).

[125] *Id*.

what constitutes openness. Differences in race, sex, age, or education between the interviewer and applicant may have affected perceptions of "openness," and in turn perceived honesty.

My research shows a more complex picture of the role of individual personality in the hiring process. This research does not untangle the effects of the temporary nature of the jobs, occupational area, and skills required for the jobs based on the importance of personality in hiring and placement decisions. Some respondents told me that there was a job for any applicant, once he or she had cleared the skills hurdle and if they were generally good-natured.[126] For example, an employer may request a temporary worker for a backroom job or data entry where accuracy and skill level are a priority. In that case, "personality" would matter less, because the applicant would have little or no personal interaction with others.

In jobs that would require more interaction with a client employer's existing workforce, it appears that both some temporary agencies and employers themselves may care about having temporary workers fit with the existing workforce in ways that create the potential for discrimination and stereotyping.

C. Folk Conception of Discrimination: Where Do Temporary Agencies Draw the Line, and What is the Role of the Law?

There can be a wide gap between the formal requirements of anti-discrimination law[127] and the ways that individuals, particularly in the non-legal community, understand and discuss discrimination in actuality. I found considerable heterogeneity among the seven temporary agencies in their understanding of the legal concept of discrimination; how they thought about the concept of discrimination without mentioning the word; and whether they were willing to articulate racial generalizations about job applicants.

Three of the seven managers interviewed did not spontaneously mention the law when describing their hiring processes, even when discussing their reactions to employers' requests for temporary workers based on a prohibited ground: race, sex, age, religion, national origin, or disability.[128] There are several possible explanations for why respondents failed to mention the law. A partial list might include: (a) lack of knowledge that the law plays a role in hiring; (b) the absence of any role for law in an individual respondent's own thought process; (c) memory

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[126] Interview with division director, Interview C (Mar. 25, 2010); Interview with managing director, Interview D (Apr. 5, 2010).

[127] *See* 42 U.S.C. § 2000e(b), § 2000e-2(a) (2006); CONN. GEN. STAT. § 46a-60 (2011).

[128] Interview with branch manager, Interview A (Mar. 9, 2010); Interview with branch manager, Interview B (Mar. 11, 2010); Interview with co-owner, Interview F (Apr. 6, 2010).

failure; or (d) unwillingness to discuss the law (perhaps because of a sense of guilt for having violated it). These explanations—some of which are consistent and some of which are contradictory—are extremely difficult to isolate on the basis of interview data.

D. I Am Accountable To My Employers, Not To State Law

In one instance, an agency co-owner (who overtly discriminated on the basis of age and race because he would never hire a person over forty years old and would keep non-whites from carpentry jobs in wealthy suburbs when general contractors asked him to) may have failed to mention the law because he did not feel constrained or governed by it.[129] That inference is supported by his comment about his loyalty, as a matchmaker, to the employers who paid him, and by pointing out that he "was not paid by the State of Connecticut."[130] Whether or not he believed that he was subject to the law, he seemed to ignore it.

E. Employer, I Can't Do That Because Of The Law

Three of the seven respondents did refer to the existence of anti-discrimination laws.[131] They varied, however, in how they described their relationship to that law and how they subsequently acted—the moral line that they would not cross. Only one respondent, a female managing director of a national temporary hiring agency, described her own "internal" conception and understanding of discrimination as based on the formal requirements of the law.[132] She stated that the law prohibited her from taking race, sex, or age into account when choosing an applicant for a job and that she used the law as an official reason to combat client employers' illegal requests.[133]

She told me that when she receives a request for a woman or a young person, she tells the client employer that the agency cannot pick applicants out based on that trait because the law forbids it.[134] All that she can do is send the top candidates to the employer to choose from.[135] For her, the law seemed to function as a kind of "cover": it gave her a permissible reason for behavior that ran counter to what her client wanted her to do. As she described it, when she had occasion to remind the employer about the law's requirements, the employer typically tried to backpedal, claiming

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[129] Interview with co-owner, Interview F (Apr. 6, 2010).

[130] *Id.*

[131] Interview with managing director, Interview D (Apr. 5, 2010); Interview with branch manager, Interview E (Apr. 6, 2010); Interview with manager, Interview G (Apr. 8, 2010).

[132] Interview with managing director, Interview D (Apr. 5, 2010).

[133] *Id.*

[134] *Id.*

[135] *Id.*

that they were not *really* asking for a person of a particular race or sex.[136] The employers seemed embarrassed because she was pointing out the illegality of their requests.[137] This demonstrates that the law works only when at least one party cares about race or sex discrimination and will comply with it. If neither party were concerned, anti-discrimination laws would be ineffective to combat illicit use of race or ethnicity.

