Liminally-Recognized Groups: Between Equality and Dignity

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Abstract

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This dissertation explored existing tensions between legal structures aimed at achieving justice—specifically, concept of dignity and the concept of equality—and groups not fully recognized under the law ("Liminally-recognized groups"). It approached this tension from a critical perspective on identity, exploring it both in the U.S. and in Israel/Palestine. While not comparative in the traditional sense, the dissertation nevertheless journeyed between both geographies, drawing inspiration from each, and exploring similar questions and their differing (albeit parallel) answers in each locality. It examines the limitations of the concept of equality within anti-discrimination law, stemming mainly from its dependency upon legal recognition. Simultaneously, it similarly explores the perils of dignity-based universal protections, rooted in dignity's cultural and racial biases. For this purpose, all three chapters center groups in a liminal state of legal recognition—groups that often challenge dominant binaries of sex/race/disability—as a methodological vantage point from which to examine legal systems and orthodoxies. It analyzes law's ability to see past recognition, and its effectiveness for groups who have yet to meet—and shoulder—the burden of recognition. Simultaneously, it explores the ability of liminally-recognized groups to see past the law, and to seek alternative routes for political power.

The first chapter, *Coming Out of the Shadows: The Non-Western Critique of Dignity*, focuses on the intersection between Mizrahi Jews (i.e., descendants of Jews from Arab and Muslim countries who immigrated to Israel) and the right to dignity, exploring this right's racialized undertones within Israeli courts. Following a conceptual and cultural exploration of the development of dignity (a universal, status-neutral right) as the antithesis of honor, this chapter questions the strong divide and moral hierarchy between both terms. Applying critical race methodology, methods of close reading, and doctrinal analysis, it analyzes multiple legal cases to explore Western influences on the societal and judicial imagination of Israeli dignity. The chapter concludes by arguing that dignity's pretense of universality obscures racial biases in its interpretation and application.

The second chapter, *Whiteness at Work*, focuses on U.S. antidiscrimination law and identity groups at the margins of whiteness. The chapter analyzes workplace discrimination cases where whites have sued *other whites* for racial discrimination Examining intra-white racial discrimination cases, this chapter demonstrate that they suffer from an under-theorization of whiteness, and from the judicial assumption that race becomes relevant only in instances involving racial minorities. Instead, I argue, courts should recognize instances in which white people police other whites to behave according to racial expectations regarding whiteness as instances of racial discrimination. This could be implemented through Title VII's stereotype doctrine. Accordingly, discrimination against whites due to their association with people of color, as well as discrimination against poor whites not seen as 'refined' or 'sophisticated' enough for the workplace, are both instances in which whites are discriminated against for failing to perform their racial identities according to white supremacist expectations.

The third and final chapter of the dissertation, *Identity at Work*, develops a thematic, overarching argument regarding liminally-recognized groups and their place within anti-discrimination law. Following an analysis of various types of liminal recognition under U.S. anti-discrimination law, and the normative case for and against recognition, I examine non-essentializing strategies to promote justice that do not force marginalized communities to leave their narratives of oppression (rooted in sexism, white supremacy, ableism, etc.) at the door, but that also do not force these communities to bind their oppression to a rigid sense of what it means to *be* who they are. The first strategy focuses on possible readings of anti-discrimination laws that enable recognition of *patterns* of racism, sexism, etc. without tying them back to specific (recognized) identities. The second strategy highlights the potential rooted in labor law to promote antidiscrimination ideals.

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Introduction

My research is located at the intersection of critical theory (with a specific focus on critical race theory and queer theory), law and philosophy, antidiscrimination law, and labor and employment law. Within these scholarly fields, I am interested in themes of marginality and liminality, as a methodological vantage point from which to examine legal systems and orthodoxies. The core of my intellectual curiosity lies at the junction of critical identity theories and theories of justice. I approach law from a critical standpoint regarding identity, one which recognizes the problematic clash between the fluid experiences of our lives and the rigidity of the law. The dissertation focuses on existing tensions between legal structures aimed at achieving justice (such as the right to dignity and anti-discrimination law) and critical perspectives on identity, both in the U.S. and in Israel. In both, I seek to map marginal identities situated on the borders of legal recognition, to explore what their meeting points with the law teach us both about recognition and about the law itself.

The first chapter, Coming Out of the Shadows: The Non-Western Critique of Dignity, focuses on the intersection between Mizrahi Jews and the right to dignity, exploring this right's racialized undertones within Israeli courts. I question the potential of the concept of human dignity—which enjoys a key place in global constitutionalism—to promote justice for Mizrahi Jews. Following a conceptual and cultural exploration of the development of dignity (a universal, status-neutral right) as the antithesis of honor, this chapter questions the strong divide and moral

hierarchy between both terms. Applying critical race methodology, methods of close reading, and doctrinal analysis, I analyze multiple legal cases to explore Western influences on the societal and judicial imagination of Israeli dignity, to argue that dignity's pretense of universality obscures racial biases in its interpretation and application.

The second chapter, Whiteness at Work, focuses on U.S. antidiscrimination law and identity groups at the margins of whiteness. The chapter analyzes workplace discrimination cases where whites have sued other whites for racial discrimination, under the assumption that through this corner of antidiscrimination law we may better appreciate the oft-taken-for-granted societal and judicial working assumptions regarding whiteness, and identity itself. Examining intra-white racial discrimination cases, I found that they suffer from an under-theorization of whiteness, and from the judicial assumption that race becomes relevant only in instances involving racial minorities. Instead, I argue, courts should recognize instances in which white people police other whites to behave according to racial expectations regarding whiteness as instances of racial discrimination. This could be implemented through Title VII's stereotype doctrine. Accordingly, discrimination against whites due to their association with people of color, as well as discrimination against poor whites not seen as 'refined' or 'sophisticated' enough for the workplace, are both instances in which whites are discriminated against for failing to perform their racial identities according to white supremacist expectations.

The third and final chapter of the dissertation, Identity at Work, develops a thematic, overarching argument regarding liminally-recognized groups and their place within anti-discrimination law. Following an analysis of various types of liminal recognition under U.S. anti-discrimination law, and the normative case for and against recognition, I examine non-essentializing strategies to promote justice that do not force marginalized communities to leave

their narratives of oppression (rooted in sexism, white supremacy, ableism, etc.) at the door, but that also do not force these communities to bind their oppression to a rigid sense of what it means to be who they are. The first strategy focuses on possible readings of anti-discrimination laws that enable recognition of patterns of racism, sexism, etc. without tying them back to specific (recognized) identities. The second strategy highlights the potential rooted in labor law to promote antidiscrimination ideals.

Chapter 1: Coming out of the Shadows: The Non-Western Critique of Dignity

1.1 Introduction

Dignity is one of the most important legal concepts of our time. Its increasing presence in international law,[1] as well as in constitutional law around the world,[2] is generally tied to a growing concern for basic human rights in light of past atrocities, along with a heightened recognition of socio-economic rights, including to health care, housing, and against the harms of extreme poverty.[3] Within legal-philosophical writing, dignity is seen as the great equalizer, providing a conceptual basis for shifting from honor-based hierarchical societies towards egalitarian societies wherein everyone's human dignity is recognized and respected.

However, the concept of dignity is not free from hierarchy itself.[4] Dignity can signal not only the intrinsic value of each person, but also a person's *superior status* relative to other beings, human or animal. Such formulations of dignity are coupled in this Article with scholarship that associates the concept of dignity with the cultural tradition of the Enlightenment and the West.[5] Together, they provide the basis for the claim that some of the discourse around

[1] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).; U.N. Charter Pmbl.
[2] This is true to the Unites States as well, see Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 UNIV. PA. LAW REV. 169–234 (2011); Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, 37 OHIO NORTH. UNIV. LAW REV. 381–428 (2011); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME LAW REV. 183–272 (2011).
[3] Libby Adler, *The Dignity of Sex*, 17 UCLA WOMEN LAW J. 1–52, 2 (2008). The importance of dignity is also highlighted in discussions regarding assisted dying, see for instance SCOTT CUTLER SHERSHOW, DECONSTRUCTING DIGNITY: A CRITIQUE OF THE RIGHT-TO-DIE DEBATE (2014); Angelika Reichstein, *A Dignified Death for All: How a Relational Conceptualisation of Dignity Strengthens the Case for Legalising Assisted Dying in England and Wales*, 19 HUM. RIGHTS LAW REV. 733–751 (2019).
[4] As this Article will show, the concept of dignity is non-singular, nor agreed upon. Various scholars offer different definitions for dignity, and some suggest the concept itself holds more than one meaning. See *infra* sections II.1-3 of this Article.
[5] For an explanation on the East/West divide and its relation to Enlightenment and Orientalism see *infra* notes 90-92.

dignity is racialized, associating dignity primarily with Western individuals and ideals.[6] This association is most evident when juxtaposed and compared to the discourse around honor. The concept of honor is traditionally recognized as dignity's antithesis, both conceptually and culturally. Accordingly, honor today is generally associated with "primitive," backward societies and subjects.

Developing a non-Western critique of dignity, this Article argues that the relationship between honor and dignity has ramifications for how both concepts are applied. To demonstrate this claim, this Article focuses on Israel, a leading example of dignitarian constitutionalism, as a case study. By applying close reading analysis and critical race methodologies to judicial opinions from Israeli courts, this Article explores the range of judicial techniques that racialize the jurisprudence of dignity. The stories of people caught up in the space between honor and dignity illustrate the effects of its racialization.

The association of dignity with Whiteness, moral superiority, and the West is a practice that calls for urgent attention. While dignity can be a moral compass for egalitarian societies, it can also build societies around exclusionary, elitist forms of morality. Nietzsche, in *On the Genealogy of Morals*, explores the ramifications of exclusionary morality. He describes how associating the "good" with nobility and the powerful may lead to the formation of an oppositional moral language, developed out of the *ressentiment* of the powerful by the powerless.[7] Nietzsche's writing proves extremely relevant today amid the collapse of liberal

[6] Racialization refers to the idea that race is not the origin or natural-biological fact from which racism emerges, but vice versa. There exists no "race" prior to the act which constitutes it via the daily meeting points of institutional and individual power. As Kendall Thomas explains: "we are raced through a constellation of practices that construct and control racial subjectivities." Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. LAW REV. 1805–1832, 1806–7 (1993).

[7] FRIEDRICH WILHELM NIETZSCHE, ON THE GENEALOGY OF MORALITY (Maudemarie Clark & Alan J. Swensen trans., 1998). The word *ressentiment*, used by Nietzsche, is defined as "A vengeful, petty-minded state of being that does not so much want what others have (although that is partly it) as want others to not have what they have." Ian Buchanan, *Ressentiment*, *in* A DICTIONARY OF CRITICAL THEORY (2010). David Weisstub similarly argues that dignity-denial

morality worldwide, along with the rise of populist, nationalistic, and anti-egalitarian leadership. Such leaders' rising popularity may be attributed to voters' perception that they are not part of the zeitgeist of dignity and liberal morality, and the *ressentiment* that results from this feeling. Acknowledging dignity's exclusionary potential is necessary for its inclusionary reconceptualization. This Article offers a cautionary tale of the potential perils of dignity.

This Article proceeds in four parts. Part I of this Article reviews the ascendance of dignity, both in U.S. constitutionalism and as part of the transnational grammar of global constitutionalism. Part II focuses on the relationship between dignity and its antithesis, honor. Examining the philosophical and cultural discourses around dignity and honor, Part II demonstrates how dignity is rooted in hierarchy and orientalist assumptions. Part III then analyzes the unique case study of Israel to demonstrate this dynamic. It illustrates how moral superiority contributed to the process of racialization in Israel's early years, and how dignity and honor played an important function in that discourse. It then examines honor and dignity within Israeli courts, presenting four different legal mechanisms through which dignity is racialized. Part IV demonstrates the implications and relevance of this non-Western critique of dignity to the utilization of the concept in American constitutional law.

1.2 The Ascendance of Dignity

Dignity is perhaps one of the most important legal concepts of our time. As Samuel Moyn states, it seems that dignity is "suddenly everywhere" in both law and philosophy.[8] While not found explicitly in the U.S. Constitution, dignity is nevertheless found extensively in U.S.

may lead to distancing, "to the point where human dignity ceases to be a meaningful term of reference to the parties involved…" David N. Weisstub, *Honor, Dignity, and the Framing of Multiculturalist Values*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 263–294, 281 (2002).

[8] Samuel Moyn, *The Secret History of Constitutional Dignity*, 17 YALE HUM. RIGHTS DEV. LAW J. 39–73, 39 (2014). See also Meir Dan-Cohen, *Dignity and its (dis)content, in* JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 3 (2012).

Supreme Court cases covering a range of constitutional issues. The growing presence of dignity within U.S. constitutional law may be attributed to the phenomenon of global constitutionalism: the transnational convergence of constitutional norms or concepts, along with the core place dignity enjoys in this global convergence.

1.2.1 Dignity in U.S. Constitutionalism

In a way, and perhaps quite surprisingly, dignity has always been part of U.S. constitutional law. While many other countries have centered their constitutional regimes around the right to dignity,[9] the U.S. Constitution does not mention dignity once.[10] Yet, dignity is nevertheless part of U.S. constitutionalism, and its centrality is constantly increasing. This ascendance has led some to label dignity as a new court-created constitutional right.[11]

For some scholars and judges, the concept of dignity is fundamental to understanding the U.S. Constitution, finding that it inspires many of the rights contained therein.[12] Ronald Dworkin, for instance, saw the Constitution as embodying the basic principles of human dignity.[13] Supreme Court Justice William J. Brennan, Jr., who had utilized the concept of dignity in 39 of his Supreme

[9] Such as Germany, Israel, South American countries and Japan, see *infra* p. 7 of this article.
[10] Notably, the concept may be found in The Federalist Papers. As Rex D. Glensy states, "the very first paper authored--not coincidentally, by Hamilton--urges the adoption of the new Constitution in order to ensure the 'liberty,' 'dignity,' and 'happiness' of the citizenry" Rex D. Glensy, *The Right to Dignity*, 43 COLUMBIA HUM. RIGHTS LAW REV. 65–142, 77 (2011).
[11] Michelle Freeman, *The Right to Dignity in the United States Notes*, 68 HASTINGS LAW J. 1135–1168, 1137 (2016).
[12] According to Hugo Bedau, dignity is "the premier value underlying the last two centuries of moral and political thought," Hugo Adam Bedau *The Eighth Amendment, Human Dignity, and the Death Penalty, in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES, 145 (Michael J. Meyer & William A. Parent eds., 1992). Alan Gewirth sees it as the "basis of human rights," Alan Gewirth, *Human Dignity as the Basis of Rights, in* THE CONSTITUTION OF RIGHTS, *id.*
[13] Ronald Dworkin, *Three Questions for America*, 2006, http://www.nybooks.com/articles/2006/09/21/three-questions-for-america/ (last visited Feb 21, 2020).

Court opinions,[14] saw "the constitutional ideal of human dignity"[15] as the kernel of American law.[16]

Empirically examining the usage of dignity in the U.S. Supreme Court, Leslie Meltzer Henry shows that the term was invoked by various Justices more than nine hundred times in the last 220 years, with a clear increase throughout the last half a century.[17] As she points out, the concept of dignity has been invoked in connection with the First, Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh, Fourteenth, and Fifteenth Amendments.[18] For instance, already in 1958, in *Trop v. Dulles*, the Supreme Court declared that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[19] Dignity is similarly found in decisions regarding police searches: in *Schmerber v. California*, the Court ruled that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[20] Likewise, in the context of welfare recipients' procedural rights, the Court ruled that the United States' basic commitment is to "foster the dignity and well-being of all persons within its borders."[21] The Court has further invoked the concept of dignity in decisions regarding free speech,[22] gun rights,[23] and disability rights.[24]

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[14] Henry, *supra* note 2 at 171.
[15] Bernard Schwartz, *How Justice Brennan Changed America*, *in* REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE, 31, 41 (E. Joshua Rosenkranz, Bernard Schwartz, & Brennan Center for Justice eds., 1st ed ed. 1997).
[16] Henry, *supra* note 2 at 171.
[17] *Id.* at 169–70. See also Tobin Sparling, *A Path Unfollowed: The Disregard of Dignity Precedent in Justice Kennedy's Gay Rights Decisions*, 26 TULANE J. LAW SEX. REV. SEX. ORIENTAT. GEND. IDENTITY LAW 53–82 (2017).
[18] Henry, *supra* note 2 at 173.
[19] Trop v. Dulles, 356 U.S. 86, 100 (1958). The utilization of dignity in Eighth Amendment can also be found in Hope v. Pelzer, 536 U.S. 730, 736 (2002).
[20] 384 U.S. 757, 767 (1966)
[21] Goldberg v. Kelly, 397 U.S. 254 (1970)
[22] Cohen v. California, 403 U.S. 15 (1971).
[23] McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).
[24] Indiana v. Edwards, 554 U.S. 164 (2008).

Two arenas were especially pivotal in the centering of dignity within U.S. constitutional law: abortion and same-sex relationship cases. In *Roe v. Wade,* the Court recognized a right to privacy broad enough to cover intimate decisions regarding abortions. While not specifically mentioning dignity, the paradigm of privacy in relation to abortion decisions was later infused with ideas regarding personal dignity.[25] In *Planned Parenthood v. Casey,*[26] Justice Anthony Kennedy explained the constitutional protection awarded to personal decisions such as "marriage, procreation, contraception, family relationships, child rearing, and education" by noting the centrality of these choices to "personal dignity and autonomy."[27] He thus drew a direct line between personal dignity and the value of liberty protected by the Fourteenth Amendment.

When striking down the criminalization of same-sex sexual conduct in Texas, the Court in *Lawrence v. Texas* utilized the principle of dignity, tying it again to ideas of privacy and liberty. As the Court stated, "It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[28] The Court further added that the stigma caused by criminalization demeans the lives of homosexual persons and harms their dignity.[29]

Similarly, in *United States v. Windsor*, the Court's ruling focused on the harm to dignity caused by the stigmatization of same-sex relationships. The labeling of same-sex marriages as "second class marriages for the purpose of federal law,"[30] the Court ruled, demeaned same-sex

[25] Freeman, *supra* note 11 at 1139.
[26] 505 U.S. 833 (1992).
[27] *Id*, at 851.
[28] 539 U.S. 558, 567 (2003).
[29] *Id*, at 575.
[30] United States v. Windsor, 570 U.S. 744, 771 (2013).

couples. Further, a state's decision to instead recognize and allow same-sex marriages conferred upon them "a dignity and status of immense import."[31]

Finally, in *Obergefell v. Hodges,* the Court's process of recognizing an independent right to dignity was complete. Deciding whether states could refuse to recognize same-sex marriages, the Court declared and recognized a right to marriage that applies equally to same-sex marriages.[32] As Michelle Freeman writes, in *Obergefell,* "Justice Kennedy blends the Equal Protection Clause and the Due Process Clause in order to define a new constitutional right to dignity."[33]

1.2.2 Dignity in Global Constitutionalism

Lately, there is a growing understanding that constitutional law is undergoing a process of globalization. The rise of dignity in U.S. constitutionalism, certainly in recent years, may thus be attributed to the concept's strong standing around the world.

As Law & Versteeg state, "[C]onstitutional norms and values are formulated and contested at a global level."[34] The phenomenon of global constitutionalism, described as the transnational convergence of constitutional norms or concepts, sheds light on the emergence of a global constitutional language shared by many countries.[35]

Dignity enjoys a core place in this global convergence. During the first half of the twentieth century, dignity was found sporadically in various countries' constitutions, including

[31] *Id*, at 746.
[32] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
[33] Freeman, *supra* note 11 at 1143.
[34] David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. LAW REV. 1163, 1173 (2011).
[35] *Id*. Law & Versteeg attribute the rise in global constitutionalism to a set of reasons, including constitutional learning, i.e., countries learning and drawing inspiration from one another; constitutional competition between countries within a global economy and market; and finally, constitutional conformity, i.e., the international pressure on countries to conform to global constitutional norms.

that of Finland, Portugal, Ireland, Mexico, Cuba, and Weimar Germany.[36] Following World War II, dignity's status rose, and it became universally recognized. As Moyn states, "[I]n the shadow of genocide the light of human dignity shone forth."[37] Accordingly, both the preamble to the United Nations Charter and five different provisions of the Universal Declaration of Human Rights championed dignity as the core concept around which the values of the post-World War II world order were to be formed.[38]

The key place of dignity in the UN Charter and the Universal Declaration has secured it as an internationally recognized concept and legal term.[39] As a result of the bilateral feedback between national and international law, dignity also found its way into multiple national constitutions following World War II. The Federal Republic of Germany's Basic Law opens with the statement that "[h]uman dignity shall be inviolable."[40] South Africa's constitution explicitly recognizes human dignity as one of the founding values of the new South African society.[41] Dignity can also be found in constitutions in Latin American countries such as Brazil, Costa Rica and Nicaragua,[42] as well as in Italy and Japan.[43] It is also of constitutional value and importance in Canada, where the Canadian Supreme Court recognized dignity as a core value tied to the Canadian Charter,[44] and in Israel, where the Israeli Supreme Court recognized the right to dignity as a constitutional right following its enactment in Israel's Basic Law: Human Dignity and Liberty.[45]

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[36] Rao, *supra* note 2 at 193.
[37] Moyn, *supra* note 8 at 40.
[38] The Universal Declaration of Human Rights, *supra* note 1; U.N. Charter Pmbl., *id.*
[39] Rao, *supra* note 2 at 193–4.
[40] Grundgesetz [GG] [Constitution] art. 1 (F.R.G.)
[41] S. Afr. Const. § 1.
[42] Christopher A. Bracey, *Dignity in Race Jurisprudence Symposium: Race Jurisprudence and the Supreme Court: Where Do We Go from Here*, 7 UNIV. PA. J. CONST. LAW 669–720, 683 (2004).
[43] Glensy, *supra* note 10 at 98.
[44] R. v. Morgentaler [1988] S.C.R. 30, 164 (Can.)
[45] Basic Law: Human Dignity and Liberty, 5752, SH No. 1391 (Isr.).

Understanding dignity's place in global constitutionalism is important. Recognizing global influences that have impacted dignity's centrality in the U.S. urges us to think of dignity in global terms and to understand the concept of dignity from varying national perspectives. Further, it highlights the relevance of other countries' experiences with dignity to the American context. Nevertheless, much of the American legal conversation around dignity has failed to incorporate such perspectives.

The following Part presents the canon view regarding dignity, which conceptualizes it via a binary contrast with honor, and examines the manifestations of this paradigm in the American legal academy. It then presents two primary critiques of this canon: a philosophical critique and a cultural one. Together they establish the foundation for the non-Western critique of dignity, which situates dignity within the global framework of East versus West.

1.3 Dignity's Light and the Shadows of Honor

Despite the centrality of dignity, most writers have long admitted that there is an overall confusion or disagreement regarding the meaning of the term.[46] Many have attempted to understand and make sense of dignity by positioning it in opposition to honor.[47]

1.3.1 The Canon View of Dignity as Opposed to Honor

The canonical understanding of honor and dignity sees these concepts as encapsulating converse values. For its part, honor marks one's position in societal hierarchy. It is communal, portrays a certain status, and is thus granted only to those who possess certain roles

[46] Dan-Cohen, *supra* note 8, at 3 ("Dignity has come to mean different things to different people"); WALDRON, *supra* note 8 at 15. See also Rao, *supra* note 2; Adler, *supra* note 3; Bracey, *supra* note 42; Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. LAW REV. 1–62 (2017); Jeremiah A. Ho, *Find out What It Means to Me: The Politics of Respect and Dignity in Sexual Orientation Antidiscrimination*, 2017 UTAH LAW REV. 463–530 (2017).

[47] Orit Kamir suggests understanding dignity through its contrast with honor, see ORIT KAMIR, ISRAELI HONOR AND DIGNITY: SOCIAL NORMS, GENDER POLITICS AND THE LAW (2005).

in society.[48] It is also contingent: it must be earned or granted and can therefore be forfeited or withdrawn.[49] In striking opposition, dignity is described as inherent to an individual, as universal and categorical. The most common formulation of dignity under this paradigm is Kantian dignity:[50] the idea that human beings should not be treated or seen as means to someone else's end, but as ends in and of themselves on the ground of their humanity.[51] Finally, according to this renowned narrative, dignity represents the moral evolutionary progress from honor. Thus, primarily discussing Western cultures, many writers describe a positive shift, or a progressive evolution, from an honor-based society toward one based on dignity. This movement is often seen as an egalitarian step.[52] For instance, Charles Taylor connects the move toward dignity with the collapse of social hierarchies characterizing honor cultures, which are seen as intrinsically unequal.[53] Jürgen Habrames also explains the shift from honor societies to dignity-based ones as reflecting the change from a paradigm of moral duties to one in which people demand legal recognition of their own dignity.[54] Many associate this egalitarian step from honor to dignity with the Enlightenment, of which Kant was a prominent figure.[55] Around the time of the

[48] On the "restrictive" aspect of honor, see Rachel Bayefsky, *Dignity, Honour, and Human Rights: Kant's Perspective*, 41 POLIT. THEORY 809, 810 (2013).
[49] Dan-Cohen, *supra* note 8.
[50] Primarily, the second formulation of the categorical imperative, IMMANUEL KANT, THE METAPHYSICS OF MORALS 36 (1991).
[51] *Id*. Michael Sandel, for instance, explains dignity as a value that "consists in the capacity of persons as autonomous agents to choose their ends for themselves." He further adds that "[u]nlike honor, which ties respect for persons to the roles they inhabit, dignity resides in a self-antecedent to social institutions." See MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT : AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 82 (1996).
[52] Peter Berger, *On the Obsolescence of the Concept of Honor*, 11 EUR. J. SOCIOL. ARCH. EUR. SOCIOL. EUR. ARCH. FÜR SOZIOL. 339 (1970).
[53] CHARLES TAYLOR & AMY GUTMANN, MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 26–7, 42–3 (1994).
[54] see Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, 63, 65, 68–71 (2012).
[55] Milton Lewis, *A Brief History of Human Dignity: Idea and Application*, *in* PERSPECTIVES ON HUMAN DIGNITY: A CONVERSATION 93–105, 96 (2007); Arieli, Yehoshua, *On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and his Rights*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE, *supra* note 7, at 1–18.

Enlightenment, it is argued, the universal access to reason was prioritized over hierarchical rank.[56]

1.3.2 The Canon View Within American Legal Academia

Manifestations of the canon view of dignity are common in American legal academia. At first glance, these manifestations may be difficult to detect, as both honor and dignity are often presented and discussed as different *kinds* of dignity within the inner taxonomy of the term. However, acknowledging the way in which similar discussions about honor and dignity are being conducted both in the U.S. and abroad is critical. Decoding these oft-hidden similarities undermines the guise of American dignity's exceptionalism. Doing so also helps situate the concept in a global context steeped in colonial and orientalist traditions; a juxtaposition of the canon with its equivalents in American legal academia exposes how the same binaries and hierarchies are constituted, despite discursive differences.

Judge Neomi Rao, for instance, differentiates and contrasts what she coins "intrinsic" or "inherent" dignity and "substantive" dignity. According to Rao, in its basic and fundamental form, "dignity attaches to the intrinsic worth of each individual by virtue of being human."[57] She distinguishes this inherent aspect of dignity from another aspect: substantive dignity. Substantive dignity, according to Rao, centers on societal norms of conduct, or one's place within a community—traits the canon typically associates with honor. She concludes by arguing that courts must recognize only intrinsic dignity.[58]

Much like Rao, albeit from an opposing political standpoint, Jeremiah Ho echoes the canon view when critiquing the U.S. Supreme Court's utilization of dignity in the same-sex

[56] Joern Eckert, *Legal Roots of Human Dignity in German Law, in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE, *id.* See also Adler, *supra* note 3 at 8–10.
[57] Rao, *supra* note 2 at 196.
[58] See generally Rao, *supra* note 2.

marriage cases: "The court in *Windsor* and *Obergefell* promoted dignity not as respect, but rather another form of dignity—that which associates with rank or nobility, and thus—dignity as respectability."

Similarly, Alan Gewirth distinguishes between two types of dignity: one that is "inherent" to the individual and the other, which he refers to as "empirical" dignity, which is characterized by social performance, being a trait people may exhibit.[59]

The foregoing scholars import the honor/dignity binary into an inner conflict rooted in dignity. While the framework is different, the conceptual and philosophical positions are similar, differentiating between a type of dignity that is intrinsic, inherent, and egalitarian to a different kind of dignity, described as social, rooted in notions of rank and respectability.

As mentioned, tracing the alleged binary between honor and dignity that is embedded within common understandings of dignity itself is essential, as it opens the door to critical engagement. In this respect, the insistence of many writers—both globally and in the U.S.—to differentiate dignity and honor or to fragment dignity into distinct and rivaling "types" or "concepts" warrants attention. Challenging these attempts ought to be done both conceptually and culturally. As the following section shows, much of this alleged binary is fictional. Moreover, the work of maintaining this binary should be viewed as *racial* work, promoted against the backdrop of orientalist narratives regarding East and West.

1.3.3 Philosophical and Cultural Critique of the Canon

The canon's formulation of dignity as inherently egalitarian and as essentially and dichotomously distinct and morally superior to honor has generated extensive critique. Undermining this hierarchy enables the acknowledgment of the cultural influences of its draw

[59] Alan Gewirth, *supra* note 12, *at* 12.

and appeal. Accordingly, the dichotomous difference between dignity and honor may be partially understood via the orientalist paradigm differentiating West and East and situating the former as morally superior to the latter.

1.3.3.1 Philosophy: conceptual challenges to the binary and hierarchy of honor and dignity

From a conceptual standpoint, critics have challenged the canon regarding the dichotomous distinction between honor and dignity and their subsequent moral hierarchy.

As several critics have stressed, the genealogy and etymology of dignity link it to honor, thus urging us to acknowledge the shared history of these concepts. The Roman word *dignitas* traditionally signified ideas of honor, privilege, and rank.[60] Similarly, the Hebrew word for dignity, *kavod*, biblically signifies either honor, respect, or glory.[61] This "semantic undecidability" continued through medieval and early modern discourse,[62] and into current linguistic interpretations of dignity. The latest edition of the *Oxford English Dictionary* defines dignity as "honourable or high estate, position, or estimation; … degree of estimation, rank."[63]

This etymology of *dignitas* and *kavod* seeped from language to philosophy. The first philosophical account of dignity is found in Cicero, who understood *dignitas* to be "someone's virtuous authority which makes him worthy to be honoured with regard and respect."[64] This

[60] *Dignitas* was used to escribe the dignity and honor of the monarch, as well as of the King and Queen, WALDRON, *supra* note 8 at 30. Shershow similarly demonstrates the etymology of *dignitas,* which may "be reducible to a triangular semantic structure, by which *dignitas* unites (or, as it were, *aspires* to unite) three related but distinct things: (1) intrinsic worth, fitness, or value; (2) rank or status; and (3) an impressiveness or distinction of style, gesture, bearing, and comportment," see SCOTT CUTLER SHERSHOW, DECONSTRUCTING DIGNITY : A CRITIQUE OF THE RIGHT-TO-DIE DEBATE 31 (2014).
[61] Shershow provides examples from the Bible, Talmud, and Psalms, SHERSHOW, *supra* note 3 at 48–9.
[62] "In both medieval and early-modern discourse, the various linguistic cousins of *dignus* and *dignitas* continue to be primarily deployed in a manner that flickers between the three distinct but interrelated senses of worth, bearing, and status." *Id*. at 62.
[63] WALDRON, *supra* note 8 at 14; SHERSHOW, *supra* note 3 at 62. A similar definition revolving around the "triangle" of worth, status, and bearing can be found in the Wordnet lexical database at Princeton University. *Id*. at 31-2.
[64] SHERSHOW, *supra* note 3 at 53–4.

duality of dignity and honor persists through Aquinas[65] to Kant.[66] Although Kant marks for many the moment of divergence from "honor-like" *dignitas* to modern dignity, some Kantian scholars maintain that Kant's dignity was not distinctly different from honor.[67] Rather, for Kant, dignity often possesses honor-like qualities: it is not clearly immutable,[68] and, like honor, it is also rooted in hierarchy.[69]

Contemporary scholars also explain modern dignity in hierarchical terms, seeing it as representative of the sublime nature of humanity. George Kateb, for instance, sees dignity as representing the core idea that "humanity is the greatest type of being—or what we call species."[70]

Framing dignity as the core value of *humanity*—inherently and conceptually denying it from animals—exposes its inner hierarchical nature: "Invocation of dignity even as an egalitarian concept establishes a structure whereby something is degraded as a matter of analytic necessity."[71] Libby Adler highlights how the formulation of dignity as something humans have *over* animals—entitling humans to equal recognition—shaped the inner meaning of dignity as a concept emphasizing the parts of humanity that are non-animalistic: *inter alia*, reason, rationality, and the ability to control one's drives.[72] This elevated understanding of dignity

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[65] *Id*. at 64-68.
[66] *Id*. at 32.
[67] Sensen argues that Kant's views on human dignity echo the Roman *dignitas*, and thus cannot symbolize the shift from Roman tradition and the concept of honor. OLIVER SENSEN, KANT ON HUMAN DIGNITY 153–5 (c2011).
[68] Kant argues that one must work to maintain "humanity in its proper dignity in his own person and honoured it," IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON, 5:88 (2015). He further provides examples of behaviors that violate the dignity of humanity, such as "complaining and whining, even crying out in bodily pain." KANT, *supra* note 50 at 6:436. The ability to lose as well as gain dignity contrast common understandings of Kantian dignity.
[69] Sensen writes that "Kant often uses 'dignity' to express that something is elevated or uplifted over something else," SENSEN, *supra* note 67 at 166. Bayefsky further illustrate how later Kantian writings use dignity to refer to the high social rank of the government, nobility, and royalty, see Bayefsky, *supra* note 48 at 817; SENSEN, *supra* note 67 at 169–172.
[70] GEORGE KATEB, HUMAN DIGNITY 3–4 (2011).
[71] Adler, *supra* note 3 at 15.
[72] *Id*. at 16.

explains common understandings of "dignified" behavior as worthy of the high status of humanity.[73] Applying psychoanalytical tools to a discourse analysis of dignity, David Weisstub argued that dignity has its own "stylistics," which revolve around superiority, aristocracy, as well as aesthetics and mannerisms of high status.[74]

Such understandings of dignity echo the mainstream conceptualization of honor. Interestingly, these usually clash with ideas of autonomy when one's own behavior is seen as harming one's *own* dignity. One infamous example of this is France's ban on "dwarf-tossing," a controversial bar attraction in which people with dwarfism are thrown onto mattresses or padded walls. France banned this practice because it seems to harm dwarves' dignity even if they themselves wanted to pursue it.[75] Similarly, in Israel, in a 2017 decision to close a Tel Aviv strip club, the judge stated that "it can be determined that a specific activity or behavior objectifies women and harms their dignity, even if they themselves do not see it that way."[76] The usage of dignity to prohibit certain sexual acts as un-dignified rests, as Adler argues, on the (false) binary and moral hierarchy between reason and desire, as well as between humanity and animality, dignity and honor.[77]

In addition to challenges to the strict honor/dignity binary resting on the hierarchical nature of dignity, other writers insist on the possibility of egalitarian honor. Such scholarly

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[73] MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 151 (2012).
[74] Weisstub, *supra* note 7.
[75] See, for instance the ban on this practice in France, *Conseil d'Etat, Assemblée, du 27 octobre 1995, 136727, publié au recueil Lebon*. For an argument against an understanding of dignity as associated with responsibility, respectability, and legitimacy, see Katherine Franke, *Dignifying Rights: A Comment on Jeremy Waldon's Dignity, Rights, and Responsibilities*, 43 ARIZ. STATE LAW J. 1177 (2011). Similarly, Shershow argues: "[O]ne might understand dignity (in something like the Althusserian or Foucauldian manner) not as the *source* but as the *product* of normalizing behaviors imposed on social subjects via complex discursive processes and dynamics of power," SHERSHOW, *supra* note 3 at 30.
[76] AA (Administrative Appeal) 8707-07-15 Local Committee for planning Ramat-Gan v. Eran Yerushalmi, published in Nevo (Aug. 28, 2017).
[77] Adler, *supra* note 3 at 48. Adler discusses the binary between dignity in the egalitarian sense and dignity in the aristocratic sense, the latter closely resembling my characterization here of honor, see *id*, at 4.

interventions subvert the tendency to depict honor societies as inherently backward or as morally inferior. Kwame Anthony Appiah, for instance, examines different oppressive practices, including dueling, foot binding, and the slave trade, to argue that they all disappeared through the utilization of honor and the framing of such practices as dishonorable.[78] Therefore, he concludes, honor not only played, but can play in the future, a key role in moral egalitarian revolutions.[79] One notable challenge to the dichotomous understanding of dignity and honor surfaces when considering humiliation. Humiliation is an emotion that manages to capture both sides of the cultural divide between honor and dignity. It is closely connected to shame—key for societies in which honor is a foundational value.[80] It is often manifested through hierarchy, degradation, or the act of *lowering down*,[81] which echoes many common understandings of honor. And, humiliation is typically linked to one's standing in society, and thus often requires witnesses for it to be induced, also in tandem with honor's mainstream conceptualization.[82] Simultaneously, humiliation is associated with the negative experience of discrimination and exclusion, practices that the egalitarian commitment of dignity is aimed at addressing. Accordingly, certain acts of humiliation are clearly associated with harms to dignity.[83] The U.S. Supreme Court also

[78] "[H]onor, especially when purged of its prejudices of caste and gender and the like, is peculiarly well suited to turn private moral sentiments into public norms. Its capacity to bind the private and the public together is evident in the way that it led—in Britain, in China, and now in Pakistan—from individual moral convictions to the creation of associations, and the planning of meetings, petitions, and public campaigns," ANTHONY APPIAH, THE HONOR CODE : HOW MORAL REVOLUTIONS HAPPEN 178 (2010).

[79] A more recent example of the potential of honor and shaming in promoting gender equality can be seen in the #metoo movement and the utilization of acts of public shaming of harassers to raise awareness to the problem of sexual harassment with the aim of eradicating it.

[80] KAMIR, *supra* note 47.

[81] Daniel Statman, *Humiliation, dignity and self-respect*, 13 PHILOS. PSYCHOL. 523–540, 531 (2000); APPIAH, *supra* note 78.

[82] See, for instance, Israel's Prohibition against Defamation Law, 5725-1965 464 LSI 240 (1965). Amnon Reichman recognizes the potential spill-over from dignity to honor through humiliation, which leads him to warn against interpreting dignity as non-humiliation, Amnon Reichman, *Dignity Abound: The Right to Human Dignity as Membership in the Community of Moral Agents*, 7 LAW GOV. IN ISR. 469, 485–6 (2004) (Heb.).

[83] HUMILIATION, DEGRADATION, DEHUMANIZATION: HUMAN DIGNITY VIOLATED, (Paulus Kaufmann et al. eds., 2011). See also Statman, *supra* note 81; AVISHAI MARGALIT, THE DECENT SOCIETY 149 (1996).

subscribes to this understanding of dignity, as apparent from its characterization of dignity as being infringed by demeaning and stigmatizing legislation.[84] There is currently no agreed-upon determination of when humiliation causes harm to honor and when to dignity. The criterion could be a matter of degree or contingent upon the normative justification of the humiliation. What is clear is that the locus of humiliation highlights the conceptual indeterminacy around the divide between honor and dignity. And that humiliation can be easily explained either through the conceptual framework of honor *or* of dignity.[85]

1.3.3.2 Culture: Honor/Dignity and the East/West divide

As follows from this lack of conceptual clarity, writers have long struggled to distinguish between honor and dignity. This has led some to recognize the cultural and racial influences of the discursive geography of the terms. As Oscar Schachter argued, dignity's intrinsic meaning is "conditioned in large measure by cultural factors."[86] Don Herzog similarly acknowledged a "long-running cultural war" over dignity.[87]

Notably, under the canon paradigm, the source of dignity is rooted in Western culture. According to this view, the West's belief in the universal validity of its norms provided the necessary precondition for the development of dignity.[88] The socio-historical background for the emergence of dignity, it is argued, stems from "the fundamental awareness of the Western Elites since the dawn of modern history" to the potential of mastering the forces of nature, "increasing the power of men to create a new world."[89]

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[84] See discussion above, p. 9-10 of this dissertation.
[85] Kamir, for instance, uses humiliation to describe both honor and dignity, despite her account—according to which the two concepts are converse: compare p. 31–2 with 210, KAMIR, *supra* note 47.
[86] Oscar Schachter, *Human Dignity as a Normative Concept*, 77 Am. J. Int. Law 848–854, 849 (1983).
[87] Don Herzog, *Aristocratic Dignity? in* WALDRON, *supra* note 8, at 107.
[88] Lewis, *supra* note 55.
[89] Arieli, Yehoshua, *supra* note 55 at 6.

The sharp distinction between honor (reflecting pre-modern values) and dignity is in tandem with other Enlightenment-era binaries, along axes of reason/emotion, secularism/religion, and cleanness/dirtiness.[90] These binaries are also rooted in an orientalist paradigm, specifically with the construction of the West as dichotomously opposed to the East, and with the West being the marker of morality, rationality, and modernity.[91] As Edward Said argues, a key part of the systematic discipline by which European culture managed and produced the Orient was the discursive production of the relative strength between East and West.[92]

The exclusionary dimension of dignity manifested in its rejection of animality[93] ought to be similarly viewed through orientalist and colonialist lenses. Colonized and racialized groups have been historically characterized and discursively produced through their proximity to nature—their animality, eroticism, and lack of civility.[94] As so eloquently put by Rosi Braidotti,

> Not all of us can say, with any degree of certainty, that we have always been human, or that we are only that. Some of us are not even considered fully human now, let alone at previous moments of Western social, political and scientific history. Not if by 'human' we mean that creature familiar to us from the Enlightenment and its legacy: "The Cartesian subject of the cogito, the Kantian 'community of reasonable beings', or, in more sociological terms, the subject as citizen, rights-holder, property-owner, and so on."[95]

[90] Dafna Hirsch, "WE ARE HERE TO BRING THE WEST": HYGIENE EDUCATION AND CULTURE BUILDING IN THE JEWISH SOCIETY OF MANDATE PALESTINE 47 (2014) (Heb.)
[91] On the connection between the Enlightenment and Orientalism see AZIZA KHAZZOOM, SHIFTING ETHNIC BOUNDARIES AND INEQUALITY IN ISRAEL: OR, HOW THE POLISH PEDDLER BECAME A GERMAN INTELLECTUAL (c2008). See also pages 14-5 of this article.
[92] EDWARD W. SAID, ORIENTALISM 6 (1979).
[93] Kyle Ash, *International Animal Rights: Speciesism and Exclusionary Human Dignity*, 11 ANIM. LAW 195–214 (2005).
[94] Kay Anderson, *'The Beast within': Race, Humanity, and Animality - Kay Anderson, 2000*, ENVIRON. PLAN. SOC. SPACE, 302 (2000), http://journals.sagepub.com/doi/abs/10.1068/d229 (last visited Oct 31, 2019).
[95] ROSI BRAIDOTTI, THE POSTHUMAN (1 edition ed. 2013).

And—to echo Weisstub's argument—just as dignity came to possess a certain style, so did honor. Honor is often understood as "old-fashioned" at best,[96] or as characterizing backward, "primitive" communities and subjects—mostly Arab, Muslim, and Mediterranean—at worst.[97]

As this section showed, mainstream legal and philosophical discourse has attempted to portray dignity as the essence of the egalitarian, modern West, a discourse that often builds on dignity's antithetical relation to honor, a concept symbolizing pre-modernity and archaism, and which is often attributed to non-Western societies and subjects. The next Part will further develop this discussion, focusing on the case study of Israel, the role dignity and honor had played in forming its racial landscape, and the way in which courts partake in the racialization of both terms.

1.4 The Case Study of Israel

As mentioned earlier, the bilateral feedback between various jurisdictions regarding the meaning and scope of dignity highlights the importance of learning from other countries' experiences. The Israeli case offers a unique opportunity to evaluate the culture wars at the core of dignity. Israel has long been a leading example of dignitarian constitutionalism. Its impact on dignity's place within global constitutionalism parallels that of Germany and Canada as countries championing dignitarian constitutionalism. Israel's utilization of dignity also influences U.S. jurisprudence. For instance, the Israeli Supreme Court's interpretation of dignity, which insists on constitutionally connecting equality and dignity, preceded Justice Kennedy's similar

[96] APPIAH, *supra* note 78 at 178.

[97] MICHAEL HERZFELD, ANTHROPOLOGY THROUGH THE LOOKING-GLASS: CRITICAL ETHNOGRAPHY IN THE MARGINS OF EUROPE 11 (Reprint edition ed. 1989). "[T]he extension of ethnography to the circum-Mediterranean has created a need for exoticizing devices to justify research in what is otherwise a familiar cultural backyard. One of these devices is a complex literature that presents honor and shame as *the* moral values of Mediterranean society […] The nation-state - by its own reckoning, the ultimate symbol and embodiment of modernity - serves as the touchstone against which Mediterranean society and culture acquire their distinctive characteristics, their fundamental otherness, and above all their removal to a more primitive age." See also KATHERINE PRATT EWING, STOLEN HONOR: STIGMATIZING MUSLIM MEN IN BERLIN 133 (2008).

theorization of dignity in the same-sex marriage cases. Furthermore, in Israel, both honor and dignity—conversely conceptualized—are signified by a mutual signifier: the Hebrew word *kavod.*[98] This semantic conflation brings to the surface many of the oft-hidden dynamics between both concepts and allows for a better examination into judicial bias around them both, as this section will show.

