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Market Humiliation

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MARKET HUMILIATION

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For many people, the marketplace is too often a site of intense humiliation. This Article aims to assist legal practitioners, judges, lawmakers, and scholars in understanding what market humiliation is, how it operates, and what can be done to curtail it. This is a particularly timely—even urgent—task due to a pair of 2022 developments at the Supreme Court that carry an enhanced threat to dignified market participation. In one, Cummings v. Premier Rehab Keller, *the Court denied damages for emotional harm from a deaf and legally blind woman who was refused suitable accommodation by a private medical provider. The other,* 303 Creative v. Elenis*, is still pending. However, the Court's willingness to hear it signals the possibility of allowing businesses to refuse to serve LGBTQ clients. While conventional analyses would classify such incidents as discrimination, with victims' relief mainly depending on the group to which they belong, this Article takes a novel approach. It studies what market assaults targeting people's identities have in common—regardless of the identity attacked—revealing three features most relevant to devising an adequate and much-needed legal response.*

First, it shows that humiliating incidents in the marketplace start with a shared and blameworthy behavioral profile, which this Article delineates. Second, it explains how when such a behavioral pattern exists, the rise of the particular emotion of humiliation is highly predictable, making claims of emotional harm far more credible than currently treated. It also brings to law scientific data showing how uniquely intense and long-lasting this emotion is and how it spreads from individuals to communities, suggesting jurists should stop minimizing the emotional harm created by humiliating acts. Third, it clarifies that feeling humiliated carries consequences much more severe and provable than what is

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currently assumed due to treating humiliation solely as an emotion. Those outcomes include significant common health problems that sometimes can lead to death.

In light of these findings, the Article proposes a solution called market citizenship—the idea that market participation must entail a unique set of rights and duties that should be defined and enforced by the state. It originally suggests doing so not only via expanded nondiscrimination laws but also through private law. People attacked in the marketplace due to their identity should have the right to full, uninterrupted, stable, and humiliation-free market citizenship. The businesses that humiliate them must have a corresponding duty—inherent in their market citizenship—to show them normal levels of respect.

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> *It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights.*
>
> – Senator Lyman Trumbull[1]

INTRODUCTION

Today's life cannot proceed without a host of market interactions. We depend on the market for income, housing, transportation, food, medical treatments, and more. Most people also turn to the marketplace for more luxurious and less necessary goods and services, such as jewelry, gadgets, dining, and entertainment. And, as the prevalence of fancy malls demonstrates, frequently, the shopping process itself is less about the economic exchange and more about a broader social experience. In all those ways—from the most necessary to the most enjoyable—participating in the market matters.

The problem is that while numerous people take their ability to participate in all market activities for granted, others risk immense suffering when they try to engage in the same activities. Their ability to partake in the market is constrained not by the limits of their own means or capabilities but by how providers and counterparties mistreat them.

To get an initial and intuitive sense of the issue, consider the following sample of eight accounts, all briefly describing actual market debacles:

- A woman named Pamela Krueger worked as an independent drywall contractor on a construction project. Onsite, the job managers repeatedly referred to her as "a 'c--t,' and 'f-----g b---h,' . . . telling her that cleaning rather than drywalling was appropriate work for her."[2]
- Shanta Lester, an African American woman, ordered lunch at McDonald's. When her French fries arrived cold, she requested to substitute them for fresh ones. In response, a White manager called her, not once but twice, "a black bitch." The manager also exclaimed, "I'm tired

1. CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865) (statement of Sen. Trumbull, author of the Civil Rights Act of 1866).

2. Krueger v. Zeman Constr. Co., 781 N.W.2d 858, 866 (Minn. 2010).

of these damn [n-word] bringing their food back and don't want to pay for it."[3]

- Deborah Reynolds worked for Dr. Robert Hasbany for a few years. Throughout her employment, Dr. Hasbany repeatedly told her (and others) things like "you gotta lose this weight," "I'm sick and tired of these fat/big/overweight people," and "you guys need to take the weight off." One day, when Reynolds arrived at work, Dr. Hasbany demanded that she weigh herself; when she refused, he responded, "[Y]ou either weigh in, or get a doctor's note."[4]
- A man with a disability named Joshua Foster called an Uber to go have drinks with his friends but was left without transportation. When the driver pulled up and noticed his wheelchair, he shook his head as if saying, "no. no. no. I can't do this," and drove off.[5]
- Aimee Stephens, a transgender woman, who had worked at a funeral home, shared with her employer her transition. Describing himself as a devout Christian, the employer immediately fired her, telling her that "this is not going to work out."[6]
- A mother to a six-year-old boy, Valerie Kozera, wanted to move closer to her disabled mother and found an apartment that fit her needs. However, the landlord refused to lease to her. He told her he "does not rent to people with children and ended the phone call."[7]
- Dr. Faisal Khalaf, a Middle Eastern engineer, who "immigrated from Lebanon and spoke Arabic," worked for

3. Lester v. BING the Best, Inc., No. 09-81525-CIV, 2010 WL 4942835, at *1 (S.D. Fla. Nov. 30, 2010).

4. Reynolds v. Robert Hasbany MD PLLC, 917 N.W.2d 715, 717 (Mich. Ct. App. 2018).

5. Michael Finney & Renee Koury, *Uber Driver Sees Passenger in Wheelchair, Takes Off*, ABC 7 NEWS (May 1, 2019), https://abc7news.com/technology/uber-driver-refuses-to-pick-up-passenger-in-wheelchair/5278327 [https://perma.cc/4RWH-773E]. For a similar incident that happened to Elizabeth Morgan, see Scottie Hunter, *The Investigators: Woman Alleges Uber Driver Discriminated Against Her Over Wheelchair*, WAFB9 (Mar. 8, 2022, 3:15 PM), https://www.wafb.com/2022/03/08/investigators-woman-alleges-uber-driver-discriminated-against-her-over-wheelchair [https://perma.cc/7CCM-FCFM].

6. Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020).

7. Granger v. Auto-Owners Ins., 40 N.E.3d 1110, 1112 (Ohio 2015).

> Ford. After years of employment, Khalaf's subordinates made comments about his "English-language skills" and his "ability to communicate clearly," while his supervisor "shouted" at him, "What's wrong with you? Don't you know English?"[8]

- A married lesbian couple, Amy and Stephanie Mudd, drove from home for an hour to file their taxes with an accounting business offering attractive fees. But, upon arrival, they saw a sign on the business's door that said: "Homosexual marriage not recognized."[9]

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This sample of eight dismal incidents demonstrates a dynamic that this Article seeks to highlight, define, and explain. It covers the disparaging market experiences of people fully capable of working, renting, or shopping who found themselves assaulted for a host of reasons related to one or more of their characteristics: gender, race, weight, disability, gender identity, parenthood, foreign accent, and sexual orientation. Yet, despite this great variety of non-economic reasons, the incidents have much in common: a painful and significant pattern, yet to receive legal attention, emerges.

This pattern includes several key features. First, the events occur at the heart of the market in the various settings that comprise the marketplace: work, housing, transportation, retail, and other types of transactional exchanges of goods or services for pay. Second, the events entail adverse treatment of people who engage or attempt to engage in ordinary market activities. They are being refused, insulted, rejected, or excluded, notwithstanding their undisputed ability to engage in the transactions they seek. Third, the aggressions are intentional and are sometimes carefully calculated. In them, the mistreating parties openly express disdain toward their counterparties. Fourth, the offenses target the mistreated parties' identity traits, directly threatening their addressees above and beyond the market exchange at hand.

While scholars, myself included, have often focused on certain identity traits in isolation, discussing, for example, market

8. Khalaf v. Ford Motor Co., 973 F.3d 469, 475, 483, 486 (6th Cir. 2020).

9. Jo Yurcaba, *A 'Troubling Rise' in Business Owners Refusing Gay Couples, Advocates Say*, NBC NEWS (Apr. 21, 2021, 7:19 AM), https://www.nbcnews.com/nbc-out/out-news/troubling-rise-business-owners-refusing-gay-couples-advocates-say-rcna735 [https://perma.cc/L6H9-Y58C].

mistreatments based on race,[10] disability,[11] or sexual orientation,[12] this Article takes a different and novel approach. Instead of focusing on any particular attacked group, it explores what the various different groups have in common. Taking this unique approach shows that complete, stable, safe, and effortless market participation—enjoyed by many and celebrated by liberal and neoliberal philosophies—is far from being available to all. This method exposes that true market membership is only certain for standard able-bodied heterosexual and cisgender white men. Anyone perceived—for one reason or more—to be different from the ideal user of the market system has no such privilege and is at constant peril of severe market mistreatment.

The troubling phenomenon of systematic market mistreatment in a market-admiring society deserves a robust legal response. However, because conventional legal analysis focuses on discrete identities, it narrowly categorizes the issue as a matter of discrimination against certain protected groups. Such framing leaves out members of unprotected groups, such as the employees required to weigh themselves to keep their work. It also demands engagement in taxing definitions, creating a bifurcated outlook that eclipses the existence of a broader problem and the faulty behavior of those who mistreat their counterparties while profiting from the market. Moreover, in what sometimes is dubbed the "Oppression Olympics," much energy is spent on a futile effort to rank the suffering of various groups to decide their eligibility for legal protection.[13] Together, those obstacles make it much harder to develop adequate resolutions.

In response, this Article breaks away from conventional discrimination analyses and offers a fresh and cohesive investigation of what is usually treated as a collection of seemingly sporadic events. It studies what market assaults targeting people's identities have in common—regardless of the identity attacked. Such an alternative perspective on market aggressions is made not to undermine the intensity and importance of group-specific problems like the unique experience

10. *See, e.g.*, Suja A. Thomas, *The Customer Caste: Lawful Discrimination by Public Businesses*, 109 CALIF. L. REV. 141 (2021) (race).

11. *See, e.g.*, Linda McClain, *Shopping Center Wheelchair Accessibility: Ongoing Advocacy to Implement the Americans with Disabilities Act of 1990*, 17 PUB. HEALTH NURSING 178 (2000) (disability).

12. *See, e.g.*, Hila Keren, *Separating Church and Market: The Duty to Secure Market Citizenship for All*, 12 U.C. IRVINE L. REV. 907 (2022) (sexual orientation and gender identity).

13. *See, e.g.*, ANGIE-MARIE HANCOCK, SOLIDARITY POLITICS FOR MILLENNIALS: A GUIDE TO ENDING THE OPPRESSION OLYMPICS 3–4 (2011).

known as "Shopping While Black."[14] Rather, by identifying and defining the commonalities between the attacks on various marginalized groups, the Article aims to develop tools that would better assist members of all of them. Notably, the benefits of this method are not limited to categories currently recognized under nondiscrimination laws. Instead, this Article examines market attacks on protected groups (e.g., racial minorities), somewhat protected groups (e.g., LGBTQ individuals), and currently unrecognized groups (e.g., fat people[15]) to maximize the learning from all those experiences.

It goes without saying that brutal events like those opening this Article often directly impair access to economic resources in a hypercapitalist world utterly reliant on the marketplace. The examples of losing a job due to gender identity (Stephens) or missing out on preferable fees due to sexual orientation (the Mudds) speak loudly to that effect. However, the Article's central contribution goes beyond direct economic damages to illuminate and explain the under-recognized non-economic aspects of the pattern. That is, even if transactional alternatives are readily available in the open market—i.e., other apartments, jobs, goods, or services—the described assaults create and perpetuate the "othering" of people, unfairly and painfully marking some individuals as inferior humans.

Such profound marginalization has economic ramifications, but its negative consequences go much further. As explained below, incidents like the ones raised here are uniquely corrosive in a manner yet to be grasped and accounted for by legal analyses. In a nutshell, they are intentionally hostile, leaving people shaken, insecure, and sometimes severely sick. To distinguish this particular dynamic from general discussions of discrimination and to allow a deeper understanding of what's at stake, this Article names it *market humiliation.*

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14. *See, e.g.*, Cassi Pittman, *"Shopping While Black": Black Consumers' Management of Racial Stigma and Racial Profiling in Retail Settings*, 20 J. CONSUMER CULTURE 3 (2020).

15. I use the term fat and not overweight following its increasing use by fat activists, scholars, and popular writers. *See, e.g.*, Lauren Freeman, *A Matter of Justice: "Fat" Is Not Necessarily a Bad Word*, 50 HASTINGS CTR. REP., Sept./Oct. 2020, at 11 (arguing that "fat" is not a word "that health care providers should avoid"); Esther Rothblum, Editorial, *Why a Journal on Fat Studies*, 1 FAT STUDIES 3, 3 (2012) (describing the history of using the word "fat" instead of "obese" or "overweight"); Charlotte Zoller, *Ask a Fat Girl: It's OK to Say the Word "Fat,"* TEEN VOGUE, (May 27, 2020), https://www.teenvogue.com/story/ask-a-fat-girl-its-ok-to-say-the-word-fat [https://perma.cc/9UYC-PR3D] ("[F]at is a word that has been hurled around as an insult for decades. Now it's a term that plus-size individuals are reclaiming as a neutral descriptor for themselves.").

As used herein, the term market humiliation aims to capture a relational dynamic that is both narrower and broader than other cases of market discrimination. It is narrower—and far more intense—than other identity-based market mistreatments due to the high levels of intentionality and hostility that typify humiliating aggressions. For example, structural obstacles and unconscious biases often lead to discrimination in the form of disparate impact on certain groups without involving the humiliation demonstrated by the incidents that animate this Article. This is not to legitimize structural market unfairness, such as when women earn less or pay more than men. The point is different: the behaviors discussed here go further than other cases of discrimination in a manner that currently escapes comprehension and legal attention. This Article seeks to cope with this void. It offers a detailed transdisciplinary study of the meaning of humiliation when caused through the market to allow adequate response to this disturbing (if little understood) socioeconomic dynamic.

Market humiliation, as defined here, is also broader than market discrimination. Unlike definitions of discrimination that heavily depend on whether the harmed person belongs to a legally protected group, this Article argues that more people from more groups regularly suffer from market humiliations. Therefore, their pains should concern us even if they cannot fit into conventional discrimination bans. On this point, the incidents of harassing Deborah Reynolds for her weight and Dr. Khalif for his English are instructive.[16]

Introducing and explaining market humiliation is a key to developing an improved legal response to the problem of acute market mistreatments. Towards this goal, this Article first rejects the legal misconceptions of the damage inflicted by events similar to the eight listed here. Generally speaking, there are three such erroneous approaches, all resulting in an insufficient response to market humiliation. One prevalent approach denies the humiliating effect altogether as long as market alternatives exist.[17] Another recognizes that the behaviors

16. Yet, the Article strictly focuses on the market. Indeed, humiliation is prevalent elsewhere, such as when the police stop only certain people while driving, or when teachers misgender their students, but such non-market events lie outside the scope of this Article.