The respondent found that the employer typically reoriented its request, to avoid taking responsibility for its discriminatory preferences.[138] This often took the form of an explanation that the employer was only looking for someone who would feel "comfortable" in the open position.[139] The employer turned its request into a concern for the job applicant, not the company's preference. Although it is possible that the client employer's concern was real, it does not make a difference from a legal perspective. For example, in a small company, a supervisor might feel more comfortable having a woman do the secretarial work; therefore, he would ask for a female worker. But if challenged, he would claim that he assumed that a woman would be more likely to want such a job than would a man.[140]

Although she understood that client employers' race or gender-based requests are illegal, she admitted the difficulty of ignoring such requests when choosing among job applicants for those client employers.[141] She noted that such requests probably affected whom she placed in the jobs subconsciously.[142] She talked about how satisfying both client employers' desires and the law were at odds when employers make illegal requests, which showed that she understood the legal concept of discrimination.[143] Even though the law limited her flexibility to make decisions, she told me that she approved of the law's existence, although she did not explain why.[144]

F. Employer, I Can't Fill That Order Because Of Company Policy

The second respondent, a male branch manager of an international employment agency, acknowledged the existence of discrimination laws;

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[136] *Id.*
[137] *Id.*
[138] Interview with managing director, Interview D (Apr. 5, 2010).
[139] *Id.* (this reframes the employer's preference for a particular race or gender as based not on animus, but a desire to protect the employee); *see also* 42 U.S.C. § 2000e-2 (2006) (stating that the law does not permit *any* use of race or sex in hiring, even if done for putatively benign purposes, with the exception of gender and religion, where these characteristics are bona fide occupational qualifications for the particular job in question).
[140] Interview with managing director, Interview D (Apr. 5, 2010).
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*

however, he did not use the laws to inform or constrain his response to employers' requests.[145] Unlike the female managing director who used the law as a reason not to act, the branch manager did not mention the law to client employers who made illicit requests. Instead, he told client employers that the agency's company policy kept him from filling orders for a "pretty woman" or "strong man."[146]

He appeared to use his own internal sense of right and wrong to make decisions on whether he would fulfill a client employer's explicit request for a prohibited trait.[147] For example, he suggested he would not consider fulfilling explicit race-based requests, but he seemed more tolerant of some sex-based requests. At first, the branch manager told me that he would fill a specific request for a woman or man.[148] Five minutes later, however, he said that he would not fill a request for a "pretty woman" or a "strong man," but he would try to work with a client employer who asked for simply a woman or a man.[149] A request for a "pretty woman" bothered him because "I'm not sure what kind of environment I'd be sending the 'pretty woman' into."[150] Although he would not use race to make decisions, he may have regarded sex as a socially acceptable explanation for differences and may have been more comfortable taking them into account. Although he acknowledged that sex is formally part of the "illegal threshold" that he cannot cross, he later told me that he would try to work with a sex-based request.[151] It was not clear whether "work with" meant fulfilling the request or trying to find a compromise that would avoid directly offending either the client or the law. The second statement could be seen as conflicting with his earlier statement, refining it, or revealing how he actually thought or acted. He stated the law correctly in the first sentence; therefore, he did not seem to be uncertain about the law.[152] Hence, this suggests an ambiguous attitude or a shifting moral or comfort line toward sex discrimination.

G. I'm Just Doing What Employers Want Me To Do; Thus, I'm Not Personally Discriminating.

The third respondent who mentioned anti-discrimination laws, along with another respondent who did not discuss the law, did not seem to have an internal line that they were unwilling to cross in the hiring process,

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[145] Interview with branch manager, Interview E (Apr. 6, 2010).
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] Interview with branch manager, Interview E (Apr. 6, 2010).
[152] *See id.*

expressing no personal problems with making hiring decisions based on prohibited grounds.[153] A male branch manager who catered to the manufacturing/light industrial sectors and acknowledged an awareness of anti-discrimination laws, when asked if employers ever ask for specific traits in their workers, said that "[t]here are employers who straight [out] ask for only a worker that speaks Spanish or is black or white."[154] When I asked how he responds to such a request, he replied, "I get the kind of worker that the client wants. The employer is the client. . . pays the bills and is who we need to satisfy."[155] In another example, an agency co-owner who staffed truck driving and light industrial companies, and did not mention the law, said, "During the two minutes that I'm helping to get [the person] set up with the application, I've already made a big judgment about if the person is going to get the job. . . . A deal breaker is age. . . and if he's overweight."[156] These two respondents seemed to make no judgments as to prohibited requests from employers and seemed quite willing to act as the employers' handmaidens in carrying out discrimination. Both respondents expressly said that they got requests based on sex or race from client employers, and they admitted that they try to find in the applicant pool what the employer wants or what the respondents believe the employer wants.[157] In addition to the branch manager's comment, the co-owner respondent stated that when an employer asks for an applicant with a certain race or sex, "I try to accommodate their needs."[158]

Both of these respondents were white men who appeared to be in their early to mid-thirties and ran temporary employment agencies, as the branch manager and co-owner, respectively. Their placements were primarily blue-collar positions in manufacturing, light industrial, warehouse/distribution, truck driving, and construction. Both respondents used race, sex, age, and physical ability to rule out job applicants for either specific job openings or all openings that the agency had available.[159] However, their reasons for having no qualms about making these placements seemed to differ.

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[153] Interview with manager, Interview G (Apr. 8, 2010); Interview with co-owner, Interview F (Apr. 6, 2010).

[154] *Id.*

[155] *Id.*

[156] Interview with co-owner, Interview F (Apr. 6, 2010).

[157] Interview with manager, Interview G (Apr. 8, 2010); Interview with co-owner, Interview F (Apr. 6, 2010).

[158] Interview with co-owner, Interview F (Apr. 6, 2010).

[159] *See* interview with manager, Interview G (Apr. 8, 2010); Interview with co-owner, Interview F (Apr. 6, 2010).