Finally, the cultural clash between East and West in Israel is strikingly prominent. Israel's establishment revolved, at least partly, around the hope of bringing the West to the Middle East. Today, this clash is mainly manifested through two defining social rifts: (1) the Jewish/Palestinian rift; (2) and the internal Jewish rift between Ashkenazi Jews (descendants of Jews from European countries) and Mizrahi Jews (descendants of Jews from Arab and Muslim countries). However, while legal analysis of Israel's jurisprudence of dignity fills entire libraries, there is no analysis of this concept from a critical race perspective. The following seeks to fill this scholarly gap.

1.4.1 A Short History of Dignity/Honor in Israel /Palestine

Before examining dignity within Israeli jurisprudence, it is important to situate it within its relevant historical context. While a full and comprehensive analysis of dignity in Israel/Palestine is outside the scope of this paper, the following is mainly meant to provide some necessary background.

The State of Israel was established with the declared intention of serving as "the portion of the rampart of Europe against Asia, an outpost of civilization as opposed to barbarism."[99] Writers have traced the source of the Zionist movement's hostility towards the East in the

[98] The Hebrew word *kavod* also signals "respect" and "glory." It is commonly used in everyday language (for instance, 'I have lost all *kavod* for you,' or 'this person has no *kavod* for his profession'), as well as in legal and religious contexts.
[99] THEODOR HERZL, THE JEWISH STATE: AN ATTEMPT AT A MODERN SOLUTION OF THE JEWISH QUESTION 30 (1943).

cultural dynamics resulting from the rise of the Enlightenment in 18th century Europe, the same cultural and intellectual tradition that birthed the modern concept of dignity.

Western European Jews were generally allowed to integrate into European Enlightenment ideals and culture only as long as they shed their "backward" traditions and moved toward "modernity."[100] The association of Jews with backwardness rested on orientalist views and identitarian binaries that constructed the East as opposed to the West. Many quickly adapted to new Enlightenment ideals, and not long after, the orientalization process moved toward Eastern European Jews,[101] who were similarly depicted as filthy, uncultured savages, even by Western European Jews.[102] Simultaneously, both Western and Eastern European Jews also joined in an orientalization of Middle Eastern Jews, as well as Arab non-Jews, in tandem with the colonization of the non-West.[103]

New meeting points between European Jews, Mizrahi Jews, and Palestinians—resulting from the formation of the State of Israel and waves of Mizrahi immigration to Israel in the 1950s—brought to the surface similar dynamics. Palestinians and Mizrahi Jews now embodied the stereotypes originally used by Christian European Enlightenment thinkers to describe the Jews of Europe two centuries earlier.

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[100] KHAZZOOM, *supra* note 91 at 107. Of course, this process of integration was short-lived, and not long after European Jews were subjected to the mass extermination of the Holocaust.

[101] See STEVEN E. ASCHHEIM, BROTHERS AND STRANGERS: THE EAST EUROPEAN JEW IN GERMAN AND GERMAN JEWISH CONSCIOUSNESS, 1800-1923 (1982) and DAN MIRON, A TRAVELER DISGUISED: A STUDY IN THE RISE OF MODERN JEWISH FICTION (1973).

[102] ASCHHEIM, *Id.* at 14. Notably, not all European Jews responded with assimilation and Westernization processes, but, all in all, as Khazzoom states, even those who sought to merge "new" and "old" nevertheless accepted the binary between East and West, and preferred perceiving themselves as European with Oriental features. KHAZZOOM, *supra* note 91 at 116.

[103] *Id.* at 119. See also Ella Shohat, *Taboo memories, diasporic visions : Columbus, Palestine, and Arab-Jews*, *in* TABOO MEMORIES, DIASPORIC VOICES 201 (2006). Focus specifically the interaction between British-Jewish Solomon Schechter and the Jews of Alexandria.

Zionism's need to present itself as Western explains the marginalization of what was perceived as Oriental, Eastern, or Arab. [104] Importantly, Enlightenment, as an intellectual tradition, associates those who fit its ideals with *moral* advancement, and those who do not with *moral* retardation and backwardness.[105] Thus, within the racialized space of morality in Israel/Palestine, the tension between honor and dignity plays an important function. A closer look at the role honor and dignity played in historic Palestine (and later Israel/Palestine) reveals how the West, seeking to define itself oppositionally to the East, maintained its relative moral strength even through a dramatically changing moral framework.

During the rise of the Zionist movement, at the turn of the 20th century, honor was heavily espoused by European Zionists.[106] As theorized by Orit Kamir, in the wake of Israel's War of Independence in 1948, Arab and Mizrahi honor began to be seen as violently patriarchal.[107] Honor's positive values were abandoned—at least declaratively—in favor of dignity. Honor suddenly became a marker for moral backwardness.[108] This "allowed veteran

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[104] This Article suggests applying Ian Haney López's racial model to this process of "rolling racialization": from Europeans toward European Jews, and toward the Orient. According to López, the construction of race is always the result of the initial investment in whiteness: "Whiteness exists as a pole around which revolve imaginary racial meanings." IAN HANEY LÓPEZ, WHITE BY LAW 10TH ANNIVERSARY EDITION: THE LEGAL CONSTRUCTION OF RACE 130 (Revised and Updated: 10th Anniversary ed. edition ed. 2006). Thus, Enlightenment-era ideals and binaries, which emerged from the construction of the relational East/West and the "self" of white European Christians, created a vortex of racial identities, constantly shifting and changing but always revolving around the white European core.

[105] One important work that highlights this dynamic is DAFNA HIRSCH'S WE ARE HERE TO BRING THE WEST. Hirsch's research explores the historic promotion of hygiene during the British Mandate by Western Jewish doctors, who saw it as their mission to "civilize" the people in Palestine and to "clean" Palestine itself. Hygiene, according to Hirsch, was employed as part of a grand cultural project aimed at "Westernizing" the identity of the Jewish collective in Palestine. Part of this identity-construction project revolved around the ability to construct the West as inherently clean, civil, and moral, and the East as inherently dirty and barbaric. See Hirsch, *supra* note 90, at 37, 252-3.

[106] Dafna Hirsch, *Hygiene, dirt and the shaping of a new man among the early Zionist halutzim*, 18 EUR. J. CULT. STUD. 300–318, 305 (2015). European Zionists wished to associate themselves with the aristocratic ideal of the "Man of Honor." The Zionist movement itself revolved around honor, and the need to "cure the disease" of femininity among Jewish men. See KHAZZOOM, *supra* note 91 at 33. Upon their arrival in British Palestine, still placing a great value on honor, European Zionists discovered that both the local Palestinians and Mizrahi immigrants had their own honor discourses.

[107] KAMIR, *supra* note 47 at 90.

[108] *Id.* at 89. Kamir is currently the only scholar attempting to explain the demise of honor in European Zionist culture, Orit Kamir, *Zionist and Palestinian Honor and Universal Dignity in Israeli Cinema*, 15 COMP. SOCIOL. 639–668, 646, see text in footnote 12 (2016).

Israelis of European descent to not only differentiate themselves from the new immigrants from Arab countries, but to also disassociate themselves from any identification with honor mentality . . . and deny its manifestations in their own culture."[109]

Israeli dignity was accordingly accepted as having sweeping legitimacy,[110] both prior to its enactment as a constitutional right, and most certainly after.[111] While Israel never actually eliminated all traces of honor from its legal discourse—it is still found in its blackletter law—[112] it is nevertheless mostly socially attributed to Arab or Mizrahi culture.[113]

The conceptually contrasting images of honor and dignity, and the way both are aligned perfectly with the Orientalist logic of modern/primitive, render Israeli dignity a site of orientalist and racial production. A racially conscious legal analysis of the concept of dignity invites an investigation into how cultural narratives regarding honor and dignity have racialized the jurisprudence of *kavod*, and subsequently, the jurisprudence of dignity.

1.4.2 Honor and Dignity in Israeli Courts: Mechanisms of Racialization

Robert Cover stated that "[l]egal interpretation takes place in a field of pain and death."[114] By that, Cover meant to highlight the material implications of acts of judicial interpretation: "A judge articulates her understanding of a text, and as a result somebody loses

[109] KAMIR, *supra* note 47 at 90.
[110] As apparent from the enactment of Basic Law: Human Dignity and Liberty, 5752, SH No. 1391 (Isr.).
[111] Ariel L. Bendor & Michael Sachs, *The Constitutional Status of Human Dignity in Germany and Israel Symposium: Human Dignity and the Criminal Law*, 44 ISR. LAW REV. 25–62, 29 (2011).
[112] See, for instance, Knesset Television Broadcasting Law (Amendment 6) 5776-2016, 2575 LSI 1174 (2016) (Isr.), Flag and Emblem Law 5709-1949, SH No. 8 p. 37, as amended (Isr.), etc.
[113] Through expressions such as "Moroccan honor" or "Morocco-knife" (meaning in slang, "If you mess with a Moroccan, you get knifed"), the "problem" of honor is framed as being "imported" with Mizrahi immigration. KAMIR, *supra* note 47 at 90. See for instance a 2000 column by Uri Avnery, a seminal figure in the Israeli left about the prominent Mizrahi politician David Levy: "There are junkies of many kinds. Heroin junkies, Hashish junkies, Nicotine junkies, Alcohol junkies. David Levy is an honor junkie." See Uri Avnery, *The Lost Honor of David Levy*, GUSH SHALOM (Feb. 28, 2000), http://zope.gush-shalom.org/home/en/channels/avnery/archives_article81.
[114] Robert M. Cover, *Violence and the Word*, 95 YALE LAW J. 1601–1629, 1601 (1986).

his freedom, his property, his children, even his life."[115] This section examines judges' interpretation of texts (written and spoken) involving the concept of *kavod,* in order to shed light on this concept's interpretations and the consequences of these judicial acts.

Notably, while this section discusses racial categories in Israel extensively, it deliberately avoids any ontological statements regarding individuals or groups, who they are, or what may "explain" them. Instead, this section trains its critical gaze upon the judicial system and the racialized dynamics that operate within courtrooms. In other words, rather than exploring, for instance, the "nature" of Mizrahi Jews and the legal system's response to this presumed nature, it focuses on the legal system itself and on racialization as its by-product.

Much like the global construction of dignity, the judicial construction of dignity in Israel has always revolved around the enlightened, modern West. Chief Justice Aharon Barak famously stated that the content of dignity ought to be determined "according to the views of the enlightened public in Israel."[116] This determination, along with multiple judicial statements locating the idea of Enlightenment with the West,[117] *a priori* situated Israeli dignity as a Western value. This "enlightened public" trope helped shape the converse concept of those associated with darkness: non-European "others."[118]

This section analyzes several legal cases involving Mizrahi Jews, Palestinian citizens of Israel, and Ashkenazi Jews,[119] selected for their ability to demonstrate the dynamics of

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[115] *Id*.

[116] HCJFH 3299/93 Wechselbaum v. Minister of Defense, IsrSC 49(2) 195 (1995), as well as Aharon Barak, *Basic Law: Freedom of Occupation*, 2(1) LAW & GOV. IN ISR. 545 (1994). Barak later regretted this statement in an interview, see Ze'ev Segal and Ariel Bendor, *Coming Full Circle*, HAARETZ (Mar. 27, 2009), http://www.haaretz.co.il/misc/1.701388.

[117] See, for instance, many cases where courts examine the standards of "enlightened western countries," see AH 2401/95, Nachmani v. Nachmani, 50(4) PD 661 (1996) (Isr.), CA 1915/91, Yaacovi v. Yaacovi 49(3) PD 529 (1995) (Isr.).

[118] Ronen Shamir, *The Politics of Reasonableness*, 5 THEORY AND CRITICISM 7, 13 (1994).

[119] I classified the parties as Mizrahi/Ashkenazi/Palestinian based primarily on their names, and thus limited myself to cases where names were distinctively classifiable. While it is possible that a non-Mizrahi will have a Mizrahi name,

racialization surrounding honor and dignity.[120] I analyze these cases deploying Critical Race Theory and critical legal methods, as well as discourse analysis and close reading.[121] Behind these methods lies the assumption that by analyzing the language, syntax, choice of words, repetitions, contradictions, and so on within a text, we may better understand it. Close reading offers a sustained and detailed interpretation of segments from a text, through which meaning may be retrieved.[122] In the context of my argument, utilizing close reading methods may provide a window into judges' and legal parties' unchallenged common sense and worldview, and the socio-cultural apparatus affecting both. It may also illuminate how such a socio-cultural apparatus has racialized the concept of dignity in Israeli adjudication.

Given that legal databases in Israel do not classify by ethnicity/race, I was mostly limited to a case-by-case method. In addition, analysis of legal cases requires distinctive scrutiny, as

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under an understanding of race as performative, one's "passing" as Mizrahi is sufficient. For an analysis of Mizrahi identification and the importance of names, see TALIYAH SAGIV, ON THE FAULT LINE: ISRAELIS OF MIXED ETHNICITY (2016). See also LaborA (TA) 3816-09 Malka v. Israeli Aviation Industry Ltd. (2013). A clarification is required regarding my juxtaposition of Mizrahi Jews and Palestinians in this article. The material and legal realities of Mizrahi Jews and Palestinian citizens of Israel are profoundly different. As Mizrahi Jews do not threaten Israel's Jewish majority (indeed, they contribute to it), they are not seen as a threat to the state's self-declared Jewish character. However, discrimination against Mizrahi Jews *is* influenced by anti-Arab and anti-Palestinian sentiment. Mizrahi Jews have historically represented the "Arabs from within" for the Zionist movement, threatening its presumed homogeneity (see Ella Shohat, *The Invention of the Mizrahim*, 29 J. PALEST. STUD. 5–20, 7 (1999)). Understanding Israel through the Oriental/Occidental paradigm exposes the need to also acknowledge spaces where Mizrahi Jews and Palestinians occupy similar positionalities, and how meaning-making mechanisms, such as racialization, configure them along similar lines. In the context of *kavod*, socio-cultural narratives regarding honour and dignity certainly conflate Mizrahi Jews and Palestinians under the umbrella of "Arab" honour mentality. Thus, and given that my objective with this article is to understand the racialization of *kavod*—rather than the racialization of Mizrahi Jews and Palestinians—I discuss these groups jointly.

[120] I identified the cases via searches of the three major Israeli legal databases (Nevo, Takdin, and Pador Legal Databases (by subscription, in Hebrew). employing keywords and phrases such as "*kavod*," "my *kavod*," "humiliation," or "I was humiliated." I determined whether a judge was interpreting *kavod* as honor or as dignity based on the semantic field she or he used. Therefore, when a discussion of *kavod* was expressed through terms such as social status, insult, or patriarchal values, I usually classified the word as signaling honor; and when the discussion was developed alongside terms such as autonomy, humanity, or *k'vod ha'adam* (human dignity), I classified it as signaling dignity.

[121] For discussion of the critical interpretation of legal cases see Richard K. Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. LAW REV. 543 (1988); for a specific discussion of Critical Race theory case analysis and methodology see Richard A. Jones, *Philosophical Methodologies of Critical Race Theory*, 1 GEORGET. J. LAW MOD. CRIT. RACE PERSPECT. 17 (2009).

[122] FRANK LENTRICCHIA & ANDREW DUBOIS, CLOSE READING: THE READER (2003). For one primary example of close reading see Jacques Derrida, *Ulysses Gramophone: Hear Say Yes in Joyce*, *in* ACTS OF LITERATURE 253 (1992).

their authors (judges and justices) are often careful to conceal what they recognize may potentially be perceived as problematic.[123] Accordingly, my findings are intended specifically to illuminate several striking racial dynamics at play within the honor/dignity space, and to analyze the socio-legal conditions that enable these dynamics.[124] By doing so, this Article hopes to lift the veil of racial neutrality currently covering the jurisprudence of dignity, and to expose it as influenced by ethnic and racial stereotypes while reciprocally reaffirming these stereotypes. These cases, taken in the aggregate, paint a clear picture establishing this Article's argument. As will become apparent, each of the mechanisms discussed portrays a different level of culpability on the part of judges. Some mechanisms are birthed from a complex non-racial dynamic that nevertheless has racial implications, while others are the result of direct stereotypes and judicial bias. However, my claim is not intended to illustrate judges' culpability in the racialization of honor and dignity, but only to emphasize that such racialization has long existed.

Four main strategies of racialization are evident from the cases discussed next: first, the legal grounding of dignity as Western through judicial interpretation of non-Western subjects' usage of *kavod*; second, legal incentives for non-Western subjects to present honor narratives within courtrooms; third, scapegoating, i.e., the projection of honor onto non-Western, imagined subjects; and fourth, judicial moral contempt for honor narratives.

1.4.2.1 Misinterpretation of non-Western dignity as honor

This section examines judicial interpretations of *kavod* narratives presented by Mizrahi and Palestinian individuals. Specifically, it focuses on two types of narratives: narratives that should have been interpreted as dignity-based, and narratives that reject the honor/dignity

[123] Stephen Robertson, *What's Law Got to Do with It? Legal Records and Sexual Histories*, 14 J. HIST. SEX. 161–185 (2005).
[124] Notably, this Article does not argue that in every case, or even in most cases, the interpretation of *kavod* was influenced by race or racial stereotypes.

dichotomy completely. Experiences of humiliation provide the main channel for *kavod* narratives in Israeli courts. Echoing my earlier point, humiliation often provides judges with the opportunity to employ discretion when categorizing *kavod* narratives as revolving around either honor or dignity. A racial reading of these interpretations could provide a framework for judges' interpretive choices.

Doe v. the State of Israel was the criminal appeal of a rape conviction overturned by the Israeli Supreme Court in 2010.[125] The alleged victim, a 17-year-old Mizrahi girl,[126] who was a virgin at the time of the incident, accused her 40-year-old employer of rape. Shortly thereafter, she documented the events in her diary, the interpretation of which was subject to disagreement between the District and Supreme Court. She wrote,

> I never thought this would happen to me. I never thought this is how my first time would be. With pain, force, without love, to someone I hardly know. Today I am 17 years and 5 months old, no longer a virgin. I am someone else. I don't want to say I am humiliated, but the opposite is not true either. . . . I hate you for doing this to me. I hate the fact that you exist and that you keep existing as if nothing happened. . . . I believe you don't even care, but my *kavod* is lost, you ruined my life, I wish I could've killed you. . . . Every day I will live with the fact that you were my first. My first, with force. I did not agree for this to happen, you decided on your own, and one day you will pay for this . . . . [127]

While the District Court that convicted the defendant of rape focused on the multiple references to force and lack of consent, the Supreme Court—which eventually reversed the conviction on appeal—chose to focus specifically on the word *kavod*, used only once in the diary.[128] The Court states, "The emotional turmoil the complainant felt over the loss of her virginity fits her testimony . . . where she said, 'I realized that I was no longer a virgin and that

[125] CA 1651/10 Doe v. Israel (Nov. 08, 2010) Nevo Legal Database (by subscription, in Hebrew) (Isr.).
[126] Her ethnicity was verified by the defendant's lawyers. I extend my thanks to Avi Himi and Moshe Weiss for their help in verifying this key detail.
[127] Doe v. Israel, *supra* note 125, at 30.
[128] She also mentioned *kavod* several times during her testimony.

he took my *kavod* which I had kept up until then.'" The Court further observed that "[t]he complainant felt very early that a significant and essential part of her *kavod*—which is, in her view, her virginity—was lost forever. The result of this recognition was a difficult psychological experience, to the point of constructing a demonic story and attributing the execution of intolerable acts to the appellant."

According to the Court, because the complainant tied her *kavod* to her virginity in a manner that echoed ideas of sexual honor, she was not seen as using *kavod* as dignity. Perhaps it goes without saying, but rape most evidently harms the victim's dignity. It objectifies the victim, violating their most basic and intimate sphere of being. Thus, there is no doubt that the complainant's use of *kavod* in the context of describing a forced and painful sexual assault could have also signaled dignitarian harm, producing a narrative where honor and dignity may be harmed simultaneously. However, once the Court associated her with the usage of honor language, she was not seen as sharing enlightened values such as dignity. The converse binary construction of honor versus dignity did not allow the complainant to exist on both sides of this imagined divide. This divide creates an inherently incoherent state for those who are "blurring the lines between dignity and honor."[129] The interpretive act could not maintain this perplexity, curing it by placing the complainant on one side of the equation only—that of honor. Furthermore, the use of honor language assigns an additional stigma of deceit to its speaker: the girl was seen as fabricating her testimony to construct a "demonic story."[130]

The State v. R.[131] illustrates a similar dynamic and might explain this point more vividly. In this case—in which the court similarly acquitted a defendant of sexual harassment—the

[129] Dana Lloyd, *Paradoxes of Dignity in Israel/Palestine*, LAW CULT. HUMANIT. 1–11, 11 (2016).
[130] Doe v. Israel, *supra* note 125, at 33.
[131] CrimC (Hi) 17098-01-11 Israel v. R (Jun. 27, 2012) Nevo Legal Database (by subscription, in Hebrew) (Isr.)

interpretation of the complainant's usage of *kavod* played a key role. The complainant, a Palestinian Israeli citizen who worked as a hotel maid, claimed she was sexually harassed by the hotel manager, in a manner that humiliated her and harmed her *kavod*. She shared the incident with her husband, who called the manager numerous times to request financial compensation and settle the issue outside of court. The woman further stated in front of several witnesses that she wanted money as compensation for the damage to her *kavod*, and in one instance was cited as saying that undoing the harm to her *kavod* was more important than the money itself.

Interestingly, the court saw her statements regarding the financial compensation requirement and her wish to restore her *kavod* as contradictory, citing them alongside other discrepancies in her testimony, and framed the financial demand as extortion. The woman's claim that her *kavod* was damaged within the context of sexual harassment—a scenario commonly associated with dignitary harms—was never analyzed as a claim concerning dignity and was not deemed worthy of attention.

Among the key testimonies upon which the court based its acquittal was that of one of the hotel's owners, also a Palestinian citizen of Israel.[132] The witness, Mr. Afifi, described one of the phone calls from the husband to the hotel manager asking for money,

> And then this number-tossing conversation starts [*the husband asks for money*]: Have you made up your mind? Haven't you? And then [the manager] said to him 6,000, so the other guy tells him no way, stuff like that. I mean, I don't recall exactly the conversation, but I, *my impression was that such a thing is not acceptable in the Arab society to negotiate on an offense, touching, rape, or anything like that*. I know the mentality, I come from this culture. I know how a person would act. He won't even talk to him, he'll try and chase him, do other things. I mean, it's not about money in such situations.

[132] The court mentions that it presents arguments for the hotel manager's acquittal from the least to the most persuasive. The testimony of the hotel owner is judged to be very persuasive, positioned second to last, *id*, at 50. (emphases in original text).

The fact that the complainant and her husband, by demanding financial compensation, acted outside the honor culture stereotypically associated with Arab mentality was used in the case as an argument *against them*. Their stepping outside their assigned racial category and the traditional honor code, which would have expected the husband to "chase" the hotel manager, did not prompt the court to position their case within the realm of dignity. Instead, the court concluded that their behavior was simply incoherent. This led the court to believe that the plaintiff's real goal was extortion. Within this interpretive racialized space, the husband's role can exist either in the framework of "honor killings" or in that of "extortion." Furthermore, the association of the complainant and her husband with the honor discourse is again coupled with doubt regarding their truthfulness and with a stigma of deceit. Once they were unilaterally associated with the honor mentality, their place on the moral spectrum was downgraded, and with that downgrade came other negative associations.

Analysis of these cases indicates how conceptual vagueness regarding dignity and honor creates an interpretive judicial space where racial narratives tilt the meaning of *kavod* from dignity to honor.

1.4.2.2 Incentives for non-Western subjects to use honor arguments in court

One of the earliest (albeit short lived) incentives for Mizrahi Jews and Palestinians to present themselves in accordance with honor-based racial stereotypes was a legal narrative this article refers to as the "primitiveness defense," which gained some popularity during the 1950s and 1960s. The "primitive" category was historically employed as a way to evaluate witnesses,[133] or to decide custody disputes,[134] and also appeared in tort law as a way to anticipate

[133] CA 363/61 Nachman v. Israel 26 PD 2208 (1961) (Isr.); CrimC (Jer) 386/63 Attorney General v. Kimel, 42 PM 70 (1964) (Isr.); CrimC (TA) 642/60 Attorney General v. Zevegalsky 28 PM 167 (1961) (Isr.).
[134] DC (originating motion) (TA) 2289/58 Gabay v. Gabay 19 PM 231 (1959) (Isr.)

certain behaviors.[135] This section illustrates such court-created legal incentives for non-Western subjects to present honor narratives in court.

A search of the term paints a very clear image regarding which legal subjects are overwhelmingly referenced, or reference themselves, as primitive.[136] Out of 98 direct references to primitiveness, either by the court or by the parties themselves, 67 (~68.3 percent) of the subjects were either Mizrahi or Palestinians, and only in two instances (~2 percent) were the subjects Ashkenazi.[137] This suggests that the discourse around primitiveness in Israeli courts mostly concerns non-Western Jews. While in many cases (such as custodial disputes), one's identification or classification as "primitive" works against them,[138] there are several instances in which such classification was used by the party him/herself to diminish guilt[139] or to obtain other benefits in the courthouse.[140] Such a possibility creates an incentive for Mizrahi Jews and Palestinians to utilize this self-characterization for their own benefit.

Instances where Mizrahi Jews and Palestinians bring forth such arguments themselves are particularly interesting, as they illustrate a dynamic where individuals actively participate in their

[135] CA 350/77 Kitan Ltd. v. Weiss (May. 20, 1979) Nevo Legal Database (by subscription, in Hebrew) (Isr.); DC (NII Appeal) 44/67 NII v. Alush (Dec. 11, 1967) Nevo Legal Database (by subscription, in Hebrew) (Isr.).

[136] The search was conducted in the Nevo Legal Database, the main legal database in Israel. The Nevo database has exclusive distribution rights to publish official court decisions. See explanation from the Library of Congress, *Legal Research Guide: Israel*, LIB. OF CONGRESS (last visited Jul. 23, 2017): www.loc.gov/law/help/legal-research-guide/israel.php.

[137] In the other 29 cases (~29.5 percent), I was unable to racially classify the subjects, or their identity was confidential. To gather this data, I searched for the Hebrew word for "primitive" (in both male and female forms) with no specific time window in the Nevo Legal Database. The search produced 386 results. Out of those, I isolated 333 relevant cases (clearing double results, results from legal documents that were not cases, and suits against a company named "Primitive," as well as quotes that were neither by the parties nor the court). Out of these results, I also omitted 212 cases where "primitive" did not refer to people (a primitive system, a primitive method etc.), and in a very few occurrences, to a group of people, or a hypothetical subject. I classified the parties as Ashkenazi/Mizrahi/Palestinian/other according to the name.

[138] Gabay v. Gabay, *supra* note 134.

[139] CrimAH 4342/97 Israel v. El Abid (Apr. 28, 1998) Nevo Legal Database (by subscription, in Hebrew) (Isr.); CrimA 50/64 El-Navari v. Attorney General 18(4) IsrSC 73 (1964) (Isr.); DC (BS) 77/69 Ohana v. Israel 70 PM 22 (1969) (Isr.)

[140] CA 164/60 (originating motion 506/60) Malka v. Revivo 17 PD 2099 (1960) (Isr.); Originating Motion 593/68 Shimon v. Avraham 22 PD 875 (1968) (Isr.).

own racialization. Such arguments further fuel racial stereotypes revolving around "primitive honor" by producing Mizrahi and Palestinian subjects who voluntarily adhere to racist stereotypes regarding the "honor-chasing Arab," whether a Mizrahi Jew or a Palestinian.

In a 1967 workplace accident case, *National Insurance Institute (NII) v. Alush*, the Mizrahi male plaintiff was verbally humiliated by his manager. Enraged, he slammed his hand down on the table, injured himself, and subsequently sued for compensation from the NII. The magistrate's decision centered on whether the plaintiff's hand gesture was voluntary. If it was, the plaintiff's claim for compensation would be denied. If the injury stemmed directly from the humiliation, however, it would be recognized as a workplace accident. The court's decision states,

> From the plaintiff's statement, it appears he did not want, or intend, to hit the table or shout at his manager, and did not even realize at the time, or immediately afterwards, what he had done. He lost his self-control as his mental awareness was blurred by the rage that filled him. This is not surprising: *here we have a primitive man, hot-tempered and easily enraged, very sensitive to every minor or imaginary harm to his kavod or professional pride.* . . . Once the plaintiff lost his temper, he obviously lost control of his motor movement due to physiological–psychological reasons, due to a rise in blood pressure, and/or in the amount of internal secretions into his blood from the endocrine glands, and/or the involuntary reactions of his nervous system, and he thus should not be considered as having intended to hit the table.[141]

On this basis, the court awarded the plaintiff compensation. Despite the case being overturned on appeal, it nevertheless portrays a certain type of honor claim associated with primitiveness that was discussed, and at times accepted, by the courts. The loss of self-control in response to harm of one's honor was associated with the plaintiff's primitiveness and became a medical, scientific fact. Clearly, the scientific discussion was assumed by the court, as evident from the use of "and/or" when describing physiological possibilities for plaintiff's state. This did

[141] *Id*, at 10 (emphasis added).

not prevent the court from determining that the plaintiff's primitiveness was natural, biological, and uncontrollable.

Subsequently, we witness over the years several attempts by defendants and plaintiffs to present themselves as primitive, hot-tempered, easily insulted, or lacking control over their actions. While most attempts were unsuccessful,[142] they were brought predominantly by Mizrahi Jews and Palestinians. Indeed, it appears, the primitiveness defense did not present with the same coherence when presented by Western (that is, Ashkenazi) defendants or plaintiffs. With fewer legal successes over time, this defense inevitably lost its power and became rarer. This dynamic provides an important example of the courts' power in shaping the legal narratives with which they are presented, and the racial meanings these narratives produce.

Starting in 2000, with the enactment of the *Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Act*—a law that opened the gates to many discrimination lawsuits, many of which revolved around nightclub entrance selection processes—a new, similar dynamic arose. In these cases, plaintiffs were incentivized to present honor-related arguments, thus again taking part in the process of self-racialization and, in turn, in the racialization of the space of dignity/honor.

Selective entrance to nightclubs is a common practice in Israel. While discrimination against Mizrahi Jews has long been practiced in multiple arenas, selection in the case of nightclubs became a hotly contested scenario, perhaps due to the high visibility of the discriminatory act and the rather straightforward procedure via which it can be proven.[143] Since 2000, Mizrahi Jews have repeatedly made use of this Act to sue nightclub owners who have

[142] CA 29/79 Salman v. Israel, 34(2) PD 118 (1979) (Isr.); CA/66 Peretz v. Helmut, 20(2) PD 337 (1966) (Isr.); CrimC (BS), for a relatively recent failed attempt, see 952/03 Israel v. Elharar (Jan. 4, 2005) Nevo Legal Database (by subscription, in Hebrew) (Isr.).

[143] It is easy to see who enters and who does not, and the decision is usually based on appearance alone.

denied them entry to their establishments. Further, Mizrahi Jews have been the primary population making use of this Act.[144]

While the Israeli constitutional right to equality traditionally derives from the right to dignity,[145] suits brought within the Act's framework require only a demonstration that one has been treated unequally. Proof of harm to one's *kavod* is not required to establish an infringement of the right to equality under the Act. The same is true when determining compensation. Section 5 of the Act states that compensation of up to 50,000 ILS (approximately $13,000 USD) may be awarded without proof of damage. The law itself does not once mention *kavod* or humiliation. Notably, many judges handling these lawsuits were particularly interested in the humiliation suffered by the plaintiffs, *de facto* reading a humiliation requirement into the law's text.[146] The type of humiliation in which judges were interested is highly associated with common understandings of honor. In a 2013 case in which two Mizrahi men were denied entry to a nightclub,[147] for instance, the judge emphasized her strong impression of the humiliation suffered by the plaintiffs: "I was convinced by the reliability of the plaintiffs' version of the humiliating situation of others being chosen over them to enter the club, . . . and I was particularly struck by the harm and humiliation they experienced in this event." The judge repeats this impression later when determining compensation.[148] In *Kay v. Shraga*,[149] the appeal of the aforementioned case,

[144] Bitton shows that 69 percent of the suits brought in the framework of this law are presented by Mizrahi Jews, mostly against nightclubs. Further, 79 percent of discrimination suits against nightclubs are brought by Mizrahi Jews. Yifat Bitton, *Mizrahim and the Law: Absence as Existence*, 41(3) MISHPATIM 455–516, 488 (2011).

[145] A constitutional protection of equality was never written into any of Israel's Basic Laws. Instead, this right was interpreted by the Supreme Court as included within the constitutional protection of the right to dignity. Therefore, humiliation was utilized to link discrimination with the infringement of dignity. See, for instance, HCJ 4541/94 Miller v. Minister of Defense [1995] IsrSC 49(4) 94 (Isr.).

[146] It is important to note that the Supreme Court rejected the idea that humiliation should be a factor in determining discrimination. See Justice Danziger's opinion in PerCA 8821/09 Prozansky v. Good Night Productions Ltd. (Nov. 16, 2011) Nevo Legal Database (by subscription, in Hebrew) (Isr.).

[147] CC (Rishon LeZion) 39454-08-10 Shraga v. Kay Entrepreneurship Ltd., 12(37) Pador 683 (2012) (Isr.)

[148] *Id*, at paragraph 37.

[149] CA (Merkaz) 39345-07-12 Kay Entrepreneurship Ltd. v. Shraga (Jan. 09, 2013) Nevo Legal Database (by subscription, in Hebrew) (Isr.)

the appellate court references the trial court's impression of the plaintiff's humiliation as one of the reasons not to overturn its decision. Moreover, in *Shiran v. Ramot Menashe,*[150] the court goes as far as to argue that compensation should be determined according to the *degree of humiliation* suffered by the plaintiff.

When courts opt to place emphasis on one particular outcome of experiencing discrimination, employing it to grant legitimacy and determine compensation, they gradually shape the very narratives to which they are exposed. Plaintiffs are incentivized to adapt their stories to what courts have indicated they are interested in hearing. As Leigh Goodmark writes, "[L]awyers organize their cases around these stock characters and stories, seeking to situate their clients' narratives within the skeletons of past successes."[151] The brief lifespan of the 'primitiveness defense' provides a good example of these dynamics.

The type of humiliation such stories generate—and which most impress judges—is associated with common understandings of honor, not dignity. First, the humiliation is public. Judges often mention the fact of being *seen* when discriminated against as part of the humiliation suffered by plaintiffs. Second, one's social position is at stake. "It is no wonder," one judge writes, "that such behavior of the defendants would provoke anger and insult from one who was unlawfully discriminated against *in front of his acquaintances who came with him and other people who were present,* and thus would cause him humiliation and harm to his *kavod*."[152] In another case, the judge finds, "[The plaintiffs] suffered a harsh experience of rejection and humiliation which radiates to one's perception of his or her *status in the society* in which they

[150] CA (Hi) 51160-06-11 Shiran v. Ramot Menashe, (Jan. 25, 2012) Nevo Legal Database (by subscription, in Hebrew) (Isr.)
[151] Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman—When She Fights Back*, 20 YALE J. LAW FEM. 75, 115 (2008).
[152] Shiran v. Ramot Menashe, *supra* note 150, at 14 (emphasis added).

lived."[153] Third, the focus on emotional harm, and specifically on emotions such as "anger and insult," similarly guide the reader to the semantic realm of honor rather than dignity.

Strikingly, Yifat Bitton highlights a number of nightclub cases in which courts had offered plaintiffs the alternative remedy of being allowed entry to the discriminatory club. She describes these proposed settlements as pseudo-*sulh* rituals—an Arab-Islamic practice of conflict resolution, often utilized to solve disputes over "honor crimes," and to preserve the honor of both parties.[154] Given the strong link between *sulh* rituals and honor, these proposed settlements again stereotypically locate the harm that plaintiffs have suffered in the realm of "Arab honor," rather than in human dignity.[155]

Legal incentives for non-Western subjects to present honor narratives should be understood as one of the mechanisms that racialize both honor and dignity. Such incentives have resulted in a certain Mizrahi and Palestinian narrative gaining coherence in the courtroom: that of the easily insulted, honor-chasing Mizrahi/Arab man. As a result, a facade of naturalness is granted to this stereotype, legitimizing and reinforcing it at the same time.

1.4.2.3 Racial scapegoating: projection of Western honor onto non-Western subjects

This section explores and presents a mechanism this Article labels as "racial scapegoating," characterized by the projection of problematic Western manifestations of honor

[153] CC (TA) 43168/05 Zadok v. Sabach Slush Ltd. (Sep. 26, 2009) Nevo Legal Database (by subscription, in Hebrew) (Isr.), at 15 (emphasis added). Similar framings exist in other cases: "The plaintiffs were humiliated in front of everybody," see SCC (Small Claims) 3422-11-15 Zahi Moshe v. Kibbutz Kabri (Oct. 13, 2016) Nevo Legal Database (by subscription, in Hebrew) (Isr.); "The discriminatory event was not short … and led to an embarrassment and humiliation of the plaintiffs in front of the crowd of passengers." CC (Rishon LeZion) 1230-07-13 Abu Smit v. IsraAir Ltd. (Sep. 21, 2015) Nevo Legal Database (by subscription, in Hebrew) (Isr.); "I was convinced that the plaintiff suffered aggravation due to him being humiliated, shocked, and embarrassed in front of a crowd or people—some strangers and some known to him…" SCC (Small Claims) 26703-06-14 Nizri v. Hai-Gad Ltd. (Sep. 24, 2015) Nevo Legal Database (by subscription, in Hebrew) (Isr.).

[154] See George Emile Irani, *Apologies and Reconciliation: Middle Eastern Rituals*, *in* TAKING WRONGS SERIOUSLY: APOLOGIES AND RECONCILIATION 132, 138 (Elazar Barkan & Alexander Karn eds., 1st Edition ed. 2006).

[155] *Absence as Existence*, *supra* note 144, at 504.

onto imagined Mizrahi or Palestinian subjects. This mechanism is not strictly judicial, but it demonstrates the discursive apparatus that racializes the concept of honor as revolving around an alleged "Arab" mentality.

In *Sofer v. Abergil*, a defamation suit brought by a Mizrahi man, the plaintiff argued that the defendants claimed he was gay and that he had "had sex with three ni***rs."[156] In its decision to award compensation for the defamation, the court writes,

> Love for mankind and an optimistic world view cannot live hand-in-hand with a statement according to which a young bachelor is said to have had sex with three ni***rs and drinks their sperm. Such 'humor' can cause its object severe damage and stick with him as if an irremovable stain. Among certain social groups (and mainly in Mizrahi societies), this is a real mark of disgrace.

This statement, and particularly its reference to Mizrahi Jews' sexual conservativeness and backward attitudes, is presented by the judge as fact, without any need for proof or expert witness testimonies.[157] Such racial truism may be contrasted with an opposite statement from a different case, that "[n]o one disputes that in this modern age, in Western society, free sexual activity . . . may be legitimate."[158] The generation of diametrically opposed racial "truths" in these cases is achievable precisely *because* these statements are presented as self-evident and uncontestable. Notably, the trope of sexual openness/closeness is often utilized as part of orientalist discourse comparing East and West.[159]

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[156] CC (BS) 9005/99 Sofer V. Abergil (Apr. 02, 2001) Nevo Legal Database (by subscription, in Hebrew) (Isr.). The Hebrew word he uses is *kushim*, an offensive term when used in slang as a racial slur.
[157] For a critical examination of judicial knowledge, see Menachem Mautner, *Common Sense, Legitimacy, Coercion: Judges as Narrators*, 7, 25 PLILIM 11 (1998) (Heb.).
[158] CrimC (Tiberias) 1088/01 Israel v. Yonatan (Apr. 30, 2003) Nevo Legal Database (by subscription, in Hebrew) (Isr.).
[159] LAURA NADER, CULTURE AND DIGNITY: DIALOGUES BETWEEN THE MIDDLE EAST AND THE WEST 62 (1 edition ed. 2012); SABA MAHMOOD, POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT (With a New preface by the author edition ed. 2011).

The excerpt cited from *Sofer* is interesting because, despite maintaining a guise of coherence,[160] it seems to do two opposite things simultaneously. On the one hand, it starts with a conservative statement regarding sexuality, according to which "love for mankind" is incompatible with saying that a man is having sex with Black men. The labeling of homosexuality as a source of shame and humiliation, and heterosexuality as a source of honor and pride, reflect the court's heteronormativity. It further reinforces restrictions on speaking about homosexuality in public, pushing it back to the metaphorical closet.[161] In this case, the court's heteronormativity intersects with ideas regarding racial purity, which sensationalize interracial sex as well as position it as being defamatory. Interracial homosexual sex is regarded in the above excerpt as so obscene that it conflicts with "love for mankind." Mankind—that is, humanity itself—is situated here as heterosexual and white.[162]

On the other hand, and despite this display of conservative white heteronormative views, the court moves on to situate another group—Mizrahi Jews—as the designated "backward" community, not enlightened enough to accept such sexual acts. Mizrahi societies, it is argued, are especially prone to stigmatize gay sex with Black men. Imagined Mizrahi subjects embody a site where primitiveness may be projected. By placing conservative values on the shoulders of the imagined, racialized, Mizrahi subject, Israeli society can retain its conservative sexual views while maintaining an enlightened image, achieved through the act of othering and differentiation. "They" are primitive; thus, "we" are not. Concepts of Enlightenment and moral superiority are

[160] On the importance of coherence in adjudicative narrative-building and how it may be used (or abused), see Jonathan Yovel, *Running Backs, Wolves, and Other Fatalities: How Manipulations of Narrative Coherence in Legal Opinions Marginalize Violent Death*, 16 LAW LIT. 127–159 (2004).
[161] Hedi Viterbo, *The Crisis of Heterosexuality: The Construction of Sexual Identities in the Israeli Defamation Law*, 33 TEL AVIV UNIV. LAW REV. 5 (2010). For more on this point see EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET (c1990).
[162] On the Western-centered perception of "human," see ROSI BRAIDOTTI, THE POSTHUMAN (2013).

used here as subtext to mark Mizrahi Jews as racial scapegoats, even though the values carried by the court are no different.[163]

Furthermore, this "racial scapegoating" associates Mizrahi subjectivity—particularly Mizrahi masculinity—with ideas of honor and shame. In an honor culture, mainstream theorists would argue, it would be especially harmful to have one's (hetero)masculinity challenged. The apparent coherence that this implication generates is telling; it highlights the racialized nature of honor, and, by contrast, of dignity. Mizrahi Jews—as alleged homophobes—are imagined here as unable to recognize the humanity (and thus the dignity) of others. The pretense of Mizrahi Jews' diminished capacity for recognizing the dignity of others,[164] or for Enlightenment morality, locates them outside of the assumed "egalitarian step" from honor to dignity.

1.4.2.4 Moral contempt for honor manifestations

The last aspect of Mizrahi Jews and Palestinians' association with honor is the judicial admonishment they receive for employing honor language. This section presents an example of this dynamic, although it may be found in other cases as well.[165]

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[163] A noteworthy example of such dynamic of projection may be found in a letter Hanna Arendt wrote to Karl Jaspers while covering the Eichmann trial. She writes, "Fortunately, Eichmann's three judges were of German origin, indeed the best of German Jewry. [Attorney General Gideon] Hausner is a typical Galician Jew, still European. … Everything is organized by the Israeli police force, which gives me the creeps. It speaks only Hebrew and looks Arabic. Some downright brutal types among them. They would obey any order. Outside the courthouse doors the oriental mob, as if one were in Istanbul or some other half-Asian country." HANNAH ARENDT, HANNAH ARENDT/KARL JASPERS CORRESPONDENCE, 1926-1969 434–5 (c1992). As Shenhav rightly states, Arendt ranks Jews on a scale with the occidental or European Jews at the top and Mizrahi Jews and Orientals at the bottom, YEHOUDA A. SHENHAV, THE ARAB JEWS: A POSTCOLONIAL READING OF NATIONALISM, RELIGION, AND ETHNICITY 6 (2006). Arendt's statement exemplifies the idea of racial scapegoating. The context of this statement, the Eichmann trial, is one where the "most European" man in the room—according to the oriental scale Arendt is echoing—is facing trial for obeying, literally *any order*. Nevertheless, those who are assigned to embody that feature are Mizrahi Jews, who under this paradigm are constructed as "brutal types" who "would obey any order."

[164] TAYLOR, GUTMANN, AND TAYLOR, *supra* note 53 at 73.

[165] See for instance FamilC 10022/05 Y. G v. Y. A (May 19, 2009) Nevo Legal Database (by subscription, in Hebrew) (Isr.); LaborD. (Labor Dispute) 17100-02-11 Elias Hazan v. Israel Electric Corporation 12 (103) Pador 44 (2011) (Isr.).

Moris Peretz v. The Official Receiver is one illuminating case in which a Mizrahi honor narrative is legally shunned.[166] The plaintiff, a Mizrahi carpenter, was reassigned by his employer to work as a steeplejack—a more dangerous and less prestigious position. The plaintiff refused reassignment, arguing, among other reasons, that such a move would be humiliating for him. He was then fired without severance pay. According to Israeli law, an employee who resigns over "substantial deterioration in work conditions" is entitled to severance pay.[167] The plaintiff presented a sound case of deterioration in work conditions. But the judge nevertheless seemed more interested in chiding him for emphasizing the importance of his *kavod,* repeatedly mentioning that it was the only thing he cared about, adding "other than that, nothing existed for him." The judge repeats this statement four times in her opinion to reject the plaintiff's claim for compensation.