17. Keren, *supra* note 12, at 945–46. *See also* Justice Alito, Keynote Address at the Federalist Society's Annual National Lawyers Convention (Nov. 12, 2020), *in* Josh Blackman, *Video and Transcript of Justice Alito's Keynote Address to the Federalist Society*, REASON: VOLOKH CONSPIRACY (Nov. 12, 2020, 11:18 PM) ("For many today, religious liberty . . . can't be tolerated, even when there is *no evidence that anybody has been harmed*," because the rejected couple "was given a free cake by another bakery." (emphasis added)); State v. Arlene's Flowers, Inc., 441 P.3d

described here are offensive but minimizes their legal meaning.[18] Finally, a third approach is more sympathetic to the victims but reduces humiliation to merely one of several emotions that may follow discrimination.[19]

Instead of each of those three perspectives, this Article emphasizes the central role of humiliation in marketplace events, delving into the question of what it actually means. It is the first to bring to the legal context of market insults some fascinating scientific works that explain humiliation not merely as an emotion but rather as a fuller and distinct *social process.* While the emotion of humiliation belongs to this process, it is importantly preceded by and resulting from specific and identifiable *behavioral* patterns. As to this behavioral stage, one of the Article's main original offerings—drawing on rich humiliation studies in non-legal disciplines—is a six-item profile of market humiliation. Delineating such a profile is essential to making humiliation claims concrete, provable, and verifiable. As such, it is a salient step toward countering the claims' conventional abstractness, which too often renders them easy to dismiss.

Defining the above profile is also vital to explain why, when an incident features many or all of the profile's six items, the emergence of a feeling of humiliation is inevitable. This linkage is necessary to make claimants' reports regarding feelings of humiliation far more credible than currently assumed. Moreover, the resulting emotion is strikingly different than other emotions frequently associated with discrimination, such as embarrassment.[20] As the Article shows, scientific measures prove that humiliation is a particularly intense and lasting emotion. For that reason, feelings of humiliation do not go away or

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1203, 1223 n.14 (Wash. 2019) (citing the appellants' brief in which they argued that the rejected two grooms-to-be "are able to obtain custom floral designs for their same-sex wedding from nearby florists"); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999) (making a libertarian claim that refusing to provide goods and services inflicts no harm).

18. *See, e.g.*, Turner v. Wong, 832 A.2d 340, 349 (N.J. Super. Ct. App. Div. 2003) (dismissing a claim for intentional infliction of emotional distress where the plaintiff, an African American woman targeted with racial slurs by a shop owner, "*merely* claimed that she felt humiliated and mortified because of the racial insults" (emphasis added)).

19. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 292 (Goldberg, J., concurring) (quoting S. REP. NO. 88-872, at 2370 (1964), and stating the harm in commercial discrimination is less access to "hamburgers or movies" and much more "the humiliation, frustration, and embarrassment that a person must surely feel when he is unacceptable as a member of the public").

20. Linda M. Hartling & Tracy Luchetta, *Humiliation: Assessing the Impact of Derision, Degradation, and Debasement*, 19 J. PRIMARY PREVENTION 259, 263 (1999).

end the social process. Instead, the emotional stage typically carries additional and more tangible consequences that lie outside the affective realm. These include physical and mental health complications that sometimes end with suicide.

In sum, this Article uncovers the link between previously unconnected market incidents, explaining them as part of a process that starts with particular behaviors, generates a predictable emotion, and leads to foreseeable medical outcomes. Recognizing and defining market humiliation in this way thus offers a practical breakthrough. It makes humiliation claims comprehensible and confirmable and allows overcoming suspicions. This, in turn, can open the door to devising a measured legal response.

Beyond improving the ability to cope with individual cases, this Article offers a broader policy reason for legal reform. Drawing on non-legal literature, it introduces the concept of *collective humiliation*: the mechanism through which acts of humiliation and their consequences spread to hurt numerous people even if they were not personally attacked. This happens when people share salient identity features with those directly harmed. Under the model of collective humiliation, aggressions like the one suffered by Shanta Lester at McDonald's, for example, impact countless other Black shoppers. Similarly, Uber's rejection of Joshua Foster pains numerous people with disabilities. In this way, the damage caused by any incident of market humiliation proliferates, making the need to develop a clear and decisive legal response even more imperative.

To foster improved handling of the problem identified and studied, this Article utilizes the vast knowledge accumulated in the humiliation literature to propose specific legal solutions. First, it makes a straightforward call to expand the statutory coverage of nondiscrimination laws and, most urgently, close loopholes that invite humiliation by, for example, retailers and digital platforms. Second, it argues that we must reform the judicial application of nondiscrimination laws to market settings. On this point, the Article reconstructs the promise of the Thirteenth Amendment to enable a more generous interpretation of those laws and then utilizes the six-item profile of humiliation it has developed to define a new cause of action. The proposed cause would allow jurists to hold a nuanced and science-based discussion before deciding if a market incident amounts to market humiliation.

Reaching beyond specific solutions, the Article theoretically advocates for an approach it calls *market citizenship.* The term reflects

the idea that market membership should entail more than privileges and access to profits, encompassing, much like general citizenship, both rights and duties. Furthermore, following conventional citizenship, the unique bundle of privileges and responsibilities relevant to the market must be defined, protected, and enforced by the state via its laws.[21] People like Ms. Krueger, Ms. Lester, Ms. Reynolds, Mr. Foster, Ms. Stephens, Ms. Kozera, and the Mudds deserve a right to complete, uninterrupted, stable, and humiliation-free market citizenship. At the same time, the businesses that humiliated them should be held to a corresponding duty—inherent in their market citizenship—to show them normal levels of respect.

All told, this Article stands to assist legal practitioners, judges, lawmakers, and legal scholars in understanding what market humiliation is, how it operates, and what can be done to curtail it. To that end, it is divided into four parts. Part I introduces market humiliation. It explains how the current nondiscrimination regime, which is fragmented and parsimonious, leaves severely humiliated parties without redress. Part II ventures outside of the legal field to gather important scientific information that illuminates humiliation as a social process. This part introduces an original six-item behavioral profile of humiliating acts, laying the foundation for later proposals. Part III presents compelling evidence that legal reform is much needed due to humiliating acts' severe and credible consequences. It emphasizes how, counter to conventional beliefs, the harm is much more than fleeting unpleasant feelings. Finally, Part IV returns to law and utilizes the knowledge from the two preceding parts. This part offers theoretical grounds and practical ways to respond to market humiliation by defining and protecting market citizenship for all.

It is worth noting from the outset that developing the new framework offered by this Article is a particularly timely project. Two 2022 developments at the Supreme Court—one still awaiting a decision—carry an enhanced threat to dignified market participation for all, necessitating immediate legal attention to the issue of humiliation.

The first challenge originates in *Cummings v. Premier Rehab Keller*.[22] In this case, the conservative majority of the Court denied damages for emotional harm to a deaf and legally blind patient who was

21. *See* SOPHIA MOREAU, FACES OF INEQUALITY: A THEORY OF WRONGFUL DISCRIMINATION 218–26 (2020) (arguing that the state should enforce on market actors a duty to treat others equally).

22. Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022).

rejected and humiliated by a private medical provider.[23] On this point, this Article's insistence that humiliation should not be taken as merely an emotional harm but rather as arising from a blameworthy behavior and carrying tangible consequences offers a way to avoid *Cummings*'s harsh result.

The second menace to dignified market citizenship comes from the Court's willingness to reconsider its nondiscrimination jurisprudence by hearing *303 Creative LLC v. Elenis.*[24] In this pending case, a business requests judicial permission to publicly announce that it will not serve same-sex couples due to its owner's religious objection.[25] This Article's explanation of how harmful such rejection can be to the entire LGBTQ community thus offers salient new grounds against affirming the troubling market behavior at hand, which is—unfortunately—on the rise.

Now, more than ever before, we must move from a reality of pervasive market humiliation to equitable market citizenship.

I. MARKET HUMILIATION UNDER A LIMITED LEGAL RESPONSE

Linking market discrimination to humiliation is hardly a new idea. Back in 1964, the Supreme Court expressed this view in the context of racial discrimination. An often-cited part of the concurring opinion in *Heart of Atlanta Motel* stated that the issue is less access to "hamburgers or movies" and much more "the *humiliation*, frustration, and embarrassment that a person must surely feel when he is unacceptable as a member of the public."[26]

However, this explicit awareness has never become the law's focal point or organizing principle. Nor has a deep understanding of what it means to humiliate or be humiliated during ordinary market pursuits ever developed. As a result, those exposed to market insults remain without proper redress, and the law ends up perpetuating and even legitimizing humiliation. This result has two manifestations, both related to the misunderstanding and neglect of humiliation. The first is the struggle to establish the illegality of humiliating behaviors, and the other is the challenge of securing access to remedies.

23. *Id.* at 1576.
24. 142 S. Ct. 1106 (2022).
25. *Id.*
26. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 292 (Goldberg, J., concurring) (quoting S. REP. NO. 88-872, at 2370 (1964)).

A. The Challenge of Establishing Illegality

People seeking redress for humiliating mistreatments in the market face numerous hurdles and much uncertainty. For the most part, our current laws frame the issue as a public law matter, lying outside of the ordinary rules of the market.[27] Redress for market humiliation thus largely hinges on a complex and confusing patchwork of nondiscrimination norms. Generally speaking, the legal response to despicable events occurring at the market's heart is hopelessly fragmented and unsympathetic, leaving many with no recourse and depriving them of full market participation. Without attempting to map out all the unprotected areas, the following are leading obstacles to the ability to establish the illegality of humiliating market discrimination.

First, most nondiscrimination norms that pertain to the market cover only certain enumerated groups, leaving others exposed or questionably and inconsistently covered. For example, the Supreme Court only recently made protections against workplace discrimination available to the LGBTQ community.[28] After a long battle over the rights of the late Aimee Stephens (mentioned earlier) and other employees, the Court interpreted the protected category of "sex" as inclusive of sexual orientation.[29] However, the broader protections of the community still hinge on context and geography. Legal action is not available, for example, when the relevant nondiscrimination norm does not mention the word "sex," such as in the case of refusals to serve same-sex couples in states that had never included sex in their public accommodations laws.[30]

Similarly, Americans with foreign accents, like Dr. Khalaf, are only sometimes covered, depending on how well they can link their injury to their national origins.[31] In the same vein, fat people who suffer body-shaming while working or shopping, like Ms. Reynolds, cannot get legal protection unless they are willing and able to claim and convince that their weight amounts to a disability.[32] All in all, while the injuries of those insulted or rejected due to their identity tend to be similar and happen in identical settings (e.g., while shopping or

27. *See generally* Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022).
28. Bostock v. Clayton County, 140 S. Ct. 1731 (2020).
29. *Id.* at 1737.
30. Keren, *supra* note 12, at 918.
31. Khalaf v. Ford Motor Co., 973 F.3d 469, 486 (6th Cir. 2020).
32. Katie Warden, *A Disability Studies Perspective on the Legal Boundaries of Fat and Disability*, 39 MINN. J.L. & INEQ. 155, 171–76 (2021).

dining), their access to legal protection is uncertain. Instead, it is controlled by factors unrelated to either the wrongful behavior or the harm it caused.

Second, even claimants that can show coverage by some norms of the nondiscrimination maze too often fail to establish a legal claim and frequently suffer early dismissal of their case. The legal treatment of race-based discrimination in the marketplace demonstrates this point with an abundance of evidence. Consider, for example, Title II of the Civil Rights Act of 1964, which prohibits discrimination and segregation in public accommodations.[33] Despite this straightforward prohibition, courts have applied it narrowly and erratically, thereby legitimizing highly humiliating market behaviors. They approved practices such as following and monitoring shoppers of color, giving inferior seating and service to diners of color, and offering second-rate accommodations to minority guests.[34] Courts also released from the Act's prohibitions significant segments of the market, including retail stores as large as Walmart,[35] airlines, banks, most barbershops, and more.[36]

A 2021 extensive study focusing on discrimination by businesses open to the public proves as much. In *The Customer Caste*, Professor Suja Thomas analyzes numerous decisions regarding claims made under the nondiscrimination norms applicable to this salient section of the market: Section 1981 of the 1866 Civil Rights Act and Title II of the 1964 Civil Rights Act.[37] A central finding of her meticulous study is highly relevant to this Article's focus on humiliation. The study reveals that federal judges have repeatedly shrunk the protections offered by Section 1981 and Title II to the bare minimum.[38] With few exceptions, they have insisted that only direct refusals to make or enforce contracts are actionable.[39] As a result, whatever happened before a concrete contract was pursued (e.g., while browsing) or after a

33. 42 U.S.C. § 2000a(a)–(b)

34. Thomas, *supra* note 10, at 143.

35. Jones v. Wal-Mart Stores E. I, LP, No. 19CV74 JCH, 2020 WL 587706, at *4 (E.D. Mo. Feb. 6, 2020).

36. Thomas, *supra* note 10, at 155.

37. Thomas, *supra* note 10.

38. *Id.* at 147–48.

39. Most direct refusals to make or enforce contracts are made in the context of full-service restaurants but not in the retail context, which includes fast-food restaurants and food deliveries. *See, e.g.*, Pena v. Fred's Stores of Tenn., Inc., No. 3:09-cv-209-RV/EMT, 2009 WL 5218027, at *3 (N.D. Fla. Dec 31, 2009) (quoting Rogers v. Elliott, 135 F. Supp. 2d 1312, 1315 (N.D. Ga. 2001)).

transaction was completed does not matter in the eyes of the law. Thomas's study details how, under this meager reading of the statutes, courts had dismissed cases in which Black and Hispanic customers suffered egregious treatments, such as unreasonably delayed service, waiters touching their food, false shoplifting accusations, and repeated derogatory remarks.[40]

Significantly, before dismissing cases due to this narrow interpretative approach, many courts express awareness of the emotional harm inflicted by the discriminating businesses on their customers.[41] However, they often classify those intentional injuries as insufficient to establish a legal claim.[42] Recall, for example, the obscenities directed at Shanta Lester over an order of fries. The court deciding the case agreed that the manager's loud expressions were "highly offensive" but still granted McDonald's motion for summary judgment.[43] Astonishingly, it reasoned that "egregious as the comments alleged here may have been, they did not prevent the formation of a contract."[44]

As Professor Thomas explains, and as a response to her study by Professor Elizabeth Sepper further substantiates,[45] courts' willingness to accept hostile and insulting treatments as unprotected by otherwise-applicable nondiscrimination laws is indefensible. Such a narrow reading cannot be justified by either the language, history, or rationale of these norms. Indeed, the prevention of humiliation was at the core of the effort to legislate the Civil Rights Acts that apply to the market.[46] Prevention of humiliation was also the reason for which Section 1981 was expanded by the Civil Rights Act of 1991, explicitly extending protections beyond the ability to contract to the "enjoyment of all the benefits . . . of the contractual relationship."[47]

It is intuitively clear that the experience of shopping while being humiliated cannot possibly be equal to the one "enjoyed by white citizens" (the relevant comparison under Section 1981). However, as long as jurists treat acts of humiliation and their results lightly, without

40. Thomas, *supra* note 10, at 165–89.

41. *Id.* at 166–72.