H. I Find A Place For Everyone. Thus, I'm Not Discriminating.

Unlike the agency co-owner, the branch manager seemed to see temporary agencies as immune from discrimination laws because he was willing to find *some* job for any qualified candidate, sorting applicants into the "proper" job category based on employer request or other qualifications sought:

> Employers love the firm and staffing agencies more generally because we can do the things, like hire a man for the job, that an employer can't. . . . When a man and woman come into the office applying for similar jobs, and the job that I'm trying to fill for, the employer asked for a man—then I can place that man in that job with that employer and simply put the woman in some other job that we have open. . . .
>
> It's not discrimination because I'm not choosing a man over a woman for this one position. [Instead,] I'm satisfying what my client wants and then putting the female in another position. Both the man and woman are getting jobs. . . . It's not discrimination because I'm not choosing one over the other. . . . This makes us different than employers who are trying to fill one position.[160]

His personal understanding of discrimination seemed based on the end result of whether qualified applicants got a job, regardless of how they were assigned those jobs or which jobs they were assigned to. He believed that he, along with his agency more generally, were not wrong or discriminatory when he placed a man in one position based on his sex because of an employer's request and a woman in another available position because both applicants end up with jobs.[161] Needless to say, this kind of conduct is expressly forbidden by law. Title VII, for example, prohibits segregation of employees by sex or race: it is clearly illegal to send women to one job (secretary) and men to another (truck driver), even if both pay the same.[162]

I. I Know Who Can Do The Job, And That's All That Matters.

On the other hand, the agency co-owner did not mention the law as regulating any aspect of the hiring process.[163] He described how, within the first few minutes of seeing a job applicant who is old or overweight, he

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[160] Interview with manager, Interview G (Apr. 8, 2010).
[161] *Id.*
[162] *See* 42 U.S.C. § 2000e-2 (2006).
[163] Interview with co-owner, Interview F (Apr. 6, 2010).

had already decided that the applicant cannot be placed in any of the agency's jobs: "My clients want men between the ages of twenty and forty years old."[164] The co-owner would not hire an old person because the person would be unable to perform the job: "I already have an idea who the applicant is [by the in-person interview] because I've had that two minute initial appearance [of the applicant] in the office when giving the applicant the application to fill out. I get a good sense of who you are based on that two minutes. I can tell what a person can handle."[165] From the interview, it was not clear if he thought that an older person could not perform the job because of what employers had told him or he believed personally.

Both men received prohibited requests from client employers based on race, gender, age, and physical abilities, and both accommodated such requests without hesitation and without passing judgment on the request itself.[166] Both men focused on the employers as the clients and the paying parties; thus, it was employers, not job applicants, who needed to be satisfied.

J. Everyone Does It, Just Like In Everyday Life

Another topic that all of the respondents talked about was whether they had noticed work quality differences within and among racial and ethnic groups, illustrating how they personally generalized about race. Consistent with the Kirschenman and Neckerman survey, the majority of respondents said that they noticed no differences in the average quality of job applicants and workers among demographic groups.[167] One respondent noted that "there are good workers and bad workers in all categories,"[168] and another respondent felt that workers of all races have let him down at one point.[169]

Of the two respondents who said that they saw differences in the quality of job applicants and workers based on demographic groups,[170] one, a Latina branch manager of a national agency, explicitly mentioned race.[171] She primarily encountered applicants from the Latino community, particularly the Puerto Rican population because of the agency's location in downtown City X. She described "bad attitudes" from applicants who

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[164] *Id.*

[165] *Id.*

[166] *Id.*; Interview with manager, Interview G (Apr. 8, 2010).

[167] Interview with branch manager, Interview B (Mar. 11, 2010); Interview with division director, Interview C (Mar. 25, 2010); Interview with managing director, Interview D (Apr. 5, 2010); Interview with co-owner, Interview F (Apr. 6, 2010); Interview with manager, Interview G (Apr. 8, 2010).

[168] Interview with branch manager, Interview B (Mar. 11, 2010).

[169] Interview with manager, Interview G (Apr. 8, 2010).

[170] Interview with branch manager, Interview A (Mar. 9, 2010); Interview with branch manager, Interview E (Apr. 6, 2010).

[171] Interview with branch manager, Interview A (Mar. 9, 2010).

"snap their heads and tell me, 'Don't tell me what to do.'"[172] She had found that in the Spanish population, people got easily frustrated when she could not simply place them in a job without having to go through a process: "In the Spanish population, people believe that the firm has very general jobs and wonder why the firm can't just place the applicants."[173] Based on her experiences, the respondent also saw worker quality differences *within* the Latino community:

> Young Spanish guys seem not to care about actually working. Young to middle age Spanish women tend to have the worst attitudes. Older Spanish women are better workers. . . . I've had the best [placement] experience with black women. They are calmer and more professional.[174]

Another respondent, a male branch manager of an international employment agency, identified differences among groups, but he did not specify what characteristics, such as race or sex, created the differences.[175] Instead, he pointed to individuals who wore their pants around their knees as being worse job applicants and lower quality workers. For example, when asked if he saw a difference among demographic groups, he replied, "If a person comes in with jeans falling off, I'm going to think certain things."[176] He had the attitude that he could "get a first impression about a person without the person saying much. . . . People are who they are."[177] He justified making judgments about applicants superficially by comparing them to what people routinely do: "What I do in the in person interview [is like] what people ordinarily do every day–make judgments about people from how they look, what they say, and the image they project."[178]

In conclusion, this research has uncovered a complex taxonomy of justifications that respondents deployed for taking account of illegal factors, such as race and sex:

- Everyone does it, just like in everyday life;
- I am just doing what employers want, thus, I'm not personally discriminating;
- I am accountable to my employers, not to state

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[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] Interview with branch manager, Interview E (Apr. 6, 2010).
[176] *Id.*
[177] *Id.*
[178] *Id.*

law;
- If I do not follow an employer's request, I would lose business;
- I want a good "fit" and happiness for both the worker and the employer; and
- I find a place for everyone. Thus, I'm not discriminating.