Several things are noteworthy about this case. First, almost every time the word *kavod* is used in the judge's decision, it is placed in quotation marks. She writes, "All the appellant cared about was his '*kavod,*'" and later, "All he cared about was his 'insulted *kavod.*'"[168] These quotation marks, this article argues, signify the judge's distance from the concept of *kavod* and act as reminders that this "primitive" concept is the plaintiff's own distinctive language.[169] Further, the quotation marks also add a touch of ironic humor to the term,[170] casting doubt on the validity of the idea itself, or its connection to the plaintiff. In essence, the judge ridicules the plaintiff. She further describes his profession as "assembling parts"—in what would seem a deliberate attempt to downgrade his position as a carpenter.

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[166] CC (BS) 6115/00 Moris Peretz v. The Official Receiver 01(3) Pador 298 (2001) (Isr.)
[167] Severance Pay Law, § 11(a) 5723-1963 404 LSI 136 (1963) (Isr.)
[168] Peretz v. The Official Receiver, *supra* note 166, at 3, 5.
[169] On quotation marks as symbolizing the switching of voices, see Yovel, *supra* note 160 at 137. See also ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL : LEARNING TO "THINK LIKE A LAWYER" 103 (2007).
[170] RUTH FINNEGAN, WHY DO WE QUOTE?: THE CULTURE AND HISTORY OF QUOTATION 50 (2011).

Here, too, the judicial language is inherently contradictory. On one hand, the judge makes an effort to strip the plaintiff of any honor he possesses, belittling his profession, and implicitly casting doubts on whether he even had any honor to begin with.[171] By doing so, she assigns a certain level of importance to honor at the same time as she makes an effort to deny it from the plaintiff. On the other hand, the judge nevertheless continues to explicitly disregard the importance of honor altogether, denigrating the plaintiff for the role it played in his life.[172]

Examining various rulings from U.S. courts regarding experiences of humiliation in the workplace, Catherine Fisk shows how the question of "what constitutes an unacceptable level of workplace humiliation" has been subjected to gender, class, and race bias.[173] Thus, when a vice president of a company was demoted to a position that required him to perform janitorial tasks, the court ruled this demotion to be outrageously humiliating, constituting intentional infliction of emotional distress.[174] Fisk asks, "What does this case say about 'menial jobs' in America? What constitutes a humiliating demotion? Without a greater understanding of humiliation, it is difficult to rationally explain why working as a janitor may have dignity for some, be humiliating but not actionable for others, and constitute actionable humiliation for a few."[175]

While Fisk's argument helps us to acknowledge the racial bias in the judicial evaluations of *levels* of workplace humiliation, the non-Western critique of dignity illuminates another crucial angle regarding the racialization of humiliation: it exposes the specific cultural and racial stereotypes arising from the mere claim of humiliation suffered by a non-Western subject. Such

[171] Iris Young discusses the connection between respectability and professionalism, see IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 136 onwards. (c1990).
[172] Compare with LabD (Labor Dispute) 9055-06-10 Efrati v. Reshef Security 12 (104) 116 Pador (2012) (Isr.), as well as with CC (Rishon LeZion) 10535-07-11 Ashkenazi v. Resident Music Ltd. (Sep. 12, 2016) Nevo Legal Database (by subscription, in Hebrew) (Isr.).
[173] Catherine L. Fisk, *Humiliation at Work*, 8 WILLIAM MARY J. WOMEN LAW 73–96 (2001).
[174] Wilson v. Monarch Paper Co., 939 F.2d 1138, 1138 (5th Cir. 1991).
[175] Fisk, *supra* note 173 at 88.

stereotypes are discursively possible due to the racialization of humiliation, honor, and dignity. It furthers illuminates the specific cultural functions that both honor and dignity play in the construction of the East/West dichotomy and hierarchy.

Back to *Peretz*, the judge concludes her opinion by rejecting the plaintiff's claim for compensation with a moral lesson: "There is no degrading work. Only degrading behavior. Man's greatness is measured in times of need in the workplace, in his ability to do anything in order to help."[176] Reading these noble words, one cannot help but wonder whether this judge would so readily agree to be reassigned to the role of court stenographer.

This Part reviewed several Israeli court mechanisms that expose the racialized nature of honor and dignity. The disassociation of non-Western subjects from dignity and their association with honor is possible through the dichotomous, mutually exclusive nature through which both concepts are portrayed. The moral condemnation assigned to non-Western subject's usage of honor is further enabled by the East/West binary and hierarchy and its impact upon the jurisprudence of dignity. As these cases have shown, understanding dignity as inherently separate from honor, and as a concept which draws its legitimacy and moral superiority through its conversion from honor, has real ramifications on how courts imagine dignitary subjects. Subsequently, this may affect their adjudication. In addition, even in instances where no judicial bias may be traced, the dynamics that revolve around both honor and dignity have led to the re-emergence of racial stereotypes such as the "honor-chasing," aggressive and violent Arab. These in turn reinforce both the dignity/honor divide and the racial attributes and association with which it is connected.

[176] Peretz v. The Official Receiver, *supra* note 166, at paragraph 6.

1.5 Implication of the non-Western critique for American Dignity

Recognizing the racialized nature of the dignity/honor dichotomy has direct implications for the U.S. legal context. The growing presence of dignity in American constitutionalism has been received with mixed reactions. While some praise it, seeing it as offering a path and a future for antidiscrimination law,[177] others are more hesitant, highlighting aspects of dignity that hinder the promotion of racial and gender justice.

Those who are hesitant about the rise of dignity in U.S. constitutional law emphasize, for instance, the Supreme Court's use of dignity to block affirmative action policies and promote a colorblind judicial approach to antidiscrimination. Both in *City of Richmond v. J.A. Croson Co.* and *University of California Regents v. Bakke,* the Supreme Court saw African Americans' dignity as being violated by affirmative action. Affirmative action, in the eyes of the Court, had the potential to stigmatize all members of the community.[178] Thus, dignity—and specifically the dignity of African Americans—was utilized to thwart attempts to promote racial justice. Moreover, like in the Israeli case study, dignity was used to create a false pretense of unification and universality, and as a justification for courts' decision to move away from race-conscious decision-making.

The concept of the "dignity of states" has also been used by courts to shield states from lawsuits and from federal regulation. Thus, in *Shelby County v. Holder,* the Supreme Court held § 4(b) of the Voting Rights Act unconstitutional, finding that it infringed the equal dignity of

[177] See for instance Kenji Yoshino, *The New Equal Protection*, 124 HARV. LAW REV. 747–804 (2010).
[178] See *University of California Regents v. Bakke*, 438 U.S., at 298, 98 S.Ct., at 2752 (opinion of Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth"). For more on this, see Bracey, *supra* note 42; Hutchinson, *supra* note 46.

states.[179] The U.S. Supreme Court's refusal to account for the ways in which race was at play in various states' regulation of their voting laws found as its normative basis the concept of dignity.

Other critics stress how dignity's core place in same-sex marriage cases has led courts to take a normalizing turn in awarding same-sex couples' equality. Jeremiah Ho promotes one such argument. Ho criticizes the same-sex marriage cases by arguing that the type of recognition they accorded to sexual minorities came with an expectation of respectable and "dignified behavior."[180] To make his point, Ho argues that it is the aspects of dignity *more closely associated with honor* that force sexual minorities to assimilate into dominant heterosexual norms:[181] "[I]n the case of defining dignity by rank or nobility status—in which dignity is earned and accorded—dignity by rank or nobility has been replaced with evaluations of the social respectability of sexual minorities."[182] This respectability, he argues, pressures sexual minorities to negotiate their acceptance through assimilation, sometimes by staying in the proverbial closet.[183]

However, many of these critics miss an important facet of critique—mainly, the non-Western critique of dignity. Even when attempting to advance a critique of dignity's role in maintaining white supremacy,[184] most writers do not tie this tendency to global aspects and

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[179] Shelby County v. Holder, 570 U.S. 529 (2012); Hutchinson, *supra* note 46 at 36–7; Joseph Fishkin, *The Dignity of the South*, 123 YALE LAW J. FORUM 175–196 (2013).

[180] "According to Kennedy, there were 'four principles and traditions [that] demonstrate[d] that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.' Essentially, these four principles and traditions allowed Kennedy to specifically evaluate the qualifications of same-sex couples to be given the right to marry. Each of these principles and traditions dealt, in their own manner, with what marriage conferred upon a couple and how same-sex couples—as far as each principle and tradition was concerned—qualified to receive marriage." Ho, *supra* note 46 at 507–8.

[181] This line of critique was presented by Katherine Franke years before *Obergefell*, see Franke, *supra* note 75.

[182] Ho, *supra* note 46 at 481.

[183] *Id.* at 482. ("To this end, '[g]ays and lesbians who 'pass' have been able to break through these barriers, however, usually the price is costly: 'staying in the closet.' Through respectability, the whole negotiation assures and legitimizes hierarchy, and demonstrates that the subgroup individual trying to gain access starts at the position of the outsider. Rather than demanding respect for their inherent dignity, there is pressure to exhibit respectability in order acquire dignity from a dominant group")

[184] Bracey, *supra* note 42; Hutchinson, *supra* note 46.

ideologies of Whiteness: colonialism and orientalism. As a result, much of the work dedicated to critiquing dignity—like Ho's work—revolves around *separating* the "problematic," honor-like aspects of dignity from its universal, egalitarian aspects, insisting on preserving only the latter.[185]

For Ho and others, the risk of assimilation comes from not separating honor and dignity *enough*. According to these views, if we only carve out the aspects of dignity tied to rank or nobility—read: take honor out of dignity—we can promote dignity in its universal, egalitarian sense. However, the non-Western critique of dignity highlights another, opposite risk of assimilation: assimilation through the unification of dignity into one singular value. As the argument advanced in this Article illustrates, maintaining the separation between honor and dignity and placing the badge of moral inferiority on one side of this equation, reproduces the orientalist discourse of light/dark; moral/immoral; dignity/honor. Ignoring this discourse increases the risk of assimilation into Western performativity of moral superiority.

The Israeli case study further exposes the risk of regulating sexuality from a strictly dignity-centered jurisprudence, which gains its moral legitimacy through the downgrading of honor. Put simply, ideas regarding respectability and dignified behavior cannot be plainly removed or carved out of the concept of dignity, as Ho suggests. They are at its core.

Indeed, as Libby Adler demonstrates, it was not the association with rank and nobility that led the recognition of same-sex marriages to revolve around respectability and assimilation. Rather, it was the utilization of the modern, Enlightenment-era type of dignity Ho and others seek to champion. The same-sex marriage cases did not, in fact, demonstrate a "slip" back to honor. They are a celebration of dignity, in its universal, intrinsic, egalitarian sense. Free from hierarchy and simultaneously bound by it: a dignity springing from humanity in its restricting

[185] Recall, Rao made a similar argument, see Rao, *supra* note 2.

and policing sense, one which sees humans as non-animals, and thus non-animalistic rational beings who only engage in 'non-animalistic' dignified sex.

Katherine Franke further highlights this problem, exemplifying its applicability not only to the regulation of sex in U.S. courts, but also to the question of American racial relations. Similarly examining the way in which the struggle for marriage equality took a "dignified" turn of assimilation, she argues that this turn has had one other problematic effect: "[I]n some circumstances winning marriage equality has been a zero-sum game that has entailed shifting the stigma same-sex couples have endured to other, already stigmatized people and groups."[186] Same-sex couples were thus "awarded a kind of 'dignity of self-definition' that law and culture have never recognized in African-Americans."[187] Franke's argument highlights an important aspect of the Westernization of dignity, and its potential to harm racialized subjects. The hierarchical nature of egalitarian dignity inherently creates designated "others." These designated "others" conversely cast meaning upon what it means to be part of the category of humanity that are perceived to enjoy intrinsic dignity.

Only by situating the critique of dignity within the global context of Enlightenment as a Western project embedded in the moral superiority of the West may we recognize the assimilatory dangers rooted in the jurisprudence of dignity. While an analysis of such assimilatory manifestations is outside the scope of this paper, acknowledging the perils of dignity is undoubtedly the first step for any such project.

[186] KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY 187 (2015).
[187] *Id.* at 201.

1.6 Conclusion

The idea of honor lives in the shadows of dignity. It grants meaning to the idea of dignity through contrast and difference. By enabling dignity's light through oppositionality, honor is inherently anchored in assumed darkness. As this Article has shown, this binary, hierarchical relationship is not colorless. Racial stereotypes and orientalist logics, buttressed by the philosophical canon that constructed dignity and honor as converse values, have seeped into the legal understanding of both terms.

The tension and complex relationship between honor and dignity have been extensively covered by scholars worldwide, yet few have isolated the unique complexity offered by the Israeli case. A racial reading of its day-to-day uses in courtrooms allows for the recognition of the ethno-racial dynamics at play in the jurisprudence of dignity. In effect, the stories and narratives presented in this Article illustrate how the human condition rejects the conceptual binaries of legal and philosophical language. These stories further expose the clash between the legal system's narratives and those of the people whose lives it controls. These clashes, although examined specifically in the Israeli case, may prove relevant for other localities as well. While the Hebrew *kavod* is somewhat unique to the Israeli case, its existence brings to the surface some of the hidden mechanisms which charge the concept of dignity with meaning, mechanisms that could be traced outside of Israel.

The Israeli link between dignity and Western ideals, modernity, and Enlightenment—and, by contrast, between honor and oriental, primitive, and retrograde belief systems—provides a cautionary tale. The Euro-centric discourse surrounding dignity, this Article demonstrates, may create "designated others" who often pay the price for the racialization of dignity.

Chapter 2: Whiteness at Work

2.1 Introduction

How is Whiteness theorized in Title VII jurisprudence? Courts deciding in racial discrimination cases deal with Whiteness on a regular basis. However, their understanding of Whiteness is limited, as is the understanding of most race scholars who limit their discussion on Whiteness to White people's privileges or to Whiteness' invisibility. This tendency, this Article argues, stems from the fact that Whiteness is mostly examined through contrast, i.e., through the lives and experiences of racial minorities. But the nature of Whiteness as a racial project—the project of White supremacy—is better realized when looking at intra-White dynamics, that is, when examining Whiteness against itself.

Through careful examination of race theory from the margins of same-race discrimination cases between Whites, this Article argues, we are offered a peek into what enables regimes of Whiteness and White supremacy and how they operate within the workplace. Unpacking intra-White dynamics is crucial for examining how Whiteness is policed within the workplace and allows us to craft additional ways to combat regimes of White supremacy at work.

Intragroup discrimination has long been recognized by the courts as actionable under Title VII of the Civil Rights Act of 1964. Accordingly, courts recognize the possibility that women may discriminate against other women on the basis of sex, for instance by preferring men in the hiring process. Similarly, discrimination by Black people and other racial minorities against their own group members is recognized in Title VII jurisprudence. Title VII has also expanded to encompass situations where men harass or discriminate against other men on the basis of sex, usually in instances where the performance of masculinity by those discriminated

against does not meet their supervisor's or colleagues' expectations. However, there is currently almost no discussion, either in courts or in legal scholarship, of the possibility that Whites may racially discriminate against other Whites. This is no coincidence. The failure to recognize most types of same-race discrimination between Whites results, this Article argues, from courts' tendency to de-racialize Whiteness. Whiteness' privilege of invisibility, which has made White norms the default, also prevents courts from recognizing Whiteness as a racial category that polices itself on its members. This inability is manifested through the courts' limited recognition of intra-White discrimination.

Courts should acknowledge this type of discrimination. They can do so by adopting the stereotype doctrine developed under Title VII. Under the stereotype doctrine, discrimination based on societal expectations regarding how people from certain groups ought to behave is forbidden. Thus, cases where White people police other Whites based on their expectations of how White people should act, speak, dress, etc., should be regarded as forbidden race discrimination.

The possibility of intra-White discrimination is ever more relevant. Alt-right, White pride, and White nationalist/supremacist movements, all of which see Whiteness as a category with concrete content and distinct borders maintained by its members, have become more prevalent in recent years. These groups promote racist norms regarding Whiteness and its legitimate manifestations within American society. Their popularity may lead to an increased number of intra-White discrimination cases involving employers who enforce such ideas of Whiteness on their White employees or White employees who harass White colleagues for failing to "act White."

Part I of this article argues that Title VII ought to be understood as a law that forbids certain ideologies from dictating employment decisions rather than one that protects specific identities in the workplace. Such framing of Title VII is consistent with both Title VII's language and its original purpose. Part II sketches the various ways in which courts have recognized same-race discrimination, focusing first on discrimination between racial minorities and then on discrimination between Whites. While courts generally have been open to acknowledging intraracial discrimination between racial minorities, a review of same-race discrimination cases between Whites indicates that it has only been recognized in limited circumstances. The "strongest" set of circumstances is currently known as "associational discrimination" referring to instances where White employers discriminate against White employees because of their association with racial minorities. Part III describes and critiques the current theorization of associational discrimination, arguing that it de-racializes Whiteness, thus missing the main dynamic at play in these acts of discrimination. This problematic theorization leads to courts' limited recognition of discrimination between Whites, which is restricted to scenarios in which racial minorities are involved. Part III then offers an alternative theoretical framework— the stereotype doctrine.

Part IV suggests scenarios that are missed by the current theorization and may be recognized via the stereotype doctrine. Examining stereotypes against poor rural Whites—often referred to as "White trash"—I argue that these stereotypes revolve around the "right" ways to perform Whiteness. Accordingly, discrimination against poor Whites may sometimes be seen as forbidden racial discrimination, especially when the one acting in a discriminatory manner is White. Part V deals with a possible challenge to my argument based on anti-subordination

theory, demonstrating the potential advantages my argument offers to racial minorities. Part VI offers a concrete suggestion as to how courts should adopt my argument.

2.2 Title VII: From Identity to Ideology

A key question that shapes discussions of antidiscrimination theory revolves around the essence and purpose of antidiscrimination law. This question is usually approached via the distinction between anti-classification, anti-subordination, and, lately, anti-essentialism theories of antidiscrimination.

According to anti-classification theory, the injury caused by discrimination results from the act of distinction between or classification of individuals.[188] Anti-classification theory, which is largely identified with ideas of formal equality, focuses on identitarian traits (e.g. race, gender, and national origin) that are seen as illegitimate grounds for classification.[189] The way to achieve equality, according to this theory, is to ignore these traits.[190] Anti-classification theory mostly focuses on disparate treatment and disregards larger questions of historical and structural inequality.[191]

In contrast, anti-subordination theory places historical inequality and structural modes of oppression at its center.[192] Under the anti-subordination view, the law should be concerned with remedying the conditions that allow for the disadvantage of historically oppressed groups.[193] To fully achieve justice, we must not ignore the identities of different individuals but rather acknowledge them and their social and historical meaning. Anti-subordination theory places a

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[188] *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 UNIV. MIAMI L. REV. 9, 15 (2003).
[189] Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 963 (2012).
[190] *Id*
[191] *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472 (2004).
[192] Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 155 (2017).
[193] *Id*; *See* Balkin and Siegel, *supra* note 188 at 9.

heavy weight on disparate impact, as it focuses the legal system's attention to the realities of racial discrimination, even in instances where an employment decision may seem neutral or objective.[194]

Writers on equality describe a turn in recent years from the anti-subordination paradigm, which reflected Title VII's origins, towards an anti-classification paradigm.[195] Cases like *Ricci v. DeStefano* and *Wal-Mart v. Dukes* have seriously challenged disparate-impact litigation as well as social-framework theories associated with anti-subordination.[196] Further, it is argued that recent anti-discrimination laws such as the Americans with Disabilities Act (ADA) and the Genetic Information Act have tilted the antidiscrimination scale towards anti-classification ideals of equality.[197] Part of this turn is explained through anti-subordination theory's focus on identity, which seems increasingly less relevant to lawmakers and courts that have embraced the view that we are in a post-identity era.[198] This sentiment is most visible in Title VII race-discrimination cases, where the constitutional commitment to colorblindness has arguably "spilled over" into Title VII jurisprudence.[199]

While recent judicial and legislative developments indicate disdain for identitarian-based policies, anti-essentialist views on antidiscrimination provide an important alternative. Anti-essentialism as an approach to antidiscrimination law first emerged as a critique of racial and

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[194] *See* Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2157-58 (2012).
[195] *See* Richard Primus, *Of Visible Race-Consciousness and Institutional Role: Equal Protection and Disparate Impact After Ricci and Inclusive Communities*, *in* TITLE VII OF THE CIVIL RIGHTS ACT AFTER 50 YEARS: PROCEEDINGS OF THE NEW YORK UNIVERSITY 67TH ANNUAL CONFERENCE ON LABOR 295 (Anne Marie Lofaso & Samuel Estreicher eds., 2015); Areheart, *supra* note 189, at 966; Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination The 40th Anniversary of Title VII of the Civil Rights Act of 1964 Symposium*, 22 HOFSTRA LAB. & EMP. L.J. 431, 463-64 (2004); Helen Norton, *The Supreme Court's Post-Racial Turn towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 229, 231-32 (2010).
[196] *See* Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 921. *See generally* Wal-Mart v. Dukes, 564 U.S. 338 (2011); Ricci v. DeStefano, 557 U.S. 557 (2009).
[197] Areheart, *supra* note 189, at 968.
[198] *Id.* at 999–1000.
[199] Stephanie Bornstein, *Unifying Antidiscrimination Law through Stereotype Theory*, 20 LEWIS CLARK LAW REV. 919–980, 965–6 (2016).

gender justice struggles' potential to essentialize identities and to allow courts to weigh in on questions regarding groups' and individuals' ontological traits.[200] Richard Ford, for instance, raised the concern that "racial culture" arguments—i.e., braids are a proxy for African American women's race—essentialize race and can potentially lead to graver racial discrimination.[201] Other writers have developed additional critiques of both racial- and gender-justice projects.[202] Anti-essentialist theories "see group-based identities as constructed and contested through social interaction, not as fixed and stable properties of the individual."[203] They urge us to move from identities on the ground to the ideologies that construct them. The law's objective under anti-essentialism is to destabilize mechanisms which reinforce and construct individual and group identities.[204] Accordingly, Title VII and other antidiscrimination legislation under an anti-essentialist framework are aimed at combating oppressive ideologies such as White supremacy, racism, sexism, hetero-normativity, and ableism.

This article shares the view that Title VII jurisprudence should be developed along the theoretical lines of anti-essentialism. Anti-essentialism—which shares both anti-subordination theorists' goal of dismantling structures of power as well as anti-classification theorists'

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[200] ontological traits are traits that both define one's nature of being and can be gendered or racialized, like women being associated with traits such as dresses and uteruses and braids being regarded as a black trait. For a critical discussion on racial ontological traits *see* KAREN E. FIELDS & BARBARA J. FIELDS, RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE (2012) (providing that the belief in the invisible ontology of race is both rational and irrational at the same time, given the connection between invisible, socially constructed ontologies and their actual, material consequences).

[201] RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE 29-33 (2009).

[202] *See* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L. J. 365, 373 (1991) (arguing that essentialism in legal theories of antidiscrimination excludes the experiences of those situated at the intersection of race and gender). *See also* Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GEND. LAW JUSTICE 83–144, 83 (2008).(arguing for an anti-essentialist approach to trans rights in antidiscrimination law); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588-89 (1990) (arguing that the concept of gender essentialism in feminist legal theory can also apply to race) [hereinafter Harris, *Race and Essentialism*]; Ian Haney López, *Race and Color Blindness After Hernandez and Brown*, 25 CHICANO-LATINO L. REV. 61 (2005) (arguing that colorblindness divorces race from social meaning and cannot effectively promote social justice).

[203] Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N. Y. UNIV. LAW REV. 101–182, 145 (2017).

[204] *Id.* at 145.

disinclination towards identity-based policies—can potentially help refocus Title VII on historical and structural forms of oppression. An anti-essentialist view would be less concerned with advancing the number of categories protected by antidiscrimination legislation and more concerned with how workplaces are gendered and raced according to different conservative ideologies (e.g., hetero-patriarchy,[205] White supremacy) that disadvantage anyone who does not fit these ideological expectations.[206]

Despite its seemingly radical position towards social institutions (such as the law itself),[207] anti-essentialist theories are consistent with Title VII's language. Jessica Clarke argues that, unlike the ADA, which defines "people with disabilities" as its protected class, Title VII is a symmetrical law that does not designate any protected class.[208] Section 703(a), which defines unlawful employment practices as those discriminating against any individual "because of such individual's race, color, religion, sex, or national origin,"[209] forbids racial discrimination against racial majority and minority group members alike.

Clarke further argues that, while it is possible to see the original language of Title VII as focused on the identitarian traits of individuals, the 1991 amendment that added Section 703(m)

[205] Hetero-patriarchy fuses two ideological systems that often work conjointly: heterosexism/heteronormativity and patriarchy. As Francisco Valdes describes it, "the ideology of compulsory heteropatriarchy rests on four key tenets: the bifurcation of personhood into "male" and "female" components under the active/passive paradigm; the polarization of these male/female sex/gender ideals into mutually exclusive, or even opposing, identity composites; the penalization of gender atypicality or transitivity; and the devaluation of persons who are feminized. The combined impact of these four tenets is compulsory hetero-patriarchy." Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & (and) Sexual Orientation to Its Origins Symposium*, 8 YALE J. L. HUMAN. 161, 170 (1996).
[206] *See generally* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL LAW REV. 1259–1308 (1999). (arguing that traditional notions of the "working identity" that apply pressure on employees to conform to certain behaviors at work are a form of employment discrimination).
[207] Anti-essentialism may seem more radical as it tries to combat discrimination through a challenge to its root causes—the structures that constitute the identities that are discriminated against—rather than through forbidding classification between identities or protecting subordinated identities once they are formed.
[208] Clarke, *supra* note 203 at 110.
[209] Title VII § 703(a).

reinforced Title VII's non-identitarian slant.[210] Section 703(m) states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice."[211] The provision not only signals a move away from identity-based jurisprudence,—shifting the Archimedean point of proving discrimination claims from the victims' identity to the motivation behind the discriminatory act,—but also signals a step towards ideology-based claims.[212] Under Section 703(m), an individual must demonstrate that the *ideology* behind the relevant employment practice was wrongfully motivated by race, color, religion, etc.[213] Put differently, Title VII is not aimed at protecting women in the workplace but rather at forbidding sexism in the workplace; it is designed not to protect Black and Latino workers but to forbid racism as a motivation behind employment decisions or conduct.

Anti-essentialist theory is relevant to intragroup discrimination because the motive behind such acts of wrongful discrimination is usually ideological, not identitarian. Under this framework, when a female employer discriminates against women in the course of hiring for a position, the relevant factor is arguably not the identities of the parties involved but the ideology that dictates or motivates the act: chauvinism, sexism, or heteronormativity. Similarly, when a Black employer harasses a Black employee by giving him harsher assignments and referring to

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[210] Clarke, *supra* note 203 at 114.
[211] Title VII § 703 (m). *See also Id.* at 114. (providing that § 703(m) "includes no limitation based on an individual's own identity").
[212] For a discussion on the motivational efficacy of ideology within workplaces, see Ysanne M. Carlisle & David J. Manning, *The Concept of Ideology and Work Motivation*, 15 ORGANIZATIONAL STUD. 683, 685 (1994). ("Just as technology concerns an awareness of the motive power of controlled energy systems, and theology concerns an awareness of God and the motivation of religious practice, so an ideology is concerned with an awareness of the self and the motive sense of self-enactment in human conduct including that 'at work.'")
[213] Notably, this amendment was added, among other reasons, to account for cases involving stereotyping, following Price Waterhouse v. Hopkins, 490 U.S. 228, 280 (1989), see Clarke, *supra* note 203 at 114. As I will argue later in this Article, stereotype doctrine is closely linked to the ideology of the workplace, rather than to the individual identity traits of the plaintiff.

him as the n-word, anti-essentialist theory would characterize it as an act of echoing and reproducing White supremacist ideological norms. Cases of intragroup discrimination often force courts to acknowledge the ideology behind patterns of discrimination, following along the theoretical lines of anti-essentialism. Furthermore, it allows us to acknowledge intra-group discrimination's role in constructing group identities.

Anti-classification theory is limited in analyzing such cases, as the theory does not recognize concepts such as stigma, structural ideological oppression, internalized racism or sexism. Therefore, anti-classificationists' ability to theorize such dynamics is limited, and the discriminatory act itself might be seen as perplexing and thus resulting from other, non-forbidden reasons.

The strong identitarian grip on anti-subordination theory also limits its ability to theorize intragroup discrimination, as doing so requires moving beyond fixed identity classifications rather than deferring to the employer's identity.[214]

2.3 A Taxonomy of Intragroup Race Discrimination

The U.S. Supreme Court has recognized the possibility of intraracial discrimination on three notable occasions. First, in *Castaneda v. Partida,* a jury-selection case involving a Mexican American, the Supreme Court stated that "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group."[215] Second, was *Saint Francis College v.*

[214] *See Id.* at 147. While Clarke focuses on anti-subordination theory's fixation on the identity of the *plaintiff*, I utilize her argument to challenge anti-subordination theory's fixation on the identity of both plaintiff and defendant. *Id.* Further, while Clarke focuses primarily on missed identification cases when discussing discrimination against Whites, this article focuses on situations where Whites discriminate against other Whites specifically due to acknowledging their Whiteness, thus assigning to it specific racial expectations. *Id.*
[215] Castaneda v. Partida, 430 U.S. 482, 499 (1977).

Al-Khazraji, a case regarding §1981 discrimination[216] against an Arab employee who argued racial discrimination.[217] Given that his Arab identity was seen as part of the "White race" by the Court, the Court addressed the possibility of intraracial discrimination. Rejecting the biological understanding of race as a criterion for evaluating discrimination claims, it stated that

> It has been found that differences between individuals of the same race are often greater than the differences between the 'average' individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological in nature.[218]

This case was understood by lower courts to open up the possibility for same-race discrimination claims under both §1981 and Title VII.[219] Finally, Justice Scalia in *Oncale v. Sundowner Services* referenced the possibility of same-race discrimination to support his finding that Title VII applies in same-sex discrimination cases.[220] The case dealt with a man who claimed he was sexually harassed by male coworkers who taunted and sexually abused him.[221] In his opinion, Scalia acknowledged same-sex discrimination and harassment, and also directly addressed same-race discrimination: "In the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race."[222]

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[216] § 1981 secures African Americans' rights to make and enforce contracts and courts interpreted it as prohibiting racial discrimination in hiring and employment. 42 U.S.C. § 1981 (2012). [Patterson v. McLean Credit Union, 491 U.S. 164 (U.S. 1989)]. It applies to all private employers, as well as to state and local governments. § 1981. Courts have recognized a "necessary overlap" between § 1981 and Title VII, *see* CBOCS West, Inc. v. Humphries, 553 U.S. 442, 445 (2008).
[217] Saint Francis Coll. v. Al-Khazraji, 41 U.S. 604, 606 (1987).
[218] *Id.* at 614 n.4.
[219] *See, e.g.*, Hansborough v. City of Elkhart Parks & Recreation Dep't, 802 F. Supp. 199, 206 (N.D. Ind. 1992) ("Certainly, this Supreme Court decision has made clear that discrimination claims should not be barred merely because the plaintiff(s) and defendant(s) belong to the same race.").
[220] Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 78 (1998).
[221] *Id.* at 77.
[222] *Id.* at 78.

Despite these statements, cases acknowledging intraracial discrimination are rare and mostly revolve around discrimination between members of racial minority groups. Cases acknowledging intraracial discrimination between Whites are almost nonexistent; when they do reach courts, it is usually under a limited set of circumstances.

2.3.1 Same-Race Discrimination Between Racial Minorities

The overwhelming majority of same-race discrimination cases recognized and discussed by the courts involve racial minorities discriminating against their fellow group members. These cases are discussed at length by Enrique Schaerer,[223] so I will mention them here only briefly.

Same-race discrimination between racial minorities was recognized by courts with few complications. In *Walker v. Secretary of Treasury, I.R.S.*, the court declared that "[i]t would take an ethnocentric and naive world view to suggest that we can divide Caucasians into many sub-groups but somehow all Blacks are part of the same sub-group. There are sharp and distinctive contrasts amongst native Black African peoples (sub-Saharan) both in color and in physical characteristics."[224] Similarly, in *Williams v. Wendler* the Seventh Circuit posited that "there can, it is true, be 'racial' discrimination within the same race, broadly defined, because 'race' is a fuzzy term... Light-skinned blacks sometimes discriminate against dark-skinned blacks, and vice versa, and either form of discrimination is literally color discrimination."[225]

[223] Enrique Schaerer, *Intragroup Discrimination in the Workplace: The Case for Race Plus*, 45 HARV. CIV. RTS.-CIV. LIB. L. REV. 57, 64-76 (2010) (reviewing race discrimination cases between racial minorities to argue courts should develop a "race plus" doctrine similar to the "sex plus" doctrine used for intragroup sex discrimination).
[224] Walker v. Sec'y of Treasury, IRS, 713 F.Supp. 403, 407-08 (N.D. Ga. 1989).
[225] Williams v. Wendler, 530 F.3d 584, 587 (7th Cir. 2008).

This line of reasoning relies heavily on anti-classification logic,[226] which explains same-race discrimination by redrawing the lines demarcating a racial group.[227] Many other courts, however, have recognized same-race discrimination between racial minorities without resorting to the sub-group analyses. In *Parrott v. Cheney*, the plaintiff was a Black man who argued that his supervisor, another Black man, had discriminated against him on the basis of race and sex.[228] While the court dismissed his claims on the ground that he failed to prove a *prima facie* case of discrimination, it nevertheless acknowledged the possibility of similar claims and focused the criteria for recognizing such discrimination on the types of behavior the law is aimed at remedying, instead of identities of those suffering from discrimination.[229] In *Belton v. Shinseki*, a Black female plaintiff claimed that her supervisor, a Black woman, discriminated against Black nurses.[230] Here, too, the court recognized same-race discrimination without establishing a sub-group difference between the plaintiff and the defendant.. In *Mitchell v. Nat'l R.R. Passenger Corp.*, the court recognized intraracial discrimination between Black people while rejecting the subgroup-based reasoning employed by other courts.[231]

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[226] This anti-classification rhetoric echoes the language in *Saint Francis*, where—despite rejecting biological understandings of race—the Court nevertheless based its ruling on ethnic and ancestral classifications between individuals, see Saint Francis Coll. v. Al-Khazraji, 481 U.S 604, 613 (1987) ("[W]e have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.").

[227] *See, e.g.*, Saint Francis Coll., 481 U.S. at 613. This turn by courts and by scholars to colorism is understandable. First, color is an important – perhaps the most important – signifier of race, and it constitutes much of the logic behind racist ideologies like White supremacy. In addition, Title VII's inclusion of color as a category of prohibited discrimination makes it easier to explain and justify same-race discrimination through color-based sub-racial grouping. However, this framing is also limited in nature. It resorts to anti-classification paradigms which were limited in the first place in their ability to explain intragroup discrimination. Furthermore, it only works in those cases where the intraracial discrimination was color-based, and racist ideologies are manifested via the recognized categories of light/dark-skinned. In reality, many same-race discrimination cases do not revolve around color, see for instance Mitchell v. Nat'l R.R. Passenger Corp., 407 F.Supp.2d 213, 236 (D.D.C. 2005). The context-specific logic of identifiable subgroups thus obscures the ability to offer same-race discrimination a unifying explanation.

[228] Parrott v. Cheney, 748 F.Supp. 312, 313 (D. Md. 1989).

[229] *See id.* at 317 ("Title VII operates 'to make persons whole for injuries suffered on account of unlawful employment discrimination.'" (internal citations omitted).

[230] Belton v. Shinseki, No. 4:08CV915RWS, 2009 WL 2488025 (E.D. Mo. Aug. 12, 2009).

[231] Mitchell v. Nat'l R.R. Passenger Corp., *supra* note 227 (quoting Saint Francis Coll., 481 at 613) ("Contrary to [the] contention that only 'sub-group' intraracial discrimination is actionable, such as [W]hite defendants acting against a

Courts have also recognized the possibility of same-race harassment. In *Ross v. Douglas Cty., Nebraska*, Odis Ross, a Black employee at Douglas County Correctional Facility, argued that his supervisor, also a Black man, used racial epithets when addressing him, including the n-word and "black boy."[232] The Eighth Circuit rejected the County's claim that no animus could be proven in this case because Ross and Johnson were of the same race. The court reasoned that

> Given the *Oncale* decision, we have no doubt that, as a matter of law, a Black male could discriminate against another Black male "because of such individual's race." Such comments were demeaning to Ross. They could have been made to please Johnson's White superior or they may have been intended to create a negative and distressing environment for Ross. However, whatever the motive, we deem such conduct discriminatory.[233]

Similarly, In *Pollock v. City of Philadelphia*, a Black employee claimed that his Black supervisor reduced his pay without cause, spat sunflower seeds and shells on the floor and ordered him to clean up the mess, referred to him as a "dumb n****r with an easy job," and yelled at him in front of others, threatening to "write him up."[234] The court ruled that there was "sufficient evidence to raise a genuine issue of material fact" as to whether the hostile work environment was "motivated by racial bias," adding that "the use of a racial slur, when combined with the broader pattern of mistreatment, is sufficient to raise an inference of racial discrimination."[235]

Importantly, these cases reveal that courts are at least partially able to recognize the ideological backdrop to such behavior. Although they do not clearly articulate the possibility of internalized racism, they tie these acts back to White supremacy by suggesting that they were

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[W]hite [A]rab, or light-skinned [B]lack defendants acting against a dark-skinned [B]lack plaintiff, § 1981 is a broad prohibition of racial discrimination, and 'a distinctive physiognomy is not essential to qualify for § 1981 protection.").

[232] Ross v. Douglas Cty., 234 F.3d 391, 393 (8th Cir. 2000).

[233] *Id.* at 396.

[234] Pollack v. City of Philadelphia No. CIV. A. 06-4089, 2008 WL 3457043, at *2, *10 (E.D. Pa. Aug. 8, 2008), ***aff'd sub nom.*** Pollock v. The City of Philadelphia, 403 F. App'x 664 (3d Cir. 2010).

[235] *Id.* at *10.

motivated by a desire to impress a White employer, or by assigning particular importance to the use of racial slurs. Under the anti-essentialist approach, when a Black employer discriminates against a fellow Black person or shouts racial slurs towards him or her, it should be seen as an act of conforming to White supremacy's ideological norms.

Despite the existence of cases dealing with intraracial discrimination between racial minorities, very few cases deal with such discrimination between Whites. This is especially interesting given the fact that courts often cite *Oncale*, which unlike other same-sex harassment cases involving women, discussed harassment between men (i.e., the dominant gender), in order to explain same-race discrimination and harassment. This prompts the following question: what would a race version of *Oncale*—i.e., when both parties are White—look like? In the following section, I detail the few instances where same-race discrimination cases between Whites have reached the courts and analyze their limited contextual features and theorization.

2.3.2 Same-Race Discrimination Between Whites

Before reviewing the few cases of same-race discrimination between Whites, it is important to acknowledge one major difference in Title VII litigation between racial minority plaintiffs and White plaintiffs, which revolves around the extra level of protection granted to "protected classes" under Title VII. Title VII, as mentioned above, does not specify the groups it aims to protect. However, after courts recognized how difficult it is to prove discrimination, especially in hiring decisions, the Supreme Court in *McDonnell Douglas* offered an easier route to proving discrimination for those considered members of a protected class.[236] Under the *McDonnell Douglas* method of proof, instead of directly proving discrimination, a plaintiff may show that: (1) the plaintiff is part of a "protected class," (2) the plaintiff applied for a job, (3)

[236] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973).

which he or she was qualified for, (4) the plaintiff did not get the job, and (5) the position remained open even after the plaintiff was rejected.[237] If all these requirements are met, then the burden of proof shifts to the employer to provide a legitimate, nondiscriminatory reason for his or her decision, which the plaintiff may then rebut.[238]

Notably, because they are not members of a protected class, White plaintiffs cannot prove discrimination via the *McDonnell Douglas* test, which might explain why there seem to be fewer cases dealing with same-race discrimination between Whites.[239] This assumption draws further support from what Jessica Clarke has coined "protected class gatekeeping," a tendency on the part of courts to read the *McDonnell Douglas* "protected class" requirement into all Title VII claims, limiting the ability of plaintiffs not from protected classes to claim discrimination under the law.[240]

However, protected class gatekeeping explains only part of the picture. Another reason for the lack of intra-White discrimination cases is the mis-theorization and under-theorization of the cases that do reach the courts. In short, I argue, courts' tendency to de-racialize Whiteness—to view race as something that only racial minorities possess—has led them to mis-theorize the few instances where intra-White discrimination is discussed. Thus, this section will show, recognized cases of intraracial discrimination are confined almost exclusively to scenarios involving racial minorities.

A review of same-race-employment-discrimination cases between Whites reveals that they arise in three circumstances. The first two are what I call "weak" intraracial discrimination cases, meaning that the intraracial component in these cases is accompanied by another form of

[237] *Id.*
[238] *Id.* at 802.
[239] White plaintiffs fail the first requirement, that they are part of a "protected class."
[240] Clarke, *supra* note 203.

discrimination. The third type I call "strong" intraracial discrimination cases because discrimination by Whites against other Whites is located at the center of the legal discussion.

The first "weak" set of intraracial discrimination occur where there is an ethnic difference between the parties, but the court nevertheless refers to both as "White." This dynamic is found in *Castaneda v. Partida* and *Saint Francis* discussed above, which recognized discrimination against Mexican and Arab Americans, respectively.[241] A similar analysis is at play in *Covalt v. Pintar*, which also deals with discrimination against a Mexican American plaintiff.[242] While these cases are interesting in terms of how courts draw and understand the borders of Whiteness,[243] the theoretical challenge they pose to the discussion in this article is minimal, as we often recognize and understand ethnicity to be closely linked to race.[244] These cases can thus be framed as closer to *inter*racial discrimination than *intraracial* discrimination.[245]

The second type of "weak" same-race discrimination cases are interracial solidarity doctrine cases. Under the interracial solidarity doctrine, Whites may sue other Whites for discriminating against racial minorities in a way that violates their right to diversity or their interest in colorblindness.[246] One of the first cases recognizing this possibility was *Trafficante v. Metropolitan Life Insurance Company*, a 1972 case where a White tenant filed a Title VIII

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[241] *See supra* notes 215-217; 226 and accompanying text.
[242] *See* Covalt v. Pintar, 2008 WL 2312651 at *1 (S.D. Tex. June 4, 2008).
[243] *See* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (10th ed. 2006).
[244] STEPHEN CORNELL & DOUGLAS HARTMANN, ETHNICITY AND RACE: MAKING IDENTITIES IN A CHANGING WORLD 15 (Charles Ragin et al. eds., 2007). The courts themselves recognize this link. *See* Saint Francis Coll. v. Al-Khazraji, 41 U.S. 604 (1987); *Covalt*, 2008 WL 2312651, at 7.
[245] The relationship between ethnicity and race is, of course, much more complex than I discuss here. Questions regarding what identities are included within the borders of Whiteness and the framing of Mexicans, Arabs, and other groups as White or non-White are of great importance and relevance to this discussion, as they influence the category itself. In that sense, the difference between interracial and intraracial is often arbitrary, contingent upon how we draw the lines between different groups, which groups are "within" Whiteness, and which are outside it. However, given that both Mexican Americans and Arab Americans are considered to be subjected to racialization practices, and given that both groups discuss themselves as racialized, I have chosen to focus the discussion in this Article on the dynamics within Whiteness, between individuals who recognize themselves, and each other—as White.
[246] Clarke, *supra* note 203 at 131–2; Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. LAW REV. 1497–1593 (2010). (both critiquing the limited range of this doctrine).

housing-discrimination claim jointly with a Black tenant, both arguing against a landlord who discriminated against Black housing applicants.[247] The White tenant's standing was challenged by the housing company, which argued he did not suffer any injury from the discrimination.[248] Nevertheless, the Court sustained his claim, ruling that the plaintiff suffered an injury to his interest in interracial association.[249] The interracial solidarity cases pose a greater challenge for theorizing Whiteness, as they bring to the surface instances where the interests of White individuals clash in legally recognized ways.[250] However, here, too, discrimination against Whites accompanies another type of interracial discrimination, that which occurs between Whites and racial minorities.

The "strong" type of cases involves claims of associational discrimination, where Whites discriminate against other Whites because of their association and relationship with racial minorities. While these cases do resemble those involving the interracial solidarity doctrine, they are distinct. Interracial solidarity cases emerge from claims of direct discrimination against racial minorities that have an indirect impact on the White plaintiff, whereas in associational discrimination cases, intraracial discrimination is direct, and the main dynamic discussed by the court.[251] These cases serve as the focus for the next section.

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[247] Traficante v. Metro. Life Ins. Co., 409 U.S. 205, 209-10 (1972).
[248] *Id.*
[249] *Id.* at 210-12. Different courts and the EEOC interpreted the meaning of the right to interracial association differently. *See* Rich, *supra* note 246 at 1538. While some courts have adopted this doctrine, others have narrowed its scope and application. *See, e.g.*, Cochran v. Five Points Temps., 907 F.Supp.2d 1260 (N.D. Ala. 2012) (rejecting a claim by a White plaintiff against a racially hostile work environment); Jerome v. Midway Holding, 2007 WL 973968, at *9 (D. Ariz. Mar. 29, 2007) (rejecting a racial discrimination claim by a White plaintiff based on minority-targeted racism due to her race being White). *See also* Clarke, *supra* note 203 at 129–30.
[250] *See* Clarke, *supra* note 203; Rich, *supra* note 246; Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 INDIANA LAW J. 63–142 (2002).
[251] see for instance Parr v. Woodmen of the World Life Ins., 791 F.2d 888 (11th Cir. 1986).