42. *Id.*

43. Lester v. BING the Best, Inc., No. 09-81525-CIV, 2010 WL 4942835 at *3, *6 (S.D. Fla. Nov. 30, 2010).

44. *Id.* at *5.

45. Elizabeth Sepper, *The Original Meaning of "Full and Equal Enjoyment" of Public Accommodations*, 11 CALIF. L. REV. ONLINE 572 (2021) (commenting on Thomas's *The Customer Caste*).

46. *Id.* at 582.

47. 42 U.S.C. § 1981.

grasping their true meaning, decisions to disregard those harms continue to be made, perpetuating and legitimizing a harsh market reality with severe social consequences. This is one of the main obstacles that this Article wishes to remove. It does so by developing, in the next part, a deeper understanding of humiliation that is essential to fortifying and expanding the critiques offered by Professor Thomas and others.

Last, specific market spheres present additional challenges. For example, in the wedding industry, some Christian business owners had secured from courts permission to discriminate against LGBTQ clients despite the ban of applicable nondiscrimination laws.[48] Importantly, this issue is currently pending at the Supreme Court.[49] Likewise, there is much uncertainty around whether online or app-based businesses qualify as places of public accommodation for purposes of nondiscrimination laws and, if so, under which conditions. For example, with regard to the Americans with Disabilities Act, several Circuit Courts recognized websites as public accommodations while others refused to do so.[50] Similar ambiguity exists as to rideshare transportation of the kind that abandoned Joshua Foster and as to short-term housing.[51]

Overall, the legal response to humiliating market events is deficient. Does the law suggest that it is a legitimate business behavior? Is it possible that using racial slurs against customers is acceptable? Can signs at storefronts that limit clientele to heterosexual people be a valid way of contracting? Are we willing to approve commerce that is free and enjoyable for most but extremely painful for others?

48. *See, e.g.*, Brush & Nib Studio, LC v. City of Phoenix, 448 P. 3d 890, 898 (Ariz. 2019); Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't, No. 3:19-CV-00851, 2022 U.S. Dist. LEXIS 98559, at *1 (W.D. Ky. June 1, 2022).

49. 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022).

50. *See* Martinez v. San Diego Cnty. Credit Union, 264 Cal. Rptr. 3d 600 (2020). At least one article makes the argument that the platform economy is almost certainly already subject to nondiscrimination laws but nevertheless suggests updates to a variety of laws to clarify the question. *See* Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271 (2017). In the context of discrimination against LGBTQ people, one court dismissed a business owner's action to permit discrimination due to religious objections for the reason that the business was only operating online. My goal here is not to exhaust this question but to highlight the lack of clear legal response to market humiliations that occur while using new technologies.

51. *See, e.g.*, Allyson E. Gold, *Redliking: When Redlining Goes Online,* 62 WM. & MARY L. REV. 1841 (2021) (discussing discrimination by Airbnb hosts); Kyungwon Lee et al., *Creating a World Where Anyone Can Belong Anywhere: Consumer Equality in the Sharing Economy*, 130 J. BUS. RSCH. 221 (2021).

B. The Remedies Problem

To make things worse, even those with cognizable legal claims and the ability to prove them face another significant hurdle: a struggle to get legal remedies for the injury. And, without effective remedies, the existence of a right for dignified market participation is further undermined.

Some nondiscrimination laws relevant to market behavior specifically deny remedies for past events alone. Such is the case with discrimination by businesses considered public accommodations under the 1964 Civil Rights Act.[52] According to Title II of this act, remedies are limited to injunctions and declarations and do not include compensation.[53] So, to the extent that humiliating incidents reflect more bursts of animus than permanent policies, this remedial limitation means a lack of recovery, regardless of the severity of the harm. For example, under this statute, people like Shanta Lester cannot hope for recovery, even if they survived the previous stages of their litigation.

More broadly and even closer to the focus of this Article on humiliation as a typical and fundamental injury arising from discriminatory behavior is the increasingly limited access to damages for emotional harms under nondiscrimination laws. Notably, a 2022 decision of the Supreme Court has further clouded the hope for such damages. In *Cummings v. Premier Rehab Keller*, the Court decided that businesses that receive federal funding and therefore are particularly obliged to refrain from discrimination do not owe damages for causing emotional suffering by breaching their duty.[54] Although the decision directly relates to federally-funded businesses,[55] it reveals a more general flaw in the legal response to market humiliation under the nondiscrimination paradigm: undermining rights by denial of remedies. Indeed, in his dissent in *Cummings*, Justice Breyer emphasized that "even though the primary harm inflicted by discrimination is rarely

52. 42 U.S.C. § 2000.

53. C.R. DIV., U.S. DEP'T OF JUST., CONFRONTING DISCRIMINATION IN HOTELS, BARS, AND OTHER PLACES OF PUBLIC ACCOMMODATION (2022), https://www.justice.gov/crt/page/file/1466211/download [https://perma.cc/JT7A-VC57].

54. Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1572 (2022).

55. Federal funding is so widely distributed that *Cummings* directly applies to a significant section of the market. *See* Brief for U.S. Chamber of Com. et al., as Amici Curiae Supporting Respondents at 22, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219), https://www.supremecourt.gov/DocketPDF/20/20-219/194694/20211006124814543_20-219%20Amicus%20Brief%20of%20The%20Chamber%20of%20Comerce%20of%20the%20United%20States%20of%20America%20et%20al.pdf [https://perma.cc/Q8WF-3RZN] ("In 2020, for example, 650,000 companies received Paycheck Protection Program funds.").

economic," and "victims of intentional discrimination may sometimes suffer profound emotional injury without any attendant pecuniary harms," "[t]he Court's decision today will leave those victims *with no remedy at all*."[56]

Notably, reading the decision in *Cummings* would leave one wondering what the emotional injury was, as the factual description is so thin that the injury is hidden, perhaps to justify the lack of remedy. The Court portrays Jane Cummings as a "deaf and legally blind" person who was interested in receiving physical therapy services from a private provider called Premier, which is a recipient of federal funding.[57] It also states that Cummings requested Premier to provide "an ASL interpreter for her appointments," but Premier refused, telling her "she could communicate with the therapist using written notes, lip reading, or gesturing," which made Cummings "obtain care from another provider." So much is true. Yet, what was omitted minimizes the emotional aspects of the event. Why did Cummings turn to another provider? At what cost to her? What did she do afterward?

The case's record offers answers that better explain Cummings's pursuit of a remedy for emotional harm. It shows how necessary was an ASL interpreter and how unreasonable, even cruel, was Premier's refusal to provide one. Ms. Cummings, the record shows, has been deaf since birth and that, combined with her blindness, made ASL her "primary language," leaving her with "limited ability to read, write, speak, or understand English."[58] Therefore, her request was not a mere preference but an absolute need; it was impossible for her to communicate with her physical therapists without an ASL interpreter. Knowing this much more makes all the "alternatives" offered by Premier and listed by the Court offensive, painful reminders of what Ms. Cummings cannot do (read, write, and understand English) rather than possible accommodations of her condition.

The Court also left out Ms. Cummings's response to the "alternatives." As the District Court stated, she "explained that such methods were ineffective because of her visual impairment,"[59] to no avail. This fact makes her turn to another provider more an act of surrender than

56. *Cummings*, 142 S. Ct. at 1582 (Breyer, J., dissenting) (emphasis added).

57. *Id.* at 1568–69 (majority opinion).

58. Amended Complaint at 1, Cummings v. Premier Rehab Keller, P.L.L.C, No. 4:18-CV-649-A, 2019 U.S. Dist. LEXIS 7587 (N.D. Tex. Jan. 16, 2019), ECF No. 05.

59. Cummings v. Premier Rehab, P.L.L.C., 18-CV-649-A, 2019 WL 227411, at *2 (N.D. Tex. Jan. 16, 2019).

a choice. Moreover, the Court further left out the consequences: the fact that the other provider offered only "unsatisfactory care," which made Ms. Cummings consult a doctor who referred her back to Premier because it "provides the best physical therapy in the area."[60] This omission has led to another one: following the doctor's advice, Ms. Cummings approached Premier two more times, only to suffer repeated unwillingness to accommodate her as a patient.[61]

The missing facts thus critically prevent readers from seeing an important aspect of the humiliation in this case: marking people as lesser than others because they cannot enjoy what is available to anyone else (here, quality care).

The point of telling the fuller story goes beyond a critique of *Cummings*'s legal result. It explains much of the general difficulty in getting remedies for humiliation without accounting for what it means. First, emotional injuries are not abstract or purely subjective, as many assume. Rather, the fuller facts explain why Ms. Cummings claimed humiliation and make her claim plausible. Second, lawyers and sympathetic judges can and should better help victims by moving beyond the general claim that humiliation is and should be a compensable injury. They need a framework that would allow them to articulate the concrete ways by which a factual pattern is one of humiliation. They also need more knowledge to describe the consequences of this particular injury credibly.

Parts II and III will offer such a framework. In the meantime, it is worth mentioning that while writing for the dissent to insist that Ms. Cummings deserves a remedy, Justice Breyer cited important general legal statements that highlight the problem of humiliation.[62] Yet, he did so without linking the statements to Ms. Cummings's experience,[63] missing an opportunity to show that the business that rejected her should have been able to foresee causing her a significant emotional injury.

In any case, having taken out of the story some of what led to Ms. Cummings's emotional suffering, the Court proceeded to an abstract and theoretical discussion of the availability of a remedy tailored to such harm. Access to compensation for emotional harm under the

60. Amended Complaint at 4, *Cummings*, No. 4:18-CV-649-A, 2019 U.S. Dist. LEXIS 7587 (N.D. Tex. Jan. 16, 2019), ECF No. 05.

61. *Id.*

62. *Cummings*, 142 S. Ct. at 1579 (Breyer, J., dissenting).

63. *Id.* at 1579–82.

relevant nondiscrimination laws would depend, the Court explained, on the availability of such compensation under contract law.[64] This turn to contract law was based on seeing the discriminating business as breaching a promise not to discriminate made to the government in return for receiving federal funding.[65] Under this contractual analysis, previous precedents have already established a path to monetary damages, recognizing a right for private parties to sue as beneficiaries of the contract between the funded business and the government, followed by remedies such as contract law offers in case of a breach.[66]

Yet, because of this contractual framing, earlier cases limited the scope of remedies only to those available under contract law, emphasizing that businesses considering receipt of federal funding need to be "*on notice*" of what they risk if they breach the promise not to discriminate.[67] In 2002, in *Barnes v. Gorman*,[68] this reasoning led the Supreme Court to affirm compensatory damages but deny punitive damages to a discriminated plaintiff.[69] Compensatory damages, the Court explained, are included in "forms of relief traditionally available in suits for breach of contract," while punitive damages are "generally not available for breach of contract."[70]

And here started the debate between the majority and the minority in *Cummings*. While the minority classified damages for emotional distress as compensatory and thus available based on a direct application of *Barnes*, the majority gave *Barnes* a new interpretation, adding a new limit to the remedies available to humiliated parties.[71] According to this new limit, although damages for emotional distress are considered compensatory and not punitive like those denied in *Barnes*, they also should be eliminated.[72] This is so not because they do not qualify as contractual, but because courts—according to the

64. *Id.* at 1571 (majority opinion).

65. *Id.*

66. *Id.*

67. *Id.* at 1570.

68. 536 U.S. 181 (2002).

69. *Id.* at 189 (2002).

70. *Id.* at 187. Note that in *Barnes*, the Court went all the way back to the logic of compensatory damages. It said: "When a court concludes that a recipient has breached its contract, it should enforce the broken promise by protecting the expectation that the recipient would not discriminate. . . . The obvious way to do this is to put private parties in as good a position as they would have been had the contract been performed." *Id.* at 189 (citing Guardians Ass'n v. Civil Serv. Comm'n of N.Y.C., 463 U.S. 582, 633 (Marshall, J., dissenting)).

71. *Cummings*, 142 S. Ct. at 1576.

72. *Barnes*, 536 U.S. at 189. It is worth noting that the District Court wrongly classified emotional distress damages as punitive.

majority—do not "normally" award them, which makes them not "generally" available.[73] As a result, the Court decided that businesses are not "on notice" that they may be liable for emotional damages and thus should not owe them.[74]

As Part IV will show, the majority's presentation of the state of contract law on this point is both inaccurate and objectionable. For now, however, it is more important to recognize the new obstacle added by *Cummings*. Specifically, the decision leaves its plaintiff with no remedy while the business that harmed her is released from liability for undisputed market humiliation. More generally, *Cummings* slammed another door in the face of victims of market humiliation and effectively allowed businesses supported by the state to continue to humiliate at no cost as long as they do not cause economic injuries.

The denial of damages for emotional distress in *Cummings* can be seen as limited to businesses receiving federal funds. However, that might be an overly optimistic reading of the case. The disagreement between the majority and the minority had strong political tones, with the conservative justices supporting discriminating businesses and the liberal justices trying to protect the equality and dignity of market participants. Since a conservative supermajority controls the Court, the concern is that any future opportunity to side with businesses and narrow nondiscrimination protections will be similarly used. Indeed, the majority's opinion in *Cummings* disregarded repeated claims by amici and the dissent that emotional distress damages are essential because a core purpose of nondiscrimination laws was to fight humiliation, which is the main, if not the only, result of many discriminatory incidents.

C. The Marginalization of Humiliation

Much beyond the legal nuances described in the previous two sections, the omissions, loopholes, and anti-claimant tendencies described so far reflect a general legal misconception and undervaluation of the emotional dimension of discriminatory events. One group of scholars summarized the obstacle faced by those painfully mistreated as follows: "Beyond the hurdles they must clear in order to present their cases in court, perhaps the greatest difficulty for plaintiffs is in

73. *Cummings*, 142 S. Ct. at 1576.
74. *Id.*

demonstrating the harm that they experience."[75] This significant barrier results from a combination of several factors worth elucidation. Taken together, they explain why this Article insists on developing a concrete understanding of market humiliation.

1. Legal Resistance to Emotions

At the most general level, the legal system's failure to respond to emotions as they operate in market discrimination situations is part of a deeper tension between law and emotions.[76] Conventional law has a complex, perhaps even volatile, relationship with emotions. Embracing the historical dichotomy between reason and emotion as axiomatic, law has long been portrayed as an enterprise that *is* and *should* be clearly affiliated with reason and patently distanced from emotion.[77] Accordingly, the project of "casting law as a bastion of pure reason"[78] has included strong claims—made by prominent jurists—regarding the nature of law, specific legal doctrines, and the operation of the judiciary. Let me offer three brief examples. Law is a "science," announced the influential jurist Christopher Columbus Langdell,[79] equating law libraries to chemists' laboratories.[80] "The law moved from 'subjective' to 'objective' from 'internal' to 'external,'" stated the powerful Oliver Wendell Holmes, reconfiguring legal doctrines to fit his statement.[81] And, following his predecessors, Richard Posner, a judge and one of the founders of the economic analysis of law, observed that in making legal decisions, judges, unlike jurors or children, discipline themselves to set emotions aside and respond to problems with careful rationality.[82]

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75. GERALDINE ROSA HENDERSON ET AL., CONSUMER EQUALITY: RACE AND THE AMERICAN MARKETPLACE 79 (2016).