Whether these are honest accounts of actual motivations or merely rationalizations for public consumption, what is clear is that most respondents admitted to taking race, ethnicity, and sex into account in various ways, virtually all of which are illegal under existing federal and state antidiscrimination laws.[179]

K. Agencies' Use Of Tests In The Screening And Hiring Process

Significant portions of the interviews were spent describing each step of the application and evaluation processes. All of the respondents began the process with a formal application, and all used an in-person interview. Between those two events, the majority of respondent agencies also utilized tests of some sort. The question is whether those tests—which may in theory provide more individualized information about each applicant—reduce the amount of reliance on stereotypes undertaken by temporary agencies. My research indicates that the tests are predominantly an initial hurdle to determine an applicant's skill level, but that respondents' emphasis on the in-person interview may undermine the additional individualized information that the objective tests gather.

L. Skills Tests

My findings suggest that temporary employment agencies do use skills tests, but they use them unevenly. Some use them to define applicant

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[179] Six of the seven respondents were white. Some of their explanations may be explained by John Dovidio and Samuel Gaertner's social psychology research on aversive racism, particularly in employment hiring decisions. *See* John F. Dovidio & Samuel L. Gaertner, *Aversive Racism & Selection Decisions: 1989 & 1999*, 11 PSYCHOL. SCI. 315 (2000). Aversive racism characterizes the racial attitudes of many whites who "endorse egalitarian values, who regard themselves as non-prejudiced, but who discriminate in subtle, rationalizable ways. . . . Racial bias is expressed in indirect ways. . . . Discrimination occurs when bias can be rationalized on the basis of some factor other than race." *Id*. Dovidio and Gaertner found that there was no bias or discrimination against blacks who were clearly qualified or unqualified for particular jobs. Bias occurred when black job candidates' credentials were ambiguous. *Id*. at 318. When given room for interpretation, white participants gave the benefit of the doubt to white job candidates and judged black ones more negatively. Dovidio and Gaertner's research offers one explanation as to why the temporary agency respondents in this study do not believe their hiring decisions are discriminatory, when their actions could be characterized as discriminatory. *Id.*

pools from which to select temporary workers; others use them, in conjunction with other objective measures, to overcome weak interview performances. All of the agencies seemed to place much more weight on the in-person interview than on the tests. However, even if the tests simply set the bar for who is minimally qualified, the temporary agencies could still use more individualized information that employers who do not test job applicants at all and who use race or sex to rule out particular groups entirely. At a minimum, the use of tests allows minority applicants who scored over the threshold a chance to be hired for a job, which they might not have been if they went to the non-test using employers directly and were rejected because of race or sex alone. Therefore, my findings run, in part, counter to the assumptions of Holzer and Neumark. In this respect, temporary agencies act much like ordinary employers; rather than conducting in-depth individualized assessments of workers, as Holzer and Neumark suggest, my respondents relied more on subjective measures for determining job placements.

Three of my seven respondents—well-established, (inter)national firms—had hundreds of computerized exams to test job applicants on the skills they claimed to possess.[180] These agencies gave the exams before the formal interview, providing the interviewers with more individualized information about the job applicant.[181] The exams objectively test proficiency with office software, such as Excel, as well as light industrial skills (through knowledge-based and situational questions). After the job applicant completes the exam, the agency gets the applicant's test results, including a score, with a breakdown by specific topic area, such as graphics/charts and diagrams for Excel.[182] The test results identify the number of questions attempted, answered correctly, and degree of difficulty (e.g., beginner, intermediate, advanced). One agency's result sheet even compared a job applicant's scores to the branch and nationwide averages in those same areas.[183]

After the computerized tests, these agencies possessed at least some of the objective, individualized information that Holzer and Neumark suggest will combat employers' reliance on stereotyping. But that conclusion relies on the premise that temporary employment agencies actually use the test information in determining who is the best applicant for a job. My respondents did not in fact use the test results this way.

The agencies instead viewed the test scores as an initial hurdle to

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[180] Interview with division director, Interview C (Mar. 25, 2010); *see also* Interview with managing director, Interview D (Apr. 5, 2010); Interview with branch manager, Interview E (Apr. 6, 2010).

[181] Interview with branch manager, Interview E (Apr. 6, 2010).

[182] Interview with division director, Interview C (Mar. 25, 2010); Interview with managing director, Interview D (Apr. 5, 2010).