2.4 Theorizing Intra-White Discrimination Via the Stereotype Doctrine

2.4.1 The Current Framework: Associational Discrimination

Title VII's language does not recognize associational discrimination expressly.[252] While some recognition of associational discrimination claims is found in the lower courts,[253] for many years federal courts did not recognize associational discrimination claims, adhering to a strict interpretation of Title VII.[254]

However, in *Parr v. Woodmen of the World Life Insurance Co*., the Eleventh Circuit—basing its decision on Title VII's goals—recognized the possibility of associational discrimination.[255] The plaintiff in *Parr* was a White man who was rejected from a sales position after the manager discovered he was married to a Black woman. The court acknowledged that this employment decision was made "because of race."[256] Similar claims, revolving around interracial marriage, were later recognized by the Sixth and Fifth Circuits.[257] In all these cases, the courts stressed that it was because of *the plaintiff*s*'* race that they faced discrimination.[258]

Associational discrimination claims filed by White plaintiffs based on a friendship or workplace relationship with racial minorities rather than marriage proved more challenging. In *Barrett v. Whirlpool Corp*, three White female plaintiffs claimed they suffered a hostile work

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[252] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2017).
[253] *See, e.g.*, Reiter v. Ctr. Consol. Sch. Dist., 618 F. Supp. 1458, 1459 (D. Colo. 1985); Robinett v. First Nat'l Bank of Wichita, 1989 WL 21158, at *2 (D. Kan. 1989); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1365 (S.D.N.Y. 1975).
[254] Jessica Vogele, *Associational Discrimination: How Far Can It Go?*, 32 TOURO L. REV. 921, 927 (2016).
[255] Parr v. Woodmen of the World Life Ins., *supra* note 251.
[256] *Id.* at 891.
[257] *See, e.g.*, Tetro v. Elliott Popham Pontiac, 173 F.3d 988 (6th Cir. 1999); Deffenbaugh-Williams v. Wal-Mart Stores, 188 F.3d 278 (5th Cir. 1999).
[258] *Parr*, 791 F.2d at 892 ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race."); *Tetro*, *supra* note 257 at 994 ("A White employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is a prejudice against the biracial child."); *Deffenbaugh-Williams*, 188 F.3d at 280. *See also* Holcomb v. Iona Coll., 521 F.3d 130, 139 (2d Cir. 2008) ("We reject this restrictive reading of Title VII. The reason is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race.").

environment due to their association with Black colleagues.[259] One plaintiff testified that she was called "a bitch" after commenting on racial remarks directed at Black employees. White coworkers stopped talking to her and gave her "strange looks" every time she was friendly to Black colleagues. Her supervisor began treating her worse than her colleagues. Another plaintiff testified that she was mocked and made fun of whenever she complained against the usage of the n-word and was told to "stay with her own kind."[260] Further, she argued that when she sought a promotion she was told by her supervisor that she would never be promoted due to her relationships with African-American coworkers.[261] The district court rejected the plaintiffs' claim, reasoning that they failed to demonstrate that their relationship with their Black coworkers constituted a sufficient associational claim. The district court concluded that there is "no evidence, however, that those friendships constituted anything other than the casual, friendly relationships that commonly develop among co-workers but that tend to be limited to the workplace."[262] The Sixth Circuit reversed, arguing that Title VII protects individuals, even when they are not members of a protected class, if they are victims of discrimination due to their association with protected individuals.[263] Further, the court clarified that if a plaintiff shows discrimination based on association with a racial minority, the degree of association is irrelevant.[264]

Similarly, in *Reiter v. Center Consolidated School District No. 26-JT*, a White teacher claimed that her employment was not renewed due to her "close association with the Spanish

[259] Barrett v. Whirlpool Corp., 556 F.3d 502 (6th Cir. 2009).
[260] *Id.* at 510.
[261] *Id.*
[262] Barrett v. Whirlpool Corp., 543 F. Supp. 2d 812, 826 (M.D. Tenn. 2008).
[263] *Barrett*, 556 F.3d at 512.
[264] *Id.* at 513. The Sixth Circuit adopted the Seventh Circuit's holding in *Drake v. Minnesota Mining & Manufacturing Co.* 134 F. 3d 878 (7th Cir. 1998).

citizens of the district."[265] The court accepted her claim, arguing that "[t]he underlying rationale in these cases is that the plaintiff was discriminated against on the basis of his race because his race was different from the race of the people he associated with."[266] Similarly, in *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, the plaintiff argued that her "casual social relationship" with a Black man led to her discharge from the church. [267] The Southern District of New York held that "the plaintiff's race was as much a factor in the decision to fire her as that of her friend. Specifying as she does that she was discharged because she, a White woman, associated with a Black, her complaint falls within the statutory language that she was 'discharge[d] ... because of [her] race.'"[268]

The associational cases' "strong" relationship to intra-White discrimination provides an interesting site for examining the "wrong" of this dynamic. Specifically, an examination of the courts' theorization (and under-theorization) of this type of discrimination reveals paradigmatic problems that extend beyond these cases and help explain the limited recognition of same-race discrimination between Whites, and the limited understanding of Whiteness under Title VII in general.

2.4.2 The Problem with the Existing Framework

The reasoning offered by courts to explain why associational cases are considered racial discrimination provides little to work with. In most cases, judges merely declare that discrimination due to one's association with racial minorities is discrimination "because of race"

[265] Reiter v. Center Consol. Sch. Dist. No. 26-JT, 618 F. Supp. 1458, 1459 (D. Colo. 1985).
[266] *Id*. at 1460.
[267] Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1365 (S.D.N.Y. 1975).
[268] *Id.* at 1366.

but do not explain how or why that is the case or why such discrimination is because of the plaintiff*'s* race, rather than the race of those with whom the plaintiff associates.[269]

Some courts, however, provide a limited explanation for their decisions. One example is found in *Barrett.*[270] *The court reasoned that, even though one of the White plaintiffs was not a member of a protected class, she suffered "direct harassment resulting from her associations with [B]lack employees"—i.e. protected individuals.*[271] *Here, it seems, t*he protection the court grants to White plaintiffs is contingent upon the protection Title VII and the *McDonnell Douglas* test grant to racial minorities. Put differently, the White plaintiff's protection latches onto the protected-class status of racial minorities.[272] This line of reasoning explains the turn some courts have taken in examining the degree of association between the plaintiff and the racial minorities with whom he or she is associated: if these minorities' protection rubs off on the White plaintiff, it must be restricted to cases where the degree of association between them and the plaintiff is more than casual.[273] Notably, despite courts' rejection of this criterion over the years, recent cases have reopened these debates by rejecting claims of associational discrimination based on more nominal levels of association with racial minorities.[274]

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[269] See for instance Parr v. Woodmen of the World Life Ins., *supra* note 251, Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581 (5th Cir. 1998), Alizadeh v. Safeway Stores, Inc., 802 F.2d 111 (5th Cir. 1986).

[270] *Barrett*, 556 F. 3d 502.

[271] *Id.* at 519.

[272] Clarke argues that the protected class rationale of the *McDonnell Douglas* framework, developed to allow plaintiffs a shortcut when discrimination is hard to prove, is now examined even when the shortcut is not needed, thus creating a phenomenon she coins: "Protected Class Gatekeeping." Protected Class Gatekeeping occurs when courts read a protected class requirement into Title VII. *See* Clarke, *supra* note 203 at 104.

[273] *See, e.g., Barrett*, 543 F. Supp. 2d 812.

[274] Zielonka v. Temple Univ., No. CIV. A. 99-5693, 2001 WL 1231746, at *1, *20 (3d Cir. Oct. 14, 2001) ("Plaintiff did not have the type of relationship with Dr. Roget that alone may reasonably support and assumption that plaintiff's race motivated the action he complains of."); EEOC v. Parra, No. CIV. 05-1521-HO, 2008 WL 2185124, at *1, *13 (D. Ore. May 22, 2008) ("[T]he law requires something more than just friendship."); Salazar v. City of Commerce City, No. CIV. A. 10-cv-01328-LTB-MJW, 2012 WL 1520124, at*1,*6 (D. Colo. May 1, 2012), aff'd,535 F. App'x 692 (10th Cir. 2013) ("[T]he relationships alleged by Plaintiff are insufficient, as a matter of law, to meet her *prima facie* burden of national origin discrimination by association.").

A similar but distinct line of reasoning is found in *Reiter*, *Whiteney*, and *Holocomb*. While in *Barrett* the court recognized the plaintiff's standing as deriving from the racial minority in the situation, in these cases courts explain that associational discrimination is "because of race" by focusing on the association itself.[275] In *Holocomb*, the court argues: "because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race."[276] *Reiter* further develops this logic, adding that the key point is that the plaintiff's race "was different from the race of the people he associated with."[277] Here, too, the problem is not the plaintiff's race *per se*, but rather the entanglement of the plaintiff's race with African Americans, Hispanics, or other racial minorities. This reasoning leads back to courts' scrutiny of the type of "protected associations" which may justify court intervention.

Neither line of reasoning leads to a finding of discrimination based on the plaintiff's race alone. Further, even though I argued earlier that the interracial solidarity doctrine and the associational discrimination cases are distinct, both share one major similarity. In both, courts are only able to acknowledge racial discrimination when other racial minorities are in the picture.[278]

In that sense, both signify one major privilege of Whiteness: its invisibility.[279] According to the invisibility thesis, one of the major privileges associated with being White is that White people do not belong to "a race"—only racial minorities do.[280] Under the ideological regime of White supremacy, "White" norms, codes of behavior, and perspectives are considered the

[275] Barrett v. Whirlpool Corp., 556 F.3d 502 (6th Cir. 2009).
[276] Holcomb v. Iona Coll., 521 F.3d 130, 139 (2d Cir. 2008) (emphasis in original).
[277] Reiter v. Center Consol. Sch. Dist. No. 26-JT, 618 F. Supp. 1458, 1460 (D. Colo. 1985). A similar reasoning is found in Tetro, *supra* note 257 at 994-5 ("the essence of the alleged discrimination in the present case is the contrast in races between Tetro and his daughter").
[278] *See, e.g.*, Traficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972) (applying the interracial solidarity doctrine); *Barrett*, 556 F. 3d 502 (applying the associational discrimination doctrine).
[279] Writers on Whiteness have long stressed this major feature of Whiteness, see Rich, *supra* note 246 at 1511.
[280] *Id*.

default, and thus are neutralized and seem to be objective and colorless.[281] Accordingly, courts in both associational discrimination cases and interracial solidarity doctrine cases do not see the color White, but only the shadows cast onto it by Black or Brown people. Only their presence allows courts to recognize racial discrimination against White individuals. By limiting same-race discrimination to instances in which racial minorities are present, intraracial discrimination between Whites is recognized only in a rigid set of circumstances.

Instead of conceptualizing associational cases based on the racial identities of those with whom the plaintiff associates or according to the difference between the plaintiff's race and his or her associate's, I suggest theorizing these cases via the stereotype doctrine. According to such theorization, plaintiffs in associational cases are discriminated against for failing to conform to stereotypes about Whiteness held by their employer or supervisor.[282] Under the stereotype doctrine, racial minorities' involvement would not be necessary for the court to acknowledge racial discrimination. Further, such theorization manages to "see" color even when that color is White.

The stereotype doctrine first originated in sex discrimination jurisprudence.[283] Within that context, courts have managed to recognize intragroup discrimination between men, usually in same-sex *harassment* cases.[284] This is important, as men are characterized by the "invisibility" of their gender just as Whites are characterized by the "invisibility" of their race. In the coming section, I thus detail doctrinal and theoretical developments in same-sex stereotyping and harassment cases to draw lessons for intragroup race-based discrimination between Whites.

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[281] *See, e.g.*, Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2013 (1994).
[282] [NEED CITATION]
[283] *See, e.g.*, Price Waterhouse v. Hopkins, *supra* note 213.
[284] *See, e.g.*, Oncale v. Sundowner Offshore, *supra* note 220.

2.4.3 Lessons from Same-Sex Stereotyping and Harassment

The doctrine of sexual harassment, as well as the doctrine of sex stereotyping, both emerged from the "traditional" feminist paradigm of a female plaintiff and a male wrongdoer.[285] Sexual harassment was first recognized as sex discrimination in *Meritor Savings Bank v. Vinson,* where Mechelle Vinson sued her employer for forcing her to have sexual relations with him, touching her, and forcefully raping her on multiple occasions.[286] Justice Rehnquist declared that Title VII's language is not limited to "tangible" discrimination and recognized sexual harassment, both in the form of quid pro quo sexual advances and hostile work environments as sex discrimination.[287] Three years after *Meritor Savings,* the Supreme Court's *Price Waterhouse* decision first introduced the idea of sex stereotyping as a form of sex discrimination into Title VII.[288] Ann Hopkins, an exemplary employee, claimed that she was denied partnership due to sex discrimination, because of her failure to conform to feminine stereotypes.[289] She was described as "overly aggressive" and was advised to dress "more femininely" and attend "charm school" in order to improve her chances of partnership despite the fact that aggressiveness and toughness were qualities the firm sought in partners.[290] The ruling in *Price Waterhouse*

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[285] *See* JANET E. HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 17-20 (2006). Halley maps the three minimum conditions which make a project, or a claim, a feminist one. These are: m/f (making a distinction between males/female, or masculine/feminine); m > f (i.e., the claim/project must posit some kind of subordination of f by m); and, finally, carrying a brief for f, which stems from the prior conditions.

[286] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 60 (1986); Vinson v. Taylor, 753 F.2d 141, 143-44 (D.C. Cir. 1985).

[287] *Meritor Sav. Bank*, 477 U.S. at 64-65.

[288] *See* Price Waterhouse v. Hopkins, *supra* note 213. A Seventh Circuit decision from 1971 made a short reference to stereotypes as a form of sex discrimination, arguing that in "forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *See* Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971). This statement was later cited and adopted in *Price Waterhouse*, *supra* note 213, at 251. The stereotype doctrine was first developed within the constitutional framework of Equal Protection, where this theory was litigated in a series of constitutional cases of Equal Protection by Ruth Bader Ginsburg, then head of the ACLU Women's Rights Project, *see* Bornstein, *supra* note 199 at 937. Notably, most of the petitioners in these cases were men, challenging stereotypical norms regarding childcare responsibilities, *id*.

[289] *Price Waterhouse*, *supra* note 213, at 233-34.

[290] *Id.* at 235-36.

determined that stereotypes regarding how women should behave, how they should talk, or dress, or conduct themselves in general, amount to sex discrimination prohibited under Title VII.[291] Justice Brennen specifically condemned the "Catch 22" for women in the workplace: "out of a job if they behave aggressively and out of a job if they do not."[292]

Despite the *inter*group origin of these doctrines, both progressed beyond their initial categories to account for intragroup discrimination, including discrimination between members of the dominant group. At first, courts were reluctant to recognize same-sex harassment cases involving men.[293] Critiquing this tendency, Katherine Franke argued these cases ought to be recognized as same-sex harassment, as they "clearly show how sexually harassing conduct can effectively enforce particular gender orthodoxies in the workplace."[294] Describing the "wrong" of sexual harassment from "the margins" of same-sex harassment cases,[295] Franke argues that sexual harassment should be seen as a form of sex discrimination because it operates as a "technology of sexism."[296] That is, "[i]t is a disciplinary practice that inscribes, enforces, and polices the identities of both harasser and victim according to a system of gender norms that envisions women as feminine, (hetero)sexual objects, and men as masculine, (hetero)sexual subjects."[297] Same-sex harassment between men is theorized as the way in which members of the dominant group police fellow members in order to preserve the ideological paradigm that grants them this exact dominance.[298] Anita Bernstein makes a similar argument with regard to

[291] *Id.* at 241-42; 250-51.
[292] *Id.* at 251.
[293] Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 698 (1997).
[294] *Id.* at 698.
[295] *Id.* at 694.
[296] *Id.* at 696.
[297] *Id.* at 693.
[298] [NEED CITATION]

stereotyping in general, arguing that stereotyping is a "technology of prejudice" which places an unjustifiable constraint on its subjects.[299]

One year after Franke's article the Supreme Court decided *Oncale*, officially recognizing same-sex harassment as sex discrimination under Title VII.[300] Joseph Oncale worked on an oil platform in the Gulf of Mexico where he was repeatedly subjected to severe sexual harassment by his colleagues and supervisors, who called him names "suggesting homosexuality," threatened him with rape, and sodomized him with a bar of soap.[301] Justice Scalia, delivering the opinion of the court, clarified that Title VII protects both men and women and, accordingly, grants protection from same-sex harassment.[302]

The *Oncale* ruling, combined with the concept of sex stereotyping developed in *Price Waterhouse,* has led lower courts to theorize same-sex harassment according to the stereotype doctrine.[303] In these cases, sex stereotyping and harassment are discussed jointly, with sexual harassment as the discriminatory practice and stereotypes regarding how men should behave (according to masculine standards) providing the proof that the harassment was "because of sex."[304]

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[299] Anita Bernstein, *What's Wrong with Stereotyping*, 55 ARIZ. L. REV. 655, 680 (2013).
[300] *See* Oncale v. Sudowner Offshore Servs., *supra* note 220. The case came out one year after Katherine Franke's article and therefore is not discussed in her paper, but its facts clearly demonstrate and echo her argument.
[301] *Id.* at 77; Oncale v. Sundowner Offshore, *supra* note 220, at 118-19.
[302] *Oncale*, *id.*, at 78-79.
[303] *See, e.g.*, EEOC v. Boh Bros. Constr. Co., 731 F.3d 44 (5th Cir. 2013); *Bibby v. Phila. Coca Cola Bottling Co.*, No. 00-1261, 2001 WL 919976, at *1 (3d Cir. Aug. 1, 2001), *infra* note 131.
[304] In Boh Bros. Constr. Co., a male ironworker claimed that he was sexually harassed by his employer who referred to him as "'pu—y,' 'princess,' and 'fa—ot,'" because he "did not conform to [his employer's] view of how a man should act." 731 F.3d at 449. The Fifth Circuit argued that gender stereotyping may provide proof that the harassment was "because of" sex. *Id.* at 456. Similarly, in *Bibby v. Phila. Coca Cola Bottling Co.*, a gay employee claimed sexual harassment by his employer. 2001 WL 919976, at *1. The Third Circuit argued that a plaintiff can prove that same-sex harassment is discrimination "because of" sex by showing that "the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender." *Id.* at *5. *See also* Prowel v. Wise Bus. Forms Inc., 579 F.3d 285 (3d Cir. 2009); Rene v. MGM Grand Hotel, 305 F.3d 1061 (9th Cir. 2002); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001); Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997). For a similar discussion about the links between same-sex harassment and stereotyping, *see* Bornstein, *supra* note 199.

This case study of same-sex harassment and stereotyping demonstrates the possibilities that open up once a theory of discrimination moves from identity to ideology. Sexism as ideology, these cases and Franke's theory indicate, must enforce itself on all parties within the workplace in order to maintain its societal grip.[305] Sexual harassment under this conceptualization is not an expression of sexual desire or of men demonstrating dominance over women. Instead, it is a technology through which sexism and stereotypes regarding masculinity and femininity are enforced on all members of the workplace.[306]

Same-sex stereotyping and harassment cases should provide a relevant framework from which to draw insights into same-race discrimination. Framing harassment and stereotyping as technologies of sexism in the workplace, made effective through the subordination of both men and women, invites a parallel discussion in race.

Such an analogy should be approached with caution, as gender and race operate differently as systems of "othering." Accordingly, gender stereotypes play a pivotal role in enforcing the gender binary, whereas in the racial context racial minorities are often pressured to present themselves according to White norms.[307] However, race, like gender, is an ideology and a disciplinary practice and, like gender, it enforces and polices identities.[308] As critical race theorists explain, race forms through daily meeting points of institutional and individual power.[309] Thus, "we are raced through a constellation of practices that construct and control

[305] Franke, *supra* note 120, at 693. In Althusserian terms, to reproduce the relations of production. *See* Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, *in* LENIN AND PHILOSOPHY AND OTHER ESSAYS 127–186, 128 (1970). I will elaborate on this concept later in this Article, see *infra* Part IIId.
[306] *See* Franke, *supra* note 293 at 693.
[307] *See* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (Reprint ed. 2007). I will elaborate on the differences between race and sex further in this Article.
[308] *See, e.g.*, LÓPEZ, *supra* note 104 at 82–4; 91–3.
[309] Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of* Bowers v. Hardwick, 79 VA. L. REV. 1805, 1806-7 (1993).

racial subjectivities."[310] The applicability of principles underlying same-sex discrimination jurisprudence is particularly evident in associational discrimination cases, as acts of associational discrimination serve to enforce and maintain a racial binary.[311]

2.4.4 Back to Race: Intra-White Discrimination as Stereotyping

The understanding of race as a technology of production rather than an identity, as a relational dynamic that produces subjectivities and allocates resources and opportunities rather than a state of being, prompts us to isolate and study these technologies.

When a White employee is told to "stay with her kind,"[312] more than just associational discrimination is at play. This is a specific type of racial work aimed at subjecting that employee to stereotypes regarding Whiteness held by her supervisor or colleagues. Under this paradigm, Whiteness is seen as "pure," an asset that may be diminished by the act of mixing.[313] "Strange looks" in the hallway at White employees who associate with Black coworkers send a message that the plaintiff has failed to conform to her White colleagues' expectations of her as a White person.

Such discrimination, manifesting as hostile work environments, echoes *Oncale* and other same-sex discrimination cases involving men. In both scenarios, members of the dominant group police their fellow members in order to maintain the group's identity, content, and borders. And,

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[310] Kendall Thomas, *id*. *See also* JOHN A. POWELL, RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY 49, 53 (Reprint ed. 2015). ("In other words, before someone can be said to possess a racial characteristic or identity, there first must be a process of "racing." This requires the social creation of racial categories, the assignment to categories, and determination of the meanings associated with each category.") Notably, this position must be distinguished from colorblindness. While both stances hold race to be fictional, each take a different route in addressing racism. For a discussion on the differences between the two, as well as the importance of acknowledging race and racism to combat both, see LÓPEZ, *supra* note 63, at 6-125; LÓPEZ, *supra* note 104 at 6–125; Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STANFORD LAW REV. 1 (1991).

[311] Race-based associational discrimination stems from the ideological position that different races should not mix. I elaborate more on this point in the coming section.

[312] Barrett v. Whirlpool Corp., 556 F.3d 502, 510 (6th Cir. 2009).

[313] Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1737 (1993).

following the main logic of *Price Waterhouse*, this discrimination stems from wrongful stereotypes (as expectations) regarding race.

One of the key stereotypes regarding Whiteness is indeed its purity.[314] Law and social practice, from the notorious "one drop rule,"[315] to prohibitions of interracial marriage,[316] to de facto and de jure segregation of schools, neighborhoods, and workplaces,[317] not only reflect expectations regarding Whiteness's purity and inherently-assumed supremacy,[318] but they are also the mechanisms that maintain it as such.[319]The associational discrimination cases demonstrate that within workplaces governed by White supremacist ideologies, we can detect racial work at play through intragroup dynamics between Whites. Indeed, workplaces are not only gendered, but also raced.[320] As Devon Carbado and Mitu Gulati argue, workplaces are often governed by racial ideologies.[321] Thus, a Black employee may be incentivized to conceal racial critique or opinions in order to avoid appearing to be "racially sensitive, uncollegial, a potential troublemaker."[322] Carbado and Gulati's work, as well as other scholarly work on workplace racialization, revolves mostly around how such racialization affects racial minorities and the extra burden it places on their shoulders. Such arguments are important, as they allow antidiscrimination theory to recognize the often-hidden ways in which racism and racial stereotypes intermingle with inequality. However, little attention has been paid to how the White

[314] *See infra* notes 144-146.
[104] *See* F. JAMES DAVIS, WHO IS BLACK?: ONE NATION'S DEFINITION (2010).
[316] SHERYLL CASHIN, LOVING: INTERRACIAL INTIMACY IN AMERICA AND THE THREAT TO WHITE SUPREMACY (2017).
[317] Rosenthal, *supra* note 194.
[318] *See* Loving v. Virginia, 388 U.S. 1, 11 (1967).
[319] LÓPEZ, *supra* note 104 at 84, 91–3.
[320] Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEG. ISSUES 701–730, 702 (2000); Carbado and Gulati, *supra* note 206 at 1262.
[321] *See* Carbado and Gulati, *supra* note 206 at 1262–63, 1263 n.8.
[322] *Id.* at 1289–90.

workplace inherently requires racial work within the White racial group in order to subject its members to racial expectations regarding Whiteness.

Importantly, Whiteness, like masculinity, is performed.[323] As with any ideology, nonconformity by group members threatens its sustainability.[324] Same-sex discrimination cases illustrate the point perfectly. When men behave or perform their identity in ways that do not conform to the ideal of masculinity, they risk devaluating the "worth" of masculinity, which is associated with dominance and control of women.[325] Thus, group members are prompted to police men's behavior in order to force them to conform to patriarchy's ideological lines.[326]

Louis Althusser's idea of interpellation—specifically the act of "hailing"—helps crystallize how same-race discrimination cases work within the workplace.[327] Althusser's concept of interpellation is relevant here, as it ties together ideology and interpersonal exchange. Ideology, according to Althusser, constitutes concrete subjects through the act of interpellation.[328] The ideological apparatus manifests itself through rituals and practices in which individuals take part.[329] When individuals are recognized and recognize themselves and their designated role in said rituals, they are *interpellated* into this ideology and thus become its

[323] Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 156 (1998); John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 820 (1999).
[324] *Cf.* Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32 (1982) (discussing the importance of political legitimacy as well as the consent of the governed to the exercise of political domination: "It is the notion that, in order to understand the modern industrial state, one has to understand its ideological power to generate consent from the masses through the creation of institutions, and organizations, and social patterns that appear legitimate to the masses of the people", at 32).
[325] *See, e.g.*, Franke, *supra* note 293 at 693.
[326] *Id.*; R. W. CONNELL, MASCULINITIES 77–79 (2005).
[327] Althusser, *supra* note 305, at 170-177.
[328] The term "ideology," Althusser clarifies, is "pure illusion," Althusser, *supra* note 305 at 159. It represents the "imaginary relationship of individuals to their real conditions of existence." *Id.* at 162. However, it has material manifestations. *Id.* at 166.The ideological apparatus is the source of an individual's ideas, which are manifested through his material actions into material practices. *Id.* at 169. These practices themselves are also governed by rituals that the ideological apparatus defines and charges with meaning. *Id.* at 168.
[329] Althusser, *supra* note 305 at 166–68.

subjects.[330] When a police officer, for instance, hails you in the street, saying "Hey, you there!" and you turn around, you become a subject via the mere act of turning because you recognize this hail as being addressed to you and you take part in the practice or ritual of the governing ideology. You are formed as a specific type of subject – a citizen that follows the instructions and rituals of the regime, and inherently, its ideological apparatus.[331]

Althusser's idea of interpellation is aimed at highlighting subject formation through ideology in more subtle interactions. However, his argument should apply *a fortiori* to harsher interactions of harassment and discrimination. As previously mentioned, Bernstein describes stereotypes as a "technology of prejudice" that unjustly constrains the individual.[332] These constraints, she argues, emerge from both external and internal stereotyping.[333] I argue that this claim ought to be understood, in Althusserian terms, as the way in which stereotyping as interpellation produce individuals as subjects who recognize themselves in the relevant ideological apparatus regulating the workplace. Internal constraints are therefore also inherently the outcome of external constraints that form the individual as a specific subject through interpellation. Put differently, when someone forces us to recognize ourselves in societal stereotypes, and we perceive them to be directed at us, they can also become internal(ized) constraints. Understanding how ideology functions in situations of workplace discrimination is important because it helps highlight the structural problem arising from workplace discrimination as well as the reason such discrimination is "because of race."

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[330] *Id.* at 173.
[331] Althusser, *supra* note 305 at 174. Notably, interpellation does not necessarily require a state agent. See Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 124 (David Kairys ed., 1998); Gilden, *supra* note 202.
[332] Bernstein, *supra* note 299.
[333] *Id.* at 667.

Going back to comments such as "stay with your kind," we can now see how they echo a specific type of ideology, and how they interpellate employees into its subjects.

This recognition of intraracial racialization between Whites is therefore in line with the stereotype doctrine and Title VII. Acts of expectation policing within the workplace are not only an enforcement of White supremacy but are also forbidden racial stereotyping, which amount to forbidden racial discrimination under Title VII.

2.5 New avenues for intra-White discrimination: "White trash" as Failing White performativity

The value of Whiteness—or the property interest in Whiteness[334]—for White supremacy is not threatened solely by the act of mixing, although this is one of the perceived "threats" to it.[335] Examining other stereotypes regarding Whiteness as key in the production of Whiteness and White supremacy may open up other avenues for combating regimes of Whiteness within the workplace. Such dynamics do not have to include racial minorities for courts to recognize that race is at play.

One example of intra-White discrimination may illuminate such possibilities. Camille Gear Rich discusses in her article "Marginal Whiteness" the category of "low-status Whites." Marginal Whites, according to Rich, are those who "have more limited access to White privilege"[336] and enjoy it only in "contingent, context-specific ways."[337] Further, Rich argues, high-status Whites may impose economic and dignitarian costs on low-status Whites in order to preserve resources for themselves or in order to disguise anti-Black discrimination as racially

[334] Harris, *supra* note 313.
[335] LÓPEZ, *supra* note 104 at 82.
[336] Rich, *supra* note 246 at 1505.
[337] *Id.* at 1516.

neutral.[338] These dynamics, however, are not translated to legal language via current antidiscrimination doctrine.[339]

Indeed, similar to the understanding that Blackness is not one singular racial experience, as Gulati and Carbado's *The Fifth Black Woman* illustrates, there are varying ways to perform Whiteness, and some are more socially acceptable and socially rewarded than others. [340] To expand upon Harris' idea of Whiteness as property,[341] not all types of Whiteness performativity yield similar "value."

The type of discrimination suggested by Rich—between low- and high-status Whites—could potentially be litigated via the stereotype doctrine in cases where the circumstances indicate that the motivation for discrimination was based on stereotypes or expectations regarding the "right" way to perform Whiteness.[342]One such argument is presented by both Matt Wray and Nancy Isenberg, who study the social othering of poor rural Whites, or "White trash."[343] As Wray argues, individuals referred to as "White trash" were historically seen by high-status Whites as a social group threatening the "contamination" of the White race and were accordingly perceived as "filthy," "lazy,"[344] and morally and evolutionarily inferior.[345] Isenberg adds that White trash individuals were socially understood as those "who lack the *civic markers*

[338] *Id.* at 1503-04.
[339] *Id.* at 1504. While Rich focuses her critique on the interracial solidarity doctrine, my argument applies to all intra-White discrimination dynamics stemming from stereotypes regarding Whiteness.
[340] Carbado and Gulati, *supra* note 320 at 701–03.
[341] Harris, *supra* note 313.
[342] Using Rich's argument regarding marginal Whiteness prompts me to make one important distinction between her argument and mine. While Rich's move is to acknowledge "marginal Whites" or "low-status Whites" as a unique and distinct social group, existing between and in addition to other categories, my suggestion is rather to complexify our understanding of how the racial binary is maintained via technologies of racism aimed at policing individuals to adhere to norms regarding Whiteness.
[343] MATT WRAY, NOT QUITE WHITE: WHITE TRASH AND THE BOUNDARIES OF WHITENESS (2006); NANCY ISENBERG, WHITE TRASH: THE 400-YEAR UNTOLD HISTORY OF CLASS IN AMERICA (2016).
[344] WRAY, *supra* note 343 at 22, 65.
[345] *Id.* at 16, 96.

of stability, productivity, economic value, and human worth."[346] This is specifically relevant to our discussion as stereotypes regarding White trash collide with qualities employers seek in potential employees. Accordingly, stereotypes against poor rural Whites can lead to employment discrimination.[347]

Stereotypes associated with poor rural Whites should not be mistaken as merely class stereotypes. Importantly, they were always created to distance White trash from the core of Whiteness, not affluency;[348] scientists described their "yellowish", tallow-colored skin, which was explained both through the depiction of them as "clay eaters" as well as through interracial sex "leaving traces" of "negro blood."[349]

Furthermore, similar symbolic properties, characteristics, and traits were used from very early on to refer to both Blacks and poor Whites. As Wray notes:

> Behaviors and attitudes regarding conventional morality and work were particularly salient here, with the lower classes and lower races typically characterized as holding deep aversions to both. Also highly salient in the minds of observers were behaviors regarding cleanliness— the lower sorts were consistently characterized as dirty, smelly, and unclean. What is striking about reading historical documents of the period then is the similar ways in which poor Whites, Indians, and Blacks are described—as immoral, lazy, and dirty.[350]

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[346] ISENBERG, *supra* note 343 at 315 (emphasis added).

[347] As Gulati and Carbado rightly stress, not all stereotypes are necessarily negative, and at times employees can "use prejudice" for their advancement, for instance stereotypes according to which Korean Americans are hard-working and technically-inclined. Carbado and Gulati, *supra* note 206 at 1304–5. Therefore, acknowledging the conflicting nature of the stereotypes against poor rural Whites and what is considered to be necessary within the workplace highlight the potential of anti-White-trash stereotypes to lead to discrimination.

[348] *See* WRAY, *supra* note 343 at 139. (discussing the idea of "lack of whiteness" possessed by poor Whites).

[349] ISENBERG, *supra* note 343 at 151; WRAY, *supra* note 343 at 40, 77. Interestingly, the 19th century accusation of White trash and "scalawag" as associating too much with "freedmen," *see* ISENBERG, *supra* note 343 at 184., is at the intersection of both lines of stereotyping developed in this Article: the discussion regarding associational discrimination and the discussion regarding White trash. This is perhaps not surprising, given the framework which sees them both as limbs of one body, that of Whiteness policing. Accordingly, stereotypes regarding the 'right' way to perform Whiteness go hand in hand with efforts to keep Whiteness pure. Furthermore, this dynamic, which ties together hostile positions towards "White trash" and racial minorities, is also apparent in present day Title VII discrimination litigation, *see infra* Part V.

[350] WRAY, *supra* note 343 at 23. For more on that similarity, see for instance this 1956 quote with which Thomas Sowell opens his *Black Rednecks and White Liberals*: "These people are creating a terrible problems in our cities. They can't or won't hold a job, they flout the law constantly and neglect their children, they drink too much and their moral standards would shame an alley cat. For some reason or other, they absolutely refuse to accommodate themselves to any kind of decent, civilized life." THOMAS SOWELL, BLACK REDNECKS AND WHITE LIBERALS 1 (2005).

Certainly, stereotypes regarding Whites as clean, moral, and hard-working historically constituted the racial lines between Whites and Blacks in the U.S. and thus constituted the core around which the concept of Whiteness was formed.[351] Accordingly, discrimination against White trash could be analyzed as stemming from their failing performance of Whiteness.

Instances where such stereotypes are the motivation behind intraracial discrimination between Whites should be seen as a form of policing of Whites back into the boundaries of acceptable Whiteness and thus as a form of illegal racial discrimination. Notably, while discriminating against or stereotyping poor rural Whites may stem partially from class, § 703(m) of Title VII acknowledges the possibility of mixed-motive discrimination. Thus, being able to show that discriminatory treatment stemmed partly from stereotypes about the "proper" performance of Whiteness is sufficient even if the discrimination was also motivated by other reasons.

A better, more nuanced theorization of same-race discrimination cases could account for the possibility of discrimination by high-status Whites against low-status Whites and explain it as racially motivated discrimination.

2.6 The Anti-Subordination Challenge

At the beginning of this Article, I presented three competing views on antidiscrimination to argue that anti-essentialism is favorable both in advancing Title VII's goals and in dealing

As he immediately states, while many would mistake this quote as referring to racial minorities, it was said about poor Whites living in Indianapolis. *Id*.

[351] *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1370-76 (1988). *See also* JUAN WILLIAMS, MY SOUL LOOKS BACK IN WONDER: VOICES OF THE CIVIL RIGHTS EXPERIENCE 9 (2005); PATRICIA A. TURNER, CERAMIC UNCLES & CELLULOID MAMMIES: BLACK IMAGES AND THEIR INFLUENCE ON CULTURE 65-66 (1994).

with intragroup discrimination.[352] However, my argument regarding intraracial racialization may also resonate with both anti-classification and anti-subordination theorists.

The challenge posed by anti-classificationists is rather minimal. Even though I have argued that anti-essentialism is better suited to explaining the phenomenon of intraracial racialization, I believe that once it is theorized, anti-classificationists would agree that any race-based classifications between White workers are unacceptable.

Anti-subordination theorists might have a harder time accepting my proposition. Some might fear that allowing White plaintiffs to sue for racial discrimination is the legal manifestation of "all lives matter"[353] and that it risks ignoring the reality in which racial minorities are the primary targets of racial discrimination in the workplace. Further, and especially due to the damaging effect that White plaintiffs have had on the advancement of Title VII litigation, for instance in *Ricci*,[354] anti-subordination theorists might argue that opening up more legal avenues for Whites to claim racial discrimination requires meaningful justification. In this section, I dispel some of the apprehension this argument might cause and present several arguments that illustrate how the under-theorization of intra-White discrimination is harming racial minorities' interests, thus highlighting the positive externalities of my suggestion for the goals of anti-subordination theory.

[352] *See supra* Part I of this chapter.
[353] Clarke, *supra* note 203 at 156.
[354] In *Ricci v. DeStefano*, 557 U.S. 557 (2009), a group of White firefighters claimed discrimination under Title VII after city officials chose to ignore the results of a test they had all passed, qualifying them for a promotion. The city's invalidation of the test result stemmed from the fact that no Black firefighters passed it, and officials feared that accepting the results would expose them to a disparate impact discrimination lawsuit from the Black firefighters. The Supreme Court held that the decision to ignore the test results was in violation of Title VII as it was an impermissible race-based decision, adding that the city could have ignored the results only if it had a "strong basis in evidence" that, had it not taken the action, it would have been liable to a disparate impact claim. See *Ricci*, 557 U.S. 557.

2.6.1 De-racialization of Whiteness Grants White Employers Immunity from Lawsuits

On a pragmatic level, the inability to acknowledge diverse scenarios of intra-White discrimination grants White employers immunity from discrimination lawsuits that Black employers do not enjoy.

Recall that under the courts' broad understanding of same-race discrimination between *racial minorities*, discrimination "because of race" has been analyzed and understood according to the relevant circumstances of each case and includes acts of racial harassment in the form of repeated racial slurs.[355]

In striking contrast, and in keeping with the example of high/low-status Whites, a review of all Title VII cases including the phrase "White trash" or "hillbilly" reveals that there are almost no cases in which White employers have been sued for referring to their employees as "White trash."[356] Rather, the majority of those accused of using this term within these cases are racial minorities,[357] either in "reverse racism" discrimination cases[358] or when racial minorities

[355] *See supra* Part IIA of this chapter.

[356] A Westlaw search conducted on April 10, 2017 for the phrase "White trash" or "hillbilly" and "Title VII" produced 71 relevant results (omitting repeating results and mere mentioning of the phrase as a side note). Out of these cases, only four cases (approx. 5.6 percent) discussed White plaintiffs suing their White employer for referring to them by the term "White trash."

[357] In 33 (approx. 46.5 percent) of these cases, the person using the term was a racial minority. In 23 (approx. 32 percent) of these cases, the identity of the speaker was unknown, and in 15 (approx. 21 percent) of these cases, the speaker was White.

[358] Charest v. Sunny-Aakash, LLC, 2017 WL 4169701 (M.D. Fla. Sept. 20, 2017); Atkins v. Denso Mfg. Tennessee, Inc., 2011 WL 5023392 (E.D. Tenn. Oct. 20, 2011); Hood v. Nat'l R.R. Passenger Corp., 72 F. Supp. 3d 888 (N.D. Ill. 2014) (dealing with the term "hillbilly"); McCoy v. Johnson Controls World Servs., Inc., 878 F. Supp. 229 (S.D. Ga. 1995); Braid v. MJ Peterson Corp., 208 F.3d 202 (2d Cir. 2000); Schiraldi v. AMPCO Sys. Parking, 9 F. Supp. 2d 213 (W.D.N.Y. 1998); Julian v. Safelite Glass Corp., 994 F. Supp. 1169 (W.D. Mo. 1998); Scarbrough v. Gray Line Tours, 2004 WL 941729 (W.D.N.Y. Mar. 21, 2004); Fuelling v. New Vision Med. Labs. LLC, 284 F. App'x 247 (6th Cir. 2008).

sue for racial discrimination, and then face accusations that they themselves engaged in a racially-charged manner by referring to colleagues or supervisors as "White trash."[359]

This is not a reflection of societal reality, but rather of the narrow range of cases that find a place within Title VII courts. It thus appears that within the imagined borders of Title VII litigation, mostly racial minorities use the words "White trash" to refer to White colleagues and employees and, almost exclusively, they are the ones reprehended for doing so.

In only a few instances did White employees tried to argue that they were harassed by other White coworkers or supervisors using the term "White trash."[360] In some of them, female plaintiffs attempted to explain the use of the term by their male supervisor as creating a sex-based hostile work environment. These were mostly rejected for failing to prove that the term was motivated by their sex.[361] In the only case where a White employee claimed a race-based hostile work environment due to the use of the term "White trash" by her White coworkers, the court granted the defendant's request for summary judgment on the hostile work environment claim, concluding that the plaintiff failed to prove that her colleagues had any "racial animus" towards her.[362]

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[359] See, for example, Vasquez v. Atrium, Inc., 218 F. Supp. 2d 1139 (D. Ariz. 2002); EEOC v. Champion Intern. Corp., 1995 WL 488333 (N.D. Ill. Aug. 1, 1995); Evans v. Hussmann Corp., 2007 WL 2303730 (E.D. Mo. Aug. 8, 2007); Morris v. Overnite Transp. Co., 2005 WL 2291188 (S.D. Tex. Sept. 20, 2005); Canady v. John Morrell & Co., 247 F. Supp. 2d 1107 (N.D. Iowa 2003).

[360] As mentioned, these cases amount to approximately 5.6 percent of the cases, see footnote 356.

[361] *See, e.g.*, Schofield v. Maverik Country Store, 26. F. Supp. 3d 1147 (D. Utah 2014); Sacco v. Legg Mason Inv. Counsel & Trust Co., 660 F. Supp. 2d 302 (D. Conn. 2009). Notably, one such attempt was fruitful. *See* Huff v. Sw. Va. Reg'l Jail Auth., No. 1:o9cvooo41, 2009 WL 3326889 (W.D. Va. Oct. 13, 2009). The case discussed a doctor who referred to a female nurse as "stupid", "incompetent" and as a "hillbilly." The court found that these comments are sex-based as they were directed only at female nurses: "I find that Huff has presented sufficient evidence to show that Dr. Ofagh's comments and behavior were based on her sex. Although the majority of Dr. Ofagh's comments were not directly related to gender, Huff has testified that he spoke only to the female nurses in such derogatory terms, including "stupid," "incompetent" and "hillbilly." *Id.* at *7. The case was nevertheless dismissed, as the court ruled that Huff failed to show that the comments were sufficiently "severe and pervasive."

[362] Hoffman v. Winco Holdings, Inc., 2008 WL 5255902 (D. Or. Dec. 16, 2008). Other interesting findings from this review illustrate how some racial minorities sue for a "reverse" interracial solidarity doctrine, arguing they suffered retaliation for complaining about racial comments directed at their White colleagues. See, for instance, Kess v. Mun. Emps. Credit Union of Baltimore, Inc., 319 F. Supp. 2d 637 (D. Md. 2004); Ambris v. City of Cleveland, 2012 WL 5874367 (N.D. Ohio Nov. 19, 2012); Mosby-Grant v. City of Hagerstown, 630 F.3d 326 (4th Cir. 2010); Davy v. Star

The current understating of same-race discrimination thus reinforces a kind of meta-inequality—inequality in the enforcement of antidiscrimination laws where White supervisors and employers receive *de facto* immunity from discrimination charges to which non-Whites are currently exposed. The inability to acknowledge intraracial discriminatory patterns within Whiteness, except for specific and limited circumstances, creates a shield around Whiteness that protects the most powerful members of the group.[363]

2.6.2 De-racialization of Whiteness Redirects Whites' Claims Towards Racial Minorities

If various intra-White conflicts and discriminatory practices exist in society but receive no legal redress through antidiscrimination laws, instances of discrimination remain individualized and lose social meaning and importance. The assumed cohesiveness of Whiteness within Title VII thus pits marginalized social groups from different races against each other, at times placing the advancement of Black people and other racial minorities at risk.[364]

The following hypothetical might help illuminate my point. Let's assume, for this discussion, that a White person (Bob) who fails to conform to White stereotypes is subject to bias by fellow Whites. He applies for a job with a White employer, and, after several remarks from his potential employer about rural Whites not being "White enough" or good enough for

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Packaging Corp., 517 F. App'x 874 (11th Cir. 2013); Brown v. CSX Transp., 2013 WL 5305664 (D.S.C. Sept. 17, 2013). Finally, in many cases, the same employer targets both "White trash" and racial minorities. 26 (approx. 36.5%) of the cases I reviewed demonstrated patterns of combined racism to both racial minorities and "White trash." This could potentially support a claim that the animus towards "White trash" was part of a general ideology of White supremacy. See, for instance, Thompson v. North American Terrazzo, Inc., 2015 WL 926575 (W.D. Wash. Mar. 4, 2015); Okokuro v. Com. Dep't of Welfare, 2001 WL 185547 (E.D. Pa. Feb. 26, 2001); Crawford v. BNSF Ry. Co., 665 F.3d 978 (8th Cir. 2012); Williams v. Asplundh Tree Expert Co., 2006 WL 2131299 (M.D. Fla. July 28, 2006); Guy v. City of Phoenix, 668 F. Supp. 1342 (D. Ariz. 1987).