76. *See* Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010).

77. *See* Terry A. Maroney, *A Field Evolves: Introduction to the Special Section on Law and Emotion*, 8 EMOTION REV. 3 (2016).

78. *Id.*

79. Christopher Columbus Langdell, *Address to the Harvard Law School Association*, *in* A RECORD OF THE COMMEMORATION, NOVEMBER FIFTH TO EIGHTH, 1886, ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE 84, 85 (1887).

80. *Id.* at 86–87 ("[T]he library is the proper workshop of professors and students alike; . . . it is to us all that the laboratories of the university are to the chemists and physicists . . . .").

81. GRANT GILMORE, THE DEATH OF CONTRACT 41 (Ronald K. L. Collins ed., 2d ed. 1995) (quoting Holmes).

82. Richard A. Posner, *Emotion Versus Emotionalism in Law*, *in* THE PASSIONS OF LAW 309, 311 (Susan A. Bandes ed., 1999).

These examples and many other efforts to establish law-as-reason have entailed, indeed required, a decisive rejection of the opposite end of the dichotomy: emotions. Following influential philosophers[83] and socio-cultural popular views (themselves "an amalgam of religious beliefs, superstition, fear of the unknown and witchcraft"[84])—emotions have been framed as a threat to legal rationality.[85] Conceived as invisible, subjective, enigmatic, intense, and uncontrollable—emotions have been treated as positioned to overwhelm, distract, and sway legal actors.[86] And these beliefs have yielded, either intuitively or with deliberation, a variety of legal responses that set emotions aside or at least minimize their importance.

This general legal resistance to emotions stands in the way of adequately responding to market humiliation. To illustrate, recall Dr. Faisal Khalaf's workplace experience. Like other discrimination cases, the court expressed awareness of emotions but refused to award them *legal meaning.* Despite acknowledging that comments directed at Dr. Khalaf made him "feel '. . . humiliated and devastated,' 'week after week after week,'"[87] the Sixth Circuit drew a clear line between emotions and law. It explained that "[the] derogatory statements, though abusive, were not enough to establish a hostile work environment based on . . . national origin. Rude, yes; discriminatory, no."[88]

In another example, an African American female customer purchased a donut and a coffee.[89] When she complained that the donut was stale and requested a new one, the owner and operator of the shop responded with racial slurs. In the court's words, the owner called the customer "'black [n-word] from Philadelphia,' repeating that phrase

83. Immanuel Kant, for example, famously advanced the argument that our emotions interrupt and limit our ability to engage in moral deliberation and make appropriate moral judgments. JESSE PRINZ, THE EMOTIONAL CONSTRUCTION OF MORALS 20 (2007) (discussing Kant's argument that "in making successful moral judgments, we would generally do well to ignore our passions"). Of course, Kant was not the first. As described by Jonathan Haidt, former "high priests of reason," including Plato and Aristotle, presented models of thought in which reason ruled over passions. *See* Jonathan Haidt, *The Moral Emotions*, *in* HANDBOOK OF AFFECTIVE SCIENCES 852, 852 (Richard J. Davidson et al. eds., 2003). Such models and thoughts most certainly influenced Kant and the other great philosophers.

84. HARVEY TEFF, CAUSING PSYCHIATRIC AND EMOTIONAL HARM: RESHAPING THE BOUNDARIES OF LEGAL LIABILITY 12 (2009).

85. *See id.*

86. *See* Robert C. Solomon, *Emotions and Choice*, *in* WHAT IS AN EMOTION? 224, 224 (Robert C. Solomon ed., 2d ed. 2003) (describing the view of emotions as "irrational and disruptive," and the belief that "[c]ontrolling one's emotion is . . . like the caging and taming of a wild beast").

87. Khalaf v. Ford Motor Co., 973 F.3d 469, 487 (6th Cir. 2020).

88. *Id.* at 488.

89. Turner v. Wong, 832 A.2d 340, 345 (N.J. Super. Ct. App. Div. 2003).

three or four times in front of other customers in the shop, who were all white."[90] The court also mentioned that a municipal judge found that the owner "used the [n-word] several times in a loud voice."[91] However, the court dismissed the customer's tort claim of intentional infliction of emotional distress despite her explicit claim that she was humiliated.[92] To explain this result, the court had to downplay the injury of humiliation. It reasoned that because the customer's distress "never manifested itself physically or objectively," and since she "*merely* claimed that she felt humiliated and mortified because of the racial insults,"[93] the distress was not severe enough.

Furthermore, the court insisted that feeling humiliation and mortification is not enough, because, for legal purposes, the injury could not be "merely transitory."[94] This emphasis reflects and perpetuates a common but mistaken legal assumption that emotions are fleeting. In this case, the court also seemed to presume that, unlike humiliation, physical manifestations of distress, such as "headaches" and "loss of sleep," are long-lasting.[95]

The court further demonstrated its mistrust of emotions when it clarified that the customer did not offer enough evidence: she failed to provide proof that she sought or obtained "medical, psychological or other professional treatment."[96] She also failed to otherwise "corroborate her feelings of lost self-esteem or anger."[97] The court concluded that it "cannot infer severe emotional distress simply from proof of racial slurs alone," adding that "without further evidence of resultant illness or serious psychological sequella" the customer's claims "fall far short of sustaining a cause of action for the intentional tort."[98] Beyond the erroneous conception of emotions expressed in this decision, it is not difficult to see how such a heightened burden of proof would fail any victim of humiliation that lacks the resources necessary to obtain expensive professional treatments and expert opinions.

90. *Id.* at 345–46.
91. *Id.* at 346.
92. *Id.* at 346, 349.
93. *Id.* at 349 (emphasis added).
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*

2. Particular Resistance to Emotions in the Market

The place of emotions is even more challenged in legal disputes that occur in the marketplace. For one, some tend to believe in the unlimited power of the market to solve any problem. This conviction has gained particular intensity in the last four decades, which have been increasingly dominated by the neoliberal application of market logic to all domains.[99] Accordingly, when some people are refused service in a humiliating manner, their harm is seen as nonexistent or at least significantly mitigated by the ability to get the service elsewhere. As long as the market offers an alternative, the claim goes, the problem of some rejections does not amount to a legal problem.

Astonishingly, the market alternative argument was made not only in briefs[100] and legal articles,[101] but was also voiced by a Supreme Court Justice. In a pre-recorded virtual keynote broadcasted to participants of the annual Federalist Society Lawyers Convention, Justice Alito recently revisited *Masterpiece Cakeshop*[102]—a case in which a bakery's owner refused to sell a wedding cake to a same-sex couple.[103] He first denied the harm altogether, stating that "[f]or many today religious liberty . . . can't be tolerated, even when there is *no evidence that anybody has been harmed*."[104] Next, he reasoned that even if there was some harm, the market solved the problem. According to Justice Alito, "there was . . . no reason to think [the baker's refusal] would deprive any same-sex couple of a wedding cake," because the market offered an alternative that turned out even cheaper than the original product: "[t]he couple . . . was given a free cake by another bakery."[105]

One of the problems with Justice Alito's description of the incident is that it conflicts with the record of *Masterpiece Cakeshop.* Far

99. WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 9–10 (2017).

100. State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1223 n.14 (Wash. 2019) (citing the Appellant's Brief, which argued that the owner "is more significantly burdened in that she is forced to choose between losing business or violating her religious beliefs, whereas 'Mr. Ingersoll and Mr. Freed are able to obtain custom floral designs for their same-sex wedding from nearby florists'").

101. *See* Volokh, *supra* note 18 (making a libertarian claim that refusing to provide goods and services inflicts no harm).

102. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

103. Josh Blackman, *Video and Transcript of Justice Alito's Keynote Address to the Federalist Society*, REASON (Nov. 12, 2020, 11:18 PM), https://reason.com/volokh/2020/11/12/video-and-transcript-of-justice-alitos-keynote-address-to-the-federalist-society/ [https://perma.cc/V6NA-6RQH].

104. *Id.* (emphasis added).

105. *Id.*

from being pleased or relieved that the market offered them a free cake, the rejected couple invested their resources in submitting a brief that emphasized the non-monetary source of their harm. They opened their brief with the following words:

> Five years ago, David Mullins and Charlie Craig were planning their wedding. When they visited Masterpiece Cakeshop . . . to inquire about a cake for their reception, what should have been a happy occasion became a *humiliating* one.[106]

Notably, the market alternative argument persists and attracts supporters despite many nondiscrimination laws—federal, state, and local—that ban (however imperfectly) humiliating market mistreatments. Those laws never present the alternative question as an exception or a mitigating factor. Yet, those interested in dismissing complaints continue to appeal to the imaginary power of the market to erase or at least conceal harm.

3. Fighting for a Right to Exclude

In recent years, an additional anti-humiliation argument has emerged. With particular energy since the recognition of same-sex marriage and as part of a battle against LGBTQ rights, businesses owned by devout Christians and their conservative legal advisors have attempted to get special, religion-based immunization from nondiscrimination laws that otherwise apply to them. They have argued that even if there is any harm at all in refusing to serve LGBTQ people, it pales in comparison to *their* injury.[107] Their injury, they have argued, comes from having to abide by the demands of equality and serve people to whom they object for religious reasons.[108] Baking and selling a cake that will later be eaten in a celebration of the marriage of two men, they have maintained, is akin to endorsing same-sex marriage against a sincerely held belief that such unity is wrong.[109]

106. Brief for Respondents at 1, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), https://www.scotusblog.com/wp-content/uploads/2017/11/16-111_bs-cc-and-dm.pdf [https://perma.cc/3QTM-EQ6K] (emphasis added).

107. *See* Brief for Petitioners, Masterpiece Cakeshop, Ltd. v. Colo. C. R. Comm'n., 138 S. Ct. 1719 (2018) (No. 16-111), https://www.scotusblog.com/wp-content/uploads/2017/09/16-111-ts.pdf [https://perma.cc/WL4S-JJQQ].

108. *Id.*

109. *Id.* at 19.

I have previously tracked and analyzed the use of the market to lead an evangelical-conservative crusade against LGBTQ people,[110] but here the point is narrower. Claims of victimhood on the side of religious market actors operate to eclipse the pain and suffering that necessarily flow from their antagonistic behavior. A chief way in which conservative advocates, scholars, and judges have spread such victimhood themes is by appealing to the extreme idea of bigotry.[111] Because forbidding market discrimination of LGBTQ people might mark religious objectors as bigots, they have claimed, the law should allow such discrimination even when it is forbidden under existing nondiscrimination laws.

Consider again, for example, Justice Alito's recent address to the Federalist society. There and then, he saw fit to take to the market his 2015 warning in *Obergefell*, when he first asserted that recognizing same-sex marriage will "vilify" those with conflicting religious beliefs, depicting them—in his words—"as bigots."[112] Five years later, Justice Alito expanded his concern to ordinary market activities, such as a bakery's refusal to sell a cake, lamenting: "[f]or many today, religious liberty is not a cherished freedom. It's often just an excuse for bigotry."[113] Voicing similar Christian grievance, conservative scholar and activist Ryan Anderson has also emphasized the risk that religious objectors will be condemned as bigots. For instance, he argued that "[t]he Court should not treat biology as bigotry."[114] He also insisted that even compromising proposals, which do offer some exemptions based on religious beliefs, "brand alternatives to the favored ideology as bigotry while carving out a limited 'right to discriminate' for some 'bigots.'"[115]

Significantly, the argument that businesspeople should be allowed to discriminate when their economic activity conflicts with their sincerely held beliefs is now pending at the Supreme Court. By its mere agreement to hear the case of *303 Creative v. Elenis*, the Court had already sent an alarming signal regarding the value of market

110. Keren, *supra* note 12.

111. For the general argument that this is an extreme idea, see LINDA C. MCCLAIN, WHO'S THE BIGOT?: LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAWS (2020).

112. Obergefell v. Hodges, 576 U.S. 644, 741 (2015).

113. Blackman, *supra* note 103.

114. Ryan T. Anderson, *On the Basis of Identity: Redefining "Sex" in Civil Rights Law and Faulty Accounts of "Discrimination,"* 43 HARV. J.L. & PUB. POL'Y 387, 423 (2020).

115. Ryan T. Anderson & Robert P. George, *The Unfairness of the Misnamed "Fairness for All" Act*, NOTRE DAME J. LEGIS. ONLINE SUPPLEMENT, July 2020, at 2.

participation for all.[116] In many ways, the case is a repetition of the bakery's refusal to deal in *Masterpiece Cakeshop.* Only this time, the business is yet to humiliate and seeks *advance permission* to do so.[117] Rather than cakes, 303 Creative LLC designs websites.[118] It wants to expand itself into the wedding industry while offering its services only to heterosexual couples due to its owner's religious beliefs and freedom of speech.[119] The Court's agreement to hear the case after the Tenth Circuit rejected the business's plea is highly concerning because only a few years ago, in *Masterpiece Cakeshop*, the Court was still determined that the market must remain open for all.[120]

But now, with a conservative super-majority at the Court, the pending hearing of *303 Creative* stands to undo decades of civil rights protections of the market as an egalitarian space. It threatens to allow regression to darker times in which the marketplace was segregated and filled with humiliating signs. Indeed, with permission from some lower courts, such signs have already started to appear. For example, in August 2020, the United States District Court for the Western District of Kentucky preliminarily enjoined Louisville from enforcing its nondiscrimination laws.[121] It also allowed a photography business to state its exclusionary policy publicly.[122] As a result, and with judicial approval, the photography business website now openly declares: "I cannot positively depict anything that . . . devalues marriage between one man and one woman . . . (for example, I don't photograph same-sex weddings . . .)."[123]

The court's reasoning for allowing such a troubling public statement is highly important to the humiliation problem raised by this Article. According to this court, imposing a duty to serve all would be "*demeaning*" to the business owner.[124] Astoundingly, having used this

116. Hila Keren, *The Alarming Legal Strategy Behind a SCOTUS Case That Could Undo Decades of Civil Rights Protections*, SLATE (Mar. 9, 2022, 8:00 AM), https://slate.com/news-and-politics/2022/03/supreme-court-303-creative-coordinated-anti-lgbt-legal-strategy.html [https://perma.cc/QD7H-QCKP].

117. *Id.*

118. Brief for Respondents at 34, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

119. Keren, *supra* note 116.

120. *Id.*

121. Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't, 479 F. Supp. 3d 543, 559–62 (W.D. Ky. 2020).

122. *Id.* at 561.

123. *Weddings*, CHELSEY NELSON PHOTOGRAPHY, https://www.chelseynelson.com/weddings [https://perma.cc/6MAE-JZJL].

124. *Chelsey Nelson Photography*, 479 F. Supp. 3d. at 554 (emphasis added).

strong language, the court did not even consider how demeaning it would be to those who face the discriminatory statement. The court further disregarded the emotional effect of the above declaration on members of the LGBTQ community.