[183] Interview with division director, Interview C (Mar. 25, 2010).

qualify the applicant to perform certain types of work; the test score indicates that the applicant has the minimum requisite skills.[184] For example, a male branch manager of an international employment agency believed that skills tests were a "good indicator of actual skills" when an employer asked for a temporary worker with a particular skill set.[185] Each employer requires a different level of ability in a skill; therefore, an applicant's score may exclude him or her from positions with some employers, but not others who have minimal requirements.[186]

In another instance, a male division director of an international employment agency put every applicant that walked through his door into the agency's database, regardless of their skills test score, because 80 percent of the applicants had already been weeded out via the Internet application process.[187] He used the skills test scores as a sorting mechanism once an employer asked for specific skills. If an employer wanted a worker who had advanced skills in graphs/charts in Excel, the respondent narrowed the database of applicants by those who scored highly on the advanced skills section of graphs/charts. Then once he had narrowed the pool, he sorted through the options by "fit" with the employer.[188] But if another employer called him looking for someone who is "generally proficient" in Excel, he would broaden the applicant pool that he would consider to those who scored well in the moderate and advanced sections of the Excel test, and then he would choose the best "fit" from that pool.[189] The respondent did not explain if he used test scores once he shrank the database to the pool from which he would pull his final group of workers. Nevertheless, he still used the test score as an indicator of baseline skills that an employer would want and chose from that pool.

After this initial hurdle, however, respondents varied in whether test scores mattered again. None of the three respondents who used skills tests mentioned whether they preferred applicants with higher scores or that employers asked for workers with higher scores. One respondent, a female managing director, used the test score as "just a guideline" when choosing the top three applicants to send to an employer because applicants may have been poor test takers or may have overestimated their abilities.[190] It is not clear the weight that she gave the test scores in making the top three

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[184] Respondents did recognize that job applicants may test badly or be plagued by nerves when taking the tests. To minimize any negative influences, the agencies inform the applicants about the exams ahead of time and allow the applicants to retake the test later on to improve their scores. This flexibility suggests that the temporary agencies want the tests to be an accurate representation of the applicants' abilities. *Id.*; Interview with managing director, Interview D (Apr. 5, 2010).

[185] Interview with branch manager, Interview E (Apr. 6, 2010).

[186] *See* Interview with managing director, Interview D (Apr. 5, 2010).

[187] *See* Interview with division director, Interview C (Mar. 25, 2010).

[188] *Id.*

[189] *Id.*

[190] Interview with managing director, Interview D (Apr. 5, 2010).

determinations. On the other hand, the male division director of the international employment agency used strong test scores, in combination with a solid work history, to place an applicant who had a "bad attitude" in jobs with employers that cared about accuracy, not interpersonal skills.[191] He allowed strong scores to compensate for weak performance at the interview stage.

In sum, temporary agencies use tests to establish which job applicants meet the minimum threshold to be hired; however, the pre-employment interview remains the most important aspect of the hiring process. The increased importance on the in-person interview illustrates the growing influence of soft skills that often already disadvantage minority groups. Temporary agencies may not gather as much individualized information about job applicants as Holzer and Neumark may have hoped for, but agencies do gather more information than employers who do not test applicants at all.

M. Testing for Integrity

Other agencies used tests that did not gauge job applicants' skills, but rather their integrity,[192] asking about drug use, lying, stealing, and, after watching a video, their workplace safety knowledge.[193] The former are supposed to get at character, while the latter is meant to avoid potential workplace accidents. A female branch manager for a national employment agency told me that she has job applicants take an integrity exam that asks whether the applicant lies, steals, or uses drugs.[194] Although she believed that the integrity test was reliable,[195] it is questionable what type of individualized information (if any) integrity tests provide or whether an applicant could easily discern the correct answers.[196]

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[191] Interview with division director, Interview C (Mar. 25, 2010).

[192] Interview with branch manager, Interview A (Mar. 9, 2010). The EEOC states that "a… personality test that is designed merely to measure an applicant's 'honesty, tastes, and habits' is not medical. . . ."; *see* Sujata S. Menjoge, Comment, *Testing the Limits of Anti-discrimination Law: How Employers' Use of Pre-Employment Psychological and Personality Tests Can Circumvent Title VII and the ADA*, 82 N.C. L. REV. 326, 348-49 (2003) (citing Gregory R. Vetter, Comment, *Is a Personality Test a Pre-Job-Offer Medical Examination Under the ADA?*, 93 NW. U. L. REV. 597, 628 (1999)).

[193] Interview with branch manager, Interview A (Mar. 9, 2010); Interview with branch manager, Interview B (Mar. 11, 2010).

[194] Interview with branch manager, Interview A (Mar. 9, 2010).

[195] *Id.*

[196] Under Title VII, personality and integrity tests can be used to hire employees if they do not exhibit a disparate impact (most do), while those tests that have an adverse impact must be justified by validity evidence. Through a major study of twenty-five leading integrity tests and 180 research studies, integrity and honesty tests have been "shown to be valid predictors of job performance, as well as other disruptive behaviors such as disciplinary problems, absenteeism, and theft" with "the estimated average predictive validity coefficient of integrity tests for predicting supervisory ratings of job performance to be 0.41." Randy C. Brown, *Psychological and Honesty Testing in the Workplace*, *in* 2 BATTLEGROUND BUSINESS 424, 429 (Michael Walden & Peg Thoms eds., 2007).