[363] Clarke rightly points out another pragmatic argument for allowing Whites to sue for racial discrimination: opening up more possibilities of same-race discrimination between Whites may diminish the negative incentive to hire racial minorities, as they are often seen as a "litigation risk." Clarke, *supra* note 203 at 159–61.

[364] Rich talks about the risk of pitting marginalized groups against each other in her critique of the limited scope of the interracial solidarity doctrine, Rich, *supra* note 246 at 1590.

the job, or questions regarding his hygienic routine, he is not accepted for the position. Now let's say that in scenario A, another White person (with different performativity markers) gets the job. In scenario B, a Black candidate (regardless of his status) gets the job rather than Bob. Under the current theorization of same-race discrimination between Whites within Title VII, only in scenario B does Bob have legal recourse, and he can only articulate it as "reverse racism" or as illegitimate affirmative action, arguing that he did not get the job because he is White. Perhaps due to cognitive dissonance (along with a racist bias), Bob will eventually convince himself that being *White* (rather than not being White enough) is what cost him the job. Title VII's inability to acknowledge the complex patterns of intraracial racialization prevents Bob from describing his grievance differently.

An inability to recognize the nature of discrimination between Whites thus places racial minorities' advancement (e.g., job opportunities) at risk of being dismissed as resulting from bias or affirmative action while similar advancements by Whites are framed as neutral and merit based.

2.6.3 De-racialization of Whiteness Reinforces the Category of Whiteness as Neutral and Invisible

The inability to acknowledge the various intraracial discriminatory practices between Whites leads to the construction of Whiteness as a cohesive, singular, natural, and, simultaneously, invisible category.[365] As mentioned above, one of the main technologies of Whiteness is its ability to seem as the norm, thus masking its racial coloring.[366] Under this paradigm, Whiteness must be constantly constructed and concealed.[367] Acknowledging the racial

[365] I thank Ido Katri for helping me think through this point.
[366] *See supra* Part IIB of this chapter.
[367] Gotanda, *supra* note 310 at 6.

work necessary to maintain Whiteness exposes Whiteness as a project of White supremacy. This is most evident in associational discrimination cases, in which racial work in preventing the mixing of races historically has been more visible. Revealing and exposing hidden divisions within Whiteness may also subvert the natural and neutral conventions regarding Whiteness. Acknowledging that not all Whites perform Whiteness in the same way and do not enjoy Whiteness in similar ways forces us to see Whiteness not as flowing naturally (and merely) from skin color, biology, or ancestry but rather as a mechanism of power, constructed on an ongoing basis to maintain and justify dominance and supremacy.

In addition, providing White plaintiffs with legal avenues to name, blame, and claim[368] intraracial racialization and discrimination may also help undermine these marginal White groups' current broad loyalty to Whiteness and fellow Whites simply due to their assumed Whiteness. Such a legal development may have significant implications for the viability of Whiteness as a social project.[369]

My project is therefore not an attempt to merely describe low-status Whites—for instance, through the rhetoric of identity politics—in what Nancy Fraser would describe as an "[a]ffirmative strategy for redressing injustice."[370] Rather, my project uses divisions within Whiteness as a catalyst for transformative change towards its dismantling—one that may push people away from the fiction of Whiteness and challenge the seemingly natural/biological regime of White supremacy.[371]

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[368] William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. SOC. REV. 631, 635-36 (1980).
[369] Ian Haney López argues that the only way to dismantle racism is to dismantle Whiteness. *See* LÓPEZ, *supra* note 104 at 132.. This last argument thus follows his argument by offering concrete legal avenues to achieve it.
[370] NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE 74 (2003).
[371] *Id.* at 72-78.

2.6.4 De-racialization of Whiteness Maintains the Whiteness of Workplaces

One of the challenges to antidiscrimination law generally, and to the stereotype doctrine specifically, is how to address the discriminatory norms of the workplace via existing legal tools. In *Price Waterhouse,* the Court rightly recognized that the defendant's company encouraged norms socially associated with masculinity, such as aggressiveness and toughness.[372] Recall Justice Brennan's critique of the "Catch 22" for women in the workplace: out of the partnership track if not aggressive enough, and out of it if they are.[373] While the struggle to allow women to behave aggressively in the workplace is a necessary step towards equality, it still only challenges half of the equation, as it accepts the gendering of the workplace as masculine, leaving that aspect of hetero-patriarchy intact.[374] "Catch 22" arguments are thus powerful, but also limiting. When women have tried to challenge masculinity norms in the workplace, in instances without similar double binds, these attempts generally have been unsuccessful. This is effectively illustrated by cases where women tried challenging grooming codes in the workplaces,[375] as well by *Wal-Mart* decision.[376]

Interestingly, it was the same-sex discrimination cases between men that forced courts to tackle the hyper-masculinity of many workplaces.[377] The male privilege of performing masculinity without being stereotyped or discriminated against rendered the "Catch 22" argument irrelevant – men simply do not face the type of 'Catch 22' situation described by Brennan. However, the inability to fall back on "Catch 22" arguments focused the discussion

[372] Price Waterhouse v. Hopkins, *supra* note 213, at 251.
[373] *Id.*
[374] For an explanation of hetero-patriarchy *see supra* note 205.
[375] For cases where women tried to challenge grooming policies within the workplace, for instance, policies requiring them to wear make-up, *see* Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006).
[376] Wal-Mart v. Dukes, 564 U.S. 338, 344 (2011).
[377] *See supra* pages 87-88.

around the various ways in which the masculinity of workplaces harmed men who failed, or simply did not want to conform to expected masculine behavior.[378]

Acknowledging the limited scope of "Catch 22" arguments is important when shifting our discussion from sex back to race. As Kenji Yoshino stresses, while racial minorities are often required to "cover" traits that do not conform to the dominant White culture, women are socially expected to simultaneously "cover" and "reverse cover."[379] Put differently, racial minorities who "dress white" or "speak unaccented English" find safe harbor while women are generally expected to act feminine.[380] Therefore, "Catch 22" arguments are mostly irrelevant with regard to racial discrimination. This could explain why Title VII jurisprudence has not developed a racial stereotype doctrine alongside the sex stereotype doctrine.[381]

However, the general expectation that racial minorities "cover," while sparing them the "Catch 22" scenario, does not mean they do not bear the costs of conforming to the White norms of most workplaces. The often-invisible racialization of many workplaces places a heightened burden on the shoulders of racial minorities to perform their working identity strategically. Such acts of strategic performance consume time and effort, and they often come with psychological costs and potential risks.[382]

Enabling White plaintiffs to sue employers who pressure them to perform Whiteness in a certain way could help racial minorities in challenging the racial norms of the workplace. By

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[378] *Id.*
[379] YOSHINO, *supra* note 307 at 145–47.
[380] *Id.* Yoshino mentions the possibility of racial minorities being caught in another type of "Catch 22" situation, not by White demands alone, but rather as a result of cross-expectations from the White community and their own community—which often expects its members to stress their unique traits. *Id.*
[381] *See* Bornstein, *supra* note 199 at 964.
[382] *See, generally,* Carbado and Gulati, *supra* note 206 at 1278–9, 1291–2. Carbado and Gulati detail two such risks: First, the risk that "others will identify the performative element of an outsider's behavior as strategic and manipulative," and second, "when multiple interconnected stereotypes operate simultaneously, the risk exists that taking steps to negate one kind of stereotype will activate some other negative stereotype."

grounding same-race discrimination between Whites in the stereotype doctrine White plaintiffs would be incentivized to expose the racialized nature of Whiteness and the mechanisms through which it polices employee behavior. Exposure of hidden norms opens the way for their subversion. Opening legal avenues for White plaintiffs to sue their White employers or supervisors is therefore in the interest of racial minorities.

2.7 Practical Suggestions

This article argues that same-race discrimination between Whites ought to be theorized and understood via the stereotype doctrine. While the practical implications of this argument are self-evident, it is nevertheless worth sketching very briefly how such cases might look.

Applying the stereotype doctrine, courts should allow a White plaintiff to prove a *prima facie* case that discrimination was "because of race" by showing that the discrimination stemmed from perceived failure to properly perform their Whiteness. Whether a plaintiff has proven such a *prima facie* case due to stereotypes regarding Whiteness should be decided according to the unique circumstances in each case.

Accordingly, the doctrine of racial stereotypes regarding Whiteness will develop on a case-by-case basis. This is important, as the content of Whiteness shifts and changes according to the needs of the ideology of White supremacy. The rise of the Alt-right and White supremacy movements since Trump's election in 2016, for instance, could bring forth new dynamics of intraracial racialization that courts will have to address.[383] Such movements may charge Whiteness with new meanings that expand the inner expectation from its members beyond the idea of "purity," already addressed under the associational cases. A flexible doctrine of racial

[383] GEORGE HAWLEY, MAKING SENSE OF THE ALT-RIGHT 113–121 (2017); James Cook, *The rise of the alt-right*, November 7, 2016, https://www.bbc.com/news/election-us-2016-37899026 (last visited Nov 11, 2018).

stereotypes, and its adaptation to same-race discrimination patterns between Whites, would thus be able to accommodate such changes.

Finally, the *McDonnell Douglas* framework, which requires that plaintiffs be members of a protected class, will not be available to White plaintiffs. This asymmetry between White plaintiffs and racial minorities is appropriate, given the asymmetry between the respective privilege of Whites and racial minorities. While the invisible nature of Whiteness could make it hard for White plaintiffs to prove that the discrimination they faced was "because of race," cases in which the enforcement of White norms is overt should nevertheless lead courts to acknowledge the possibility of race-based discrimination between Whites. With time and doctrinal developments, proving such patterns of same-race discrimination should become easier.

2.8 Conclusion

Matt Wray finishes his book *Not Quite White* with an excerpt from Erskine Caldwell's *God's Little Acre*.[384] The novel depicts a group of poor southern Whites digging for gold without luck. Their "futile mining efforts are destroying what little is left of their land."[385] The secret to finding gold, local folk wisdom says, is finding an albino. ". . . a man ain't got as much of a chance as a snowball in hell without an albino to help," one of the characters, Pluto, says at the beginning of the novel. Albinos apparently possess the magical ability to find gold. When protagonist Ty Ty Walden inquires as to what an albino is, Pluto explains:

> "An albino is one of these all-[W]hite men, Ty Ty. They're all [W]hite; hair, eyes, and all, they say [. . .] It's the all-[W]hiteness, Ty Ty."[386] So, their only way to find gold and to enjoy wealth and success is "to have pure Whiteness on their side."[387]

[384] WRAY, *supra* note 343 at 133–34.
[385] *Id.*
[386] ERSKINE CALDWELL, GOD'S LITTLE ACRE 9-11 (1933).
[387] *Id.*

This anecdote illustrates my argument regarding Whiteness as a social goal rather than merely a biological trait. The magical albino, much like the "ultimate macho man" or the "perfect lady" (that *Price Waterhouse* executives were envisioning), serves as a mythical state of being that no one can actually fully obtain[388] but that everyone nevertheless seeks.[389] The albino here is the epitome of the White man; his blood is pure, removing any doubt or suspicious of interracial association. He is the one who can find gold and is thus the one poor Whites must aspire to find, to *be*.

The efforts to attain the idealized version of Whiteness/masculinity/femininity define social categories and boundaries.[390] The inevitable gaps between the ways we perform our identities and the mythical ideals we aspire to reach are the spaces into which stereotype-based discrimination often enters. Such acts of discrimination are simultaneously a reflection of individuals' failed attempts to become the ideal subjects of hegemonic ideologies and a mechanism through which these ideologies keep individuals in line by imposing social sanctions on those who fail or refuse to fall in line.

Being able to identify the racialized nature of such discrimination reveals the power of the stereotype doctrine. Specifically, the stereotype doctrine provides a remedy for discrimination against those who do not conform to these identitarian mythologies.

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[388] *See generally* CALDWELL, *supra* note 386 at 217. Notably, in *God's Little Acre*, Ty Ty Walden eventually finds an albino, but that too does not help him, and the novel ends with his continuing obsessive digging in the search for gold. *Id.* at 302.

[389] *See generally* JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 125 (1993) ("[H]eterosexual performativity is beset by an anxiety that it can never fully overcome, that its efforts to become its own idealizations can never be finally or fully achieved…"); *See also* KATHRIN HÖRSCHELMANN & BETTINA VAN HOVEN, SPACES OF MASCULINITIES 186–7 (2013). ("[T]he clear route to achieving masculinity is never quite within reach, it remains knowable only in part. Only through repeated iterations of male performativities can a man feel comfortable or settled in his masculinity. Masculinity can only be 'stored' for a very short while, and masculine subjectivity must be constantly enacted; a fall from grace is always possible if the performance suffers.").

[390] *See generally,* IAN DAVIS, STORIES OF MEN AND TEACHING: A NEW NARRATIVE APPROACH TO UNDERSTANDING MASCULINITY AND EDUCATION 15 (2014). ("[H]egemonic masculinity helps maintain gender divisions, and manage power imbalances in favour of the masculine even when the masculine ideal is never fully achieved.").

This Article has suggested that same-race discrimination is often a form of intraracial racialization, *i.e.,* a way in which racial expectations are enforced on members of a racial group by their fellow members. By utilizing the stereotype doctrine, these practices can be recognized as wrongful race discrimination under Title VII.

Courts' tendency to de-racialize Whiteness and view it as invisible has led to a limited doctrine of same-race discrimination between Whites, one which recognizes the possibility of such discrimination being "because of race" only when racial minorities are involved. The stereotype doctrine has the potential to racialize Whiteness by exposing the racial work necessary to maintain its content, meaning, and borders and, in doing so, lead to its subversion.

Chapter 3: Identity at Work

3.1 Introduction

Identity has a key place in society as a primary channel through which we know ourselves and the other.[391] Identity also holds a core place in our laws, and especially within employment antidiscrimination law.[392] Antidiscrimination law can be described as an economy of identities: in order to receive protection from discrimination, a group must prove it is, in fact, a group, and that *as such* it deserves special treatment: to "jump the queue"[393] in front of other wronged individuals and to have its interests favored.

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[391] RICHARD JENKINS, SOCIAL IDENTITY (2008); Andreas Wimmer, *The Making and Unmaking of Ethnic Boundaries: A Multilevel Process Theory*, 113 AM. J. SOCIOL. 970–1022 (2008). For some, the ability to have our identity recognized by others is one of the first steps of gaining subjectivity, of becoming *someone*. *S*ee *generally* CHARLES TAYLOR, MULTICULTURALISM AND "THE POLITICS OF RECOGNITION" : AN ESSAY (c1992).

[392] Hereinafter: "antidiscrimination law."

[393] MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES (1998).

Think of the following example: a supervisor at a fast-food chain has three employees. She treats all three horribly, yelling at them, humiliating and bullying them, essentially creating a "hostile work environment" that "alters their conditions of employment."[394] Currently, they may sue their employer for harassment under Title VII[395] only if this work environment is hostile because of their "race, color, religion, sex, or national origin"[396] or one of those traits is a motivating factor for the supervisor's behavior.[397] In other words, to gain legal protection one needs to show that they are "on the list." If two of the three are women, or Black, or both, and the hostility is motivated by sex or race, or both, it could lead to judicial intervention. If the third worker cannot convince the court that he too is "on the list," the harassment he endures would probably be considered lawful.[398]

This economy of identities means that for decades, groups that sought legal protection took on the hard task of having their identities *recognized*. I refer to this effort as *recognition work*. The civil rights movement of the 1960s and 1970s fought to secure designated legal protections for Black people. The feminist movement did the same for women. Similarly, recent years have borne witness to the struggle of the LGBTQ community to gain legal recognition, culminating in the decriminalization of sodomy,[399] the recognition of same-sex marriages,[400] and *Bostock v. Clayton County*, in which the Supreme Court held that gay and transgender people are

[394] See for instance *Oncale v. Sundowner Offshore Services, Inc. supra* note 220.
[395] Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(a)(1) (hereinafter "Title VII").
[396] *Id*, at § 703(a).
[397] *Id*, at § 703(m).
[398] There are non-identitarian ways to sue for workplace harassment, the most prominent of which is the tort of intentional infliction of emotional distress, which I will discuss later in this article. However, this tort is difficult to prove—one must prove that the behavior was "outrageous" and that it caused its victim "severe" damage. See David C. Yamada, *The Phenomenon of Workplace Bullying and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEORGETOWN LAW J. 475, 494–98 (1999).
[399] *Lawrence v. Texas*, 539 U.S. 558 (2003).
[400] *Obergefell v. Hodges*, 576 U.S. 644 (2015).

protected from discrimination under Title VII.[401] *Bostock* marked the end of a long period during which gay and transgender recognition under Title VII was liminal: debated in various courts that reached different opinions and rules.[402] It is tempting to look at *Bostock* as proof that recognition work pays off. This article will argue, however, that this moment calls for reflection regarding the way recognition shapes communities and individuals and the way its fruits—usually tailored antidiscrimination protections—curtail our political and legal imagination.

This paper offers the concept of *liminally-recognized groups*,[403] i.e., groups still in the process of gaining recognition, as a methodological lens through which to critically assess recognition's relationship to identities and the law. Following a definition and typology of liminally-recognized groups under U.S. society and antidiscrimination law, this paper moves to closely examine the stories of three such groups: asexuals, poor whites, and fat people.[404] Each of these groups occupies a different type of liminality with respect to the level of recognition it has acquired, and the strategies deployed to achieve it. Asexuals, for instance, have found their way into New York's Sexual Orientation Non-Discrimination Act, which bans discrimination on account of asexuality.[405] However, they currently remain unrecognized in most antidiscrimination legislation, and it remains unclear whether *Bostock* will extend to anti-asexuality discrimination.[406] Poor whites—often stigmatized as "white trash"—are not protected *as such* under any antidiscrimination laws. People who suffer discrimination or harassment based

[401] *Bostock v. Clayton*, 590 U.S. ___ (2020).
[402] In the context of gender identity see Jason Lee, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination under Title VII Symposium*, 35 HARV. J. LAW GEND. 423–462 (2012). In the context of sexual orientation see for instance *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (2017); *Hively v. Ivy Tech Community College*, 830 F.3d 698 (2016); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2018).
[403] "Liminally-recognized" is an adaptation of the commonly used adjective "liminal," employed as a specific descriptive to refer to groups at the margins of social and legal recognition.
[404] I use the term *fat* because it is the term accepted and preferred by fat activists, see Anna Kirkland, *Think of the Hippopotamus: Rights Consciousness in the Fat Acceptance Movement*, 42 LAW SOC. REV. 397–432 (2008).
[405] Infra p. 129.
[406] Infra p. 130.

on anti–poor white sentiment try to use recognized frameworks, including race discrimination, sex discrimination, and disability discrimination, to argue that they have been unlawfully discriminated against.[407] Finally, fat people have a long tradition of fighting against weight discrimination through the Americans with Disabilities Act (ADA) as well as via Title VII.[408] This rich legal history allows for a nuanced exploration into the possibilities and pitfalls of these attempts.

Jointly, their stories illuminate what liminality looks like on the ground. They also highlight the benefits, and the costs of securing recognition. Indeed, recognition has some important advantages. It can validate the experiences of devalued and marginalized individuals and communities. It has proven immensely effective in energizing individuals around a shared goal and in converting the demands of social movements into law. The products of recognition-based struggles—mainly targeted and specific identity-based laws and doctrines—are important in centering vulnerable workers, who deserve unique, tailored protections to bridge the gap between them and workplace hegemonies. But fighting for recognition also brings about a set of problems worthy of attention. As various scholars have noted, the current regime of recognition is susceptible to the "paradox of political power," according to which groups must be simultaneously powerful enough to gain recognition and yet powerless enough to justify it. Moreover, recent empirical research reveals that only a small fraction (~2%) of discrimination lawsuits result in a victory for the plaintiff, which is partly explained by the complicated procedure for proving discrimination. Recognition-based protections further propagate essentialism. Targeted remedies for discrimination anchor and fixate the identities at the core of discriminatory regimes. To be granted protection as a woman, or as a person with a disability,

[407] Infra p. 134.
[408] Infra p. 144.

one must perform their identity in a way that places them within the protected group. This, in turn, further reinforces the regulatory nature of group boundaries. As this article argues, the specific *type* of identities favored under U.S. antidiscrimination law revolves around three specifically problematic characteristics: immutability, respectability, and attachment to injury. Members of liminally-recognized groups are encouraged to perform their identities around these traits.

In light of recognition's costs, this article explores two strategies to move beyond recognition. The first strategy uses a textual approach to the interpretation of major antidiscrimination laws to argue they may be viewed not as protecting specific identities but rather as proscribing employers from making workplace decisions on the basis of harmful ideologies (racism, sexism, etc.). The second strategy focuses on the potential of labor law and union power to provide a pioneering route for liminally-recognized groups via universal protections granted to all workers. Harnessing social movements' recognition work to bolster workers' power could provide a path for workplace equity not contingent upon recognition. Moreover, such a path may strengthen broad, cross-cutting coalitions of workers of different identities, recognized and unrecognized.

This article comprises three parts. Part I provides a definition and typology of liminally-recognized groups and presents three such case studies. Part II reconsiders recognition from a normative standpoint. It argues that despite the benefits of having one's identity recognized, the costs of recognition warrant serious consideration. Part III suggests two ways to move beyond recognition: (1) utilizing antidiscrimination law as a tool with which to move beyond recognition; (2) exploring labor law's ability to achieve the goals of antidiscrimination law without resorting to identity and recognition.

3.2 Liminally-Recognized Groups

3.2.1 Definition and Typology

The concept of liminally-recognized groups defines groups at the margins of recognition—not fully recognized socially or legally. Most (but not all) such groups aspire to gain full legal recognition of their unique identities and are in the process of doing so. This type of liminality, along with the type of recognition groups often seek, is two-faceted. An epistemic facet concerns the basic knowledge that the group exists (which, in turn, comprises self-knowledge, societal knowledge, and legal knowledge). A normative facet involves the recognition that the group is *entitled* to legal protection, either through black-letter law or the courts.[409]

Accordingly, there are various possible modes of liminal recognition. Some groups are recognized by courts, for instance, that have determined they are not worthy of legal protection or do not fall under current antidiscrimination rules. The status of transgender and gay people under Title VII was in this state of liminality until the recent Supreme Court decision in *Bostock*.[410] Other groups are in the position of their very existence as a group being only liminally recognized, which leaves the question of normative legal recognition outside the legal discussion.

Under the umbrella definition of liminal recognition, it might be helpful to think of full legal recognition as the top step of a ladder, a culmination of the process that societal wrongs must go through to acquire group-based legal protections.

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[409] As Aviam Soifer showed, sometimes a group is still not considered as "deserving" legal protection even after Congress has dedicated an entire statue to providing them with exactly that, see Aviam Soifer, *Disabling the ADA: Essences, Better Angels, and Unprincipled Neutrality Claims*, 44 WILLIAM MARY LAW REV. 1285–1340, 1290 (2002).
[410] *Bostock v. Clayton*, supra note 401.

The Ladder of Recognition[411]

	Level of recognition	Examples
Full Recognition	Full normative recognition, i.e., special protected status	People with disabilities;[412] protected classes[413]
⇧	Legal epistemology of the group but no or unstable legal recognition	Fat people;[414] Arab Americans[415]
	Group consciousness and/or emerging social awareness	Asexuals;[416] nonbinary persons;[417] poor whites[418]
No Recognition	No group despite potential societal stigma/shared interests	Unattractive people;[419] "regarded as";[420] specific identity performances[421]

At the base of this ladder are individuals not seen as part of *any* group and therefore not often considered for group-based protections. Think of unattractive people. Research shows that people are significantly biased in favor of attractive people.[422] On average, less attractive people are "less likely to be hired and promoted" and earn lower salaries than their attractive counterparts.[423] And yet, unattractive people do not see themselves as part of a distinct social

[411] My division of the process of gaining recognition into distinct stages, as well as my classification of various groups as occupying specific stages, is open for debate. Recognizing the complexity and subtleties—and ongoing fluidity and evolution—of these terms and groupings, this table was designed merely to offer a rough illustration of the process of gaining full legal recognition.
[412] The Americans with Disabilities Act, 42 U.S.C. § 12101 (2000) (hereinafter: "ADA").
[413] Title VII, *supra* note 395; McDonnell Douglas Corp. v. Green, *supra* note 236.
[414] Lucy Wang, *Weight Discrimination: One Size Fits All Remedy Note*, 117 YALE LAW J. 1900 (2007).
[415] Sarah Khanghahi, *Thirty Years After Al-Khazraji: Revisiting Employment Discrimination Under Section 1981*, 64 UCLA LAW REV. 794–842 (2017).
[416] Elizabeth F. Emens, *Compulsory Sexuality*, 66 STANFORD LAW REV. 303 (2014).
[417] Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. LAW REV. 894 (2018).
[418] Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. LAW REV. 1497–1593 (2010); Lihi Yona, *Whiteness at Work*, 24 MICH. J. RACE LAW 111 (2018).
[419] DEBORAH L. RHODE, THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW (2010); Elizabeth M. Adamitis, *Appearance Matters: a Proposal to Prohibit Appearance Discrimination in Employment Notes and Comments*, 75 WASH. LAW REV. 195–224 (2000).
[420] Craig Robert Senn, *Perception over Reality: Extending the ADA's Concept of Regarded as Protection under Federal Employment Discrimination Law*, 36 FLA. STATE UNIV. LAW REV. 827–864 (2008).
[421] Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEG. ISSUES 701 (2000).
[422] Bias begins as early as infancy. Studies found that infants "stare longer at attractive faces" and that "parents and teachers give less attention to less attractive children." RHODE, *supra* note 419 at 26.
[423] *Id.* at 27.

group, and to the best of my knowledge there are no conventions or advocacy groups dedicated to their interests. We can also think of people who face discrimination based on various kinds of identity performances. A perfect example is provided in Carbado and Gulati's seminal piece *The Fifth Black Woman*.[424] The article describes Mary, a Black woman, who works as an attorney at an elite corporate firm. She, along with four other Black female attorneys, are up for promotion to partner at the firm. However, "[w]hile Mary wears her hair in dreadlocks, the other Black women relax their hair. On Casual Fridays, Mary sometimes wears West African influenced attire. The other Black women typically wear khaki trousers or blue jeans with white cotton blouses."[425] Eventually, the other four Black women win promotions, but Mary does not. Carbadu and Gulati use this hypothetical to demonstrate their claim about identity performance, arguing that minorities perform their identities in various ways, some more acceptable in an office setting than others.[426] Do "Marys" form a distinct social group located at the intersection of race, gender, and identity performance? While they may be subject to unique discrimination (and we may be able to *recognize* a Mary when we see one), there is no distinct, recognized group of Black women who perform their identity the way Mary did.

Sometimes, a collection of individuals who share interests or are similarly stigmatized come to see themselves as part of a group with more or less clear boundaries. Other times, categories are imposed on individuals from the outside—for instance, by the medical community—leading individuals to self-identify according to such classifications.[427]

[424] Carbado and Gulati, *supra* note 320.
[425] *Id.* at 717.
[426] See also generally Carbado and Gulati, *supra* note 206.
[427] For many groups, self-ownership of group identity follows outside categorization, pathologizing, and bias. See for instance MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 101 (1988).

Subsequently, group consciousness begins to form.[428] This emergence usually results in (and is the result of) communal work. Writing about the transgender movement, Susan Stryker wrote:

> [M]embers of minority groups often try to oppose or change discriminatory practices and prejudicial attitudes by banding together to offer one another mutual support, to voice their issues in public, to raise money to improve their collective lot in life, to form organizations that address their specific unmet needs, or to participate in electoral politics or lobby for the passage of protective legislation. Some members engage in more radical or militant kinds of activism aimed at overturning the social order or abolishing unjust institutions rather than reforming them, and others craft survival tools for living within conditions that can't at that moment be changed. . . . In short, a multidimensional activist movement for social change often begins to take shape.[429]

Kenji Yoshino discussed this process with regard to the bisexual movement,[430] describing its formation following Stonewall.[431] Elizabeth Emens described a similar process that the asexual identity and community is undergoing.[432] And recently Jessica Clarke documented this process with regard to nonbinary identities,[433] highlighting the ways in which the past decade has witnessed a growing number of self-identified nonbinary persons, along with increased social awareness of the possibility and legitimacy of nonbinary gender identity and performance.[434]

This process of growing group consciousness and social awareness does not translate immediately and automatically to legal recognition, neither epistemic nor normative. Asexual, bisexual, and nonbinary identities are practically erased from many antidiscrimination laws and discussions.

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[428] On when and how that process occurs see Wimmer, *supra* note 391.
[429] SUSAN STRYKER, TRANSGENDER HISTORY, SECOND EDITION: THE ROOTS OF TODAY'S REVOLUTION (2nd edition ed. 2017).
[430] Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STANFORD LAW REV. 353–462, 431–34 (1999).
[431] Yoshino discusses the establishment of the National Bisexual Liberation group during the early 1970s, the formation of various organizations and political actions groups, news articles, conferences, etc., *id.*
[432] Emens, *supra* note 416 at 314–5. See also infra p. 125.
[433] Clarke, *supra* note 417.
[434] *Id.* at 896–900.

When societal knowledge of a group becomes more and more widespread, its existence manages to coalesce within legal and judicial consciousness. Often, however, even when courts acknowledge a group's existence, the group still does not enjoy full normative recognition (i.e., legal protection). While courts have been aware of the existence of transgender people for several decades now, federal courts were until recently split on whether this group is entitled to protection from discrimination under Title VII.[435] Similarly, while the existence and social borders of Mexican Americans as a group have never been questioned, whether they suffer from discrimination and bias and are therefore entitled to a higher level of judicial scrutiny was for years up for debate.[436] Another example is Arab Americans, who are "white" according to racial data collection. While they may be stigmatized and subject to patterns of substantial hostile work environments, courts often nevertheless deem them not part of a protected class and therefore not entitled to protection from discriminatory harassment.[437]

Finally, once a group's struggle for recognition bears fruit, it may reach the status of a fully recognized group under the law. Various factors determine which groups are more likely to do so or, as Laurence H. Tribe put it, be "deemed appropriate losers in the ongoing struggle for political acceptance and ascendancy."[438] Perhaps the most famous of such factors appear in footnote 4 of *Carolene Products*, in which Justice Stone mentioned minorities who are "discrete and insular" as deserving higher levels of scrutiny and protection by the Court.[439] Elizabeth Emens offered a model of criteria that contribute to a group "winning" legal protection from

[435] Lee, *supra* note 402.
[436] Yifat Bitton, *The Limits of Equality and the Virtues of Discrimination*, 2006 MICH. STATE LAW REV. 593–636 (2006).
[437] See for instance *Chaib v. GEO Group, Inc.*, 92 F. Supp. 3d 829 (S.D. Ind. 2015), *affd on other grounds,* 819 F.3d 337 (7th Cir. 2016); *Yousif v. Landers McClarty Olathe KS, LLC.*, No. 12-2788-CM, 2013 WL 5819703.
[438] Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE LAW J. 1063–1080, 1073 (1979).
[439] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

discrimination, including an identity that is hard to alter and/or "characterized by a visible trait or distinct behavior," an identity associated with a salient social group and a widely known social movement, existing bias against the group, and a history of explicit/implicit legal burdens.[440]

Regardless of which set of criteria one uses to justify normative legal recognition of a group that wishes to be recognized, what is clear is that that status is usually the result of intense social struggles. Social movements fight, often for decades, to reach the peak of the ladder and be recognized for group-based protection from discriminatory practices and laws. African Americans, women, and people with disabilities are groups that have been recognized, either statutorily or judicially as protected classes or groups that warrant higher levels of scrutiny. Under Title VII, having the status of a protected class means not only an easier route for proving discrimination claims[441] but also, as Jessica Clarke has shown, a greater chance that your claim will be seriously considered.[442]

The examples offered here are not exhaustive. Moreover, the classifications I have offered may by contested. The positions of various groups on the ladder are in constant flux, and movement along the ladder is not always linear. Groups that once enjoyed full legal recognition may be stripped of it, and groups that were once deemed highly visible and rigid lose relevance with changing power dynamics and patterns of discrimination.[443]

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[440] Emens, *supra* note 416 at 377.

[441] In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973), the Supreme Court offered a simpler route to proving discrimination for plaintiffs who are members of "protected classes." Plaintiffs who are members of protected classes can show that they applied to—and were rejected from—a job they were qualified for and that the position remained open after they were rejected. When a plaintiff manages to meet all these requirements, the burden of proof then shifts to the employer to provide a legitimate, nondiscriminatory reason for its decision. The plaintiff can then rebut this reason. *Id.*

[442] See generally Clarke, *supra* note 203.

[443] For instance KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA (58879th edition ed. 1998). See also Wimmer, *supra* note 391.

However, what the above discussion demonstrates is the process groups must undergo to reach full societal and legal recognition and the variety of groups and positionalities that are currently in a state of liminal recognition despite societal stigma and bias. The following section will focus on three case studies of such groups, chosen for their ability to portray varying types of identities and liminalities. It will demonstrate each group's fight for group-based recognition and current vulnerability and liminality under antidiscrimination law.

3.2.2 Groups in Liminal Recognition

3.2.2.1 Asexuals

3.2.2.1.1 The Rise of the Social Movement

Asexuality is a newly emerging identity of people who do not experience sexual attraction.[444] The concept of asexuality developed first as an external classification and later reemerged as a group of self-identifying asexuals (or "Aces") who sought to reclaim the category and promote its societal acceptance and legitimacy.[445] The first mention of asexuality was in 1980. Psychologist Michael D. Storms posited asexuality as the fourth sexual orientation, after homosexuality, heterosexuality, and bisexuality.[446] By doing so, Storms challenged the Kinsey scale's problematic assumption about sexual desire, according to which lower levels of heterosexual attraction inherently mean a higher degree of homosexual attraction. During that same year, a definition of asexuality appeared in the third edition of the American Psychiatric Association's *Diagnostic and Statistical Manual* (*DSM-III*) as "inhibited sexual desire," marking lack of sexual desire as a pathology that warranted correction.[447] This definition changed in

[444] ANTHONY F. BOGAERT, UNDERSTANDING ASEXUALITY 5 (Reprint edition ed. 2015). ("a complete lack of sexual attraction and/or sexual interest").
[445] Emens, *supra* note 416 at 307.
[446] BOGAERT, *supra* note 444 at 19.
[447] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM) §302.71, at 278-79 (3d ed. 1980).

subsequent volumes.[448] Various empirical studies found that a persistent one percent of the population identified as never feeling "sexually attracted to anyone at all."[449]

Medicine's initial stigmatization of asexuality was joined by other forms of societal bias. A 2012 study that surveyed some 250 heterosexual subjects found bias against sexual minorities, and particularly toward asexuals, who were viewed most negatively.[450] Asexuals were dehumanized more than other sexual minorities, and subjects reported a greater inclination to discriminate against asexuals in hiring and renting decisions compared to other sexual minorities.[451] Studies that focused on self-identified asexual subjects corroborated these findings; the subjects reported high levels of felt stigma and bias. Asexuals further reported reactions ranging from anger to disbelief to pathologizing and even exposure to the danger of "corrective rape."[452]

Concurrent with the establishment of asexuality as a stigmatized category, beginning in the early 2000s, asexuality began to emerge as an identity group, mostly via online communities, the main one being Asexuality Visibility and Education Network (AVEN), founded in 2001 by David Jay.[453] In such spaces, asexuals discuss their identity; provide asexuals, allies, and

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[448] The revised DSM-III, published in 1987, labeled asexuality as "hypoactive sexual desire disorder," a category that remained (with some variations) in the DSM until 2013, see Emens, *supra* note 416 at 310.

[449] Anthony F. Bogaert, *Asexuality: Prevalence and Associated Factors in a National Probability Sample*, 41 J. SEX RES. 279–287, 281–2 (2004).

[450] Cara C. MacInnis Hodson Gordon, *Intergroup bias toward "Group X": Evidence of prejudice, dehumanization, avoidance, and discrimination against asexuals - Cara C. MacInnis, Gordon Hodson, 2012*, GROUP PROCESS. INTERGROUP RELAT. (2012).

[451] *Id.* at 732.

[452] See the case of *State v. Dutton*, involving a complainant who testified that her pastor had sex with her repeatedly, assuring her that sex is a gift from God, following her stated desire to be asexual. See *State v. Dutton*, 450 N.W.2d 189, 191-92 (Minn. Ct. App. 1990) and the discussion in Nancy Leong, *Negative Identity*, 88 SOUTH. CALIF. LAW REV. 1357–1420, 1381–84 (2014). Two other studies, from 2016 and 2020, reaffirmed high levels of stigmatization and marginalization reported by asexuals, see respectively Kristina Gupta, *"And Now I'm Just Different, but There's Nothing Actually Wrong With Me": Asexual Marginalization and Resistance*, 64 J. HOMOSEX. (2016); Esther D. Rothblum et al., *Asexual and Non-Asexual Respondents from a U.S. Population-Based Study of Sexual Minorities*, 49 ARCH. SEX. BEHAV. 757–767 (2020).

[453] The network, which started with 134 members in 2002 and rapidly grew to more than 100,000 members by 2019, was created with two distinct goals: "creating public acceptance and discussion of asexuality and facilitating the growth of an asexual community." *About AVEN*, THE ASEXUAL VISIBILITY & EDUCATION NETWORK,

researchers with information about the community; and organize workshops, local meetings, and visibility projects, including participation in various pride marches.[454] Asexuals have a distinct pride flag representing their sexual identity.[455] Jay described the process through which the asexual community has been moving over the last two decades: "The movement has made incredible progress from a place where most of our culture considered us a mystery, oddity, or even threat, to a place where we are widely acknowledged as an important part of the spectrum of queer identity."[456] Part of this process concerns efforts to communicate the fact that asexuality is not a choice.[457] As Emens explained, the idea that asexuals do not *choose* to avoid sex is central to the asexual movement.[458]

Changing the narrative around asexuality, pushing for recognition and social awareness, and finding a place on the "spectrum of queer identity" require work. Such work includes political engagement, protests, advocacy, the dissemination of information about asexual identity, a push for media and scholarly attention, and collaborative efforts between activists on the local, national, and international levels.[459] The hard labor the asexual community has invested in recognition work is showing signs of success, at least when it comes to visibility (societal epistemic recognition).[460] However, while asexuals have managed to climb the first step

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https://www.asexuality.org/?q=about.html (last visited Jan. 27, 2021). For the number of current registered members in AVEN, see Nosheen Iqbal, *No lust at first sight: why thousands are now identifying as 'demisexual',* THE GUARDIAN (Sep. 7, 2019) www.theguardian.com/society/2019/sep/07/no-lust-at-first-sight-day-i-finally-realised-i-was-a-demisexual (last visited Jan. 27, 2021).

[454] Notably, many studies of asexuals have relied on the AVEN community for access to research subjects.

[455] The flag comprises four stripes in the colors purple, white, gray, and black.

[456] Jasmin Liao, *David Jay and the Rise of Asexual Visibility* (Jul. 2, 2020) www.lovetoallproject.com/interviews/david (last visited Jan. 27, 2021).

[457] Emens, *supra* note 416 at 318.

[458] As one pamphlet of AVEN explains, "Asexuality is not a choice, but rather a sexual orientation." Quoted in Emens, *id*.

[459] Joseph de Lappe, *Asexual Activism*, *in* THE WILEY BLACKWELL ENCYCLOPEDIA OF GENDER AND SEXUALITY STUDIES 1–2 (2016).

[460] In recent years, asexuals have been featured in news segments, talk shows, and documentaries, see for example Julie Sondra Decker, *How to Tell if You are Asexual*, TIME (Jun. 18, 2014) https://time.com/2889469/asexual-

of the ladder of recognition to form a group consciousness and initial social awareness, they still have a long way to go to gain recognition in the normative sense. Moreover, despite their growing visibility, asexuals' place within the law is mostly absent.

3.2.2.1.2 Asexual Liminality Under Antidiscrimination Law

When it comes to legal recognition (both epistemic and normative), asexuals' positionality is almost completely erased. In fact, asexuals remain absent even in the few instances in which they are present. One of the earliest mentions of asexuality in judicial language is in *Corne v. Bausch and Lomb, Inc.*,[461] a 1975 sexual harassment case. The court, concluding that sexual harassment does not amount to sex discrimination, reasoned as follows:

> It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act . . . [A]n outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.[462]

A similar argument can also be found in *Oncale v. Sundowner Offshore Services, Inc.*, where the Supreme Court recognized same-sex harassment as actionable under Title VII. Writing the opinion of the Court, Justice Scalia explained that "[t]he prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment."[463] As Elisabeth Emens argued, paradoxically, this explicit mention by Scalia perfectly exemplifies the way in

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orientation/ (last visited Jun. 27, 2021); Charlotte Dingle, *"I'm an Asexual Woman, and this is What it's Like Not to Feel Sexual Attraction,"* COSMOPOLITAN (Mar. 8, 2018) https://www.cosmopolitan.com/uk/reports/a9088917/womankind-asexual-woman-sexual-attraction/ (last visited Jun. 27, 2021). Most notable, perhaps, are two self-identified asexual characters who have recently appeared in the popular television shows *Bojack Horseman* and *Sex Education*.

[461] 90 F. Supp. 161 (D. Ariz. 1975) vacated, 562 F.2d 55 (9th Cir. 1977)

[462] *Id*, at 163–64.

[463] *Oncale*, *supra* note 220, at 81.

which asexuals "are written out of law."[464] As in *Bausch*, the point Scalia made in *Oncale* rested on the truism that sexuality is desirable in the workplace and is regulated only to protect people from specific unwanted sexual practices. Accommodating the workplace to asexual workers (who might prefer workplaces that are nonsexual) is a possibility mentioned only as an absurdity that is self-evidently a step too far.

A notable exception to asexuals' lack of visibility in antidiscrimination law is New York's Sexual Orientation Non-Discrimination Act (SONDA). Enacted in 2002, it explicitly mentions asexuality as a protected sexual orientation along with heterosexuality, homosexuality, and bisexuality, either actual or perceived.[465] It is the first and only state law to prohibit discrimination against asexuals.[466] As Emens found, while SONDA is a major step toward legal recognition and protection, the inclusion of asexuals in it was almost accidental. The category of asexuals was included only to "broaden the perceived scope of the bill beyond gays."[467] In other words, asexuals were included not because of a conscious decision to recognize and protect asexuality but rather to depict the law as one that protects "everyone."[468] While it might be seen as an advancement, this development was the result of asexuals being *so far under the radar* at the time of the enactment of SONDA that they were not yet sufficiently recognized to even be considered a contentious group. And, in fact, asexuals are not mentioned in any other state or

[464] Emens, *supra* note 416 at 359. Similar rhetorical language may be found in other cases as well. *See, e.g., Vinson v. Taylor*, 760 F.2d 1330; *Munford v. James T. Barnes & Co.* 441 F.Supp. 459; *Goddard v. Artisan Earthworks, LLC*, No. CIV. 09-2336-EFM, 2010 WL 3909834, at *5 (D. Kan. Oct. 1, 2010); and recently *Brauer v. MXD Grp., Inc.*, No. 3:17-CV-2131 (VLB), 2019 WL 4192181, at *10 (D. Conn. Sept. 4, 2019), appeal withdrawn, No. 19-3006, 2019 WL 7167535 (2d Cir. Dec. 12, 2019)

[465] Sexual Orientation Non-Discrimination Act, ch. 2, § 3, 2002 N.Y. Laws *46, 46* (codified at N.Y. EXEC. LAW § 292(27) (McKinney 2013)).

[466] Several localities in New York mention asexuality in their antidiscrimination law, including Albany, Rochester, and Binghamton; this is also true of Madison, Wisconsin, Hyattsville, Maryland, and San Antonio, Texas. For a full list see Emens, *supra* note 416 at n.351.

[467] *Id.* at 363.

[468] *Id.* at 364.

federal antidiscrimination laws. Asexual activists pleaded for the inclusion of asexuals in the proposed Employment Non-Discrimination Act (ENDA),[469] but they remained out of the versions introduced to Congress.[470] Likewise, the proposed Equality Act that replaced the ENDA and was introduced to Congress in 2019 stated as its purpose the wish to protect "[l]esbian, gay, bisexual, transgender, and queer (referred to as 'LGBTQ') people" from discrimination.[471]

It remains unclear whether asexuals will be protected under *Bostock*. The majority in *Bostock* made clear that "Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them."[472] However, Justice Gorsuch's textual analysis could leave asexuals unprotected. The logic behind the *Bostock* decision is that when an employer fires a lesbian woman because she is attracted to women but not a straight man who is similarly attracted to women, a similar trait (attraction to women) is treated differently based on the sex of the employee. Thus, the argument goes, this is discrimination based on sex. However, if an employer fires a worker for being asexual, the same contrast cannot be drawn.[473]

Asexuals provide a vivid example of the amount of work new identity groups invest in climbing the ladder of recognition—work that is social, political, and legal. It involves the creation of a community, activism focused on awareness and visibility, and pleas for inclusion and protection from legislators. While the asexual community is slowly climbing this ladder and

[469] AVEN submitted a memo urging legislators to include asexuals as part of the list of protected sexual minorities, see *Id.* at 361.
[470] H.R. 1755 and S. 815, introduced in 2013, define *sexual orientation* as including "homosexuality, heterosexuality, or bisexuality," see respectively Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013-2014); Discrimination Act of 2013, S. 815, 113th Cong. (2013-2014).
[471] Equality Act, H.R. 5, 116th Cong. § 2(a)(3) (2019-2020).
[472] *Bostock*, *supra* note 401, at 1747.
[473] Prof. Jessica Clarke hinted at this problem on Twitter, see Jessica Clarke (@clarkeja), TWITTER (Jun. 16, 2020), https://twitter.com/clarkeja/status/1272962712914530305?s=20.

is gradually enjoying wider socio-epistemic recognition, this group has a long way to go and its members still reside at the margins of recognition.