It should be underscored that while the affront is currently directed at LGBTQ market participants, nothing guarantees that it will remain so. Some religious objectors might resume the battle carried out in *Piggie Park* against racial integration.[125] Similarly, because the pending *303 Creative* also relies on freedom of speech, objectors for non-religious reasons may also try to gain the right to discriminate. Unfortunately, in both theory and practice, nothing prevents the expansion of the claims that the market can be segregated based on businesses' beliefs. That is, unless we were to understand better what it means to expose people to such humiliation.

4. Efforts to Make Room for Emotions

Those who have tried to effectively describe what is at stake when discrimination takes place in the market have made efforts to counter some of the above arguments. In direct reply to the claim that market alternatives erase the impact of refusals to serve, opponents insisted, literally and metaphorically, "*It's Not About the Cake*."[126] Indeed, as the dissent in *Cummings* underscored while criticizing the elimination of emotional distress damages, it was never about the mere access to goods or services such as "hamburgers and movies."[127] Instead, Justice Breyer repeated and highlighted in 2022 what the Supreme Court already wrote in 1964 in the context of racial discrimination: that rejections and exclusions in the commercial sphere are mostly about "the *humiliation*, frustration, and embarrassment that a person must surely *feel* when he is unacceptable as a member of the public."[128]

These words are valuable in narrowing the broad reference to emotions—such as in the case of using the term "emotional distress" or "emotional suffering"—to three concrete emotions: humiliation, frustration, and embarrassment. This is an important step toward

125. Newman v. Piggie Park Enters., Inc., 390 U.S. 400 (1968).

126. Jennifer C. Pizer, *It's Not About the Cake: Against "Altaring" the Public Marketplace*, *in* RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 385 (William N. Eskridge Jr. & Robin Fretwell Wilson eds., 2018).

127. Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1579–80 (2022) (Breyer, J., dissenting) (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 292 (1964)).

128. *Id.* (emphasis added).

making the claim of injury concrete and hopefully more credible. However, the bundling of those three emotions together seems less helpful. It reflects a lingering level of generalization that can interrupt the effort to call attention to the substantial and troubling harm at issue. While humiliation is closely related to the patterns of market mistreatments of the type discussed in this Article,[129] frustration and embarrassment are not. Without delving too deeply into emotions less relevant here, people get frustrated or embarrassed quite easily for countless reasons that do not include the misbehavior of others or attacks on features central to their personality.

Consider embarrassment first. People can embarrass themselves, for example, by wearing the wrong clothes to an event. No one else harmed them in such a case, and the effect is fairly limited. In her new book *Atlas of the Heart*, sociologist Brené Brown analyzes and criticizes the common inclination to refer to emotions in a general and imprecise way and argues for the necessity of developing an informed and nuanced emotional vocabulary.[130] In one of the book's chapters, she particularly discusses humiliation and embarrassment, sharing findings from her studies that show a tendency to use the two terms "interchangeably."[131] That is unfortunate, Brown argues, because these emotions are linked to experiences that are "very different in terms of biology, biography, behavior, backstory, and self-talk," and they lead to "radically different outcomes."[132] Brown then contrasts the emotions as follows.

> *Humiliation*—I've been belittled and put down by someone. This left me feeling unworthy of connection and disgusted with myself. This was unfair and I didn't deserve this. . . .
>
> *Embarrassment*—I did something that made me uncomfortable, but I know I'm not alone. Everyone does these kinds of things. Embarrassment is *fleeting, sometimes funny*.[133]

Humiliation will be discussed in more detail next. For now, however, Brown's work suggests why associating it with embarrassment

129. *See infra* Part III.

130. BRENÉ BROWN, ATLAS OF THE HEART: MAPPING MEANINGFUL CONNECTION AND THE LANGUAGE OF HUMAN EXPERIENCE xxiv–xxv (2021).

131. *Id.* at 134. According to Brown's findings, people conflate humiliation, guilt, shame, and embarrassment.

132. *Id*.

133. *Id.* at 135 (emphasis added).

is not only inaccurate but also leads to undervaluation of the harm entailed in the market incidents discussed here.[134] There is nothing fleeting, let alone funny, about these incidents. Therefore, supporters of those mistreated in the market, including lawyers who draft pleadings and briefs and sympathetic judges, should focus on humiliation and explain it in full instead of citing older decisions that list it with embarrassment.

Next, consider frustration. Here, the problem with the linkage is somewhat different. Humiliation and frustration—especially deep and intense frustration that itself overlaps with anger—may coincide. Indeed, exposure to humiliation can be highly frustrating. However, frustration is simultaneously broader and narrower than humiliation, covering both experiences that have nothing to do with humiliation and failing to cover the acts that bring humiliation about. Frustration is also often less intense and more normal than feelings of humiliation.[135]

Frustration literature defines it as the negative feeling of "irritable distress" that follows disappointment (the Latin *frustrā* means "in vain").[136] Such disappointment has to do with a conflict between reality and desired outcomes.[137] Yet, the conflict can result from countless obstacles, including nature (e.g., weather interruption), oneself (e.g., incompetence), or even luck (e.g., missing a train).[138] So, unlike humiliation, the source of the negative feeling is not necessarily an ill-intending or uncaring fellow human.

Further, frustration is an inevitable and recurring feeling in *every* human life, particularly in early childhood and adolescence.[139] It is not limited to certain populations or types of people. For all those reasons, and especially for the ordinariness of most frustrations, linking humiliation and frustration seems unproductive, perhaps distracting, from the core of the problem. Therefore, like in the case of embarrassment, if emotions are the focal point, it is probably wiser to concentrate on humiliation alone.

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134. *See id.*

135. *See* Bertus F. Jeronimus & Odilia M. Laceulle, *Frustration*, *in* ENCYC. PERSONALITY AND INDIVIDUAL DIFFERENCES 1, 2 (Virgil Zeigler-Hill & Todd K. Shackelford eds., 2017).

136. *Id.* at 1.

137. *See* BROWN, *supra* note 130, at 54.

138. Sara Pasetto, *The Husserlian Will to Power: 'I Can Do Whatever I Want,'* 45 HUM. STUDIES 93, 96 (2022).

139. Jeronimus & Laceulle, *supra* note 135, at 2.

Among legal scholars, Bruce Ackerman's work is a rare example of such focus on humiliation. Ackerman has defined "the anti-humiliation principle,"[140] attributing its birth to the historic decision in *Brown v. Board of Education*,[141] which required states and the federal government to eliminate institutionalized humiliation.[142] With particular relevance to the discussion of *market* discrimination, Ackerman argues that *Brown* resulted in subjecting private market actors to "sweeping egalitarian obligations" because "humiliation was no less humiliating and no less public when it involved . . . rejection of black people at a privately owned lunch counter or workplace."[143] Most relevant to this Article, Ackerman argues that despite its race-based roots, the anti-humiliation principle should be applied broadly.[144]

Perhaps in an effort to avoid the complexities produced by the misunderstanding and undervaluation of emotions, other scholars have suggested alternative terminologies that closely relate to humiliation, such as "stigmatic injury" or "dignitary harm." For instance, legal scholar Elizabeth Sepper analyzed public accommodations laws as "part of the line of modern dignity torts."[145] Responding to an article that depicted "the demise of the dignitary common law torts,"[146] Sepper has argued that "[p]ublic accommodations statutes continue to give legal force to dignity, even as common law torts have receded."[147]

Sepper's general call aligns with this Article's argument. She proposes that when people refuse to recognize the harm inherent in market discrimination, it is critical "for scholars of public and private law to self-consciously identify and explore the interests in dignity that public accommodations laws safeguard."[148] Sepper further cautions: "Unless courts and commentators articulate clearly and concretely what dignity means, the Supreme Court may cut back public accommodations protections as it has other dignity torts."[149] This is an invaluable message, and jurists must indeed make an effort to understand

140. BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 128 (2014).
141. Brown v. Board of Educ., 347 U.S. 483 (1954); ACKERMAN, *supra* note 140, at 128.
142. ACKERMAN, *supra* note 140, at 324–25 (discussing *Brown*'s anti-humiliation principle).
143. *Id.* at 325.
144. *Id.* at 324.
145. Elizabeth Sepper, *A Missing Piece of the Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. ONLINE 70, 73 (2019).
146. *Id.* at 71 (responding to Kenneth S. Abraham & Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317, 379–80 (2019)).
147. *Id.*
148. *Id.*
149. *Id.* at 86.

better the meaning of demeaning market incidents. Although Sepper specifically recommends fulfilling the task through the lens of dignity rather than humiliation,[150] the next part responds to her appeal in the tradition of law and emotions scholarship. It insists that appreciating the problem and compellingly describing it requires illumination of humiliation's nature, structure, and consequences.

II. ILLUMINATING HUMILIATION

What unites the cases of Ms. Krueger, Ms. Lester, Ms. Reynolds, Mr. Foster, Ms. Stephens, Ms. Kozera, and the Mudds is their adverse market experience. For them, people like them, members of their communities, and other marginalized groups, the marketplace can be a source of agony. This happens in a concrete manner that this part seeks to illuminate and explain by turning to non-legal literature. The end goal of that excursion is to make it harder to legally ignore incidents currently marked insignificant despite the deep scars they leave.

As the coming sections will detail, humiliation studies offer a context against which legal actors should re-read episodes such as the cursing of Ms. Lester or the body-shaming directed at Ms. Reynolds. These studies teach us that humiliation is not merely an emotion but a known social dynamic by which some people attempt to mark others as inferior human beings. This dynamic has known patterns that are definable and verifiable and hence cannot be easily dismissed. Those patterns dispel the myth that the injuries discussed here are subjective.

Further, the humiliation scholarship explains the fallacy of treating the incidents discussed in this Article as isolated episodes. It reveals the impact such incidents have on numerous people, even if they have not experienced them first-hand, by a recognized mechanism called "collective humiliation." Last and crucially, studies show that the consequences of humiliating behaviors are particularly intense and have a long-lasting impact on people's health and well-being. These consequences go far beyond what is suggested by the amorphous legal discourse of "humiliation, frustration, and embarrassment" or the

150. *Id.* at 84 ("Humiliation, by contrast, seems not quite to capture why public accommodations laws treat this act as an offense to dignity."). *But see* Katherine Franke, *"Dignity" Could Be Dangerous at the Supreme Court*, SLATE (June 25, 2015, 4:16 PM), https://slate.com/human-interest/2015/06/in-the-scotus-same-sex-marriage-case-a-dignity-rationale-could-be-dangerous.html [https://perma.cc/36J8-UFM9] (cautioning in the context of LGBTQ rights that a focus on dignity may make the rights depend on a dignified performance at the expense of accepting human diversity).

parsimonious approach to emotional damages. All in all, expanding the investigation beyond legal debates puts in perspective the legal failure to respond adequately to what happens in the market to those who, for one reason or another, are perceived as different from the ideal or even ordinary market actors.

A. Humiliation as a Social Process

Despite conventional legal presumptions, emotions are not distractions from rationality. They are also not emerging erratically or produced merely by internal subjective forces. Instead, what explains their existence and survival through processes of evolution is that they each have a crucial and logical role in our lives. Humiliation is no exception. The feeling of humiliation serves as an alarm mechanism, cautioning people if and when their selfhood is assaulted in a manner that risks their value as humans.[151] To survive, individuals must *feel* like full members of human society. Accordingly, claims that they are inferior to standard humans or occupy a lower status than their fellow members of society threaten their core.

The adjectives "inferior" and "lower" used in this account are particularly significant because the word humiliation itself originates in the Latin word *humus*, which means ground.[152] Thus, "to be humiliated is to be put down,"[153] and acts of humiliation involve bringing people to the ground,[154] causing a feeling of humiliation. What this description adds is a salient recognition that the word humiliation captures more than an emotion. Unlike the other emotions that jurists routinely list with humiliation—embarrassment and frustration—humiliation self-defines its origins. It tells a fuller story of a *process* that starts with specific acts that necessarily and predictably lead to a deep feeling. Both the understanding of humiliation as a *process* and familiarity with its components are essential to any legal discussion of discriminating behaviors and their impact.

As a preliminary note, it is important to acknowledge that the humiliation process is *relational* and *social*; it cannot occur between one

151. Hartling & Luchetta, *supra* note 20, at 263, 270.

152. *Humus*, LATIN DICTIONARY (Dec. 3, 2021), http://latindictionary.wikidot.com/noun:humus [https://perma.cc/Q4P8-JXN8].

153. Donald C. Klein, *The Humiliation Dynamic: An Overview*, 12 J. PRIMARY PREVENTION, 93, 97 (1991).

154. Evelin Gerda Lindner, The Theory of Humiliation: A Summary 8 (Dec 2003) (unpublished manuscript), https://www.humiliationstudies.org/documents/evelin/HumiliationTheorySummary.pdf [https://perma.cc/ECW9-RZBA].

and oneself. As such, humiliation raises the issue of human interactions and people's duties to each other, rendering it a subject relevant to the law. Evelin Lindner, transdisciplinary humiliation scholar and the founding president of the global research group of Human Dignity and Humiliation Studies, has made this point explicitly. Discussing the social process of humiliation, she has argued that "the elements that constitute humiliation should be recognized as fundamental mechanisms in the formation of modern society."[155]

Indeed, while many confuse humiliation with shame,[156] probably because both entail feelings of unworthiness, it is the "harm done by others" that separates them and defines humiliation.[157] Like the lighter emotion of embarrassment discussed earlier, shame springs internally from a belief in lack of worth, but it takes other people to humiliate us and thus make us feel humiliated.[158] Leading efforts to define humiliation highlight the necessary involvement of others. For example, Donald Klein, a psychiatrist considered "a pioneer in the study of humiliation,"[159] defined humiliation as "the experience of some form of ridicule, scorn, contempt, or other degrading treatment *at the hands of others.*"[160] Surely, some humiliations are inflicted via objects, such as in the case of the photography business's website that repeatedly humiliates same-sex couples who browse the web. However, even in these cases, a social process is at play in which some people have used technology (and law) to persuade the world that these couples are less worthy than others.

Scholars in various disciplines have recognized the uniqueness of the humiliation phenomenon and made efforts to study its patterns. They theorized that "acts of humiliation, at whatever level or in whatever circumstances they occur, consistently contain the same elements

155. Evelin G. Lindner, *Humiliation and Human Rights: Mapping a Minefield*, 2 HUM. RTS. REV. 46, 46 (2001).

156. Yashpal Jogdand et al., *The Context, Content, and Claims of Humiliation in Response to Collective Victimhood*, *in* THE SOCIAL PSYCHOLOGY OF COLLECTIVE VICTIMHOOD 82 (Johanna Ray Vollhardt ed., 2020) (describing "widespread agreement about humiliation being a particularly intense and painful emotion" and citing previous literature).

157. Clark McCauley, *Toward a Psychology of Humiliation in Asymmetric Conflict*, 72 AM. PSYCH. 255, 257 (2017).

158. Hartling & Luchetta, *supra* note 20, at 262; BROWN, *supra* note 130, at 135.

159. Linda M. Hartling et al., *Humiliation: A Nuclear Bomb of Emotions?*, 46 PSICOLOGÍA POLÍTICA 55, 62 (2013) ("The Humiliation Dynamic is a powerful factor in human affairs that has, for a variety of reasons, been overlooked by students of individual and collective behavior.").