Regardless of whether the temporary agency subjects each job applicant to a skills test, the majority of participating agencies found the ten to twenty minute interviews the most important part of the screening and hiring process.[197] None of the responding agencies listed the skills test as the most important factor in making a hiring decision. The two participating temporary employment agencies that did not routinely test job applicants primarily staffed in manufacturing, light industry, warehouse/distribution, trucking, and construction.[198] Holzer and Neumark's theory seems inapplicable in this situation because employers are not trying to use the temporary employment agencies as intermediaries to find more individualized information about applicants; instead, the agencies seem to be more a database of bodies. In those fields, client employers were more likely to call the agencies and request a body—any body—rather than a particular skill set, to perform basic manual labor. This was less true in clerical jobs. When a client employer requested a body to fill a job, the job tended to last a short duration and to be for an unskilled task, such as accompanying a truck driver to deliver appliances.[199] The two respondents used job applicants' age and physical limitations to eliminate the first round of job applicants and then their interviews and work histories to determine reliability.[200] In non-clerical occupational areas, the client employers seemed to be less concerned about acquiring individualized information about applicants and more concerned about filling last minute requests. There is again little reliance on objective measures or individualized assessment.

N. Role of Geography in Filtering Who Temporary Agencies Place

A natural filtering of job applicants based on space or geography occurred before the job applicants ever met with the temporary employment agencies. City X varied from the cities analyzed in the prior literature in several ways, but geography was still important for the respondents from temporary agencies. In the Kirschenman and Neckerman study in Chicago, employers associated inner city residence with attending inferior public schools and with deficient work skills and ethics.[201] Respondents in City X were more concerned with "space" in terms of

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[197] Interview with branch manager, Interview B (Mar. 11, 2010); Interview with managing director, Interview D (Apr. 5, 2010); Interview with branch manager, Interview E (Apr. 6, 2010); Interview with co-owner, Interview F (Apr. 6, 2010); Interview with manager, Interview G (Apr. 8, 2010).

[198] Interview with co-owner, Interview F (Apr. 6, 2010); Interview with manager, Interview G (Apr. 8, 2010).

[199] *See* Interview with manager, Interview G (Apr 8, 2010).

[200] Interview with co-owner, Interview F (Apr. 6, 2010); Interview with manager, Interview G (Apr. 8, 2010).

[201] Kirschenman & Neckerman, *supra* note 10, at 216.

mobility—public transportation or own vehicle—and less about where an applicant lived or was educated.

Income and race both correlated with car ownership and type of transportation used: there are significantly lower rates of car ownership among minorities than whites,[202] and among urban residents (such as those living in City X)[203] compared to the suburbs. Thus, requiring a car (either explicitly or by virtue of the agency's location) puts minorities at a particular disadvantage for jobs in temporary agencies. Although an individual can register with a temporary agency by Internet application, the individual will still be required to go into the temporary agency at some stage of the process, and is thus hindered by a lack of transportation options.

A temporary agency's location and accessibility to public transportation appear to have a significant effect on who walks through its front door. In City X, the major form of public transportation is the bus. City residents have access to these buses, and many rely on them for mobility. About 15 percent of City X's population over the age of 16 years old uses public transportation (excluding taxicabs) to get to work, and 8.5 percent of the same population walks to work.[204] If a temporary agency is not on a bus line, it makes it more difficult for city residents and others dependent on public transportation to interview with that agency. A branch manager at a temporary agency, located approximately thirteen miles north of City X (and not on a bus line), pointed out that her agency had few job applicants from City X; instead, the city applicants "stay[ed] down there" and applied to agencies near their homes.[205] As a result, her agency drew job applicants from towns with less than 15 percent non-white population.[206]

Dependence on public transportation affects a job applicant's attractiveness to temporary employment agencies. A small number of temporary agencies will not hire applicants who do not have their own

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[202] Only 7 percent of white households do not own any cars; however, 24 percent of black households, 17 percent of Latino households, and 13 percent of Asian American households do not own any cars. THOMAS W. SANCHEZ ET AL., MOVING TO EQUITY: ADDRESSING INEQUITABLE EFFECTS OF TRANSPORTATION POLICIES ON MINORITIES, THE CIVIL RIGHTS PROJECT AT HARVARD 9 (2003), *available at* http://civilrightsproject.ucla.edu/research/metro-and-regional-inequalities/transportation/ moving-to-equity-addressing-inequitable-effects-of-transportation-policies-on-minorities.

[203] Over one-fifth of households in City X had no automobile access in 2000. Alan Berube et al., *Socioeconomic Differences in Household Automobile Ownership Rates: Implications for Evacuation Policy*, at Table 2: Percent and Number of Residents in Households with no Access to an Automobile, U.S. Central Cities, 2000 (June 2006), http://gsppi.berkeley.edu/faculty/sraphael/ berubedeakenraphael.pdf.

[204] U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY, 2006–2008 AMERICAN COMMUNITY 3-YEAR ESTIMATES, CITY X, CONNECTICUT (exact citation not provided to protect the anonymity of City X).

[205] Interview with branch manager, Interview B (Mar. 11, 2010).

[206] *Id*.

cars.[207] A co-owner of a truck and tradesmen temporary employment agency found the absence of a car to be a red flag: "If he doesn't own a car, he isn't getting a job."[208] He did this because he believed that people with their own cars were more reliable.[209] Three of the seven temporary agencies preferred job applicants who had their own vehicles rather than those who used the bus lines.[210] Respondents gave two primary reasons for this preference: the available jobs may not be on a bus line, and reliance on buses creates more uncertainties for the temporary agency.[211] A male branch manager who primarily catered to manufacturing/light industrial jobs explained, "If a person relies only on a bus line, it's a bit harder because there are more uncertainties. . . . If the worker misses his bus and then I have to find a replacement worker that day for the job."[212]

Job applicants' dependence on public transportation restricts which temporary agencies the applicants can and will seek employment from, which agencies will hire them, and which jobs the applicants can accept. City X residents are more likely to use public transportation than residents in the suburbs for accessibility and socio-economic reasons.[213] In City X, over two-thirds of the population identifies as non-white.[214] The negative effects of being dependent on buses will disproportionately impact the non-white population who live in urban areas. Some of this filtering occurs before the temporary agencies even meet the job applicants. One question

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[207] Interview with co-owner, Interview F (Apr. 6, 2010); Interview with manager, Interview G (Apr. 8, 2010).