3.2.2.2 Poor Whites

3.2.2.2.1 The Rise of an Identity Group

In recent years, there has been a growing interest in the status and condition of poor rural whites. In 2016 J.D. Vance's *Hillbilly Elegy* became a *New York Times* bestseller.[474] One year later, Nancy Isenberg's seminal book *White Trash: The 400-Year Untold History of Class in America* was published; it provides a broad historical account of this unique social group.[475] These books join a rich, albeit quite marginal, body of literature dedicated to the demarcation of poor, often rural whites as a distinct social group with shared geographical origins, social traits, and patterns of oppression and bias.[476] The discussion surrounding poor whites intensified following the 2016 elections, the results of which were explained by many commentators as stemming from poor whites' growing resentment of the Democratic party.[477]

The history of the othering and marginalization of poor whites is essential to an understanding of their social distinctness. Individuals referred to as "white trash" or "hillbillies" were historically seen by high-status whites as a clear and identifiable social group that threatened the "contamination" of the white race. Nineteenth-century scientists described their "yellowish," tallow-colored skin that purportedly derived from their being "clay eaters" and from

[474] J. D. VANCE, HILLBILLY ELEGY: A MEMOIR OF A FAMILY AND CULTURE IN CRISIS (Reprint edition ed. 2018). The book was later developed into a movie, which came out on Netflix during 2020.
[475] ISENBERG, *supra* note 343.
[476] WRAY, *supra* note 343; Lisa R. Pruitt, *Missing the Mark: Welfare Reform and Rural Poverty*, 10 J. GEND. RACE JUSTICE 439–480 (2006); Lisa R. Pruitt, *Gender, Geography &(and) Rural Justice*, 23 BERKELEY J. GEND. LAW JUSTICE 338–391 (2008); Rich, *supra* note 246.
[477] ASAD HAIDER, MISTAKEN IDENTITY: RACE AND CLASS IN THE AGE OF TRUMP (2018). For a critique of this argument see Ta-Nehisi Coates, *The First White President*, THE ATLANTIC (Oct. 2017) https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909/;

interracial sex "leaving traces" of "negro blood."[478] People who were deemed "white trash" have been perceived as "filthy," "lazy,"[479] and morally and evolutionarily inferior.[480] Some of the negative stereotypes of poor whites revolve around the perception that this social group is more politically and morally "backward" and having racist, homophobic, and chauvinistic tendencies.[481] But this is a stigmatizing stereotype. Poor and working-class whites and, specifically, self-identified "hillbillies" and "rednecks" have been involved in organized radical political actions throughout American history: groups such as the Young Patriots Organization and Rising Up Angry were involved in anti-racist, anti-capitalist struggles, often jointly with other movements such as the Black Panthers and Puerto Rican activists.[482] Today, organizations like Redneck Revolt operate under an "anti-racist, anti-fascist"[483] platform to promote "working class liberation from the oppressive systems which dominate our lives."[484]

However, despite this long tradition of political organizing and scholarly interest, the status of poor whites is not usually discussed through the prism of recognition, and their place in U.S. antidiscrimination law has been liminal at best. This has been the case despite the fact that one aspect of the stereotype of poor whites is that they lack qualities that are sought after in the workplace. Isenberg showed how "white trash" whites were socially understood as those "who lack the civic markers of *stability, productivity, economic value, and human worth*."[485]

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[478] ISENBERG, *supra* note 343 at 151; WRAY, *supra* note 343 at 40, 77.
[479] WRAY, *supra* note 343 at 21–2, 65.
[480] *Id*, at 16, 180 respectively.
[481] Lisa R. Pruitt, *Welfare Queens and White Trash Symposium on Reframing the Welfare Queen*, 25 SOUTH. CALIF. INTERDISCIP. LAW J. 289–312, 294, n. 37 (2016); Lisa R. Pruitt, *The Geography of the Class Culture Wars Crowdsourcing the Work-Family Debate: A Colloquy*, 34 SEATTLE UNIV. LAW REV. 767–814, 768–9 (2010).
[482] AMY SONNIE, JAMES TRACY & ROXANNE DUNBAR-ORTIZ, HILLBILLY NATIONALISTS, URBAN RACE REBELS, AND BLACK POWER: COMMUNITY ORGANIZING IN RADICAL TIMES (2011).
[483] REDNECK REVOLT https://www.redneckrevolt.org/ (last visited Jan. 27, 2021).
[484] *About*, REDNECK REVOLT https://www.redneckrevolt.org/about (last visited Jan. 27, 2021).
[485] ISENBERG, *supra* note 343 at 315 (emphasis added).

One important exception to the dearth of discussion about poor whites in the context of antidiscrimination law is Camille Gear Rich's 2010 article on marginal whiteness.[486] Rich discussed the category of "low-status" or "marginal" whites, that is, those who have only "limited access to white privilege."[487] She argued that high-status whites often impose costs—both economic and dignitary—on low-status whites in an attempt to preserve their resources and privileges or to disguise discrimination against Black people as racially neutral.[488] However, she added, these dynamics are generally not translated to the legal language of current antidiscrimination doctrine.

3.2.2.2.2 Poor Whites' Liminality Under Antidiscrimination Laws

No laws address discrimination against poor whites as such. Nevertheless, bias and discrimination against poor whites have found their way into judicial opinions. The majority of cases in which courts discuss discrimination against or harassment of poor whites (involving epithets like "white trash," "hillbilly," or "redneck") revolve around claims of reverse racism: white employees who complain about non-white colleagues, supervisors, or employers using such terms.[489] This is not surprising. In reverse racism cases, what courts recognize is not the specific identity group of poor whites but rather the larger, already recognized group "whites." Accordingly, in such cases, when an employee complains about being called "white trash," for instance, courts put more analytical emphasis on "white" than on "trash." Evidence of specific

[486] Rich, *supra* note 246.
[487] *Id*, at 1505
[488] *Id*, at 1503-5
[489] See for instance *Charest v. Sunny-Aakash, LLC.*, 2017 WL 4169701 (M.D. Fla. Sept. 20, 2017); *Atkins v. Denso Mfg. Tennessee, Inc.*, 2011 WL 5023392 (E.D. Tenn. Oct. 20, 2011); *Hood v. National Railroad Passenger Corporation*, 72 F. Supp. 3d 888 (N.D. Ill. 2014) (dealing with the term "hillbilly"); *McCoy v. Johnson Controls World Services, Inc.*, 878 F. Supp. 229 (S.D. Ga. 1995); Braid v. MJ Peterson Corp., 208 F.3d 202 (2d Cir. 2000); *Schiraldi v. AMPCO System Parking*, 9 F. Supp. 2d 213 (W.D.N.Y. 1998); *Julian v. Safelite Glass Corp.*, 994 F. Supp. 1169 (W.D. Mo. 1998); Scarbrough v. Gray Line Tours, 2004 WL 941729 (W.D.N.Y. Mar. 21, 2004); *Fuelling v. New Vision Medical Laboratories LLC.*, 284 F. App'x 247 (6th Cir. 2008); Charest v. Sunny-Aakash, LLC; Lamb v. Lowe's Companies, Inc. (2018).

references of the plaintiff belonging to a subset of white people generally adds no additional weight to courts' analysis of the discriminatory act. When it does, courts usually explain that such a subgroup is not recognized as a protected class under Title VII. For instance, in *Higginbotham v. Ohio Department of Mental Health*, a white plaintiff of Appalachian background argued that she was a victim of reverse racism due to her identity as a white Appalachian. She said that after her Black supervisors "learned of her cultural heritage," they made derogatory comments about her background (calling her a "white Appalachian hillbilly") and gave her "unwarranted negative job performance evaluations."[490] The court dismissed her race discrimination claim, noting that "Appalachian ancestry has not been recognized as a protected status under any federal law to date . . . This Court declines to extend such recognition here."[491]

When poor white plaintiffs have brought claims against *white* employers, they have been even less successful.[492] Workers seeking compensation in such cases have tried various strategies to fit their harm into accepted legal frameworks.

One strategy was to explain anti–"white trash" sentiment as *sex* discrimination. In *Sacco v. Legg Mason*,[493] a female employee who worked as a portfolio assistant in a New York investment company claimed she was subjected to sexual discrimination, retaliation, and hostile work environment based on sex. Her retaliation claims focused on, among other things, a

[490] *Higginbotham v. Ohio Dept. of Mental Health*, 412 F. Supp. 2d 806, 808-810 (S.D. Ohio 2005).
[491] *Id*, at 813. The court referenced *Bronson v. Board of Educ. of Cincinnati*, 550 F.Supp. 941 (S.D.Ohio 1982), where it was similarly determined that "Appalachians do not have a common national origin other than that which they share with the general population of this country" (*id*, at 946).
[492] Notably, such cases are rare. A Westlaw search I conducted on April 10, 2017, for "White trash" or "hillbilly" and "Title VII" found that only ~5.6% discussed white plaintiffs suing their white employer for referring to them as "white trash" As I have written earlier, "This is not a reflection of societal reality, but rather of the narrow range of cases that find a place within Title VII courts." See p. 101.
[493] *Sacco v. Legg Mason Inv. Counsel & Trust Co.*, N.A., 660 F. Supp. 2d 302 (D. Conn. 2009).

comment made by a coworker who referred to her as "white trash."[494] The court ruled that comments about the plaintiff being "trash," while inappropriate, are not an "adverse employment action" (that is, the employee had sustained actionable harm). So ruling spared the court from having to address the question of whether such a comment is "because of sex." In *Schofield v. Maverik Country Store*,[495] the plaintiff similarly included a "white trash" comment directed at her by her employer as part of the sex-based hostile work environment to which she was subjected. Dismissing her claim, the court stressed that this comment was not "facially sex-based."[496]

The case of *Scruggs v. Garst Seed*[497] clearly exemplifies the problem with arguing for discrimination against poor whites via a gender lens. The plaintiff, Danya Scruggs, worked as a researcher at a research facility in Indiana. She sued, raising hostile work environment and retaliation claims, on the basis of repeated demeaning comments from her supervisor, Curtis Beazer. Specifically, Scruggs testified that Beazer told her she was "too dumb to catch on," not "smart enough," and "made for the back seat of a car." She also said that Beazer described her to other employees as "the person in charge of 'cookies with sprinkles'" and told her "she looked like a 'UPS driver,' a 'dyke,' and a 'redneck.'"[498] Reviewing these facts, the Seventh Circuit upheld the district court's dismissal of the case, holding that the gender-based conduct was not sufficiently severe or pervasive.[499] While acknowledging that Beazer made some "occasional inappropriate comments,"[500] only a few of them pertained to gender. Instead, the court ruled,

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[494] *Id.*
[495] *Schofield v. Maverik Country Store*, 26 F. Supp. 3d 1147 (D. Utah 2014)
[496] Regardless, the court ruled, even if the comments were sex-based, the actions described in the lawsuit were not sufficiently severe and pervasive to establish a hostile work environment claim under Title VII.
[497] 587 F.3d 832 (2009)
[498] *Id*. at 836.
[499] The court stressed that Beazer did not "threaten to touch her," nor did he made comments "suggesting that he was interested in her sexually." *Id*, at 841
[500] *Id.*

"most of Beazer's comments related to Scruggs's work habits or alleged lack of sophistication, which were the kinds of comments he made to both male and female employees."[501]

The ruling in *Scruggs* can be analyzed as a moment of intersectional failure:[502] the court did not recognize the specific bias directed at women of poor and/or rural backgrounds, bias that is directly linked to stereotypes of "lack of sophistication." Analyzing the comments solely through a gender paradigm prevented the court from acknowledging the intersectional bias to which the plaintiff had been subjected. Thus, the fact that both men and women experienced comments about their "lack of sophistication" led the court to exclude such comments from consideration and conclude that the gender-based comments were not sufficiently severe.

Notably, in *Huff v. Southwest Virginia Regional Jail Authority*,[503] the court did recognize a reference to a female employee as a "hillbilly" as part of a sex-based hostile work environment. The plaintiff, who was a nurse at a prison facility, complained about a doctor at the facility who referred to her as "stupid," "incompetent," and a "hillbilly." While the court stressed that the comments themselves "were not directly related to gender," it nevertheless acknowledged that they were directed only at female nurses and were thus because of sex.[504]

Plaintiffs have also confronted hostility toward them as poor whites through the prism of *disability* discrimination. In *Magness v. Harford County*,[505] the plaintiff—who identified as having a low IQ, a learning disability, cognitive impairments, and an "auditory processing disorder"—argued that he was subjected to disability discrimination and harassment while

[501] *Id.*
[502] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. CHIC. LEG. FORUM 139–168 (1989).
[503] 2009 WL 3326889 (W.D. Va. Oct. 13, 2009).
[504] The case was nevertheless dismissed, as the court ruled that Huff failed to show that the comments were sufficiently "severe and pervasive." *Id*, at *7.
[505] 2018 WL 1505792 (D. Md. Mar. 27, 2018).

working as a manual laborer in Harford County. Specifically, Magness said that several of his supervisors repeatedly calling him "a 'retard', 'dumb farmer', 'idiot', 'f------g idiot', 'stupid', 'dumb', and 'asshole'."[506] After years of alleged harassment, he was transferred to the Division of Litter control, where he was assigned to the operation of a landfill, a transfer he described as an attempt by the County to "'park' its 'mentally disabled workers in the Landfill."[507] During that time, he testified, he was again subjected to harassment by his supervisors, who called him "a 'dumb redneck', 'stupid', and 'dumb.'"[508] Given the rich medical diagnosis of the plaintiff's various disorders and medical conditions, the court accepted without any discussion the merit of his claim for disability discrimination and the case survived the defendant's motion to dismiss.[509] Notably, the anti-poor-white sentiment in this case was not recognized as such, and the court did not develop any analysis of stereotypes of the social group with which the plaintiff was associated (as is clear from insults such as "dumb farmer" and "dumb redneck").

In *Keel v. Wal-Mart Stores, Inc.*, the plaintiff was a "a white male who suffers from dyslexia and illiteracy."[510] He was employed in various roles at Wal-Mart, including as a deli sales associate and as part of the maintenance crew. A few months after he was hired and very soon after accepting his last position in maintenance, Keel—with the help of his brother-in-law—wrote a letter complaining about harsh treatment he received from his supervisor, Lupe Martinez. He wrote: "She regularly swears at me calling me 'a fat lazy [m] otherf [sic]. . . . On

[506] *Id*, at *4.
[507] *Id*, at *3.
[508] *Id*.
[509] Some parts of the plaintiff's complaint that were nevertheless dismissed, mainly for technical and procedural reasons not related to the legal merit of his suit.
[510] 2012 WL 3263575 (E.D. Tex. July 17, 2012), aff'd, 544 F. App'x 468 (5th Cir. 2013). Interestingly, the court made the effort to label Keel's disability as innate, resulting from "complications that occurred at birth," at *1. However, the court admitted that there is very little evidence in the record describing the extent or cause of Keel's disability." *Id*, at n. 3.

my last shift (last night), she shouted that I was 'f* * *ing lazy WHITE TRASH."[511] The company investigated his claims but did not find any corroborating evidence. Soon after submitting the letter, Keel was fired. He filed a complaint with the EEOC for discrimination, alleging that he was discharged "because of [his] disability and race."[512] He later filed a *pro se* lawsuit against Walmart. Representing himself, Keel tried to argue that he was subjected to a discriminatory and hostile work environment due to both his race and his disability. Both arguments were dismissed by the Texas District Court. With regard to the race-based argument, the court simply stated that "[t]here [was] no evidence in the record indicating that Keel was subject to adverse employment action because of his race."[513] With regard to his disability argument, the court ruled in favor of the defendant, stating that it had presented nondiscriminatory reasons for his various transfers within the company and for his final termination. Examining the derogatory comments directed at Keel, the court merely wrote that "there [was] no evidence indicating that Keel interpreted this comment to implicate his disability." Here, as in *Scruggs*, the failure to recognize the intersection of disability with anti-poor-white sentiment prevented the court from recognizing the merit of Keel's claim.

Like the plaintiff in *Keel*, some plaintiffs have made allegations of *race*-based discrimination or harassment, mostly without success. In *Hoffman v. Winco Holdings, Inc.*, a white employee argued she was subjected to a race-based hostile work environment on the basis of her coworkers having referred to her as "white trash" and harassing her. The court dismissed her claim, noting that several of those coworkers were themselves Caucasian and that "there [was] no evidence that plaintiff's white coworkers were motivated by racial animus."[514]

[511] *Id*, at *1 (original emphasis).
[512] *Id*, at *2.
[513] *Id*, at *8.
[514] *Hoffman v. Winco Holdings, Inc.*, Civil No. 07-602-HA, 8 (D. Or. Dec. 12, 2008).

Likewise, in *Hood v. National Railroad Passenger Corp.*,[515] the court stated that the term "hillbilly" does "not reference a race or national origin," dismissing a harassment claim by a white Amtrak employee.

One exception to this judicial trend of nonrecognition is the case of *Barber v. A&J Hometown Oil, Inc.* The plaintiff, a white woman, complained that she was subjected to a hostile work environment due to her race and her background, citing her employer referring to her as "white trash" and calling "Heil Hitler" toward her to mock her German background, while simultaneously chastising her for associating with Arabs. The court clarified that each of these comments on its own would probably not be sufficient to sustain a hostile work environment claim but recognized that the combination of them for the case to survive a motion to dismiss. Despite such occasional victories, poor whites who are discriminated against or harassed at work—especially by other whites—are barely recognized under antidiscrimination law as such. Plaintiffs challenge this legal reality using varying and creative strategies. However, to be fully recognized as deserving of recognition and protection, they will have to engage in extensive recognition work.

3.2.2.3 Fat People

To this point, this article has covered two distinct liminally-recognized groups at the bottom of the ladder of recognition. Asexuals are beginning to form a movement to gain societal and legal recognition and are fighting for inclusion in antidiscrimination laws, but there are currently no attempts by asexuals to be recognized by U.S. courts. In contrast, while poor whites generally do not focus on recognition as a goal, individuals who are subjected to workplace bias or discrimination regularly seek ways to secure judicial recognition and redress.

[515] United States District Court, N.D. Illinois, Eastern Division, 28 Oct. 2014.

The third case study, which focuses on the fat rights movement, provides an opportunity to appreciate a group situated higher on the ladder and yet still excluded from full legal recognition.

3.2.2.3.1 The Rise of the Social Movement

The fat acceptance movement, inspired by other civil rights struggles during the 1960s, began to coalesce in that same decade.[516] In an act mirroring the renowned sit-ins staged by Black and anti-war activists, around 500 people staged a "fat-in" in Central Park in 1967, eating ice cream and burning diet books.[517] Two years later, the first national organization for the advancement of fat people was founded. Bill Fabrey, seeking justice for his wife, who was subjected to workplace discrimination because of her weight, formed the National Association to Advance Fat Acceptance (NAAFA).[518]

In 1972, the radical feminist group Fat Underground was formed around Marxist feminist ideas and analysis of fat oppression.[519] The group released the "Fat Liberation Manifesto," calling for fat people of the world to unite.[520] Fat Underground spoke against what it saw as a fat genocide: attempts by the medical profession and the diet industry to erase and eliminate fat people.[521] While such radical efforts remained marginal within the larger fat rights movement, NAAFA is to this day the leading organization advocating for the rights of fat people.[522] It

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[516] Bill Fabrey, who formed the first national organization for fat acceptance and rights, the NAAFA (discussed below), remarked that he consciously chose initials that resemble *NAACP*, see Abigail C. Saguy & Anna Ward, *Coming Out as Fat: Rethinking Stigma*, 74 SOC. PSYCHOL. Q. 53–75 (2011). On the connections between fat activism and feminism see AMELIA GRETA MORRIS, THE POLITICS OF WEIGHT: FEMINIST DICHOTOMIES OF POWER IN DIETING 147 (1st ed. 2019 edition ed. 2019).
[517] *Curves Have Their Day in Park; 500 at a 'Fat-in' Call for Obesity*, THE NEW YORK TIMES, June 5, 1967, at 54.
[518] Back then it was called the National Association to Aid Fat Americans, see Dan Fletcher, *The Fat-Acceptance Movement*, TIME (JUL. 31, 2009) http://content.time.com/time/nation/article/0,8599,1913858,00.html (last visited Jan. 27, 2021).
[519] MORRIS, *supra* note 516 at 147.
[520] *Id.* at 146.
[521] *Id.* at 149; Lauren E. Jones, *The Framing of Fat: Narratives of Health and Disability in Fat Discrimination Litigation Note*, 87 N. Y. UNIV. LAW REV. 1996–2039, 2006 (2012).The framing of fat p. 2006-7.
[522] *The Fat Acceptance Movement*, *supra* note 518.

organizes annual conventions and local and national events and activities designated to advocate for fat acceptance and rights.

Notably, after the rise of the fat-acceptance movement, a countermovement developed: the anti-obesity movement. Anti-obesity advocates argue that discrimination against fat people is justified and socially desirable because it shames people into a healthy lifestyle.[523] As Lauren Jones showed, fat activists' response to the countermovement was to turn to science to show that fat bodies can be healthy. This approach culminated in the Health at Every Size movement.[524]

Despite the consolidation of the fat rights movement, bias and discrimination against fat people have only increased in recent years. Anna Kirkland described negative social attention to obesity in the mid-1990s as "fat panic."[525] Amid a growing wave of media attention, obesity was labeled a serious social problem associated with a cultural decline toward self-gratification, the rise of consumerism and corporate greed, and even rising bankruptcy rates.[526]

Weight-based discrimination is currently one of the most prominent forms of discrimination in the United States.[527] A long series of studies show that weight bias leads to stigmatization, bullying, prejudice, and discrimination. A 2008 study examining reports of discrimination found weight discrimination to be one of the most common forms of discrimination reported.[528] A 2007 study found that forty-three percent of fat workers reported experiencing bias from their supervisors, and above fifty percent reported harassment from

[523] Jones, *supra* note 521 at 2009.
[524] *Id.* at 2008.
[525] ANNA KIRKLAND, FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD ix (2008).
[526] Kirkland, *supra* note 404 at 398.
[527] Molly Henry, *Do I Look Fat - Perceiving Obesity as a Disability under the Americans with Disabilities Act Note*, 68 OHIO STATE LAW J. 1761–1794, 1762 (2007).
[528] Phillippa C. Diedrichs & Rebecca Puhl, *Weight Bias: Prejudice and Discrimination toward Overweight and Obese People*, *in* THE CAMBRIDGE HANDBOOK OF THE PSYCHOLOGY OF PREJUDICE 392–412, 393 (Chris G. Sibley & Fiona Kate Barlow eds., 2016). As they indicated, reports of weight discrimination have increased from 7% in 1996–1996 to 12% in 2004, a 66% increase.

colleagues.[529] The study also found that fat workers earn less income, receive fewer raises, and are seen as having less potential for managerial positions. Seventeen percent of study participants reported having been fired or pressured to resign due to their weight.[530]

The fat rights movement has used various legal strategies to protect fat people from discrimination, including filing numerous lawsuits. This decades-long battle has resulted in some limited victories, which provide a useful vantage point from which to understand both the gains and perils of moving up the ladder of recognition.

3.2.2.3.2 Fat People's Liminality Under Antidiscrimination Laws

While there is no federal law directly targeting anti-fat discrimination, the State of Michigan and several localities, including Washington, D.C., San Francisco, California, and Madison, Wisconsin, have enacted laws designated to prevent it.[531] Given the scarcity of such laws, many fat people who have experienced workplace discrimination have, like poor whites, sought to fit their harm into existing federal frameworks.

One of the first laws through which weight discrimination was contested was Title VII, in the context of sex-based fat discrimination. A major line of cases involved flight attendants challenging airline-imposed weight requirements.[532] Over the years, flight attendants employed by various airlines were routinely weighed, and those whose weight exceeded a certain limit were dismissed. In *Laffey v. Northwest Airlines, Inc.*,[533] a class of female cabin attendants sued Northwest Airlines to challenge its maximum weight requirements. Given that the policies were

[529] Teri Morris, *Civil Rights/Employment Law Note*, 32 WEST. N. ENGL. LAW REV. 173–214, 180 (2010).
[530] *Id.* at 180–81.
[531] Yofi Tirosh, *The Right to Be Fat*, 12 YALE J. HEALTH POLICY LAW ETHICS 264–335, 332 (2012).
[532] Women were allowed to work as flight attendants, or "air hostesses," from the 1930s. A *New York Times* article from 1936 described air hostesses as ideally being "petite," weighing around 100–118 pounds, see *Air Hostess Finds Life Adventures*, THE NEW YORK TIMES, April 12, 1936, at 86-7.
[533] 567 F.2d 429 (D.C. Cir. 1976).

directed only at women, it was argued as a sex discrimination case. The district court ordered Northwest Airlines to stop weighing female flight attendants and to refrain from punishing them for gaining weight. The airline appealed this ruling and, simultaneously, expanded its maximum weight policies to apply to *both men and women*. As a result of this change, the appellate court ruled, "As long as the company henceforth extends equal treatment in this regard to all pursers and stewardesses in its employ . . . we cannot say that the company's desire for trimness in those representing it in public is discriminatory or unreasonable."[534]

Following *Laffey* and other similar cases,[535] airlines slowly began relaxing some of their weight requirements.[536] However, weight requirements exist in most airlines to this day; they are enforced "equally," regardless of gender. Male attendants' attempts to challenge weight discrimination were mostly unsuccessful.[537]

Given that Title VII requires a claimant to tie their claim of weight discrimination to another class, such as race or sex, many fat people sought redress by framing discrimination against them as being based on disability. The ADA defines disability as having "a physical or mental impairment that substantially limits one or more major life activities of such individual," having "a record of such an impairment," or, alternatively, "being regarded as having such an impairment."[538] Applying this definition, courts generally choose to interpret it narrowly, distinguishing recognized disabilities from physical properties or characteristics.[539] This

[534] *Id*, at 457.
[535] *Underwood v. Trans World Airways* 710 F. Supp 78 (S.D.N.Y. 1989).
[536] Sharlene A. McEvoy, *Fat Chance: Employment Discrimination Against the Overweight*, 43 LABOR LAW J. 3–14, 8 (1992).
[537] See for instance *Tudyman v. United Airlines*, 608 F. Supp. 739, 741 (C.D. Cal. 1984), which involved a male flight attendant who was heavier than the weight limit. He argued that he was discriminated against on account of being regarded as having a disability. The court dismissed his suit, accepting United's defense that Tudyman was fired only for not meeting its weight requirements.
[538] The ADA, *supra* note 412, at § 12102. Some of the cases I discuss in this section were brought under the Rehabilitation Act of 1972, 29 U.S.C. § 701 et seq. (RA), which preceded the ADA.
[539] Henry, *supra* note 527 at 1767.

distinction complicates attempts to fit obesity and weight discrimination into the law. Obesity may be considered a disability or a perceived disability, but that determination is usually made on a case-by-case basis and thus "requires a complicated analysis of the individual's particular condition[,] . . . creating a web of confusing and sometimes contradictory jurisprudence."[540]

In an early case discussing weight discrimination as disability discrimination, *Greene v. Union Pacific Railroad*,[541] the court concluded that being fat does not amount to having a disability, because weight is "not an immutable condition such as blindness or lameness." The court added that the plaintiff's weight "seemed to vary according to the motivation that he had for controlling [it]," implying that the plaintiff was responsible for his condition and perhaps even for the discrimination itself. In *Krein v. Marian Manor Nursing Home*,[542] plaintiff Mary Krein claimed that she was discharged from her job due to her obesity.[543] The court wrote that while obesity can be considered a disability, the plaintiff could not demonstrate that her weight had been a limiting characteristic amounting to one. The court relied on the testimony of Krein herself, who said she did not consider her weight a disability and could not think of any specific problems associated with it.[544] The *Krein* ruling highlights the paradoxical nature of weight-based claims of discrimination that are argued through a disability framework. Employees must argue they have some sort of limiting characteristic or feature while simultaneously showing that they can perform the job in question to prevent the employer from raising a valid occupational qualifications defense.[545]

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[540] *Id.* at 1763–64.
[541] *Greene v. Union Pac. R.R. Co.*, 548 F. Supp. 3 (W.D. Wash. 1981).
[542] 415 N.W.2d 793 (N.D. 1987).
[543] *Id*, at 794.
[544] *Id*, at 796.
[545] For a discussion of this tension see Henry, *supra* note 527 at 1773. Also see Michael Ashley Stein, *Foreword: Disability and Identity Foreword*, 44 WILLIAM MARY LAW REV. 907–920, 909 (2002).

In *Andrews v. Ohio*,[546] a group of law enforcement officers sued the state of Ohio, claiming they were discriminated against due to their weight and because they did not meet the specific weight requirements set for their particular jobs. Their claim was dismissed by the Sixth Circuit, which ruled that "weight or muscle tone that are within 'normal' range and are not the result of a physiological disorder" are not impairments.[547] The court did, however, argue that in some instances "morbid" obesity may be considered a disability.[548]

Some people recognized as obese indeed found a home within the ADA, either through the recognition of obesity as a disability or through its characterization as a perceived disability. *Cook v. Rhode Island*[549] was the first case in which obesity was recognized as a disability in a federal court. Plaintiff Bonnie Cook worked at a mental health facility in Rhode Island for approximately eight years. When she reapplied for the same position following a break in her employment, the Department of Health refused to rehire her on the basis that Cook's weight prevented her from fulfilling certain job-related functions such as evacuating patients during emergencies. Cook presented medical testimony that she was morbidly obese and that her obesity was a "physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system."[550] The court refrained from determining whether obesity is a disability, but it ruled that Cook was perceived by her employers and the state as having an impairment, which satisfied the Act's definition of "disability." As Molly Henry stated, this legal victory was mitigated by the court's heavy reliance on the medicalization of obesity.[551] In *Gaddis v. Oregon*,[552] the Ninth Circuit took this argument a step further, ruling

[546] 104 F.3d 803 (6th Cir. 1997).
[547] *Id*, at 810.
[548] *Id*.
[549] *Cook v. R.I., Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17 (lst Cir. 1993).
[550] *Id*, at 23.
[551] Henry, *supra* note 527 at 1783.
[552] *Gaddis v. Oregon*, 21 F. App'x 642 (9th Cir. 2001).

that "morbid obesity" *is* indeed a disability.[553] However, given the complicated and contradictory relationship of fat people with questions of health and disability, that ruling may not be viewed as a victory by fat activists. For activists invested in severing the Gordian knot of weight and health and for the Health at Every Size movement,[554] such legal "victories" prove problematic.

Recent years have marked the narrowing of protections for obese people claiming disability discrimination. In a 2006 case, *EEOC v. Watkins Motor Lines*,[555] the Sixth Circuit ruled that questions regarding the recognition of obese plaintiffs as having an actual or perceived disability would be determined on a case-by-case basis, stressing that "physical characteristics that are not the result of a physiological disorder are not considered impairments for the purposes of determining either actual or perceived disability."[556] In 2019, the Seventh Circuit, following judgments out of the Second, Sixth, and Eighth Circuits, ruled that obesity that is not caused by "an underlying physiological disorder or condition" is not an actual or perceived impairment under the ADA.[557]

For non-obese fat people, the level of legal recognition is even lower. While many are still subjected to bias, they cannot use the avenue of disability discrimination to seek redress. A 2015 attempt to challenge weight restrictions by twenty-one waitresses at the Borgata Casino & Spa failed,[558] with the court leaving plaintiffs only the narrow route of proving the restrictions were a manifestation of a disability or sex-related discrimination, at least for "[c]ertain plaintiffs,

[553] *Id*, at 643. ("Appellant Julie A. Gaddis ("Gaddis") suffers from morbid obesity, a disability under the American with Disabilities Act of 1990...")
[554] See *supra* note 524.
[555] *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006).
[556] *Id*, at 442.
[557] *Mark Richardson v. Chicago Transit Authority* 926 F.3d 881 (7th Cir. 2019).
[558] *Schiavo v. Marina Dist. Dev. Co., LLC*, 442 N.J. Super. 346, 123 A.3d 272 (App. Div. 2015). Importantly, the hotel did not regard them merely as waitresses but rather as "entertainers who serve complimentary beverages . . . similar to performance artists," id at 280.

whose lack of compliance resulted from documented medical conditions or post-pregnancy conditions."[559]

Unlike asexuals or poor whites, fat people have an enduring organized social movement and enjoy higher levels of societal visibility. Fat persons subjected to weight-based discrimination have been challenging the legal system for years, carving paths for legal recognition within the framework of existing federal legislation and securing laws in several localities. Their liminality somewhat resembles the position of gay and trans people before *Bostock*: a cohesive group with a designated national legal organization and various routes through which to argue for legal recognition. However, their ascendance toward legal recognition exposes the contradictory nature of recognition. It splits the movement between those who push against the stigmatization of fat people as unhealthy and those who advocate for their inclusion within the category of people with actual or perceived disability. For the latter group, some inner contradictions arise between the need to prove plaintiffs' impairment and their ability to perform their jobs.

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The case studies presented here offer three unique examples of groups in a liminal state of recognition and their various meeting points with the law. While they differ in the nature of the identity group, in the various groups' goals, and in the level of recognition each is afforded via laws and courts, the three display several similar patterns. In all three cases, self-identification as a group or an identity usually came *after* outside societal or medical bias and classification. For groups that have begun their movement toward (legal) recognition, climbing the ladder has brought similar consequences: turning to biology and science, often to prove some

[559] *Id*, at 279.

form of immutability, the framing of members' identity as something they were born with rather than something they can control or chose, and the framing of the identity as a source of both pride and suffering. Asexuals insist that they do not *choose* to avoid sex; in the case of poor whites, plaintiffs in some instances sought to medicalize illiteracy, detaching it from questions of inequality of access to education and tying it to biological pathologies; and, for fat people, their recognition has been mainly contingent on the ability to prove their weight is the result of a biological impairment. Finally, the stories of all three groups demonstrate that recognition requires work. It involves building large social movements and communities; coordinating orchestrated efforts of advocacy and activism; organizing political campaigns, marches, and demonstrations; and challenging legislators and courts regularly. This work does not always pay off. The fat movement has been fighting for decades, but fat people remain mostly outside current antidiscrimination laws. Asexuals are still excluded from all proposed LGBTQ antidiscrimination legislation, and poor whites' various legal strategies have mostly been unsuccessful.

Liminally-recognized groups are therefore faced with the dilemma of whether to continue climbing the ladder of recognition or to seek protections not grounded in identity: protections one can have a claim to not as a member of a recognized group but on other, non-identitarian grounds.

No doubt, forming an identity group and fighting as a group to have an identity recognized has numerous advantages for individuals: a sense they are not alone, a language with which to understand themselves and narrate their experiences. But recognition also comes with costs. Some of them were briefly illustrated via the case studies above. The following section will delve more deeply into the normative debate around recognition.

3.3 Reconsidering Recognition

The debate about recognition has occupied legal thinkers for decades. The following section provides a taxonomy of its main arguments, incorporating insights offered by liminally recognized groups.

3.3.1 The Case for Recognition

3.3.1.1 Validating

Perhaps one of the major reasons that forming an identity and climbing the ladder of recognition is appealing is identity's potential to validate the experiences and traits of stigmatized, marginal individuals. When the law *recognizes you as worthy* of protection, it usually comes with a general societal label of value and legitimization. This facet of recognition was perhaps most evident in the struggle of gay and lesbians to marry. For many advocates, earning the right to same-sex marriage signaled their recognition as equal citizens.[560] The Supreme Court in both *Windsor* and *Obergefel* accepted this argument, tying together legal recognition and the removal of stigma from gays and lesbians and their children.[561]

For groups at the beginning of their struggle for recognition, such as asexuals, the validating aspect of recognition carries further importance. Legal recognition can save one the trouble of having to explain one's identity to people because it can be framed using an already familiar rubric; in the case of asexuals, that of "sexual minority." Legal recognition can also generate publicity for a marginal identity group, which might help "crystallize the identity in the public imagination."[562]

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[560] Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. LAW REV. 1267–1346, 1344 (2011); FRANKE, *supra* note 186 at 60. As Franke stressed, a struggle to accord gays and lesbians the material benefits that come with marriage could have been promoted independently from a right to marriage equality, see *Id.* at 105.

[561] *Obergefel*, *supra* note 400, at 15, (quoting from *United States v. Windsor*, 570 U.S. 744 (2013)).

[562] Emens, *supra* note 416 at 370.

The longing for recognition as a longing for validation may be seen in the fat acceptance movement. Interviewing fat activists, Anna Kirkland showed how even their meager legal recognition has had a validating effect, de facto legitimizing their existence. One activist recalled discovering the Michigan state law banning weight discrimination:[563]

> Some time after I was working in Michigan I looked to see, you know, is it really in the statement? There it is, how cool! . . . [So you've used the Michigan law for leverage in some of your own advocacy for armless chairs?] Yeah. But not in a way I wouldn't wanna say, "Hey, there's a law." It's more in it's that legitimacy and not, "That's [Ashley] the advocate. Always bringing up weird stuff." You know? It's like, "No, it's not me. Look at, there's a whole law that addresses it."

3.3.1.2 Effective

Stating one's claims as claims for recognition is often a useful and effective tool. Simply put, it works. This effectiveness is usually threefold: (a) effectiveness in community formation; (b) effectiveness in advancing community interests; and (c) effectiveness in combating counterarguments and resistance.

First, the ability to center one's demands in a clear, defined category is a useful organizing tool.[564] It helps people who might be part of the cause to *recognize themselves* as part of it, and it encourages a deep commitment to the struggle to advance the group's interest.

Furthermore, it is effective in its engagement with the legal system. The U.S. legal system, in particular its antidiscrimination regime following the civil rights movement of the 1960s, is generally receptive to the concepts of identity and recognition.[565] Accordingly, fighting to achieve group recognition and protected class status means framing your narrative in a language the legal system already speaks and marching along routes that other groups have

[563] Kirkland, *supra* note 404 at 415.
[564] Yoshino, *supra* note 430 at 409–10.
[565] Richard Ford, *Beyond "Difference": A Reluctant Critique of Legal Identity Politics*, *in* LEFT LEGALISM/LEFT CRITIQUE 38, 42 (Wendy Brown & Janet E. Halley ed., 2002)

cleared and walked before you. As the three case studies show, groups climbing the ladder of recognition have generally sought to model their claims on those made by already recognized groups: asexuals have tried analogizing their case to that of other sexual minorities and fat people have intentionally drawn analogies to the civil rights struggles around them and narrated their claims using disability language, as have poor whites. This is not a new phenomenon. Historically, women have compared themselves to Black people, and gays, lesbians, and trans activists have used analogies to both Black people and women.[566] The power embedded in such analogical arguments is that if they are persuasive, and one group successfully equates its traits with another, recognized group, the liberal state may be compelled to respond with equal recognition. The argument becomes one of Aristotelian equality, central to liberal democracies. Kimberlé Crenshaw acknowledged the power of such arguments in *Race, Reform and Retrenchment.* She argued that one of the advantages offered by the legal structure of civil rights is its pretense of neutrality: the claim that civil rights are applied similarly in similar situations.[567] It allowed the civil rights movement to turn the state's "institutional logic" against itself and force the legal system to uphold its rhetorical promises.[568] Working outside the established ideology of the legal system, she wrote, is likely to be ineffective.[569]

Another good example of the effectiveness of recognition is found in the history of the gay rights movements. In the post-Stonewall era, many radical activists in the gay liberation movement did not focus on "gay rights" but rather argued for the disappearance of categories like homosexual/heterosexual altogether through the "abolition of constraining categories."[570]

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[566] Janet E. Halley, *"Like Race" Arguments*, WHAT'S LEFT OF THEORY? 52–86 (2002).
[567] Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. LAW REV. 1331–1387 (1988).
[568] *Id.* at 1366–67.
[569] *Id*.
[570] Steven G. Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Constructionism*, 93 SOCIAL. REV. 9–54, 18 (1987).

However, this radical movement lost its power to a new kind of gay movement: one that sought to promote an "ethnic" version of gay identity and pushed for recognition, similar to the process the fat movement underwent. Steven Epstein wrote:

> This "ethnic" self-characterization by gays and lesbians has a clear political utility, for it has permitted a form of group organization that is particularly suited to the American experience, with its history of civil-rights struggles and ethnic-based, interest group competition . . . by appealing to civil rights, gays as a group have been able to claim a legitimacy that homosexuals as individuals are often denied.[571]

Indeed, this type of recognition work, in which the gay movement immersed itself in the years that followed, paid off.[572] Gay people organized around gay identity as a distinct identity group, and it proved useful in that it resonated with the legal system, especially with the Supreme Court. Following the recognition work of the 1970s, 1980s, and 1990s, the gay movement began seeing the fruits of its labor, which culminated in a line of Supreme Court decisions recognizing gay rights, like outlawing the sodomy ban,[573] upholding same-sex marriage,[574] and, most recently, banning anti-gay and anti-trans workplace discrimination.[575]

The example of the gay struggle for recognition helps illuminate the second aspect of recognition's effectiveness: its usefulness in combating counterarguments and backlash. As Janet Haley explained, gay activists had another reason for turning away from universalizing narratives (that subvert the construction of gayness as a unique trait) and toward identitarian arguments focused on recognition of gay people as a minority group for another reason. Many feared that universal arguments are exposed to the dangerous counterargument that being gay is a

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[571] *Id.* at 20.
[572] Katherine Franke traced the specific origins of the struggle for recognition characterizing the gay community in the wake of *Bowers v. Hardwick*, 478 U.S. 186 (1986), the 1986 Supreme Court decision to uphold the constitutionality of Georgia's anti-sodomy laws. see Franke, *supra* note 75 at 1189–90. I discuss the problems rooted in this respectability turn later in this Article, see p. 172.
[573] *Lawrence v. Texas*, 539 U.S. 558 (2003).
[574] *Windsor*, *supra* note 561; *Obergefell*, *supra* note 400.
[575] *Bostock*, *supra* note 401.

choice. Under this framework, anti-gay activists could justify discrimination against gay people on the basis that it prevents an undesired and preventable lifestyle and the "spread" of homosexuality.[576] This argument echoes those made by the anti-obesity movement discussed earlier, according to which discrimination against the obese is a way to incentivize "healthy" lifestyles. In the case of both the gay and fat movements, the reaction to such arguments was to promote recognition of difference, situating fat and gay people as inherently and innately different from the rest of society—as people who were "born this way."[577]

3.3.1.3 Tailored

A major argument for recognition-based strategies is that they generally yield workplace protections that are uniquely tailored to marginalized groups instead of general, universal protections.

The products of the civil rights movements were laws designed to prohibit discrimination against and the disenfranchisement of Black people; the feminist struggle led to a series of laws and judicial doctrines pertaining to women. Specific identity-based protections have two main advantages. First, universal protections (granted to all workers) have an assimilatory potential.[578] Proponents of recognition-based protections worry that universal rights might bring us back to the gender-blind, color-blind liberal order, under which workers of minority groups are incentivized to cover their unique traits and assimilate into the white, male, heterosexual workplace.[579] Such assimilatory incentives devalue the lived experiences of minority workers.

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[576] Halley, *supra* note 566 at 53.
[577] Recall how important it is for asexuals to characterize asexuality as an orientation rather than a choice, see supra note 458. Notably, as Haley also reminded us, the characterization of gay people as a distinct "ethnic" minority is not free from susceptibility to counterarguments or backlash. Such pro-gay arguments can similarly be co-opted, "representing homosexuals as pathological deviants who should be cured, killed, aborted, or at least hidden from view." *Id.* at 53.
[578] Jessica A. Clarke, *Beyond Equality - Against the Universal Turn in Workplace Protections*, 86 INDIANA LAW J. 1219–1288, 1245 (2011).
[579] YOSHINO, *supra* note 307; Carbado and Gulati, *supra* note 206.

Further, the work embedded in assimilatory behavior consumes time and effort and is often accompanied by other psychological costs.[580] Targeted protections against discrimination and harassment, on the other hand, are developed around the lived experienced of minorities, thus bridging the gap between them and workplace hegemonies.