160. Klein, *supra* note 153, at 94 (emphasis added).

and have similar consequences."[161] This body of work defines humiliating behavior as a specific act of aggression, one that features "unjustified mistreatment that violates one's dignity and diminishes one's sense of worth as a human being."[162] The resulting experience of humiliation is accordingly defined as "the experience of being devalued, put down, or disparaged for who one is, rather than what one does."[163] Combined, the studies reveal the known "Humiliation Dynamic"—a phrase coined by Donald Klein and frequently used in the humiliation literature.[164]

In the last three decades, Klein and other humiliation researchers have explained how only some behaviors and certain circumstances can produce humiliation and why some humiliating acts are worse than others. Therefore, their body of work offers a salient account that is much more nuanced than the valuable but crude legal insight that discrimination causes humiliation. The advantage of delving into this non-legal knowledge now is that it can help legal actors recognize, articulate, and defend the value of full and dignified market participation.

B. The Profile of Humiliating Acts

The discussion below introduces six core characteristics that emerge from a transdisciplinary review of the rich literature that explores the behavioral part of the humiliation process (as opposed to humiliation as an emotion). Together, these six characteristics constitute a *profile* of the humiliation act. By creating and presenting this profile to a legal audience, this Article offers an indispensable tool for deciding legal disputes between those who claim they were humiliated and those who deny such a claim.

1. Exclusion

Many studies emphasize that "to be humiliated is to be excluded"[165] and highlight the rejection symbolized by exclusion as an element of humiliation.[166] This is precisely the spirit of the *market*

161. Phil Leask, *Losing Trust in the World: Humiliation and Its Consequences*, 19 PSYCHODYNAMIC PRAC. 129, 129 (2013).
162. Hartling et al., *supra* note 159, at 62.
163. *Id.*
164. Hartling & Luchetta, *supra* note 20, at 261.
165. Klein, *supra* note 153, at 97.
166. Leask, *supra* note 161, at 131.

incidents discussed herein. Recall, for example, how Amy and Stephanie Mudd could not file their taxes like anyone else because a sign posted on the storefront announced that, as a same-sex couple, they would not be served.[167] Further recall Valerie Kozera, who was denied an apartment for herself and her son.[168] Many other market insults are based on this type of *direct* exclusion. They feature businesses open to all only in theory but not in practice. In reality, while most people can easily transact with these businesses, others find themselves prevented from shopping, dining, renting, and so on.

Another common pattern of exclusion is *indirect.* Many marketplace assaults reject undesirable parties not by explicitly refusing to deal with them but by treating them so badly that they are effectively deterred from participating in the market experience. In their book *Consumer Equality: Race and the American Marketplace*, the authors explain that such excluding mistreatments follow two opposite modes: ignoring undervalued consumers or paying them excessive attention, following them around, and repeatedly addressing them.[169] Either way, patterns of too little or too much attention exclude because they signal to people that they do not belong to the usual, normal, and welcome crowd served by the business.

In response, some people are so hurt that they decide to exit the store without completing the deal they were contemplating. One of the authors of *Consumer Equality*, Professor Geraldine Henderson, has made the link to exclusion explicit. She shared how, as a result of repeated maltreatment at a Blockbuster store, she "no longer felt safe or welcome there," so she "turned around and left, never to return."[170] You may recall from Part I that in the eyes of the law such a decision to leave increases the chances of a legal loss. However, the humiliation works discussed here mark this legal result as unjustified. They explain how ignoring or deterring people from transacting by harassing them away is a humiliating act because it expresses exclusion and rejection.[171] This form of exclusion is akin to the direct refusals to make contracts that the law does recognize. At least one court agreed.[172] As it discussed race-based humiliation, it stated, "where minority

167. Yurcaba, *supra* note 9.
168. Granger v. Auto-Owners Ins., 40 N.E.3d 1110, 1112 (Ohio 2015).
169. HENDERSON ET AL., *supra* note 75, at 31–32.
170. *Id.* at xviii.
171. *See, e.g.*, Leask, *supra* note 161, at 131.
172. *See* Turner v. Wong, 832 A.2d 340, 356 (N.J. Super. Ct. App. Div. 2003).

customers are so deterred from entering a commercial establishment because of racial animosity, they are effectively being denied the full benefits and enjoyment of a place of public accommodation."[173]

Moreover, even if ill-treatments do not prevent the immediate transaction from materializing, they still typically create an excluding effect. Insults in the commercial setting often cause barriers to engaging in *future* exchanges based on the painful experience. The now-common term "Shopping While Black," which even has its own Wikipedia entry,[174] captures the anxiety and behavioral changes imposed on Black consumers due to past painful experiences, either of themselves or others. When people learn, for example, to avoid some notorious stores, they are effectively excluded from sections of the marketplace. To illustrate, an empirical study interviewing fifty-five Black consumers regarding the impact of retail aggressions has found that "many respondents just . . . avoided stores if they felt that their presence was prohibited or unwanted."[175]

Whether direct or indirect methods are in operation, their excluding and humiliating effect is enhanced because they happened in the marketplace. Exclusion is only possible when most similar others belong. Buying a lottery ticket and not winning, for example, is not a humiliating experience because most buyers lose. In contrast, market participation in our day and age is an absolute necessity and thus an activity shared by all humans. Further, and with special intensity in Western societies, many market engagements—such as shopping, dining, and traveling—are also sources of pleasure and significant social interactions. Accordingly, since most people function in the market with comfort and ease, limiting the ability of others to do the same is an act of exclusion. This act humiliates the excluded because it bluntly signals they do not truly belong and are less worthy than most others. Worse, because the market is essential not only for economic reasons but also affects people's social worth, the excluding message produced by it is further amplified.

2. Power Dynamics

The Humiliation Dynamic mentioned earlier emphasizes that humiliation entails an interaction between opposing parties who play

173. *Id.* at 359.

174. *Shopping While Black*, WIKIPEDIA (Oct. 6, 2022), https://en.wikipedia.org/wiki/Shopping_while_black#cite_note-journals.sagepub.com-16 [https://perma.cc/G27W-QYTR].

175. Pittman, *supra* note 14, at 11.

distinct roles: the excluding party, which the literature calls the "perpetrator," or the "humiliator," and the excluded party, referred to as the "victim."[176] Following this theoretical framing, a group of socio-psychologists has designed a set of empirical studies to offer more insight into the core features of humiliation and "empirically distinguish humiliation from similar experiences."[177] The group's studies specifically confirm that the roles of perpetrator and victim are central to the process.[178] Significantly, they also describe the typical presence of power gaps and "a demonstrative exercise of power" by perpetrators against their victims.[179]

Historically, and in terms of evolution, using power to humiliate others marked the humiliators as socially superior to their victims.[180] And, even today, humiliators typically utilize what status or control advantage they have over their victims.[181] This power exercise is what creates the downward trajectory of humiliation: it allows the more powerful party to put down the powerless. As the mother of one of the gay men rejected by the bakery in *Masterpiece Cakeshop* said: "It was never about the cake. It was about my son being treated like a *lesser* person."[182]

The power advantage of marketplace humiliators is evident in all the incidents discussed so far, at times demonstrating the use of a permanent status advantage and at other times illustrating a more situational power advantage. For instance, employers enjoy a status advantage over employees by controlling the quality of their daily life and their access to income. Such advantages were used, for example, against Dr. Khalaf and Ms. Reynolds.[183] Similarly, conventional gender roles give a power advantage to men, a gap that was used, for

176. Klein, *supra* note 153, at 101, 118.

177. Maartje Elshout, et al., *Conceptualising Humiliation*, 31 COGNITION & EMOTION 1581, 1581 (2017).

178. *Id.* at 1585.

179. Leask, *supra* note 161, at 131.

180. Paul Gilbert, *Distinguishing Shame, Humiliation, and Guilt: An Evolutionary Functional Analysis and Compassion Focused Interventions*, *in* THE BRIGHT SIDE OF SHAME: TRANSFORMING AND GROWING THROUGH PRACTICAL APPLICATIONS IN CULTURAL CONTEXTS 413, 413–20 (Claude-Hélène Mayer & Elisabeth Vanderheiden eds., 2019).

181. *See, e.g.*, Saulo Fernández et al., *Understanding the Role of the Perpetrator in Triggering Humiliation: The Effects of Hostility and Status*, 76 J. EXPERIMENTAL SOC. PSYCH. 1, 1 (2018).

182. Deborah Munn, *It Was Never About the Cake*, HUFFPOST (Feb. 2, 2016) (emphasis added), https://www.huffpost.com/entry/it-was-never-about-the-ca_b_4414472 [http://perma.cc/PG2T-CCAA].

183. *See* Khalaf v. Ford Motor Co., 973 F.3d 469, 474 (6th Cir. 2020); Reynolds v. Robert Hasbany MD PLLC, 917 N.W.2d 715, 717 (Mich. Ct. App. 2018).)

instance, against Ms. Krueger.[184] Power gaps may be more situational, for example, in cases of salespeople mistreating customers in the retail setting or when Uber drivers abandon riders like Mr. Foster.[185] In those scenarios, humiliators draw on a temporary power advantage arising from their control of the space and the situation. In the context of racial profiling, for example, store workers hold and often use the power to call the police to further enhance their power advantage and the effect of their actions.[186]

Particularly relevant to the current discussion, and especially to cases such as Shanta Lester's McDonald's experience, is the observation of humiliation scholars that "power is inherent in the ability to assign names and derogatory labels to others."[187] Furthermore, the salient play of power gaps in humiliating incidents was also confirmed by empirical studies focusing on the weaker party. These studies showed victims were viewed as "small, weak, alone, uncomfortable, powerless, and inferior."[188]

3. Defeated Expectations

Humiliation is often an experience that "transgresses established expectations of treatment."[189] People who choose to participate in political demonstrations may expect some heated moments from opponents. Conversely, no one expects what happened to Ms. Lester while purchasing fries at McDonald's or what Ms. Krueger had to suffer on a regular day in which she provided professional services.[190]

Further, like with the previous factor, here, too, the market setting operates to intensify the humiliating effect. Because the market is supposedly purely transactional, it sets an expectation for objective exchanges controlled by economic and professional considerations. In this view, as long as people have the money to pay for what they need or want, there is an expectation that who they are would not matter to the providing business. Likewise, as long as people do their work well,

184. Krueger v. Zeman Constr. Co., 781 N.W.2d 858, 866 (Minn. 2010) (Anderson, J., dissenting).

185. Finney & Koury, *supra* note 5.

186. MICHELLE R. DUNLAP, RETAIL RACISM: SHOPPING WHILE BLACK AND BROWN IN AMERICA 97 (2021).

187. Klein, *supra* note 153, at 105; Lester v. BING the Best, Inc., No. 09-81525-CIV, 2010 WL 4942835, at *1 (S.D. Fla. Nov. 30, 2010).

188. Elshout et al., *supra* note 177, at 1585.

189. Jogdand et al., *supra* note 156, at 82.

190. *Lester*, 2010 WL 4942835, at *1; Krueger v. Zeman Constr. Co., 781 N.W.2d 858, 866 (Minn. 2010) (Anderson, J., dissenting).

there is an expectation that features like their weight or country of origin will not become an issue. So, when humiliators strike for non-economic reasons, the unpredictability enhances their aggression and adds to their power advantage.

Significantly, the fact that humiliating acts defeat expectations does not necessarily require a complete surprise or unforeseeability. Surely, being caught unprepared can enhance the experience. Such was probably the case when the Uber driver turned away after noticing Joshua Foster's wheelchair.[191] Similarly, a woman who called a wedding venue to reserve a date for her wedding described a sense of shock when the venue refused despite its availability: "I was kind of speechless . . . I just had to like hand the phone over to [my partner]."[192] Yet, even those that had already been exposed to market humiliations or are more likely to experience them—such as Black shoppers too often suspected of shoplifting—are likewise vulnerable to this feature of humiliation. The arbitrariness of humiliating incidents imposes uncertainty and prevents repeat and likely victims from predicting when and how they will be attacked.[193] As the literature summarizes this point: "Humiliation almost always happens unexpectedly, even if the victim has been living in fear of it."[194]

Moreover, defeated expectations and unpredictability not only intensify present experiences; they also influence the future. They interrupt the sense that one understands how the world (here, the market) works, thereby undermining confidence and inducing fear that additional arbitrary rejections are around the corner.[195] For example, one scholar emphasized the pain experienced by LGBTQ parties when "the possibility of refusal lurks behind every store counter."[196]

4. Hostility

Humiliating acts also project negative intentions and hostility that victims easily perceive.[197] Experimental studies have confirmed that a

191. Finney & Koury, *supra* note 5.

192. Jeff Taylor, *N. Carolina Wedding Venue Denies Lesbian Couple, Citing 'Christian Values,'* NBC NEWS (Dec. 22, 2020, 12:54 PM), https://www.nbcnews.com/feature/nbc-out/n-carolina-wedding-venue-denies-lesbian-couple-citing-christian-values-n1252109 [https://perma.cc/8BC5-XKCW].

193. Leask, *supra* note 161, at 134.

194. *Id.* at 133.

195. *Id.* at 132.

196. Pizer, *supra* note 126, at 390.

197. Jesse D. Markman et al., *Medical Student Mistreatment: Understanding 'Public Humiliation,'* 24 MED. EDU. ONLINE 1, 3–5 (2019).

hostile perpetrator is key to eliciting the emotional experience of humiliation.[198] The incidents opening this Article demonstrate this fundamental feature of humiliation. Suffice it to recall how Ms. Reynolds was called fat and forced to weigh herself, how the Mudds faced an offensive sign, or how people cursed Ms. Lester and Ms. Krueger.[199] Indeed, because emotions reflect appraisals of reality,[200] such explicit antagonism toward the victims is what would later explain the intensity of their resulting feelings.[201]

Evidence of hostility and intentionality is often offered by plaintiffs litigating market discrimination. For example, in one famous case involving the Dillard's department store, *Gregory v. Dillard's Inc.*,[202] seventeen Black shoppers brought compelling evidence of deliberate antagonism.[203] They described a "very hostile" shopping atmosphere that "offended and humiliated" them, adding plenty of horrific details.[204] Shoppers shared stories of unrelenting trailing, including the police awaiting those who simply tried items in the fitting room.[205] Dillard's employees confirmed shoppers' understanding that they were being deliberately harassed.[206] One employee stated:

> [T]he security code '44' was customarily announced over the store's intercom system whenever an African American entered the store. . . . [T]he code was announced 'ninety percent more' for black shoppers than for white shoppers. . . . [T]he store manager and his assistants routinely subjected black customers to intense scrutiny and surveillance while allowing white patrons to browse the store undisturbed.[207]

Nevertheless, in court, this explicit and organized hostility concerned only the dissent.[208] It did not prevent the majority in *Gregory*

198. Fernández et al., *supra* note 181.

199. Reynolds v. Robert Hasbany MD PLLC, 917 N.W.2d 715, 717 (Mich. Ct. App. 2018); Yurcaba, *supra* note 9; Lester v. BING the Best, Inc., No. 09-81525-CIV, 2010 WL 4942835, at *1 (S.D. Fla. Nov. 30, 2010); Krueger v. Zeman Constr. Co., 781 N.W.2d 858, 866 (Minn. 2010) (Anderson, J., dissenting).