[208] Interview with co-owner, Interview F, (Apr. 6, 2010).

[209] *Id*.

[210] Interview with branch manager, Interview B (Mar. 11, 2010); Interview with co-owner, Interview F (Apr. 6, 2010); Interview with manager, Interview G (Apr. 8, 2010).

[211] Interview with branch manager, Interview A (Mar. 9, 2011); Interview with branch manager, Interview B (Mar. 11, 2010); Interview with co-owner, Interview F (Apr. 6, 2010); Interview with manager, Interview G (Apr. 8, 2010).

[212] Interview with manager, Interview G (Apr. 8, 2010).

[213] Four to six times more people in City X rely on the bus system than other areas of Connecticut, particularly the smaller urban areas. *See* URBITRAN ASSOCIATES, INC., BUS TRANSIT NEEDS ANALYSIS – CONNECTICUT 2007: FINAL REPORT, 22–24, Figs.A-1, A-2, A-3 (Apr. 2007), http://www.ctenvironment.org/images/stories/file/Transportation_PDFs/full_bus_needs_report.pdf.

When people take public transportation they save money, which is important to low-income families. One-third of individuals in the city of City X are below the poverty line. U.S. CENSUS BUREAU, 2006–2008 AMERICAN COMMUNITY SURVEY, CITY X, CONNECTICUT (exact citation not provided to protect the anonymity of City X).

American Association for Public Transportation (APTA) estimates the average annual savings for a person who rides public transportation, instead of driving, is $8,481. Connecticut Association for Community Transportation (CACT), *The State of Public Transportation in Connecticut: Moving from the Past, Serving the Present, Preparing for the Future*, 2 (Feb. 26, 2009). "Studies by the Connecticut Department of Labor indicate that 68 percent of Jobs First Employment Services participants cite transportation as the most significant barrier to employment… Access to transportation is also a barrier for certain segments of the population, such as… low-income households." URBITRAN ASSOCIATES, INC., at 7.

[214] U.S. CENSUS BUREAU, 2006–2008 AMERICAN COMMUNITY SURVEY, CITY X, CONNECTICUT (exact citation not provided to protect the anonymity of City X).

that this research cannot answer is whether urban applicants who rely on public transportation are funneled into particular jobs or fields because certain jobs are on the bus line—but this seems to be an important possibility that is worthy of further study.

The requirement of a car might create a disparate impact, although it is not an explicit use of race. Disparate impact discrimination exists when employment practices, regardless of intent or animus, adversely affect one group more than another "on the basis of race, color, religion, sex, or national origin."[215] An employer must then show "that the challenged practice is job related for the position [and] consistent with business necessity. . . ."[216]

In City X, most responding temporary agencies did not notice or care about which high school job applicants attended,[217] unlike Moss and Tilly's participating Boston employers who criticized the deteriorating Boston public schools.[218] While in the Kirschenman and Neckerman study, Chicago public schools signaled to employers that an applicant was "black. . . poor. . . from the inner city" and indicated that the schools did not arm them with the appropriate reading and writing skills.[219] Only a few respondents in City X complained about the poor quality of City X public schools, which predominantly serve minority students.[220] And only one female managing director acknowledged that it affected her applicant choice when asked if where an applicant graduated from high school matters: "Those from [Suburb Y] High School are more prepared than those coming out of [City X] High School. Even though they may only have a high school degree, they have different educations."[221] She spoke about job applicants who attended City X public schools as having "worse grammar, way of speaking, and presenting themselves. . . . Those coming from [Suburb Y] dress in more business appropriate clothing. . . . There is only one questionable part of [Suburb Y], and it is near the mall. But the rest of the town is nice especially compared to [City X]."[222] Suburb Y is a residential suburb, adjacent to City X. It has a strong reputation for its municipal services and retail/service business sectors. Suburb Y's public schools rank highly in Connecticut. Earlier in the interview, she described

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[215] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

[216] *Id*.

[217] Interview with branch manager, Interview A (Mar. 9, 2010); Interview with branch manager, Interview B (Mar. 11, 2010); Interview with division director, Interview C (Mar. 25, 2010); Interview E (Apr. 6, 2010); Interview with co-owner; Interview with co-owner, Interview F (Apr. 6, 2010); Interview with manager, Interview G (Apr. 8, 2010).

[218] Moss & Tilly, *supra* note 13, at 484–86.

[219] Kirschenman & Neckerman, *supra* note 10, at 215–16.

[220] Interview with branch manager, Interview A (Mar. 9, 2010); Interview with managing director, Interview D (Apr. 5, 2010).

[221] Interview with managing director, Interview D (Apr. 5, 2010).