Jessica Clarke developed another argument in favor of tailored protections. She argued that universalizing workplace protections—essentially detaching them from specific identities—would ultimately dilute the level of protection afforded, as rights must be narrower and more abstract to apply in more contexts.[581] Opening up protections to all workers, regardless of identity, risks trivializing the serious harm of discrimination. She argued, "Expanding a civil rights remedy may result in lesser protections in the new context, with those limitations drifting back into the core doctrine."[582]

The argument that workplace protections are somehow a zero-sum game is worth examination. We may alternatively posit that abandoning targeted protections might *broaden* the level of protection awarded to all workers (I will make a similar argument later in this article). In a different article, Clarke herself developed this line of thought. Arguing against the practice of "protected class gatekeeping"—the judicial practice of dismissing discrimination claims by plaintiffs who are not part of protected classes[583] —Clarke argued that opening avenues for plaintiffs not from protected classes would benefit protected classes as well. She listed several such advantages for protected minorities. For instance, allowing strong workers to sue for discrimination would redistribute the burden of promoting more equitable workplaces, so it would not fall solely on vulnerable workers. Additionally, doing so would diminish the added

[580] Carbado and Gulati, *supra* note 206 at 1278, 1291–92. See also Hutchinson, *supra* note 46 at 49.
[581] Clarke, *supra* note 578 at 1247.
[582] *Id.* at 1249.
[583] Clarke, *supra* note 203.

risk to employers of hiring protected classes. When only protected classes are allowed to bring discrimination claims, employers have an incentive to not hire minority employees. Furthermore, opening a path for all workers to sue for discrimination would diminish the backlash vulnerable workers are exposed to when protections are tailored specifically to them. Finally, Clarke argued, eliminating protected-class gatekeeping may advance broad coalitions against discrimination in the workplace.[584]

Moreover, examination of the dilution argument from the perspective of liminally-recognized groups turns on their heads some of its basic assumptions. Liminally-recognized groups demonstrate how particular protections designed to protect the most vulnerable workers can nevertheless miss those who are even more vulnerable. In that sense, detaching protections from recognized identities would not only afford additional protection to majority groups and powerful workers, it might pave a path for groups not yet able to reach the top of the ladder of recognition. Often, these identity groups are comprised of *less* powerful workers.[585]

It is clear that recognition comes with benefits: establishing a shared sense of identity and pushing the law to recognize it can have a validating effect on marginalized individuals. In

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[584] *Id.* at 159.

[585] See for example, Naomi Schoenbaum's argument regarding the use of the gender nonconformity doctrine (as first developed in *Price Waterhouse*) in the context of transgender plaintiffs (pre-*Bostock*). Schoenbaum argued against this use, claiming it harms both transgender people's cause and the level of protection afforded to cisgender women: "Treating transgender persons as gender nonconformers also undermines protection for gender nonconformity. Under the doctrine, claims brough by cisgender persons like Hopkins appear weak next to transgender claims. Cisgender plaintiffs are seen as less gender nonconforming." Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105(2) MINN. L. REV. 831, 836-67 (2020). Schoenbaum's argument is the flip side of Clarke's: both accept the alleged zero-sum game of workplace protections, and both argue that broadening the scope of populations deserving of protection will lower the amount of protection afforded. However, the juxtaposition of both arguments highlights the problem. The dilution argument makes sense when one thinks about vulnerable groups losing protection in favor of strong and powerful groups. But, as Schoenbaum's argument illustrates, sometimes it is the other way around: in the pre-*Bostock* era, transgender people were a liminally-recognized group fighting to be afforded protection from sex-based discrimination. Even if we accepted the zero-sum game assumption according to which affording protection to transgender people would somehow lower the level of protection afforded to cisgender women, we may still ask ourselves: is that really that bad? Thinking from the margins of liminally-recognized groups exposes the fact that sometimes, protected classes do not represent the most vulnerable members of the workforce. Accordingly, broadening the scope of workplace protections to include their harm does not distance us from the egalitarian aspirations of antidiscrimination laws as Clarke worried it would; it advances them.

addition, joining forces with others with a shared identity is effective in energizing communities toward collective action and identification. Further, arguing for recognition uses a language the legal system is receptive to and allows members of marginalized communities to follow paths carved out for them by recognized groups. It can also provide a discursive shield against backlash and delegitimization. Finally, once a group manages to climb the ladder of recognition, it usually entails tailored protections designed specifically around this community's vulnerability.

However, along with these gains, recognition imposes several notable costs, which will be the focus of the following section.

3.3.2 The Case Against Recognition

3.3.2.1 Recognition as Inherently Limited

The first key argument against recognition-based systems is the inevitability of liminality. The reality of yet-to-be-discovered minority groups is inherent in a process that requires an immense amount of recognition work by individuals who seek protection from workplace harm. There will always be new liminal groups on the fringes of recognition; there will always be groups that have yet to recognize themselves as such.[586] The goal of antidiscrimination law is to promote equality in the workplace, yet a system built around recognition will always leave that goal unfulfilled.

Recall the example of Mary from Carbado and Gulati's *The Fifth Black Woman* discussed earlier: a Black woman who performs her identity in a way that makes her less palatable to white partners at her elite corporate firm than other Black women. For Mary to argue

[586] As Naomi Schoenbaum wrote, "wronged employees do not always exercise voice. Complaining requires 'legal consciousness'—framing one's experience as a legal wrong, and formulating a response." Naomi Schoenbaum, *Towards a Law of Coworkers*, 68 ALA. LAW REV. 605–670, 620 (2016).

that the denial of her promotion was discriminatory, she must embark on a strenuous journey to highlight her positionality as a distinct identity that was discriminated against in the promotion process. Otherwise, within the identity regime of antidiscrimination law, she is bound to be misrecognized and her claims will be ignored.

Also recall the flight attendants' cases discussed in the context of weight discrimination. Some airline guidelines challenged in these cases include a wide variety of physical requirements. Flight attendants are required to have good teeth and "a clear complexion" without any evident scars, pimples, or severe blemishes.[587] Some might find these requirements irrelevant to the job and perhaps even as conferring unwanted costs upon potential employees. Under a paradigm of recognition and antidiscrimination, these guidelines may be criticized in two different ways. First, we can argue that each requirement in these airline guidelines discriminates against a not-yet recognized identity group. We might say that people with "bad teeth" and people with unclear skin form specific identity groups[588] and that these guidelines discriminate against them. This option sounds both unrealistic and undesirable: first because of the immense work it would take to secure recognition of each of these groups and second because it is hard to see people choosing to define themselves as belonging to an identity group solely due to the shape and condition of their teeth or skin. Second, we may say that attributes such as clear skin and "good teeth" are a proxy for identities (either recognized or that should be recognized). Accordingly, we can argue that having "good teeth," for instance, usually costs money, so listing it as a job requirement would disqualify candidates from less-privileged

[587] Soo Kim, Unusual Flight Attendant Requirements: The Good, The bad and the Beautiful, The Telegraph (Mar. 31, 2016) https://www.telegraph.co.uk/travel/news/unusual-flight-attendant-requirements-the-good-the-bad-the-beautiful/

[588] Richard Ford made a similar move regarding the proliferation of identities as a mechanism to "score points" in public policy debates, see FORD, *supra* note 201 at 140.

backgrounds. Then, we may attach these attributes to already recognized identities or fight for different identities to be recognized through the link between such proxies and identity-based bias (think, for instance, of the specific stereotype of poor whites having bad teeth).[589] But sometimes attributes are neither proxies for nor markers of distinct identities. Indeed, sometimes the costs of a specific job requirement go, as Janet Haley wrote, "to places where no current subordination theory can find them."[590]

This is an immanent problem of recognition: antidiscrimination law is inherently non-visionary. It is always one step behind. A group must declare itself as such, fight to gain the necessary political power, and only then achieve justice. Given the ever-shifting axis of stigma and power and the endless possible intersections of identities, the prospect of misrecognition cannot be avoided.

3.3.2.2 The Paradox of Political Power

The last argument centers on the recognition work required of stigmatized individuals for their claims to be seriously considered. As several critics have rightly noted, the process of climbing the ladder and doing this work is characterized by an inherent paradox.

As previously mentioned, the general principle for recognizing minority groups as worthy of unique protection was laid out in *Carolene Products*.[591] In footnote 4—the most famous footnote in constitutional law[592]—Justice Stone detailed the basis for applying heightened scrutiny whenever legislation adversely affects minority groups. Such heightened scrutiny, Stone

[589] ISENBERG, *supra* note 343 at 269.
[590] JANET E. HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 287 (2006).
[591] *Carolene*, *supra* note 439.
[592] Kenji Yoshino, *The Gay Tipping Point Symposium: Sexuality & Gender Law: Assessing the Field, Envisioning the Future*, 57 UCLA LAW REV. 1537–1544, 1538 (2009).

said, should be afforded to "discrete and insular minorities" who are deemed distinctly vulnerable to majoritarian repression.

Bruce Ackerman offered a strong critique of the underlying assumption in *Carolene Products* that "discrete and insular minorities" are uniquely vulnerable and thus warrant heightened levels of judicial review.[593] Ackerman stressed the relative advantages discrete and insular minorities enjoy in the political process, as opposed to "anonymous and diffused" minorities. When a minority is discrete and insular, the chances are that individual members of that group will be more loyal to it, are more likely to exercise their voice against stigma and inequalities and can more easily organize around their joint cause. In contrast, in situations where minorities are "anonymous and diffused," they face a harder time organizing. Given that such minorities are more likely to be able to assimilate, their members are usually less loyal to the group, diminishing its political and social power.[594] The "discrete and insular" paradigm is tailored to the "pariah model" of minorities, i.e. minorities who enjoy representation and political power but are considered such outcasts that they cannot advance their goals successfully through the political process. However, Ackerman pointed out, anonymous and diffused minorities often do not even have a seat at the negotiation table.[595]

Following Ackerman, Kenji Yoshino further highlighted the problem of *Carolene Products,* coining it "the paradox of political power." According to this paradox, "[a] group must have an immense amount of political power before it will be deemed politically powerless by the

[593] Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. LAW REV. 713–746 (1984).
[594] *Id.* at 730–31.
[595] *Id.* at 723–24.

Court." As Yoshino recognized, there are instances where a group is so devoid of political power that courts do not even recognize its existence.[596]

While the controversy around *Carolene* is situated mainly in the realm of constitutional law, the paradox both Ackerman and Yoshino highlighted extends to antidiscrimination law and theory as well. A group must have high levels of political power to climb the ladder of recognition; however, with every upward step it must convince courts and the public of its political powerlessness—the specific powerlessness that warrants special protections.

3.3.3.3 Complicated Proof Procedure

Even when an identity group manages to tackle the paradox of political power, climb the ladder of recognition, and enjoy legal recognition and protection, recognition still does not guarantee its members protection from discrimination. Successfully suing for workplace discrimination is a complicated challenge in and of itself. Echoing the ladder analogy, it is like climbing all the way up the ladder only to find yourself at the base of a steep and winding mountain trail. Scholars estimate that only a small fraction of workers who are subjected to workplace discrimination take any formal action before the EEOC.[597] A study of one thousand employees found that of all of those who reported experiencing workplace discrimination, only three percent sued their employer or the company.[598] When workers do sue, they are likely to settle their claims, as only six percent of lawsuits reach trial.[599] When a settlement cannot be reached, the chances of winning a discrimination lawsuit are slim. Extensive scholarship

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[596] Kenji Yoshino, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court Leary Lecture*, 2012 UTAH LAW REV. 527–544 (2012).
[597] ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 13 (Illustrated Edition ed. 2017).
[598] K.A. DIXON, DUKE STOREN, AND CARL E. VAN HORN, A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB 15 (2002) https://www.heldrich.rutgers.edu/sites/default/files/products/uploads/A_Workplace_Divided.pdf (last visited Jan. 27, 2021).
[599] BERREY, NELSON, AND NIELSEN, *supra* note 597 at 13.

highlights the procedural hardship imposed by courts on plaintiffs seeking to prove discrimination: First, courts tend to prefer individualized lawsuits, which curbs the ability to tackle systemic patterns of discrimination either through class actions or disparate impact claims.[600] Second, in cases of harassment, for instance, plaintiffs must meet the high court-created standard of showing that the pattern of harassment was "severe and pervasive."[601] Many courts have interpreted this requirement narrowly, dismissing claims alleging repeated use of epithets, for instance, as not sufficiently severe or pervasive.[602] Third, as previously discussed, courts raise additional recognition-based barriers when they engage in protected-class gatekeeping, preventing plaintiffs from advancing lawsuits if they cannot sufficiently prove they are members of protected classes.[603] In addition, as Berry, Nelson and Nielsen argued, plaintiffs are often "one-shotters" in these trials, and many of them cannot afford a lawyer.[604] However, they will most likely face employers who are "repeat players."[605] As a result of this disparity in legal experience, plaintiffs often find themselves at a "disadvantage at virtually every stage of the dispute."[606] Their study found that only 2.14 percent of cases resulted in a win for the

[600] Importantly, Congress has tried to strike down some of the barriers to disparate impact claims erected by the Supreme Court. Section 105 of the Civil Rights Act of 1991 specifies a clear procedure to prove disparate impact of an employment practice: a plaintiff can show that a specific practice led to an 80% disparity to shift the burden of persuasion to the employer to demonstrate a business necessity. However, this route still proves insufficient. According to Berry, Nelson, and Nielsen, "only 1% of cases today seek class action certification, 93% of claims are made by one plaintiff, and 93% of claims only involve an allegation of disparate treatment." *Id.* at 15.
[601] Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE LAW J. 1683–1805, 1716 (1998).
[602] *Id.*
[603] See generally Clarke, *supra* note 203.
[604] Recall the case of *Keel v. Wal-Mart Stores, Inc.*, in which the plaintiff, who represented himself, ended up losing the case when the court rejected all his arguments, see p. 139 of this Article.
[605] BERREY, NELSON, AND NIELSEN, *supra* note 597 at 13.
[606] *Id*.

plaintiff.[607] Another study, which focused specifically on the ADA, found the rate of plaintiffs' wins to be 3 percent.[608]

The complicated proof procedure of discrimination claims highlights the way in which so much of groups' recognition work is invested in tools that seem to help only a fraction of the group, favoring the strongest, most privileged individuals who can afford the costly process of suing for discrimination. And discrimination lawsuits often lead to legal outcomes that are limited in scope, as courts generally refrain from acknowledging systemic patterns of workplace inequality.

3.3.3.4 Recognition as Identity Construction

Another consequence of recognition revolves around the way in which it shapes the identity being recognized. Targeted remedies for discrimination anchor and fixate the identities that are at the core of antidiscrimination regimes, as "the law creates a juridical person in its image."[609] Simply put, to be granted legal protection as a person with a disability, for instance, or as a woman, one must perform disability or femininity in a certain way that situates them within the protected group. This, in turn, further reinforces the regulatory nature of group boundaries.[610]

Dean Spade provided a vivid illustration of this problem in the context of the transgender community. Examining the specific locus of access to sex reassignment surgery, Spade illustrated how the process of recognizing someone as transgender (and thus as eligible for gender-affirming technologies) became a process of regulating trans bodies and narratives. To be

[607] BERREY, NELSON, AND NIELSEN, *supra* note 597 at 293 (table A5).
[608] Amy L. Allbright, *2006 Employment Decisions Under the ADA Title I—Survey Update*, 31 MENT. PHYS. DISABIL. LAW REPORT. 328–331 (2007); Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work*, 59 ALA. LAW REV. 305–344 (2007).
[609] Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421–439, 433, n. 25 (1987).
[610] WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 99 (c1995).

recognized as a "real" transgender person by the medical system, trans people must narrate their identity according to the narrow legal definition of "transgender."[611] Doron Dorfman similarly described this dynamic in the context of efforts by people with disabilities to receive social security benefits. He wrote, "To comply with the expectations prescribed by the SSA, benefit claimants must 'perform their identities in explicitly self-conscious and theatrical terms' to fit the sick role."[612] One interviewee mentioned the toll performing her identity to fit the preexisting scripts has on her: "[I]t can get very confusing for me because if I was going to be that day 'the disabled' then I would have to play the disabled. You know that takes away so much of where I also see disability as an enrichment. I don't get to play the goodness of it. I have to play the identity of it."[613]

This relationship between identities and the law that recognizes them creates a cycle of identity production: through a generalization of individuals to a distinct and defined group, a script is proposed to describe specific identity *X*.[614] People try to fit this script to access the resources, opportunities, and protections associated with *X*. The fact that their performed identity fits so well into the script then becomes a proof of the script's accuracy and a justification of its legitimacy.[615]

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[611] For instance, "in order to be deemed real I need to want to pass as male all the time, and not feel ambivalent about this." Dean Spade, *Resisting Medicine, Re/modeling Gender Commentary*, 18 BERKELEY WOMENS LAW J. 15–39, 21 (2003). For a similar discussion in the context of prison reform see Lihi Yona & Ido Katri, *The Limits of Transgender Incarceration Reform*, 31 YALE J. LAW FEM. 201–248 (2019).

[612] Doron Dorfman, *Disability Identity in Conflict: Performativity in the U.S. Social Security Benefits System*, 38 THOMAS JEFFERSON LAW REV. 47–70, 67 (2015), citing from CARRIE SANDAHL & PHILIP AUSLANDER, BODIES IN COMMOTION: DISABILITY AND PERFORMANCE 2 (2009).

[613] Dorfman, *supra* note 612 at 55.

[614] On the generalizing and essentializing power of group identity see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STANFORD LAW REV. 581–616 (1989). Harris critiques "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience." *Id*, at 585.

[615] This point of the regulatory potential of recognition has been explored by other scholars as well. Butler, for instance, discussed the subjugating power of becoming a subject of regulation, JUDITH BUTLER, UNDOING GENDER 41 (2004). ("to become subject to a regulation is also to become subjectivated by it"); Likewise Nancy Fraser acknowledged the reifying potential of affirmative, recognition-based remedies for harm, see FRASER AND HONNETH, *supra* note 370 at

Think here of asexuals fighting for recognition. Assuming their struggle for recognition will eventually succeed, how would a person have to *prove* their asexuality to claim they have been discriminated against on that basis? If they once had some sexual thoughts and desires, will they be incentivized to suppress them to be considered a "true" asexual?[616]

This regulatory potential can be internalized, and thus limiting, in and of itself. When plaintiffs repeatedly describe their identity according to the expectations of the law, they can begin to believe that narrative.[617] Such internalization can also occur on the group level. One of the consequences of tying freedom from oppression with the specific language of identity is that members of recognized groups are often pressured by their peers to perform their identity "authentically" as a way of strengthening group boundaries.[618] This oft-hidden side effect of recognition curtails the kaleidoscopic nature of experiences and identities, which are much more fluid and unstable than the language of recognition allows.[619]

The regulating aspect of recognition prompts this question: what are the substantive characteristics that are constituted as part of the process of recognition? While recognized identities and identity groups differ, this article argues, some specific aspects of identities are nevertheless favored under the regime of legal recognition. Three such aspects warrant attention:

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76. ("Valorizing group identity along a single axis, [affirmative recognition remedies] drastically simplify people's self-understanding – denying the complexity of their lives…"); Janet Haley added to that discussion the power that lawyers—who often design legal strategies for social groups—have in regulating and constructing identities, see Halley, *supra* note 566 at 46. For a similar discussion regarding the regulatory nature of the ADA, see Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH LAW REV. 247–318, 250 (2001).

[616] Emens, *supra* note 416 at 371.

[617] Laura Rovner, who represented clients who sued for disability discrimination, made this claim, see Rovner, *supra* note 615 at 303. See also Weller Embler, *Metaphor and Social Belief*, 8 ETC REV. GEN. SEMANT. 83–93, 83 (1951). ("More often than not, our thoughts do not select the words we use; instead, words determine the thoughts we have").

[618] FORD, *supra* note 201 at 41. Fraser also highlighted the potential of recognition-based approaches "to pressure individuals to conform to a group type, discouraging dissidence and experimentation, which are effectively equated with disloyalty." FRASER AND HONNETH, *supra* note 370 at 76.

[619] FORD, *supra* note 201 at 56.

3.3.3.4.1 Immutability

Often, when groups seek legal recognition, a strong incentive exists for them to describe their difference as immutable. Immutability holds a key place in antidiscrimination theory because of the common desire to protect people from the "accident of birth:"[620] they should not be treated unfairly due to circumstances they cannot control nor change.[621] While immutability is not a necessary trait for group recognition,[622] its preferability among legislators and courts have led groups to describe their difference as unchangeable. This can be seen in the gay, lesbian, and transgender communities' fights for recognition[623] as well as in the struggles of asexuals and fat people. All relied, in one form or another, on the argument that members did not *choose* to engage in the practices associated with their identity; they were biologically destined from birth to engage in them. Looking to science indeed has its benefits, as courts and legislators tend to defer to medical authority when constructing and defining identities.[624] It is not surprising that of all the strategies employed by poor whites to combat their discrimination, claiming disability discrimination proved the most fruitful. It grounded their claims and their marginalization in something courts deem "real": medical diagnoses and reports.

One drawback of this biological turn is the immense power it affords scientists and doctors over the boundaries of the group.[625] This is especially problematic when the initial

[620] *Frontiero v. Richardson*, 411 U.S 677, 686 (1973). See also Jessica A. Clarke, *Against Immutability*, 125 YALE LAW J. 2–103 (2015); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STANFORD LAW REV. 503–568 (1993).
[621] The Supreme Court has mentioned immutability as a ground for heightened judicial review, see for instance *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978).
[622] Clarke, *supra* note 620 at 15.
[623] Halley, *supra* note 620 at 504. For this argument in the context transgender litigation see Maayan Sudai, *Toward a Functional Analysis of Sex in Federal Antidiscrimination Law*, 42 HARV. J. LAW GEND. 421–476 (2019).
[624] Recall that earlier in this Article, I showed how the origin of many category groups was a scientific classification, see pp. 121, 125, 132 of this article.
[625] Maayan Sudai, *Revisiting the Limits of Professional Autonomy: The Intersex Rights Movement's Path to De-Medicalization*, 41 HARV. J. LAW GEND. 1–54 (2018).

stigma that the identity group was formed to push back against originated in the medical establishment. The origin of homosexual identity was in medical classification, yet many gay advocates appeal to this very same establishment in their fight for recognition.

Yofi Tirosh stressed the problematic relationship between the regulating aspect of recognition and the turn to medical discourse and authority. Writing in the context of fat discrimination, she argued that recognizing fat people as a category in antidiscrimination law "would pave the way for a whole new spectrum of oppressive legal discourse about the fat body . . . . The concern here is that the legal discourse on weight would normalize the medical framework for talking about the fat body. The law would thereby partake in disciplining it, rather than assisting in its liberation."[626]

3.3.3.4.2 Respectability

Another characteristic that groups climbing the ladder are incentivized to exhibit is the ability to express their identity in a manner that does not seek to challenge or question the hegemonic norms of those charged with doing the recognizing—primarily courts and legislators. Accordingly, many identity groups making their case while trying to climb the ladder turn to a respectable, or dignified, representation of their difference to show that they *deserve* recognition and equality despite said difference.[627] Again, from the gay community comes a vivid example of this toll. Discussing the recognition work the gay community embarked on in the wake of *Bowers v. Hardwick*—the 1986 case that upheld the constitutionality of anti-sodomy laws—Katherine Franke critically assessed the price the community paid. She wrote:

> We understood that we had work to do. We had not made ourselves recognizable to the public and to legal authority as a community worthy of full constitutional protection and the dignity that recognition would confer. So that work began. On

[626] Tirosh, *supra* note 531 at 329–30.
[627] Kenji Yoshino wrote extensively on the incentive to "cover" minority traits to be deemed eligible for equality and rights, see YOSHINO, *supra* note 307.

> school boards, on little league fields, at PTA meetings, in churches, in workplaces, grocery stores—everywhere. We set out to demonstrate in fora both quotidian and extraordinary that we were not a perverse Other, that we were respectable citizens, that we were just like you.[628]

Another version of this argument is what Anna Kirkland called "the logic of functional individualism."[629] Persons from minority groups stress that they "can do the job"[630] like everyone else. In so doing, they assert their respectability from a perspective that emphasizes the group's ability to fit in not only within the civic order, but also into the industrial one.

Both versions of the respectability problem are clearly embedded in the fight of liminally-recognized groups to achieve recognition. Fat people have used this argument to advance their claims in courts: they submit evidence to prove that their fatness does not keep them from performing productively like any other worker. Recall that the incongruence between such an argument and some courts' interpretation of disability antidiscrimination laws as being grounded in plaintiffs' *inability* to equally perform job-related functions has cost some plaintiffs their lawsuit. Recall how David Jay, a leading asexual activist, emphasized the community's efforts to push against cultural consideration of members as oddities and to insist that they are "an *important part* of the spectrum of queer identity."[631]

Evident from this section is that many groups fighting for recognition are heavily incentivized to describe their identities as functional, dignified, and respectable.

3.3.3.4.3 Attachment to Injury

One last aspect of the specific identity that is constructed when groups climb the ladder is members' attachment to their injury and oppression. As was illuminated by the paradox of

[628] Franke, *supra* note 75 at 1189–90.1189-90. See also Adler, *supra* note 3.
[629] KIRKLAND, *supra* note 525 at 7.
[630] *Id.* at 7.
[631] *David Jay and the Rise of Asexual Visibility*, *supra* note 456. (Emphasis added).

political power, arguing from identity is essentially arguing from a position of powerlessness, not a position of power.[632] Even aside from its paradoxical potential, doing so extracts a price. Achievements that result from winning the recognition battle are always and inherently rooted in individuals expressing their weakness rather than their power. To detach from the injury caused by exclusion and oppression would be to risk losing recognition—even, sometimes to lose one's very identity.

This problematic element of securing recognition is most evident in the context of discrimination against people with disabilities. As Laura Rovner showed, for many plaintiffs with disabilities, identifying themselves as "a person with a disability" under the meaning of the law requires a complicated reconciliation of how the law sees them and how they view themselves.[633] She demonstrated that in some cases, a plaintiff's testimony that they have managed to heal from the humiliation and other harm caused by the act of discrimination works against their chances of winning their lawsuit.[634]

This dynamic maintains persons fixated on their exclusion and victimhood incentivized to suppress other parts of who they are.[635] Having your identity intrinsically connected to your exclusion curtails any possibility of achieving full liberation from the exclusion without losing *who you are* in the process.[636]

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[632] BROWN, *supra* note 610 at 66–68.
[633] Rovner, *supra* note 615 at 300–301.
[634] *Id.* at 299–300. ("By appearing as a functioning person with coping mechanisms intact, Ms. Rowley departed from the victim script. This departure presented the jury with a difficult question: can one have been victimized without being a victim? By their verdict, the jury seems to have concluded, 'no.'"). See also the following explanation from Lisa, one of the women interviewed in Dorfman's research: "You have to talk to them about how hard it is to live with a disability, how much it limits you, how much trouble it is, how bad you feel, how often you're sick . . . you have to impress [pause] you have to present an image of being pathetic and helpless." Dorfman, *supra* note 612 at 68.
[635] As Martha Minnow said, "Victimhood is a cramped identity, depending upon and reinforcing the faulty idea that a person can be reduced to a trait." Martha Minnow, *Surviving Victim Talk*, 40 UCLA LAW REV. 1411–1446, 1432 (1992).
[636] BROWN, *supra* note 610 at 27, 73.

Finally, this attachment to (personal) injury focuses the fault on specific players that are deemed responsible for the "injury,"[637] as well as on individualized dynamics, thus obscuring the systemic nature of discrimination.[638]

3.3.3.5 Contained Political Demands

The specific type of recognition relevant to antidiscrimination law can be described—in Nancy Fraser's terms—as affirmative recognition. Fraser distinguished between two forms of recognition: affirmative recognition and transformative recognition.[639] Affirmative recognition is focused on addressing the devaluing of marginalized communities through their revaluation without challenging the content of group identities or the boundaries that constitute group difference. Conversely, transformative demands for recognition are more deconstructionist in nature and redress this devaluation through the destabilization of group identities and boundaries.[640] Notably, the struggle for legal recognition as a distinct identity group takes the form of affirmative recognition, given that it does not challenge the infrastructure of difference that fuels current inequalities. This highlights the contained nature of the political demands at its core.

In the context of the workplace, arguing from the position of recognized identities limits our ability to rethink how our workplaces look and who deserves a place in them. It corrals political demands so that the treatment of minority groups is equated only with the treatment majority groups currently receive and, further, only to instances when minority groups can prove

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[637] *Id.* at 27.
[638] This argument echoes the findings of Berry, Nelson, and Nielson on the individualization process of antidiscrimination claims discussed above, see footnote 600 of this Article.
[639] Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age*, I/212 NEW LEFT REV. 68–93, 82 (1995).
[640] *Id.* at 82–3.; FRASER AND HONNETH, *supra* note 370 at 75. Recall the discussion about the gay liberationists of the 1970s, who focused on challenging the boundaries between heterosexuals and homosexuals, see pp. 155 of this article.

that their difference does not harm their ability to "do the job." This leaves serious questions unaddressed: how are majority groups treated in the workplace? How are workplaces currently shaped and what are the dominant norms that govern them?

Consider, for instance, the catch-22 argument advanced in *Price v. Waterhouse*, the U.S. Supreme Court case in which the stereotype doctrine of Title VII was developed. The plaintiff, Ann Hopkins, was denied partnership at her firm because she was considered "too masculine" and "overly aggressive" by the firm's partners, who advised her to dress "more femininely" and attend "charm school" to improve her chances of a partnership.[641] This advice was offered despite the fact that qualities such as aggressiveness and toughness were sought after in potential partners.[642] The Supreme Court determined that denying opportunities to women on the basis of gendered expectations that they act "feminine" is sex discrimination prohibited under Title VII.[643] In his opinion, Justice Brennen condemned the catch-22 women experienced in the workplace: "out of a job if they behave aggressively and out of a job if they do not."[644]

Leaning into the catch-22 of workplaces exposes the limits of current discrimination claims. They clear a path for women to be "masculine" or aggressive, but they often do not have a lot to say about the value of aggressiveness as a desired trait in many workplaces or the masculinity that characterizes such workplaces. Challenges to patriarchal or sexist norms in the workplace not backed by this type of catch-22 argument have been less successful. For example, grooming codes that require women to present themselves as "feminine" in the workplace are generally considered lawful.[645]

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[641] *Price Waterhouse*, *supra* note 213, at 233-34.
[642] *Id.* at 235-36.
[643] *Id.* at 241-42; 250-51.
[644] *Id.* at 251.
[645] For cases in which women attempted to challenge grooming policies in the workplace (for instance, policies requiring them to wear makeup), see *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006).

This problem intensifies when the lens shifts from gender to another system of othering, such as race. That is because catch-22 arguments work only when expectations of groups are converse (women are expected to "act like women" and men are expected to "act like men"). As Yoshino has shown, the expectation of racial minorities is the opposite—they are usually expected to cover their traits and assimilate to dominant workplace norms—"dress white" or speak unaccented English.[646] Accordingly, catch-22 arguments are generally irrelevant in the context of racial discrimination. There is no double bind.[647]

The structure of antidiscrimination law prevents workers from pushing for more radical visions of their workplaces and from reconfiguring the power balance between employers and workers by curtailing their demands to formal equality with the dominant groups that shape workplace hegemonies.

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Considering the costs of climbing the ladder of recognition, liminally-recognized groups may wish to explore alternatives routes to workplace justice. The final part of this article offers two such alternatives. Notably, these strategies need not replace recognition-based strategies; they may be advanced alongside them. These alternatives are meant to put more tools in liminally-recognized groups' toolkit and give them a possibility of advancing their struggle in non-identitarian ways.

3.4 Moving Beyond Recognition

Janet Haley, in her exploration of identity-based legal rules, urged us to "seek identity-indifferent norms of distributive justice."[648] This section, following her suggestion, introduces

[646] *Id.*
[647] This might explain why Title VII jurisprudence has not developed a racial stereotype doctrine alongside its sex stereotype one, *See* Bornstein, *supra* note 199 at 964.
[648] Halley, *supra* note 566 at 46. See also at p. 69.

two ways to do so. The first strategy examines the possibility of moving beyond recognition within the realm of antidiscrimination law via anti-essentialist interpretations of it. The second strategy explores the prospect of moving beyond recognition *and* beyond antidiscrimination law. It focuses on the potential of labor law and union power to pioneer a route for liminally-recognized groups via universal protections granted to all workers and on the capacity of universal protections to address "discrimination-like" wrongs sustained by persons from unrecognized or liminally-recognized groups.

3.4.1 Moving Antidiscrimination Law Beyond Recognition

Earlier, this article used Fraser's distinction between affirmative and transformative recognition to argue that discrimination rooted in identity advances the former rather than the latter. How might we approach antidiscrimination legislation in a way that promotes transformative recognition?

One key question in antidiscrimination theory is what harm antidiscrimination law aims to repair. Often, this question manifests via the debate between anti-classification and anti-subordination theories. Anti-classification theory places the harm of discrimination in the act of classifying or distinguishing between individuals.[649] According to anti-classificationists, the way to achieve equality is to ignore identitarian traits (such as race or gender) that are deemed irrelevant, illegitimate grounds for classifying individuals.[650] Anti-subordination theory, on the other hand, focuses on antidiscrimination law's role in remedying the conditions of groups that have been historically oppressed.[651] Rather than ignoring identitarian traits such as race or sex, anti-subordinationists seek to acknowledge their role in creating inequality.[652]

[649] Balkin and Siegel, *supra* note 188 at 15.
[650] Areheart, *supra* note 189 at 963.
[651] Clarke, *supra* note 203 at 155; Balkin and Siegel, *supra* note 188 at 9.
[652] Rosenthal, *supra* note 194.

Moving beyond recognition could create a middle ground between anti-classificationists and anti-suburdinationists. Notably, critical scholars have offered a third paradigm from which to promote the goals of anti-discrimination law: anti-essentialism. As Jessica Clarke explained, anti-essentialists "see group-based identities as constructed and contested through social interaction, not as fixed and stable properties of the individual."[653] Anti-essentialism shares anti-subordinationists' aim of dismantling power structures. Simultaneously, it also shares anti-classificationists' disdain for policies centering on identity.

One way of promoting an anti-essentialist reading of antidiscrimination law, this article argues, is to see it as focusing not on identities but rather on *ideologies*. Such an anti-essentialist paradigm shifts the goal of antidiscrimination law from recognizing and protecting identities toward combating the ideologies that construct them.[654] Rather than focusing on the number of recognized groups protected by antidiscrimination law, an ideology-based approach would focus on the *ideologies* that birth discriminatory practices (e.g., white supremacy, sexism, etc.). For example, sexism, as an ideology, genders workplaces in ways that disadvantage anyone who does not conform to sexist expectations.[655]

Despite anti-essentialism's radical stance toward social institutions (such as law itself), an ideology-based approach is congruent with the language of major antidiscrimination laws. Adopting a textual approach to major antidiscrimination laws opens up surprising avenues for radical transformations of antidiscrimination law and theory.[656] Below are two examples.

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[653] Clarke, *supra* note 203 at 145.
[654] *Id.* at 145.
[655] Franke, *supra* note 293; Carbado and Gulati, *supra* note 206.
[656] Notably, *Bostock* is a vivid example of the possibilities offered by "progressive textualism" to advance Title VII interpretation, and specifically to expand coverage for liminally recognized groups like gay and transgender plaintiffs, see Katie Eyar, *Symposium: Progressive textualism and LGBTQ rights*, SCOTUSBLOG (2020), https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights/ (last visited Jan 28, 2021); Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOR. LAW REV. 63–104 (2019).

3.4.1.1 Title VII

The most important thing to note when reading Title VII is that it does not designate any protected identities. Unlawful employment practices are defined under section 703(a) as practices that discriminate against *any individual* "because of such individual's race, color, religion, sex, or national origin."[657] The non-identitarian language of Title VII received reinforcement in the 1991 amendment that added section 703(m).[658] Section 703(m) states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice."[659] This provision shifts the focus of discrimination claims from the victim's identity to the motivation behind the discriminatory act. Accordingly, it may be read as signaling a step away from recognition and toward ideology-based claims. Under section 703(m), plaintiffs can show that the *ideology* behind the relevant employment practice was unlawfully motivated by race, color, religion, etc.[660] Simply put, under this reading of Title VII, its goal is not necessarily to protect women in the workplace but rather to prevent sexism from motivating employment practices. This shift echoes the Supreme Court's analysis in *Bostock v. Clayton*.[661] Rather than recognizing gay and transgender people as protected classes under Title VII, Justice Gorsuch focused on whether a decision to fire a transgender employee was wrongly motivated by sex. Accordingly, the Court dedicated most of its decision to the *motivation* behind employment practices rather than the identity of the plaintiffs.[662] Being gay or transgender, the Court tells us,

[657] Title VII § 703(a).
[658] Clarke, *supra* note 203 at 114.
[659] Title VII § 703 (m). See also *Id.* at 114.
[660] Importantly, section 703(m) was added following *Price Waterhouse* to account for instances of gender stereotyping.
[661] *Bostock*, *supra* note 114.
[662] The fact that plaintiffs might have understood their dismissal as resulting from their homosexual or transgender identity is disregarded by the Court is irrelevant to its decision. *Id*, at 16.

is equivalent to being a woman with young children.[663] Discrimination against women with young children is forbidden not because Title VII recognized the unique identity of this subgroup as distinct but because such discrimination is inevitably wrapped up in considerations of sex.[664]

For liminally-recognized groups, this means that rather than pushing toward recognition, they may focus on demonstrating the forbidden grounds that motivated the discrimination against them. Elsewhere, I have shown how poor whites can explain bias against them as rooted in white supremacy. Specifically, I argued, white supremacy fuels expectations of how white people ought to act, dress, and look. Poor whites are failing to perform their whiteness similarly to the way "soft" men are failing to perform their masculinity according to patriarchal norms (and that softness sometimes triggers harassment). Under this framework, rather than grounding their claims in a specific identity, plaintiffs can demonstrate that the motivation behind the harassment or discrimination they faced is grounded in race and racist ideology and that it therefore amounts to unlawful employment practice according to the Supreme Court stereotype doctrine.

3.4.1.2 The ADA

Unlike Title VII, the ADA seems to be centered on the specific identity of people with disabilities.[665] Discussing the definition of *disability*, the statute clarifies that it is meant to protect persons who have "a physical or mental impairment that substantially limits one or more major life activities," or have a record of such impairment.[666]

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[663] Gorsuch analogized the facts in *Bostock* to *Phillips* v. *Martin Marietta Corp*., 400 U.S. 542 (1971), which revolved around an employer's refusal to hire women with young children, *id*, at 12.
[664] *Id*, at 12-3.
[665] The ADA was enacted with the stated goal of preventing discrimination against people with disabilities. Clarke, *supra* note 203 at 111.
[666] The ADA, *supra* note 412.

Despite this identitarian language, however, the ADA allows for an ideology-based reading in that it also provides that an individual who is "regarded as having" a physical or mental impairment (i.e., a disability) is protected from discrimination.[667]

The inclusion of the "regarded as" option shifts the focus of the legal examination from the identity of the plaintiff to the perception, stereotypes, and fears behind the employer's employment decision. As the legislative history of the ADA illustrates, for Congress, these fears and stereotypes were sufficient—on their own—to impose employment liability.[668]

In addition—and following courts' narrow interpretation of the "regarded as" requirement[669]—Congress amended the ADA in 2008 (via the ADA Amendment Act of 2008, or "ADAAA") to broaden the scope of protection. The ADAAA states that "[a]n individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment."[670]

Here too, the language of the ADAAA stresses the *motives* behind employment decisions, barring employers from acting according to ableist assumptions. The rubric of "regarded as" or "perceived as" a person with a disability clarifies that the ADA's intention is to not only protect certain identities, but also to abolish certain ideologies from motivating work decisions and actions.[671]

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[667] *Id*, at §12102(1)(A), (C).
[668] For instance, the Committee on the Judiciary, discussing the Act, stressed that a person denied a job due to "the myths, fears and stereotypes associated with disabilities would be covered" regardless of that person's physical or mental condition. H.R. Rep. No. 101-485(111), at 30. See also Senn, *supra* note 420 at 835–38.
[669] *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999).
[670] *Id*, at §12102(3)(A) (2012). The Act limits this, however, for perceived impairments that are "transitory and minor." *See id*, at §12102(3)(B).
[671] Notably, courts have interpreted *regarded a*s quite narrowly. However, this analysis is meant only to demonstrate that a textual anti-essentialist reading of the ADA is possible.

The strategy of moving beyond recognition within the framework of antidiscrimination law allows groups that are liminally recognized to situate themselves within existing antidiscrimination legislation without fully climbing the ladder of recognition. Accordingly, this strategy manages to avoid some of the perils of recognition discussed above. It partially prevents *misrecognition,* as some groups who are not fully recognized may still find a path to workplace equality and justice if they can show that the bias against them is rooted in one of the ideologies antidiscrimination law currently addresses. It also avoids the challenge of *recognition as identity construction,* as plaintiffs are not required to define their identity to redress discrimination. Further, it manages to tackle the problem of *contained political demands*. Because this strategy focuses on the ideologies at the core of workplace hegemonies, it is well suited to challenging them. Moreover, allowing plaintiffs from liminally-recognized groups to sue for discrimination—even before they have gone through the normalizing and regulatory process of climbing the ladder of recognition—would open up the possibility of truly diversifying workplaces.

This strategy is, however, limited. It is ill-equipped to fully deal with the *paradox of political power*. While groups would not have to climb the ladder fully, they still would need to do the work of showing courts that bias against them is rooted in specific suspect ideologies. This in itself may require some form of epistemic recognition that a group exists, as seen in *Bostock*. In addition, this strategy does not address the problem rooted in the *complicated proof procedure* of discrimination cases. Plaintiffs will still have to narrate their harm as one that results from discrimination and prove it on an individual basis. This also means maintaining plaintiffs' *attachment to injury*, inasmuch as legal redress is contingent upon a victim narrative. Finally, this strategy rests on courts' willingness to broadly interpret antidiscrimination law.

Given all that we know, we cannot hold out much hope for it; courts hesitate to broaden the scope of employers' liability.

Nevertheless, the potential of "open-ended" antidiscrimination legislation liminally-recognized groups may offer a path for groups that seek legal protection from bias. Perhaps no less important, it also offers a lesson for groups that *do* manage to climb the ladder and shape designated legislation targeting their specific conditions: when advocating for a designated law, groups should consider promoting a version that does not gatekeep other groups from finding room in its language.[672]

3.4.2 Moving Beyond Antidiscrimination Law

Another path that would allow groups to move beyond recognition is advancing labor protections under which *all* workers could address discrimination against them in the workplace because of their specific vulnerabilities.[673]

Consider, for instance, arbitrary or biased dismissals. While workers who are members protected classes can argue that such dismissal is wrong because it amounts to discrimination against them, we might want to consider labeling unjust dismissals as *universally* wrong. Under this framework, when an employer fires *any* employee for a reason not rooted in a business necessity, it would be unlawful regardless of whether the employer's arbitrary reason was traditionally discriminatory.

Likewise, consider workplace harassment. Under Title VII, employers are prohibited from creating a work environment that is hostile to a worker because of race, sex, nationality, etc. But there are good reasons to prohibit any kind of hostile workplace environment, even one

[672] See for example Gilden, *supra* note 202.
[673] Paraphrasing Benjamin Sachs, I suggest using labor law *as* employment law, see Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO LAW REV. 2685–2748 (2007). See also Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMPLOY. LABOR LAW 163–216 (2007).

that affects workers who are not members of any recognized groups. Think of the example with which this article opens: the supervisor at the fast-food chain who humiliates and bullies her three employees. While the framework of antidiscrimination law would help the first two employees, who could show the behavior was motivated by forbidden discrimination, a universal, labor-based protection prohibiting humiliation or bullying of *all* workers would protect all three.

Some universal employment protections currently address harms such as workplace harassment or arbitrary dismissal. The tort of intentional infliction of emotional distress and the tort of termination against public policy, for instance, have both been asserted by employees suing their employer for harassment or unjust dismissal, both in scenarios where the practice was clearly discriminatory and where it was not.[674] Likewise, some localities currently require just cause to fire someone in some instances.[675] Moreover, many collective bargaining agreements incorporate a just-cause clause that protects workers from being fired without cause.[676]

Unions and activists are fighting for broader employment protections. Recent efforts to expand just-cause requirements in New York City pushed the municipality to pass legislation

[674] RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965); RESTATEMENT OF EMP'T LAW § 2.01(e) (AM. LAW INST. 2015).

[675] New York courts have developed a doctrine that requires just cause for dismissing corporate directors. *Campbell v. Loew's Inc.*, 36 Del Ch 563 (Ch 1957). In addition, the state of Montana has a law that requires just cause in firing decisions, see the Montana Wrongful Discharge from Employment Act, Mont. Code Ann. SS 39-2-901 to -914 (1995).

[676] Fischl, *supra* note 673 at 171. Dagan and Dorfman argued that the core value of private common law is constructing "frameworks of respectful interaction" between individuals, see Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395–1460, 1397 (2016). Under this formulation of private law, its commitment to constituting "just relationships" between individuals may provide a non-identitarian route from which to regulate workplace discrimination. Dagan and Dorfman make this point explicitly. See, for instance, in regard to hiring decisions: "Under our account of private law, for the terms of the interaction between an employer a would-be employee to count as relationally just, the responsibility in question must be borne, at least in part, by the employer." *Id.* at 1443. Accordingly, they argued, this responsibility "should ground a negligence duty to exercise reasonable care in making relevant employment decisions, rather than merely a duty to refrain from making intentionally discriminatory decisions." *Id*. They further stressed Title VII's limits in accommodating negligent discrimination. *Id*, at n. 205.

that secured just-cause protection for fast-food workers.[677] This protection could be relevant to liminally recognized groups. Similarly, recent years have witnessed the rise of the anti-bullying movement, which promotes the incorporation of anti-bullying laws around the world.[678] In both instances, universalizing a ban on discriminatory behavior resulted in universal employment protections that may benefit liminally-recognized groups.[679]

For liminal groups considering how to improve their status in workplaces, labor laws and workers' power are productive sites from which to push for more egalitarian workplaces. Mobilizing communities to invest their organizing power in strengthening union power (in addition to recognition work) may prove fruitful for liminally-recognized groups and, for that matter, all workers. While the structure of antidiscrimination law sends each community to fight independently,[680] labor movements could help build networks fighting together to improve workers' conditions.[681] Exploring the possibility of moving beyond recognition and antidiscrimination into the realm of universal labor protections thus has the potential to reshape

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[677] Kimiko de Freytas-Tamura, *'No One Should Get Fired on a Whim': Fast Food Workers Win More Job Security*, THE NEW YORK TIMES, December 17, 2020, https://www.nytimes.com/2020/12/17/nyregion/nyc-fast-food-workers-job-security.html (last visited Jan 28, 2021).