200. *See* Hila Keren, *Valuing Emotions*, 53 WAKE FOREST L. REV. 829, 855 (2018) (explaining and illustrating what are appraisal theories of emotions).

201. *See* Markman et al., *supra* note 197, at 1, 3.

202. 565 F.3d 464 (8th Cir. 2009).

203. *Id.*

204. *Id.* at 481 (Murphy, J., dissenting).

205. *Id.* at 474 (majority opinion).

206. *Id.* at 483 (Murphy, J., dissenting).

207. *Id.* at 482–83.

208. *Id.* at 478, 482–83.

from dismissing the victims' claims,[209] and the Supreme Court refused to hear the case, leaving its result in place.[210] The legal reasons for such an unjustified outcome were discussed in Part I. Here, the focus is on the thick factual description presented by the dissent, which painfully illustrates how deliberate hostility is part of the DNA of humiliating behaviors.

An even higher level of organized antagonism is demonstrated by the new strategy used by religious business owners against LGBTQ clients. Here, the effort is carefully planned by a leading conservative advocacy group, the Alliance Defending Freedom (ADF). As explained in Part I, the ADF has taken to courts around the country cases seeking *advance* permission to discriminate, and those cases have already yielded judicially authorized "signs" announcing that same-sex couples will not be served. This strategy is now pending at the Supreme Court after it agreed to hear *303 Creative v. Elenis*.[211] What is crucial to the understanding of humiliation's structure is the degree of intentionality demonstrated by the facts of this case.

Recall that the business in *303 Creative* did not even offer wedding services prior to seeking legal permission to discriminate against same-sex couples.[212] Instead, it initiated a business activity not carried out before for the purpose of fighting against LGBTQ people.[213] Therefore, the case introduces a peak level of deliberate attack, one that cynically and manipulatively uses the market for political purposes.

Humiliation scholar Ute Frevert recently emphasized the importance of this last point when she wrote that "[h]umiliation is more than an individual and subjective feeling. It is an instrument of

209. *Id.* at 477 (majority opinion).

210. Gregory v. Dillard's, Inc., 558 U.S. 1025 (2009).

211. 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022).

212. *Id.*

213. This is not the first time that the ADF has used this strategy. In another case the business declared an intention to enter the wedding industry for litigating the issue, and, after winning a motion for early dismissal at the Eighth Circuit, removed its case without pursuing its stated intention. *See* Telescope Media Grp. v. Lucero, 936 F.3d 740, 767 (8th Cir. 2019), *motion to dismiss granted*, No. CV 16-4094 (JRT/LIB), 2021 WL 2525412 (D. Minn. Apr. 21, 2021) ("TMG does not currently make wedding videos, but [its owners] want to *expand* TMG to include this service." (emphasis added)); *see also Telescope Media Grp.*, No. CV 16-4094 (JRT/LIB), 2021 WL 2525412, at *1 (stating that the business moved to dismiss the case as it no longer was interested in filming weddings); *id.* at *3 (stating that the case "has likely been a smoke and mirrors case or controversy from the beginning, likely conjured up by Plaintiffs to establish binding First Amendment precedent rather than to allow them to craft wedding videos, of which they have made exactly two").

political power, wielded with intent."[214] Other humiliation scholars studying the role of humiliation in various social conflicts have also explained and demonstrated the instrumental use of humiliation as a strong political weapon, with some calling it a "nuclear bomb," targeting those considered enemies.[215] These insights should illuminate how the market incidents described here are much more than isolated episodes of unfortunate rudeness. Instead, if allowed to continue and increase, they threaten to turn the marketplace into a battleground, used not for economic exchanges but to express condemnation against certain groups.

5. Targeting Identities

Related to hostility, humiliating acts are characterized by aiming at central aspects of people's identities.[216] As was just demonstrated by Dillard's harassment of Black shoppers and the ADF's battle against LGBTQ customers, the victims' core identities—their race and sexual orientation, respectively—motivated the attacks.[217] Indeed, all the market incidents discussed in this Article involve a core identity of the victims. Further, in some of the incidents, several identities are at play, raising issues of intersectionality (recall again the profanity of "black bitch").[218] As these incidents show, humiliators target women, people of color, people with disabilities, LGBTQ individuals, persons with foreign accents, fat people, and more. For example, gender was the identity attacked in the case of Pamela Krueger when her supervisors installed exposed male urinals and suggested putting in "a urinal painted pink" for her.[219] As Frevert observes, modern humiliation is about "degrading others for what they are: too smart or too dumb, too fat or too skinny, too white or too black, too feminine or too masculine. Religious and ethnic backgrounds, as well as sexual orientations, have

214. Ute Frevert, *The History of Humiliation Points to the Future of Human Dignity*, PSYCHE (Jan. 20, 2021), https://psyche.co/ideas/the-history-of-humiliation-points-to-the-future-of-human-dignity [https://perma.cc/7H9X-PXPY].

215. Hartling et al., *supra* note 159, at 64–65.

216. LIESBETH MANN, ON FEELING HUMILIATED: THE EXPERIENCE OF HUMILIATION IN INTERPERSONAL, INTRAGROUP, AND INTERGROUP CONTEXTS 20 n.2 (2017) ("[I]t is quite often the case that group-based emotions are shared and thus become collective emotions . . . .").

217. Gregory v. Dillard's, Inc., 565 F.3d 464 (8th Cir. 2009).

218. Lester v. BING the Best, Inc., No. 09-81525-CIV, 2010 WL 4942835, at *1 (S.D. Fla. Nov. 30, 2010).

219. Krueger v. Zeman Constr. Co., 781 N.W.2d 858, 866 (Minn. 2010) (Anderson, J., dissenting).

served as popular targets of humiliation."[220] The focus on identities also importantly separates humiliation from shame: the former emerges when one is disparaged "for what one *is* rather than what one *does*."[221]

The factor of targeting core identities has specific legal importance. First, in light of the limits of nondiscrimination law discussed in Part I, it should render debates regarding whether certain groups are legally protected irrelevant. It should similarly justify protecting those who belong to unrecognized groups, such as people targeted for their weight or height.

Second, recognizing that victims' identities are under attack can help establish the credibility of their claim for emotional injury in the face of a suspicious legal system. As studies show, an intense sense of humiliation is particularly anticipated when "one's *identity* has been demeaned or devalued."[222] This is so because the humiliators not only treated the victim negatively, but they also specifically directed the attack at the victim's personhood. This feature makes a serious injury much more probable due to the threat to "one's sense of having value in the eyes of others."[223]

Third, the focus on identity refutes defensive arguments by businesses that they do not discriminate based on identity because they *sometimes* (albeit not always) serve people with the attacked identities. It explains that the humiliation dynamic may still be in place even if the business sometimes serves members of the victim's group whenever the targeted identity is less salient. For example, in one case, an Indian-born customer had bought pastries at a bakery for many years until one day, the same (white) lady who had served him for twenty years suddenly refused to sell him a cake.[224] That day was right after 9/11, when new levels of xenophobia surfaced, making the customer's perceived national identity significant.[225]

Similarly, in one of the anti-LGBTQ cases litigated by the ADF, a florist willingly sold flowers to her clients but refused to do so for their wedding because they were both males.[226] In both examples, past

220. Frevert, *supra* note 214.
221. Klein, *supra* note 153, at 117.
222. Hartling & Luchetta, *supra* note 20, at 264 (emphasis added).
223. Klein, *supra* note 153, at 100.
224. DUNLAP, *supra* note 186, at 98–104.
225. *Id.* at 101–04 (Graham's story).
226. State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1211–12 (Wash. 2019).

willingness to transact when identity did not matter much should not undermine the humiliating meaning of the later refusals when identity became an issue. Lastly, the centrality of identity to the humiliation process also starts to explain why injuries are never limited to those individually assaulted but instead spread to those who share the same identity.[227]

6. Audience

Witnesses are a common and recognized part of humiliation's profile, and their mere presence typically amplifies the impact of humiliating acts.[228] Klein's illumination of the humiliation dynamic describes the prototypic humiliating experience as a "triangle," which includes humiliators, victims, and witnesses,[229] and "most researchers agree that public exposure intensifies feelings of humiliation."[230] It is worth noticing how this humiliation trait links several of the previous factors: humiliators' adverse intention is often driven more by the wish to mark their victims as outcasts, due to their identity, than by a simple wish to hurt them personally. Having some form of audience, therefore, serves the cause better than merely discretely refusing a transaction in the privacy of one's business. Or, as Frevert succinctly puts it, "humiliation needs spectators to accomplish its purpose."[231]

Note that although an audience is not necessary for humiliation to occur[232]—as illustrated by the humiliating abandonment of Joshua Foster[233]—the market's nature tends to play (again) an intensifying role. Most market incidents include witnesses due to the public nature of commercial settings such as retail stores, restaurants, and workplaces. Further, an audience exists, even if not physically, when rejecting signs are publicly posted. Those exposed to the signs, like the Mudds,[234] or same-sex couples visiting the website of Nelson Photography,[235] are fully aware of the public nature of their rejection and the

227. This point will be further discussed. *See infra* Section III.C.

228. Liesbeth Mann et al., *When Is Humiliation More Intense? The Role of Audience Laughter and Threats to the Self*, 8 FRONTIERS PSYCH. 1, 2 (2017).

229. Klein, *supra* note 153, at 101.

230. Jogdand et al., *supra* note 156, at 81 (citing studies).

231. Frevert, *supra* note 214.

232. Jogdand et al., s*upra* note 156.

233. Finney & Koury, *supra* note 5.

234. Yurcaba, *supra* note 9.

235. CHELSEY NELSON PHOTOGRAPHY, *supra* note 123.

fact that countless others have already seen or will soon notice these signs.

Studies of the presence of an audience include several more nuanced findings that can be highly relevant to legal analysis. For one, the *intent* implied by witnesses' responses matters. Psychologists have found that people rated humiliating experiences in the presence of a hostile witness as more intense than those without a hostile witness.[236] Later experimental studies have shown, for example, that audience laughter intensified reports of humiliation.[237] This finding alone can make some claims of humiliation especially credible. For example, in addition to suffering harassment, Pamela Krueger had to deal with supervisors "laughing at her when she began to cry at the humiliation."[238] Similarly, Dillard's race-based harassment of Black shoppers involved not only the police waiting for a shopper who used the fitting room but also a sales associate who was "guarding the room with her arms crossed and smirk on her face."[239] The majority in *Gregory* was thus wrong to find this smirk irrelevant and insufficient to make the case distinguishable from another case of active trailing of a minority shopper.[240]

Remarkably, humiliation researchers have also shown that the opposite is untrue, and a sympathetic response did not reduce participants' reported experience of humiliation.[241] That suggests, for example, that the presence of mothers in the incidents at Masterpiece Cakeshop and McDonald's could not have mitigated the impact of the offenses directed at the younger customers.

Further, the lack of response from witnesses pretending they did not see the aggression is probably another enhancer of humiliation. At least one interviewee vividly described the negative effect of such a seemingly indifferent audience.[242] He shared that as the saleslady was refusing to sell him cakes, he "looked around at the people over there, and they all had different kinds of 'masks' . . . . They didn't see what

236. Jeff Elison & Susan Harter, *Humiliation: Causes, Correlates, and Consequences*, *in* THE SELF-CONSCIOUS EMOTIONS: THEORY AND RESEARCH 310, 310–19 (J.L. Tracy et al. eds., 2007).

237. MANN, *supra* note 216, at 156–57; *see also* Stephanie V. Klages & James H. Wirth, *Excluded by Laughter: Laughing Until It Hurts Someone Else*, 154 J. SOC. PSYCH. 8 (2014) (discussing a study of whether laughter can cause social pain).

238. Krueger v. Zeman Constr. Co, 781 N.W.2d 858, 866 (Minn. 2010).

239. Gregory v. Dillard's, Inc., 565 F.3d 464, 491–92 (8th Cir. 2009).

240. *Id.* at 475.

241. MANN, *supra* note 216, at 37–38.

242. DUNLAP, *supra* note 186, at 99–104.

happened, and they didn't hear what happened."[243] As a result, the interviewee reported that he felt he "needed to get out of line, and let the other person be served," adding that next he "just left that place."[244]

III. THE CONSEQUENCES OF HUMILIATING ACTS

People must sense they belong to human society rather than feel rejected by it. Leading works in psychology and other disciplines have defined this human need as a matter of survival,[245] sometimes comparing social exclusions that threaten belongingness to hunger.[246] Therefore, whenever the humiliation dynamic unfolds, following most if not all of the six characteristics discussed above, an intense and unique emotion emerges to alarm against severe risk, calling for attention and activation of coping mechanisms. As what follows details, studies show that this emotional response comes with particularly dire and highly undisputable consequences. Further, these consequences affect individuals in the short and long run and also spread to the groups to which those individuals belong.

A. The Emotion of Humiliation

Exposure to perpetrators' humiliating behavior engenders an emotional experience captured by the term humiliation. Researchers who have conceptualized humiliation based on an empirical prototype approach instead of engaging in theoretical definitions confirmed that when people think about humiliation and use the term, they regularly refer to the emotional experience that follows humiliating behaviors.[247] Understanding what typifies this experience and especially its severity is a key to overcoming the legal resistance to claims of emotional injury and requests for emotional damages.

The humiliation literature describes the emotion of humiliation as belonging to a family of self-conscious emotions that also includes shame, pride, and more.[248] It frequently depicts it as not merely a

243. *Id.* at 101.

244. *Id.* at 102.

245. Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCH. BULL. 497 (1995); *see also* M.J.W. Van der Molen et al., *Why Don't You Like Me? Midfrontal Theta Power in Response to Unexpected Peer Rejection Feedback*, 146 NEUROIMAGE 474 (2017).

246. Judith Gere & Geoff MacDonald, *An Update of the Empirical Case for the Need to Belong*, 66 J. INDIVIDUAL PSYCH. 93, 94 (2010).