[222] *Id*.

an applicant's inappropriate "way of speech" as giving only one-word answers, but in this context, she did not go into more detail about what "way of speech" meant.[223]

VI. CONCLUSION

This paper shows that temporary employment agencies do practice a form of statistical discrimination on the basis of race (and other attributes). For instance, a Latina branch manager told me that "in the Spanish population, it's common for temp workers to show up late or not at all on their first day of work. . . . They'll have plenty of lies about why they couldn't make it."[224] She was the respondent who also does not want to hire workers who spoke "hood" or "ghetto."[225] Regardless of the legality of her behavior, the Latina branch manager may not have been acting unreasonably. It is possible that job applicants who speak non-standard English are more likely to be poorly educated and to have non-standard work attitudes as well. If reasonable, instructing her to ignore this information would be difficult. She would not be able to screen as efficiently and would want to continue using the information even if she is not supposed to.

In this respect, respondents resemble those of previous studies on employers. However, race did not seem to be modified by class to the same extent as Kirschenman and Neckerman's prior research. While Chicago employers stratified black applicants by their speech, dress, education level attained, skill levels, and residency signaling class to them,[226] respondents at temporary employment agencies in City X did not stratify by income level. One explanation may be that temporary agencies traditionally cater to and attract job applicants with less education and skills because of the low wages and jobs available. If the agencies draw almost exclusively from a lower class, the respondents may be less likely to stratify racial groups by class distinctions.

Although respondents did discuss space and geography, it was rarely used to refine their understanding of race. Instead, geography seemed to serve as a kind of natural filter for job applicants. Because of the over 150 temporary hiring agencies in the City X area,[227] job applicants may be more likely to go to their nearby agency to apply for positions, keeping the

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[223] *Id.*

[224] Interview with branch manager, Interview A, (Mar. 9, 2010).

[225] *See supra* Part V.B.

[226] *See* Kirschenman & Neckerman, *supra* note 10, at 13.

[227] *See* Connecticut Department of Labor, Labor Market Information from the Office of Research http://www1.ctdol.state.ct.us/lmi/EmpSearchIndustryList.asp (search for Employers by Region, Industry: Administrative and Support and Waste Management Service, Employment Services, Region(s): County X, Company Size: All Company Size) (searched on Oct. 26, 2011).

geographical space that an agency draws from quite local.

My interviews also revealed how temporary employment agencies understood discrimination, and how that understanding shaped their behavior in the hiring process. By and large, the law's requirements do not seem to play a large role in agencies' matching decisions, which are instead based on a complex mix of factors, including subjective assessments of an applicant, what is "best" for the applicant, what an employer wants, and personal feelings. Temporary agencies' unique intermediary position affects what and how they weigh these factors in practice. Based on this research, temporary employment agencies generally spend more time gathering individualized information about job applicants for clerical positions than manufacturing/light industrial positions, but they still believe that the in-person interviews are the best method to evaluate fit, creating space for agencies' subjective views to play a substantial role in the hiring process. Although charges of hiring discrimination are not common, and suits against temporary employment agencies are rarer still, my research suggests that the problem is real and needs to be combated.

APPENDIX A - METHOD

Information about the Temporary Agencies

The general composition of the temporary employment agencies interviewed is as follows:

Table 1 – Primary Kinds of Jobs the Agency Fills

Primary Kinds of Jobs Agency Fills	Manufacturing/ Light Industrial	Administrative	Mixed Light Industrial/Manufacturing and Administrative
# of Temp. Agencies	2	2	3

Table 2 – Agency Size

Agency Size	National Chain	Local[228]
# of Temp. Agencies	5	2

Table 3 – Race and Gender of Individual Respondents[229]

	White	Latino/a
Male	4	0
Female	2	1

Table 4 – Length of Time (in Years) that Respondent Working in Staffing Industry

	0 – 5	6 – 10	11 – 20
# of Respondents	2	0	5

Table 5 – Agency Location: City or Suburban; Accessibility by Public Transportation[230]

	Accessible by Public Transportation	Not Accessible by Public Transportation
City	3	0
Suburb	1	3

[228] For purposes of this research, "local" is defined as a temporary employment agency with offices exclusively in Connecticut and within 15 miles of the border of neighboring states.

[229] Respondents in Tables 3 and 4 refer to the individual hiring managers who I spoke with at each agency.

[230] For purposes of this research, I used each respondent's opinion to determine whether an agency can be accessed by public transportation.

Table 6 – The Relationship Between Location Based on Public Transportation Accessibility and Routine Agency Practice to Accept Walk-Ins

	City Accessible by Public Transportation	Suburb Accessible by Public Transportation	Suburb Not Accessible by Public Transportation
Yes Walk-Ins	1	1	1
No Walk-Ins	2	2	0

The participating temporary agencies staffed both manufacturing and clerical positions and were predominantly national chains. The majority of the respondents who I spoke with were seasoned veterans in the staffing industry, working between eleven and twenty years in the field.

Most of the temporary agencies in my research were accessible by public transportation, both in City X and its surrounding suburbs. However, four of the six agencies accessible by public transportation did not accept walk-in job applicants. Thus, job applicants must apply via the Internet in advance and then schedule an appointment to meet with these agencies. Of the three remaining agencies that accepted walk-ins, one could not be reached by public transit, making it difficult for applicants dependent on the bus system to use that agency.

The small number of cases limits the generalizability of my findings. Even so, there were clear patterns in the data, and my results were generally consistent with those of the MCSUI researchers' larger studies.