[678] Yamada, *supra* note 398; Benita Whitcher, *Workplace Bullying Law: Is It Feasible*, 31 IND. LAW J. JUTA 43–52 (2010); Michael E. Chaplin, *Workplace Bullying: The Problem and the Cure*, 12 UNIV. PA. J. BUS. LAW 437–472 (2009).

[679] Davidov and Mundlak, for instance, specifically explored the possibility of expanding antidiscrimination protections to all workers and the use of labor law doctrines for that purpose. Guy Davidov & Guy Mundlak, *Accommodating All? (Or: 'Ask Not What You Can Do for the Labour Market; Ask What the Labour Market Can Do for You')*, *in* REASONABLE ACCOMMODATION IN THE MODERN WORKPLACE 191–208 (2016). See also Matthew T. Bodie, *The Best Way Out Is Always through: Changing the Employment at-Will Default Rule to Protect Personal Autonomy*, 2017 UNIV. ILL. LAW REV. 223–268 (2017). (arguing for the expansion of just cause dismissal to all workers)

[680] Sachs, *supra* note 673 at 2728. See also FRASER AND HONNETH, *supra* note 370 at 76. ("[affirmative strategies which valorize group identity] mask the power of dominant fractions and reinforce cross-cutting axes of subordination."); and HAIDER, *supra* note 477 at 24.

[681] JULIUS G. GETMAN, RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT (2010); Benjamin I. Sachs, *Law, Organizing, and Status Quo Vulnerability Essay*, 96 TEX. LAW REV. 351–378 (2017); Catherine L. Fisk & Diana Reddi, *Protection by Law, Repression by Law: Bringing Labor Back into the Study of Law and Social Movements*, 70 EMORY LAW J. 63–154 (2020).

workplaces, shifting the balance of power between employers and employees via broad, cross-cutting coalitions of power.[682]

Moving from antidiscrimination law to labor law (and, accordingly, from "identity politics" as an overarching paradigm to the paradigm of class solidarity)[683] has some advantages as well as disadvantages worth considering. Turning to labor law as an alternative to antidiscrimination would risk losing the battle against harmful ideologies rooted in hierarchy, such as white supremacy, sexism, ableism, etc. Universal policies like anti-bullying might not be able to escape patterns of racialization and sexism.[684] As many scholars have shown, courts tend to understand dignity, as well as its negation, humiliation, in gendered, racialized, and classist ways.[685]

The history of the labor movement itself has not been free of such ideologies. Unions have been historically tainted by racism and racial exclusion and by the preservation of gender

[682] For many scholars, the rise of antidiscrimination law as the key norm in the regulation of workplaces—along with the strengthening of individual employment rights—came at the expense of workers' collective power and has thus legitimated economic inequality. Nelson Lichtenstein argued that during the same time the United States was transformed by ideas of racial and gender justice, culminating in antidiscrimination legislation such as Title VII, "the rights of workers, as workers, and especially as workers acting in an autonomous, collective fashion, have moved well into the shadows." NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 3 (2003). James Brudney explained that the rise of individual employment rights encouraged workers to view themselves (mainly, if not only) as passive individuals dependent on the state and the courts for any improvement of their working conditions. James J. Brudney, *Famous Victory: Collective Bargaining Protections and the Statutory Aging Process, A*, 74 N. C. LAW REV. 939–1036 (1995). See also Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUMBIA LAW REV. 319–404 (2005). Deborah Dinner recently argued that Title VII was historically used to promote businesses' interests in a labor market free from regulation. Deborah Dinner, *Beyond Best Practices: Employment-Discrimination Law in the Neoliberal Era*, 92 INDIANA LAW J. 1059–1118 (2016). Given the neo-liberal narratives that shaped Title VII's language and adjudication, "[e]mployment-discrimination law operates today as a means to perfect the market rather than to challenge its logic and operation." *Id*, at 1097.

[683] Notably, these are not necessarily competing or mutually exclusive paradigms, see Combahee River Collective, "The Combahee River Collective Statement," *in* HOME GIRLS 264 (Barbara Smith, ed., 2000). See also HAIDER, *supra* note 477.

[684] Fisk, *supra* note 173; Clarke, *supra* note 578.

[685] The question of what humiliates someone is intricately linked to societal notions regarding hierarchy, sexual norms, class expectations, etc. See Fisk, *supra* note 173; Adler, *supra* note 3; Franke, *supra* note 75. See also Chapter I of this dissertation.

hierarchies, anti-immigration sentiment, etc.[686] However, the history of unions is also a history of overcoming these barriers and advancing coalitions able to transcend them.[687] Finally, to those who have tracked the decline of labor law in the past few decades, the idea of finding a broader solution to workplace discrimination in the realm of labor law rather in the realm of antidiscrimination law might sound naïve. If anything, for those who have lost faith in the possibility of pushing for more labor protections, antidiscrimination law has been a raft to hold keeping them afloat.[688] But if antidiscrimination law is a raft, perhaps efforts to envision a more robust framework of labor protections and labor power are efforts dedicated to building a ship.[689]

Indeed, turning to labor law holds immense advantages. First and foremost, it would avoid most of the perils associated with recognition. Given that universal labor protections cover all workers, they manage to avoid the problems of *misrecognition* and *recognition as identity construction*: under the framework of just cause, for instance, workers do not have to prove they belong to any protected group, and the burden shifts to the employer to explain and justify their workplace practices. The paradigm of labor also avoids *the paradox of political power*: while antidiscrimination law requires that a group prove its weakness, under the paradigm of labor, strong coalitions of workers and unions do not delegitimize their own demands. Accordingly, workers who speak from a position of (union) power can mostly avoid the *attachment to injury* associated with recognition. Pushing for universal legal protection could further negate some of the problems rooted in the *complicated proof process* of antidiscrimination law. No doubt proving that one was fired without cause or subjected to workplace bullying comes with its own

[686] Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. LAW REV. 1767–1846 (2001); Einat Albin, *Union Responsibility to Migrant Workers: A Global Justice Approach*, 34 OXF. J. LEG. STUD. 133–153 (2014).
[687] HAIDER, *supra* note 477.
[688] Sachs, *supra* note 673.
[689] See for instance CLEAN SLATE FOR WORKERS' POWER PROJECT, https://www.cleanslateworkerpower.org/about. The Biden administration's recent actions in the field of labor law give some initial reasons for cautious hope.

set of complications, but while plaintiffs in antidiscrimination lawsuits must prove racist, sexist, other unlawful motivations (and, often, intent) to prevail, under the rubric of universal labor protections the judicial gaze is mainly on employer's actions rather than their thoughts.

Perhaps most importantly, the shift to a universal paradigm could overcome the problem of *contained political demands*: it may allow workers to reimagine the workplace and the power structures that shape it in ways that go beyond the gendering/racing of workplaces to other forms of exploitations and hierarchy.

Harnessing social movements' power to move toward union and worker power would carry one final, surprising political gain. To this point, this article has discussed the law's power to recognize identities, and individuals' and communities' dependency on the law to recognize them, as part of climbing the ladder. But the law's recognition is a two-way street. When political subjects turn to the law to recognize them as deserving tailored and specific protections (being recognized as a "protected class" or as worthy of affirmative policies), their plea recognizes the authority of the law to allocate rights and entitlements. Put differently, they recognize the law as the body that has the authority to recognize. The law is always recognizing and being recognized simultaneously.

Moving from social struggles centered on gaining legal recognition to struggles centered on strengthening unions would challenge law's monopoly on the distribution of power. Workers unionizing and collectively fighting for their working conditions can do so without recognizing the law as the sole entity charged with the allocation of power and rights. Any collective action that occurs in the shadow of the law will inevitably be affected by it, of course.[690] But the

[690] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE LAW J. 950–997 (1979). Indeed, even negotiations that operate outside the law's reach cannot really escape it and are dramatically bound by legal rules that govern the relationship between the sides of the negotiation table.

position is different vis-à-vis the law when the main driver of action is gaining power, not recognition, and when access to power is not contingent on legal language. In that respect, the move beyond recognition via the framework of labor would also be a move beyond political subjects' recognition of the law itself.

3.5 Conclusion

Liminally-recognized groups remind us that identities, and specifically legally-recognized identities, sometimes take a lot of work to constitute. That work, as well as its consequences, this article argues, can distance us from fulfilling the goal of antidiscrimination law: creating equal and fair workplaces. In that sense, while working from identity can sometimes create radical and profound politics,[691] moving beyond identities and beyond recognition has the potential to include everyone currently excluded from the egalitarian vision of the law of antidiscrimination.

This article used the position of liminally-recognized groups to highlight the inherently limited framework of recognition and to offer alternative paths. Various groups may adopt different strategies in different contexts. Most likely, many groups would choose to advance both identitarian and non-identitarian tactics simultaneously. Every path requires work, and each strategy comes with its own ladders. But liminally-recognized groups (as well as members of recognized groups) ought to acknowledge the costs and benefits of both arguing from recognition and arguing outside it to make more knowledgeable decisions.

The perspective of liminally-recognized individuals and groups further reminds us that rigid division of workers—minority/majority, privileged/underprivileged, vulnerable/strong—requires

[691] Combahee River Collective Statement, *supra* note 683.

more caution. From this confusion, this article argues, we may establish stronger, not weaker, networks of workers fighting together to end exploitation, humiliation, and discrimination for all.

Chapter 4: Concluding Chapter

This dissertation explored existing tensions between legal structures aimed at achieving justice (such as the concept of dignity, antidiscrimination laws, etc.) and groups not fully recognized under the law ("Liminally-recognized groups"). It approached this tension from a critical perspective on identity, exploring it both in the U.S. and in Israel/Palestine. The dissertation, while not comparative in the traditional sense, nevertheless journeyed between both geographies, drawing inspiration from each, and exploring similar questions and their differing (albeit parallel) answers in each locality.[692] It examined the limitations of the concept of equality within anti-discrimination law—limitations stemming mainly from its dependency upon legal recognition—alongside the perils of dignity-based universal protections, rooted in dignity's cultural and racial biases. For this purpose, all three chapters centered groups in a liminal state of legal recognition—groups that often challenge dominant binaries of sex/race/disability—as a methodological vantage point from which to examine legal systems and orthodoxies. I wanted to examine law's ability to see past recognition, and how effective the law is for groups who have yet to meet—and shoulder—the burden of recognition. Simultaneously, I additionally explored the ability of liminally-recognized groups to see past the law.

[692] I echo in this methodological choice Ella Shohat's relational approach, that "does not segregate historical periods and geographical regions into neatly fenced-off areas of expertise, and that speaks of communities not in isolation but, rather, 'in relation.'" Shohat, *supra* note 103 at 206–07. Shohat elaborates more on this point to provide specific justification for juxtaposing the U.S. and Israel, given the way in which "European Christian demonology prefigured colonialist racism." *Id.* at 211.

4.1 Recognition, Dignity, Equality

Writing about "the universal turn of antidiscrimination law," Jessica Clarke describes the law as shifting between two central modalities: centering equality versus centering dignity.[693] Generally, laws that place equality at their center are designed around specific groups that deserve unique and tailored protections for them to be *equal* to majority groups. The Americans with Disability Act (ADA), which guarantees protections from discrimination to the group of "people with disabilities" is an example of such law. At the other end of this spectrum are laws that center dignity (often referred to as "universal laws"). The shift from maternity leave to family leave, for instance, which shifted the allocation of paid time off from the group of women (or – people who were pregnant) to *all* workers, is an example for such a universal, dignity-based law. Often, once the law's aim shifts from equating the status of women at work to that of men, and towards allowing all workers to spend time with their newborns, the justification for the law (or, as Clarke puts it, "the value at stake")[694] similarly shifts to center workers' dignity.[695]

Recent years have borne witness to a debate between those who advocate universalizing protections and those who oppose this "universal turn," supporting particular, identity-based protections. Scholars in this latter camp[696] highlight the importance of equality as the primary value in workplace protections. Doing so guarantees that the law is centered around those workers who are most vulnerable to abuse in the workplace. Notably, studies have showed how women, Black and brown employees, and disabled employees are particularly vulnerable to

[693] Clarke, *supra* note 578.
[694] *Id.* at 1241.
[695] Clarke mentions both dignity and liberty as values which are at the core of universal laws. See also Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights after Shelby) Symposium Issue: The Meaning of the Civil Rights Revolution: Essay*, 123 YALE LAW J. 2838–2877 (2013).
[696] Notably, dividing scholars to one group or another is done here mostly in order to clarify this debate. In reality, many advocates for both, or some form of middle ground between them, see *Id.*

harassment at work. Opening up additional avenues for all workers to sue for harassment and bullying, it is argued, ultimately dilutes the level of protection for vulnerable workers, as rights necessarily have to be narrower and more abstract in order to apply to more contexts. Clarke and others further highlight another problem associated with universal protections – their assimilatory potential. Generic and universal rights may bring us back to the gender-blind, color-blind liberal order, where workers of minority groups are incentivized to cover their unique traits and assimilate into the white, male, heterosexual workplace. Targeted protections are developed around the lived experienced of minorities, thus bridging the gap between them and workplace hegemonies. Another advantage to equality over dignity, some argue, is the problems associated with dignity as a regulating, conservative concept, tied to values such as normative citizenship and respectability. Indeed, the question of what humiliates someone is intricately linked to societal notions regarding hierarchy, sexual norms, class expectations, the property and rank associated with race, and the various intersections of those.

On the other hand, those who advocate for taking the "universal turn" stress its potential in designing legal remedies that avoid the essentialist grip of identity-based protections. To be granted protection as a woman, you have to perform your femininity in a certain way that places you within the protected group, which in turn further reinforces the regulatory nature of group boundaries. And, finally, it is argued, universal protections may help avoid the backlash to vulnerable workers that often comes with unique costs (such as negative incentives to hire minority employees).

However, the scholarly debate around universal/particular norms centers almost exclusively on legally-recognized groups. This dissertation examined both equality and dignity

from the positionality of groups not yet fully recognized by the law, to re-approach this debate without taking recognition for granted.

For that purpose, I utilized varying legal methodologies and disciplines. This dissertation therefore resides on the intersection of critical theory (with a specific focus on critical race theory and queer theory), law and philosophy, antidiscrimination law, and labor and employment law. Drawing upon these diverse scholarly fields and methodologies, I sought to map marginal communities existing outside of the full recognition of the law and explore the possibilities these marginalized communities offer for the reevaluation of the role of law in shaping and reinforcing structures of inequality.

4.2 Chapter I: Coming out of the Shadows

My initial fascination with groups situated at the margins of legal recognition stemmed from my own experience of my identity as a Mizrahi Jewish woman living in Israel. During my formative years in law school, I struggled to find a language with which I could speak about my own identity, subjugation, and discrimination, against the backdrop of societal taboos in Israel regarding the Mizrahi category that felt so influential in my day-to-day life.

With every step I made towards embracing my Mizrahi identity, I recognized a gap forming between myself and the circles of left-wing student political activism with which I was involved. I realized that while the Israeli left managed to develop comprehensive and complicated critiques regarding racism against Palestinians and African refugees, its treatment of the history of Mizrahi racialization generally ranges from indifference to overt denial. And so, for me, coming to terms with my Mizrahi identity came hand in hand with the development of a critical analysis of the Israeli left. Looking back, I analyze this moment through what Wendy

Brown and Janet Haley discuss in their introduction to *Left Legalism/Left Critique*:[697] frustration "with ourselves and with the intellectual and political environment we were operating in."[698] Brown and Haley describe experiencing a split between a new found group of critical thinkers (many contributed to the *Left Legalism/Left Critique* collection) and left academic circles, where any attempt to critique and challenge what the left should fight for and ways to do so was met with a response they characterize as revolving around the theme of "in the trenches."[699] I myself encountered my own versions of the "in the trenches" response when insisting on the relevance of the Mizrahi/Ashkenazi categories, and on the history of oppression and discrimination suffered by my own community and family. Some of the objections I encountered strikingly resemble the type of those Brown and Haley describe:

- critiquing the left wing from a Mizrahi standpoint is helping the right wing with their own attacks on the left.
- The occupation and oppression of Palestinians is the major issue in Israel; any other framework only distracts from that important struggle.
- The Mizrahi critique only excuses the racism of Mizrahi communities, which is the real problem with which Israel must deal.

I found myself having to develop a language from which to speak about my community while simultaneously developing complicated answers: both to the "in the trenches" responses I met almost every time I raised my voice, and, to the gap between the left's façade of morality, egalitarianism and progression, and the complete negation of Mizrahi issues from the left's

[697] LEFT LEGALISM/LEFT CRITIQUE, *supra* note 565.
[698] *Id.* at 2.
[699] They provide several examples for such responses, including: "– My injury is real; you are just theorizing. – Why, just now, when women (blacks, Latinos, homosexuals) are finally gaining subjectivity, must we engage in a critique of the subject?..." etc. *Id.* at 2.

agenda. Digging more into that puzzle, I realized that the tension between left-wing narratives and real-life actions is in itself a racialization technique, presenting the Ashkenazi left as moral and enlightened, and Mizrahi Jews as the "obstacle for peace" and as morally and politically backwards. More specifically, moral rhetoric was (and is) used to *make* the class of Mizrahi Jews (as part of their racialization), and to create distinctions and hierarchies between Mizrahi and Ashkenazi Jews. As I discuss in the first chapter of the dissertation, the birth of Mizrahi racialization could be traced back to the Enlightenment, and to the ways in which enlightenment binaries of clean/dirty; moral/immoral; modern/backwards and civil/primitive were the inspiration behind Mizrahi formation.[700] The Enlightenment, as an intellectual tradition, generally associated those who fit its ideals with *moral* advancement, and those who did not with *moral* retardation, backwardness, and primitiveness.

Zionism's need to present itself as Western, "the portion of the rampart of Europe against Asia, an outpost of civilization as opposed to barbarism,"[701] explains the marginalization of what was seen as Oriental, Eastern, or Arab. Such marginalization, orchestrated along the lines of Enlightenment and Orientalist logic, shaped group boundaries and fixated ethnic/racial collective identities.[702]

I channeled the experience of being both seen and negated as a Mizrahi Jew, and the place of morality within systems of racialization, into the first chapter of the dissertation which centered Mizrahi Jews' positionality within the Israeli jurisprudence of dignity. Situated between Jews and Arabs, Mizrahi Jews are often misrecognized and under-theorized as a racialized

[700] See for instance Dafna Hirsch's work, who chronicles Mizrahi racialization through the hygienic model, used by Jewish British Doctors in Palestine, dividing the population into "clean" and "dirty" along racial lines, as well as the way the hygienic protocol was heavily associated with morality, see Dafna Hirsch, "WE ARE HERE TO BRING THE WEST": HYGIENE EDUCATION AND CULTURE BUILDING IN THE JEWISH SOCIETY OF MANDATE PALESTINE 47 (2014) (Heb.).
[701] Joseph Massad, *Zionism's Internal Others: Israel and the Oriental Jews*, 25 J. PALEST. STUD. 53–68, 54 (1996).
[702] KHAZZOOM, *supra* note 91 at 33–34; Shohat, *supra* note 103.

community. Their positionality offers the possibility to explore the Israeli legal system via critical race methodologies, while simultaneously questioning their racial identity as a rigid and easily delineated one. As the first chapter shows, within the racialized space of morality in Israel/Palestine, the tension between honor and dignity plays an important function.

Adopting a postcolonial lens, I explored Western influences on the societal and judicial imagination of Israeli dignity, which is constructed as the antithesis of honor. Through analysis and close reading of multiple legal cases, I argue that dignity's pretense of universality obscures racial biases in its interpretation and application. The examination of dignity's racial undertones in the context of Israeli courts is especially relevant, given that in Israel, both honor and dignity—conversely conceptualized—are signified by a mutual signifier: the Hebrew word *kavod.* This semantic conflation brings to the surface many of the oft-hidden dynamics between both concepts and allows for a better examination into judicial bias surrounding them both.

Accordingly, my analysis demonstrated how the alleged binary of honor/dignity semantically operates like other colonial binaries, signifying East/West; backwardness/moral advancement. My close reading of Israeli cases revealed several Israeli court mechanisms which maintain the racialized nature of dignity and honor. For example, analyzing instances where Mizrahi (and other non-Western) subjects used the Hebrew word *kavod* to signal harm, demonstrates how courts often analyze the word as signifying honor rather than dignity. This was the case even in instances where the events described by victims were clear violations of their dignity. Moreover, I spotlighted how, in legal arenas overpopulated by Mizrahi plaintiffs, doctrinal developments push plaintiffs to narrate their harm via the language of honor, rather than dignity. The disassociation of non-Western subjects from dignity and their association with

honor, I argued, is made possible through – and simultaneously reaffirms – the dichotomous, mutually-exclusive nature through which both concepts are portrayed.

The chapter's title: *Coming out of the shadows*, signals, first and foremost, the light/dark binary according to which the dignity/honor binary operates. But it simultaneously holds another layer of meaning for me. This first chapter indicates my own coming out of the shadows, owning my identity, and writing from it. This text the first time I found courage to academically engage with the subject, and my first experience looking through a Mizrahi lens at the Israeli legal system.

I conclude the chapter with the ramifications of my analysis to the U.S. context. I show how, despite lacking a mutual signifier, U.S. legal scholars—from the right and from the left—have reproduced the honor-dignity binary. This is usually done via an inner taxonomy of dignity itself: dividing the concept between "inherent" dignity (which is described similarly to how dignity is often described in the canon literature outside of the U.S.), and "substantive" dignity (which often echoes the canon description of honor). Others distinguish between dignity as respect and dignity as rank or nobility, producing once again the distinction between honor and dignity through different signifiers. Decoding these oft-hidden similarities, I argue, undermines the guise of American dignity's exceptionalism. Doing so also helps situate the concept in a global context steeped in colonial and orientalist traditions. Analysis of the way in which U.S scholars approach these distinctions reveals that in the U.S., like in Israel, some writers advocate for *separating* the "problematic," honor-like aspects of dignity from its universal, egalitarian aspects, insisting on preserving only the latter. But, as the non-Western critique of dignity I develop in this chapter shows, maintaining the separation between honor and dignity and placing the badge of moral inferiority on one side of this equation, reproduces the orientalist discourse of

light/dark; moral/immoral; dignity/honor. Ignoring it increases the risk of assimilation into Western performativity of "dignified" behavior and moral superiority.[703]

This final examination of dignity in the U.S. exemplifies the methodological nature of the project as a whole, which travels between localities, juxtaposing both in order to draw insights from one to another. Developing the non-Western critique of dignity from the Israeli context enabled me to critically approach the U.S. context.

Finally, my critique of dignity also signals the first step of developing a comprehensive critique of the different modalities from which one can demand justice. I utilized Mizrahi Jews' liminal recognition in Israel courts to examine the potential dignity holds for them. Courts' inability to recognize Mizrahi subjectivity, and the colorblind jurisprudence of dignity allowed bias to seep into the courtroom. Accordingly, what may be discerned from this chapter is the peril of pushing for universality from a colorblind approach and without acknowledging structures of racism and white/Western supremacy. Colorblind universalism, I demonstrated, cannot escape the structures of inequality it aims to abolish.

4.3 Chapter 2: The Racialization of Dominant Races; Examining the Work Behind Whiteness

My work on Mizrahi identity, along with the dialogical nature of the dissertation, had inspired questions that began surfacing as I was spending my time in the U.S. My attempt to trace patterns of racialization within the dominant race in the Israeli context pushed me to examine parallel patterns within the U.S. racial landscape.

[703] I engage with the work of Libby Adler and Katherine Franke, both of whom critique the assimilatory nature of dignity, and the adverse effects of its "civilized," non-animalistic nature, see Adler, *supra* note 3; Franke, *supra* note 75.

Specifically, one of the ways in which the taboo regarding any acknowledgment of Mizrahi oppression and identity is maintained is through resorting to the common saying: "we are all Jews." In one of the first cases where Mizrahi Jews petitioned to the Israeli Supreme Court for discrimination, *Shiran v. Israel Broadcasting Authority*,[704] Supreme Court Justice Miriam Porat, writing for the Court, exemplified its colorblind approach writing that the very claim of discrimination is upsetting, for it creates distinctions and divisions between Jews, who are "limbs of one body."[705] In Israel, where the main racial line is between Jews and non-Jewish Palestinians, any attempt to complexify intra-group distinction is met with resistance. Furthermore, Jewish supremacy, from a Mizrahi standpoint, is exposed as an ideology that imagines a specific type of "Jew" (as its ideal prototype) and a specific performance (physical and semiotic) from its members, punishing those who fail its imagined performativity.[706]

Following the first chapter, which focused on intra-group racialization in the Israeli context, the second chapter explored a similar theme in the U.S. context. I examine the ways in which whiteness and white supremacy enforces itself on members of the "white race," and the clashes between the legal system and those who fail in their performativity of whiteness in its full idealized and racialized sense, i.e., Poor, rural whites, who are often scornfully referred to as "white trash."

[704] HCJ 1/81 Shiran v. Broadcasting Authority 35(3) PD 365 [1981] (Isr.).
[705] The direct quote by Justice Miriam Porat is (my translation): "The claim brought in the petition, that the group which suffers harm is "Mizrahi Jewry," is upsetting. Jews may live in the East or in the West, but Judaism is one whole and inclusive concept that encompasses the entire world. "Mizrahi Jewry," like "Ashkenazi Jewry," are the limbs of one body which must be protected from harmful separations. According to this line of thought, I am doubtful whether the petitioners can argue that the production constitutes "a harm to the image of Mizrahi Jewry in the eyes of itself and others" as if they [Mizrahi Jewry] were a separate, autonomous body, and as if the rest of the nation were, probably, those "others" in whose eyes they were humiliated." See Shiran, *supra* note 704, at 388.
[706] Ido Katri, *The banishment of Isaac: Racial signifiers of gender performance*, 68 UNIV. TOR. LAW J. 118–139 (2018).

I found several similarities between poor whites and Mizrahi Jews. First, as I mentioned, their existence on the margins of the dominant race. Mizrahi Jews, also known as "Arab-Jews," hold within their identity the contradictions of the racial lines, existing in-between the Arab-Jewish dichotomy and thus inherently contradictory.[707] The term "white trash" holds within in similar contradictions, as Matt Wray writes:

> Split the phrase in two and read the meanings against each other: white and trash. Slowly, the term reveals itself as an expression of fundamental tensions and deep structural antinomies: between the sacred and the profane, purity and impurity, morality and immorality, cleanliness and dirt.[708]

This quote from Wray highlights other similarities between both groups. Like Mizrahi Jews, "white trash" also bear the stigma borne out of Enlightenment era binaries of moral/immoral, clean/dirty.[709] Further, and much like many Mizrahi Jews, "white trash" enjoy an easier ability to "pass."[710] As Bruce Ackerman in *Beyond Carolene Products* reminds us,[711] the ability for one to "exit" a minority group influences levels of loyalty and group cohesiveness.[712] Accordingly, and following Ackerman's argument, for both groups, the ability to form clear "identity politics" and fight for societal and legal recognition, and, accordingly, for group-designated protections, was lesser.[713] This ability to pass is further used, in both context, to deny the existence of the groups altogether, obscuring the possibility of serious societal and academic discussions. In both contexts, the groups' inclusion into the dominant race (Jewish; white)—both in terms of society's common understanding of its racial lines, and in terms of physiological

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[707] GIL Z. HOCHBERG, IN SPITE OF PARTITION: JEWS, ARABS, AND THE LIMITS OF SEPARATIST IMAGINATION (2007).
[708] WRAY, *supra* note 343 at 2.
[709] See supra note 700.
[710] Note that this is not true to all Mizrahi Jews, some of whom are darker-skinned, however, skin color and other physical attributes vary tremendously between Yemenite, Moroccan, Iranian, and Egyptian Jews.
[711] Ackerman, *supra* note 593.
[712] I discuss "minority" in the sociological sense, meaning non-hegemonic groups, regardless of these groups number in the population.
[713] Ackerman, *supra* note 593.

appearance ("I wouldn't know you're Mizrahi until you said so!")—operated as a technology of erasure and exclusion, negating recognition of the other as such. Following these similarities, I dedicated the second chapter to exposing the way in which racialization effects members of the dominant race in the U.S., and how courts join in reinforcing such dynamics.

Courts deciding in racial discrimination cases deal with whiteness on a regular basis, yet their understanding of whiteness is limited. This limited understanding and theoretical analysis of whiteness is also common in many scholarly analyses of whiteness, which are often limited only to white people's privileges or to the invisibility of whiteness (in and of itself a subset of the privilege discourse). I argue in the second chapter that this tendency stems from the fact that whiteness is mostly examined through contrast, i.e., through the lives and experiences of racial minorities. However, I showed, the racial project that *is* whiteness—the project of white supremacy—is better recognized when looking at intra-white dynamics, that is, when examining whiteness against itself. The methodology I utilized in order to expose courts' understanding of whiteness was to focus on the most prolific site of such cases: associational discrimination. These are instances in which white plaintiffs sued for racial discrimination targeting them motivated by their association with racial minorities. Closely reading the reasons why courts saw these cases as "because of race," I found that the most common argument revolved around the race of the racial minority with whom the plaintiff had associated. Put differently, white plaintiffs' protection from racial discrimination in these cases latched onto the protected-class status of racial minorities.[714] In none of the cases did courts based their reasoning on the plaintiffs' (white) race alone.

[714] This explains, for instance, courts' fixation with the *degree of association* between the plaintiff and the racial minority with whom he or she associated, it needed to be close enough to "stick."

The proper analysis for such cases, I argued, should be based on the stereotype doctrine. According to such theorization, plaintiffs in associational cases are discriminated against for failing to conform to stereotypes of whiteness maintained by their employer or supervisor. Drawing inspiration from the stereotype doctrine's application in same-sex harassment and discrimination cases, I argued that the dynamic in intra-white associational cases echoes the dynamic in cases where men harass other men for not being "masculine" enough, or women discriminating other women for not being "feminine" enough.[715] Stereotypes regarding how men and women should dress, talk, and behave lead to harassment and discrimination that operate as a technology of sexism enforcing itself on all members of the workplace.[716] Likewise, when a white employee is told to "stay with her kind," by her white colleagues or supervisors,[717] more than just associational discrimination is at play. Rather, this portrays a specific type of racial work aimed at subjecting employees to stereotypes regarding whiteness. According to such stereotypes, whiteness is seen as "pure," an asset that may be diminished by the act of mixing.[718]

From this analysis of whiteness enforcing itself on members who fail to perform it according to ideological expectations, I turned to examine cases of "white trash" discrimination. The characterization of poor whites as filthy," "lazy,"[719] and as morally and evolutionarily inferior;[720] those "who lack the *civic markers of stability, productivity, economic value, and human worth*,"[721] I argued, should not be mistaken as merely class stereotypes. Importantly, they were created to distance white trash from the core of whiteness, not from affluency.[722]

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[715] See for instance Oncale v. Sundowner Offshore, *supra* note 220; Price Waterhouse, *supra* note 213, at 280 (1989).
[716] Franke, *supra* note 293 at 693.
[717] Barrett v. Whirlpool Corp., *supra* note 259.
[718] Harris, *supra* note 313 at 1737.
[719] WRAY, *supra* note 343 at 21–2, 65.
[720] *Id.* at 16, 96.
[721] ISENBERG, *supra* note 343 at 315 emphasis added.
[722] *See* WRAY, *supra* note 343 at 139. (discussing the idea of "lack of whiteness" possessed by poor Whites).

Furthermore, stereotypes regarding whites as clean, moral, and hard-working historically constituted the racial lines between whites and Blacks in the U.S. and thus constituted the core around which the concept of whiteness was formed.[723] Accordingly, discrimination against "white trash" could be analyzed as stemming from their failing performance of whiteness. Courts' inability to analyze whiteness properly leads to their inability to theorize cases where plaintiffs argued they were harassed for being seen as "white trash," claiming there was no "racial animus" in such instances.[724]

The second chapter of the dissertation follows up on the two main themes explored in the first chapter: (1) the place of liminally-recognized groups within existing legal structures; and (2) complexifying legal structures aimed at promoting justice through the lens of liminally-recognized groups. While the first chapter focused on (universal) dignity, the second chapter critiqued identitarian equality as it is manifested in U.S. antidiscrimination law.

Strictly identitarian approaches to Title VII are perhaps the antithesis of universal dignity. They demand recognition of color, and of the subject's identity under the law, as the solution to legal colorblindness. However, if the first chapter demonstrated the limits of colorblind universalism, the second chapter showed the limits of identitarian particularism. Both approaches prove challenging and insufficient from the perspective of liminally-recognized groups.

A key move for the dissertation is introduced by the move from identity to ideology. I argue that the appropriate approach to Title VII should see it not as a law designated to protect identities (in line with anti-subordination approaches to antidiscrimination law) and not as a

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[723] *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1370-76 (1988). *See also* JUAN WILLIAMS, MY SOUL LOOKS BACK IN WONDER: VOICES OF THE CIVIL RIGHTS EXPERIENCE 9 (2005); PATRICIA A. TURNER, CERAMIC UNCLES & CELLULOID MAMMIES: BLACK IMAGES AND THEIR INFLUENCE ON CULTURE 65-66 (1994).

[724] See for instance *Hoffman v. Winco Holdings, Inc.*, 2008 WL 5255902 (D. Or. Dec. 16, 2008).

strictly universal, colorblind law, aimed at forbidding any classification between individuals (in line with anti-classification approaches to antidiscrimination law). Instead, I argue, Title VII ought to be interpreted as outlawing specific *ideologies* (such as racism, sexism, etc.) from motivating workplace decisions. Understanding Title VII as revolving not strictly around the identity of protected classes (thus barring whites from suing for racial discrimination), but around forbidding specific ideologies that adversely affect workplace equality, can open up avenues for courts to commit deeply to combating white supremacy in the workplace. This suggested approach, anti-essentialist in nature, highlights the role harmful ideologies play in subject and identity formation. Accordingly, Title VII's commitment under this paradigm is to prevent sexism (as an ideology and a technology) from shaping workplaces in ways that police workers of all (or no) genders.

The third and final chapter of the dissertation sough to advance my exploration of these themes on a more methodical and theoretical level, while simultaneously broadening the scope of liminally recognized groups examined. I wanted to see whether the recurring themes I found in the case of Mizrahi Jews and poor whites can be found when stepping out of race to other axes of marginality and oppression, and whether there is a way to provide relevant solutions for liminally-recognized groups given the problems I explored with regard to both equality and dignity.

4.4 Chapter 3: Re-thinking Liminality and Moving Beyond Recognition

While the first two chapters examined the law's limits in dealing with liminally-recognized groups, I have yet to address the question of whether such groups should aspire to be recognized. Does being recognized solve the problem? Should the law be, in effect, particularistic, with groups pushing towards legal recognition in order to be included when

special protections and entitlements are being allocated? My instinct was that it is not that simple. I was starting to think outside the liberal limits of equality/dignity, recognizing that power can play a crucial role that ought to be accounted for. Finally, my research up until that point led me to recognize the neo-liberal influences on the idea of particularistic, identity-based rights,[725] and I was beginning to ponder what a way out would look like? With all of these questions in mind, I set out to write the final chapter of the dissertation.

The chapter begins by acknowledging the central place that identity holds in the regulation of workplace and within antidiscrimination regimes. This, in turn, has led groups that have yet to secure legal recognition to dedicate intensive work to *gaining recognition*. I refer to such efforts as *recognition work*. I examined this type of work, as well as various meeting points between liminally-recognized groups through three case studies of such liminally-recognized groups: asexuals, fat people,[726] and poor whites. Through these groups' stories, I looked into the varying strategies liminally-recognized groups have employed in order to be granted antidiscrimination protections, from narrating their harm via recognized avenues, to pushing for recognition and inclusion in specific antidiscrimination laws. My case studies also highlighted the price group often pay in their progression towards legal recognition.

Broadening the scope to explore additional groups at the margins of recognition allowed me to better assess both the potential rooted in gaining recognition, as well as its perils. For instance, one main argument in the debate regarding the "universal turn" discussed above, which was utilized to argue in favor of identity-based protections, was that universal protection inherently help stronger workers *at the expense* of more vulnerable ones. Revisiting this

[725] Mark Kelman & Gillian Lester, *Ideology and Entitlement, in* LEFT LEGALISM/LEFT CRITIQUE 134–177 (2002); BROWN, *supra* note 610.
[726] As I state in the chapter itself, I use the term "fat people" as it is the preferred term of community members and activists, see Kirkland, *supra* note 404.

argument from the perspective of liminally-recognized groups helped me illustrate the ways in which it is actually universality that can help bridge gaps between the law and vulnerable, unrecognized communities. In addition, assessing the specific prices liminally-recognized groups have been paying for legal inclusion highlighted the burden of acquiring recognition. Fat people, for instance, had to both severe the community into "deserving" and "undeserving" plaintiffs, and to surrender to a medicalized narrative regarding their identity, presenting themselves as unhealthy, forever victims.

My case studies supported this critique regarding identity-based protections, and their power to anchor and fixate the identities at their core.[727] As Judith Butler writes:

> What we call identity politics is produced by a state which can only allocate recognition and rights to subjects totalized by the particularity that constitutes their plaintiff status.[728]

Asad Haider continues this idea, adding that:

> If we can claim to be somehow injured on the basis of our identity, as though presenting a grievance in a court of law, we can demand recognition from the state on that basis—and since identities are the condition of liberal politics, they become more and more totalizing and reductive. Our political agency through identity is exactly what locks us into the state, what ensures our continued subjection.[729]

While recognized identities and identity groups differ, I argued, some specific aspects of identities are nevertheless favored under the regime of legal recognition: immutability, respectability, and attachment to injury. Revisiting my case studies allowed me to demonstrate how liminally-recognized groups are legally incentivized to perform their identities according to

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[727] *See* for instance FRASER AND HONNETH, *supra* note 370 at 76; BROWN, *supra* note 610; BUTLER, *supra* note 615; FORD, *supra* note 201. See also Janet Halley, "*Like Race" Arguments, in* WHAT'S LEFT OF THEORY?: NEW WORK ON THE POLITICS OF LITERARY THEORY, 40, 46 (Judith Butler, John Guillory, & Kendall Thomas eds., 2000).
[728] JUDITH BUTLER, THE PSYCHIC LIFE OF POWER: THEORIES IN SUBJECTION 101 (1st edition ed. 1997).
[729] HAIDER, *supra* note 477 at 10.

these guidelines. This, in turn, echoes findings from the first chapter. I explored in that context the legal incentives for Mizrahi Jews to present themselves according to honor narratives. In both chapters, I uncovered liminally-recognized groups' unique vulnerability to identity regulation and formation in contact points with the legal system, and specifically with the courts.

I conclude the third chapter with a more in-depth exploration of ways for liminally-recognized groups to advance their interests without (necessarily) pushing for legal recognition and explore two such ways. The first is a further development of the argument developed initially in the second chapter: exploring the possibilities of shifting antidiscrimination theory from identity to ideology. This paradigmatic shift transforms the goal of antidiscrimination law from recognizing and protecting identities toward combating the ideologies that construct them. I demonstrate how such an approach of antidiscrimination law is congruent with the language of major antidiscrimination laws, focusing specifically on Title VII and the ADA.

The second strategy focuses on paths for liminally-recognized groups to move beyond recognition by searching for relevant avenues outside of antidiscrimination law altogether. I argue that pushing for universal *labor* law protections might be a useful strategy for groups who are not yet able to utilize antidiscrimination laws to their benefit. For instance, fighting for just-cause firing can prevent dismissals rooted in bias against unrecognized groups. Likewise, anti-workplace bullying laws might do the same to prevent harassment motivated by similar unrecognized bias. For liminal groups considering how to improve their status in the workplace, labor laws and workers' power are productive sites from which to push for more egalitarian workplaces. Mobilizing communities to invest their organizing power in strengthening union power (in addition to, or instead of their "recognition work") may prove fruitful for liminally-recognized groups and, for that matter, all workers.

This paradigm shift echoes larger conversations regarding the tension/harmony between identity politics and class solidarity. Echoing the first chapter, I acknowledge the risks rooted in moving from antidiscrimination law to labor law, and in abandoning identity politics for universal policies. Indeed, turning to labor law could potentially risk losing the battle against harmful ideologies rooted in hierarchy, such as white supremacy, sexism, ableism, etc. Given that universal policies like anti-bullying often rests of the idea of workers' *dignity*, such policies might not be able to escape patterns of racialization and sexism. Courts tend to understand dignity, as well as its negation—humiliation—in gendered, racialized, and classist ways.

The challenge, I argue, is to resist the push to choose between anti-racism and class-based networks, and pave pathways that combine the two: reading equality (i.e. *seeing* race, gender, etc.) into dignitarian paradigms, and insisting on dignity (in its non-identitarian promise) when thinking about paradigms of equality and antidiscrimination. Acknowledging how systems and ideologies *produce* identities, rather than merely react to ontologically-fixed ones, allows a way out of the purported binary of universalism/particularism. Notably, the introduction of the term "identity politics" by the Combahee River Collective saw both identity politics and socialism as part of their joint revolutionary politics.[730] For the Collective, socialism and coalitions between workers were undermined by system of oppression like sexism and racism, and the goal of anti-racist and feminist struggles is to support wider coalitions not constrained by race or gender.

Haider explains this point vividly:

> [identity politics] is based on the individual's demand for recognition, and it takes that individual's identity as its starting point. It takes this identity for granted and suppresses the fact that all identities are socially constructed. And because all of us necessarily have an identity that is different from everyone else's, it undermines the possibility of collective self-organization. The framework of identity reduces politics to who you are as an individual and to gaining

[730] Combahee River Collective, "The Combahee River Collective Statement," *in* HOME GIRLS 264 (Barbara Smith, ed., 2000).

> recognition as an individual, rather than your membership in a collectivity and the collective struggle against an oppressive social structure.[731]

Following these accounts, I argued that promoting universal labor law protections can be done from a position recognizing racism, sexism, etc. and their role in producing identities that inform groups' identity politics.

4.5 From Liberal Equality and Dignity to collective power (or: Is Racial Justice Moral or Political?)[732]

Both dignity and equality, as understood within the law, are bound by the liberal order that rests on recognition and identities for its *modus operandi*.[733] Striving to be *recognized* as subjects of dignity or antidiscrimination law inherently limits subjects' ability to imagine society, and themselves, outside of the liberal order.[734] Shifting the arena of political action from "recognition work" towards collective action—both in the context of labor and outside of it—allows us to simultaneously shift our language from *morality* (claiming it is *just* to recognize me/to provide me with dignity or protection from antidiscrimination) to a site of *power*. Within that modality, one is not asking the law or the state to allocate power and entitlements but is practicing the act of assuming power derived directly from political action. Indeed, as Brown writes, turning to the state to gain protection comes with a price. "Whether one is dealing with the state, Mafia, parents, pimps, police or husbands, the heavy price of institutionalized protections is always a measure of dependence and agreement to abide by the protector's

[731] HAIDER, *supra* note 477 at 24.
[732] I echo here Kendall Thomas' famous question, see Kendall Thomas, *Racial Justice: Moral or Political?**, 17 NATL. BLACK LAW J. LOS ANGEL. 222–246 (2003).
[733] Wendy Brown ties in political identities with a basic instinct for revenge, rooted in liberalism, see BROWN, *supra* note 610 at 66–73.
[734] See *Id.* at 73. ("In its emergence as a protest against marginalization or subordination, politicized identity thus becomes attached to its own exclusion […] because it is premised on this exclusion for its very existence as identity.")

rules".[735] This is because recognition is inherently a two-way street. When political subjects turn to the law to recognize them as deserving tailored and specific protections, their plea *already assumes* their recognition of the authority of the law and the state to allocate rights and entitlements. Put differently, turning to the law and to courts recognize both as the bodies that have the authority *to recognize*. The law is always recognizing and being recognized simultaneously. Moving from social struggles centered on gaining legal recognition to struggles centered on strengthening unions and collective political action has the potential to challenge the law's monopoly on the distribution of power. No doubt, any collective action always exists in the shadow of the law and is therefore inevitably affected by it.[736] But the position is different vis-à-vis the law when the main impetus towards action is securing power, not recognition, and when access to power is not contingent on legal language or legal acceptance. In that respect, the move beyond recognition is a move beyond political subjects' recognition of the law itself.

This dissertation as a whole also echoed my own journey during the years spent writing it. I started from a position of injury, as Brown writes, and insisted, from that position, on being *seen*. I saw liminally-recognized groups (specifically Mizrahi Jews) as suffering from the lack of recognition and insisted the law ought to overcome its colorblindness and afford protection to marginalized groups. I conclude with a more apprehensive stance regarding recognition, and with regard to the law itself, and its ability to "protect me." I still hold on to the initial feelings that sparked my interest in liminally-recognized groups: the importance of systems that do not reaffirm social structures and ideologies like white supremacy, colonialism, racism, and sexism. However, I also acknowledge how our methods of combating such systems often end up reaffirming them, and how almost any turn to the state and to the law is already inherently bound

[735] *Id.* at 169.
[736] Mnookin and Kornhauser, *supra* note 690.

by identity and recognition. I conclude this dissertation with a more grounded understanding of the potential of political action to free the subject both from the limitation of racism, sexism, etc., and from the limitations imposed by the identities conjured up to battle them.