247. Elshout et al., *supra* note 177, at 1583–85.

248. MANN, *supra* note 216, at 10.

negative emotion but a very painful one.[249] Indeed, experimental studies found close neurochemical similarities between physical pain and the psychological pain that comes from social rejection and devaluation of the self.[250] They showed that the same brain regions were activated when experiencing both types of pain,[251] proving legal distinctions between physical and emotional harm unfounded. This similarity is tied to the fundamental need to belong: the pain experience (physical or emotional) plays an evolutionary role by signaling threats to survival.[252]

Additionally, works comparing humiliation to other emotions reflect "widespread agreement about humiliation being a particularly intense and painful emotion compared with shame, anger, and embarrassment."[253] Contra legal assumptions, this consensus is backed up by neurocognitive research that illuminates the neurophysiology of humiliation,[254] explaining how cues that communicate social exclusion or rejection trigger a so-called neural alarm system.[255] Researchers have recorded the brain's electrical activity in response to emotion-inducing scenarios and have provided empirical and measured evidence that humiliation is an acutely consuming emotion.[256] Specifically, they compared humiliation to anger, happiness, and shame, presenting findings that "clearly indicate that humiliation is a more intense emotional experience" than the other induced emotions.[257] These findings are based on two different measures of brain activity. The first measure (LLP) indicated that participants recognized

249. *Id*. at 26.

250. *See* Naomi I. Eisenberger, *The Pain of Social Disconnection: Examining the Shared Neural Underpinnings of Physical and Social Pain*, 13 NATURE REVS. NEUROSCIENCE 421 (2012).

251. *Id.*

252. Laura. J. Ferris, *Hurt Feelings: Physical Pain, Social Exclusion, and the Psychology of Pain Overlap*, *in* OSTRACISM, SOCIAL EXCLUSION AND REJECTION RESEARCH 100 (Selma C. Ruder et al. eds., 2019).

253. Jogdand et al., *supra* note 156, at 82.

254. Marte Otten & Kai J. Jonas, *Out of the Group, Out of Control? The Brain Responds to Social Exclusion with Changes in Cognitive Control*, 8 SCAN 789, 792–93 (2013); *see generally* Marte Otten & Kai J. Jonas, *Humiliation as an Intense Emotional Experience: Evidence from the Electro-Encephalogram*, 9 SOC. NEUROSCIENCE 23 (2014) [hereinafter Otten & Jonas, *Humiliation*] (detailing experiments that assessed the intense physical responses to the experience of humiliation).

255. Elise D. Kortink et al., *Follow Your Heart? Examining Heart Rate Variability as a Predictor of Neural Reactivity to Social Rejection - A Network Approach to Individual Differences in Social Threat Sensitivity*, PSYARXIV (Feb. 7, 2021), https://psyarxiv.com/2dfpa/ [https://perma.cc/ZLS3-AKXB].

256. Otten & Jonas, *Humiliation*, *supra* note 254, at 32.

257. *Id.*

humiliation as more negative than the other emotions and thus used more processing power "to deal with the emotional implications of the humiliating situation."[258] The other measure (ERD) showed "a long-lasting increase in cortical activation following humiliation scenarios that is larger than for anger, happiness, or shame," indicating that humiliation consumes more mental resources than the other studied emotions.[259]

Fascinatingly, a few years later, the lead researchers of the previous study collaborated with others to offer even more nuanced neurocognitive evidence.[260] In correlation with the analysis of the audience factor,[261](factor #6 above), they proved the additional impact of witnesses who respond with laughter to insulting scenarios.[262] Their findings support the general understanding that such an unsympathetic response further enhances the intensity of the resulting humiliation. Even more specifically, based on the timing of the intensified brain activity, the study proved that people could *anticipate* how worse they would feel if others laughed *before* the laughter happened.[263] The researchers observed that this suggests that "insulted people proactively take into account the social context of their insults."[264] This last finding particularly supports devising a legal approach that similarly takes into account the social context within which a humiliating market event occurred.

Additionally, the social and psychological agonies that come from exposure to humiliating behavior have an exceptionally long-lasting impact, as they tend to be recalled and re-felt by victims.[265] Not only is humiliation similar to emotional pain (as noted earlier), this finding means it can sometimes be worse. While we can certainly remember past physical suffering, the psychological pain emerging from

258. *Id.*

259. *Id.*

260. *See* Marte Otten et al., *No Laughing Matter: How the Presence of Laughing Witnesses Changes the Perception of Insults*, 12 SOC. NEUROSCIENCE 182 (2017).

261. *See supra* Section II.B.6 (discussing the audience factor, one of six identified characteristics that constitute a profile of the humiliation act).

262. Otten et al., *supra* note 260.

263. *Id.* at 190–91.

264. *Id.* at 190.

265. Zhansheng Chen & Kipling D. Williams, *Imagined Future Social Pain Hurts More Now than Imagined Future Physical Pain*, 42 EUR. J. SOC. PSYCH. 314, 316 (2012); Zhansheng Chen & Kipling D. Williams, *Social Pain Is Easily Relived and Prelived, but Physical Pain Is Not*, *in* SOCIAL PAIN: NEUROPSYCHOLOGICAL AND HEALTH IMPLICATIONS OF LOSS AND EXCLUSION 161, 165 (Geoff MacDonald & Lauri A. Jensen-Campbell eds., 2011).

public humiliation can be relived and felt again and again.[266] In the context of armed conflicts, scholars analyzing the agonies caused by torture wrote that psychological degradation can be harsher than physical suffering because it has "longer-lasting and more deadly effects on the soul and mind."[267] Others, writing in the context of child abuse, explained that its damaging emotional effects, including humiliation, were still prevalent many years after.[268] While war and abuse are very extreme experiences, at least one victim of retail humiliation described a similar long-lasting impact in detail.[269] Interviewed many years after his 9/11-related exclusion,[270] the Indian-born customer reflected: "But this is something that's unresolved for me. It's not complete. It's not something that's just packaged. I have this thing inside me, and it's still alive—the hurt from it, from that incident."[271]

B. The Impact on Health and Wellbeing

The humiliation process that starts with humiliating acts does not end with the havoc created at the emotional level. Rather, intense and lingering feelings of humiliation generate additional consequences that put wellbeing, health, and even life itself, at risk. With rare exceptions, this is an aspect of the market humiliation injury that is entirely missing from the conventional legal discourse.

One legal scholar focusing on LGBTQ life in the shadow of market humiliation alluded to this problem. She wrote that the constant possibility of refusal that "lurks behind every store counter" brings about "emotional pain, disruption, . . . stress and fear of what [comes] next, causing health to suffer and altering life plans."[272] The record of the litigation in *Masterpiece Cakeshop* similarly reflected some of the long-term consequences of market rejections. In an amicus brief submitted by Lambda Legal Defense Fund, the LGBTQ advocacy group shared how rampant is the market humiliation of the community.[273] It

266. *See* Zhansheng Chen et al., *When Hurt Will Not Heal: Exploring the Capacity to Relive Social and Physical Pain*, 19 PSYCH. SCI. 789 (2008).

267. Meike Vorbrüggen & Hans U. Baer, *Humiliation: The Lasting Effect of Torture*, 172 MIL. MED. 29, 32 (2007).

268. Claudio Negrao II et al., *Shame, Humiliation, and Childhood Sexual Abuse: Distinct Contributions and Emotional Coherence*, 10 CHILD MALTREATMENT 350, 351 (2005).

269. DUNLAP, *supra* note 186, at 99–104.

270. *Id.* at 102.

271. *Id.*

272. Pizer, *supra* note 126, at 390.

273. *See* Brief for Lambda Legal Defense at 1, 9 as Amici Curiae Supporting Respondents, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111)

then offered the court a collection of victims' direct testimonies. One of them, a gay journalist called L.M. in the brief, described his humiliation when trying to check into a Chicago hotel.[274] His self-report particularly emphasized some long-term outcomes as he stated: "I began to lose my confidence, self-worth and felt invisible to the world."[275]

At the same time, outside of the legal arena, numerous works have shown that injuries go far beyond the inducement of emotions. In general, studies report that grave injury to one's self-value leads to mental health complications.[276] Related to the former discussion of Black consumers' humiliation in retail stores such as Dillard's,[277] studies found that being relentlessly trailed while shopping caused stress reactions measurable on the Race-Based Traumatic Stress scale,[278] as well as high blood pressure.[279] Another example tied to market participation emerged in an interview with a hijab-wearing student in Australia.[280] An interviewee named Ilhan (pseudonym) developed an intense social anxiety disorder due to experiencing stereotyping and racism that included a humiliating loud scene at a shopping mall, insinuating she did not linguistically or culturally belong to the community.[281] Later she shared: "I was like having to hold my breath whenever I'd go into the shopping centre or the supermarket."[282]

(summarizing complaints as demonstrating mistreatment of LGBTQ people by an overwhelming list of businesses: "pharmacies, hospitals, dental offices, and other medical settings; professional accounting services, automobile dealerships and repair shops, gas stations, convenience stores, restaurants, bars, hotels and other lodging; barber shops and beauty salons; stores such as big box retailers, discount stores, pet stores, clothing stores, and toy stores; swimming pools and gyms; libraries and homeless shelters; and transportation services including busses, taxis, ride-shares, trains, air travel, and cruise ships").

274. *Id.* at 16.

275. *Id.*

276. *E.g.*, Walter J. Torres & Raymond M. Bergner, *Severe Public Humiliation: Its Nature, Consequences, and Clinical Treatment*, 49 PSYCHOTHERAPY 492 (2012).

277. Gregory v. Dillard's, Inc., 565 F.3d 464 (8th Cir. 2009).

278. HENDERSON ET AL., *supra* note 75, at 18–19 (describing studies by Dr. Robert Carter); *id.* at 25 (citing Debra J. Barksdale et al., *Racial Discrimination and Blood Pressure: Perceptions, Emotions, and Behaviors of Black American Adults*, 30 ISSUES IN MENTAL HEALTH NURSING 104, 104–11 (2019); *see also* Yin Paradies et al., *Racism as a Determinant of Health: A Systematic Review and Meta-Analysis*, PLOS ONE (Sept. 23, 2015), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0138511 [https://perma.cc/2J96-KV9D] (reviewing evidence associating discrimination with stress, anxiety, and depression).

279. Paradies et al., *supra* note 278.

280. Sender Dovchin, *The Psychological Damages of Linguistic Racism and International Students in Australia*, 23 INTL. J. BILINGUAL EDUC. & BILINGUALISM 804, 813 (2020).

281. *Id.* at 813–14.

282. *Id.* at 815.

More generally, the emotional state of humiliation has been largely recognized as a path to causing severe anxiety, symptoms of posttraumatic stress disorder, and clinical depression.[283] In the gravest cases, these health problems can lead to suicidal ideation and even end in death.[284]

C. Beyond Individual Harms: Collective Humiliation

Beyond the significant and lingering impact on the individuals who experienced them, theorists and researchers have argued and empirically proved that humiliation episodes spread widely. The basic intuition behind this tenet would be clear to anyone who recalls the humiliating murder of George Floyd in the summer of 2020 and the collective pain it generated around the country for Blacks and their allies.[285] The coining of the term "Shopping While Black" and its increased use in popular and academic publications[286] similarly indicate that what happened to Shanta Lester, shoppers at Dillard's, or the customer at the donut store goes far beyond the individual incidents, carrying a broader collective meaning. The crowds of LGBTQ people and allies that gathered in front of the Supreme Court to wait for the decision in Aimee Stephens's case further suggest that the impact of humiliating events is not confined to the people involved.[287]

Studies support such indications and can importantly teach us more, enough to require legal actors' attention and willingness to better understand the magnitude of the problem instead of taking a case-by-case approach while disregarding social context. Theorists and researchers have recognized and defined a form of social humiliation that is neither direct nor individual. They have argued and empirically proved that learning about the humiliation of some members of a

283. Chen et al., *supra* note 266; Chen & Williams, *supra* note 265; Mann et al., *supra* note 228, at 26; Torres & Bergner, *supra* note 276.

284. Klein, *supra* note 153, at 109, 111–24; Torres & Bergner, *supra* note 276, at 495–96.

285. Hila Keren, *Why the Murder of George Floyd Remains a Deep Wound to the Public Psyche*, L.A. TIMES (May 25, 2021), https://www.latimes.com/opinion/story/2021-05-25/george-floyd-murder-humiliation-psychology-oppression [https://perma.cc/GKM9-NTN9].

286. Meirav Furth-Matzkin, Retail Race Discrimination 10–11 (Feb. 14, 2022) (unpublished manuscript) (on file with Social Science Research Network), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4034828 [https://perma.cc/UM3B-79JP] ("Contemporary experiences of mistreatment are so commonly shared among Blacks that there is even a term for it: 'Shopping while Black.'").

287. Aimee Ortiz, *Aimee Stephens, Plaintiff in Transgender Case, Dies at 59*, N.Y. TIMES, (June 16, 2020), https://www.nytimes.com/2020/05/12/us/aimee-stephens-supreme-court-dead.html [https://perma.cc/U3VP-RPY4].

group has the power to humiliate numerous members of the same group. The dissemination of humiliation from individuals to their groups has received several names, from *group-based humiliation*[288] to collective humiliation[289] or cycles of humiliation.[290]

The scientific understanding of group-based humiliation draws on the more general theory of emotions called the intergroup emotions theory.[291] This theory explains that individuals who attach significance to their belonging to a certain group would experience emotions in response to an event that affected their ingroup even when they were not directly involved.[292] This happens because group membership has become salient to and inseparable from those individuals' sense of self.[293] For example, a 2018 experimental study applied intergroup emotion theory to the LGBTQ community and demonstrated how attacks on some community members influenced other members of the group.[294] Significantly, the researchers linked their findings to the law, arguing that their findings support a state response in the form of hate crime legislation.[295]

Focusing more specifically on the emotion of humiliation, scholars have developed and tested the concept of group-based humiliation. Political philosopher Christian Neuhäuser has suggested that

288. Christian Neuhäuser, *Humiliation: The Collective Dimension*, *in* HUMILIATION, DEGRADATION, DEHUMANIZATION: HUMAN DIGNITY VIOLATED 21, 25 (Paulus Kaufmann et al. eds., 2011).

289. MANN, *supra* note 216, at 20 n.2 ("Group-based and collective emotions are not the same. Collective emotions are emotions that are shared by group members for different reasons, whereas group-based emotions are emotions felt as a result of identification with a group. However, it is quite often the case that group-based emotions are shared and thus become collective emotions as well." (citations omitted)).

290. Evelin G. Lindner, *Healing the Cycles of Humiliation: How to Attend to the Emotional Aspects of "Unsolvable" Conflicts and the Use of "Humiliation Entrepreneurship,"* 8 PEACE & CONFLICT: J. PEACE PSYCH. 125, 125 (2002).

291. Diane M. Mackie et al., *Intergroup Emotions Theory*, *in* HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 285, 292–93 (Todd D. Nelson ed., 2009) (generally explaining the birth and content of the theory and particularly stating that "people can feel emotions at group-relevant outcomes even when they remain personally unaffected by those outcomes" and "studies certainly suggest that intergroup emotions have many of the same hallmarks as do individually experienced emotions"); *see also* Marius C. Vollberg & Mina Cikara, *The Neuroscience of Intergroup Emotion*, 24 CURRENT OP. PSYCH. 48 (2018) (reviewing findings in social and affective neuroscience that suggest that the ability to imagine events is involved in shaping emotional experience in intergroup settings).

292. Mackie et al., *supra* note 291, at 287.

293. *Id.*

294. Jenny L. Paterson et al., *Feeling for and as a Group Member: Understanding LGBT Victimization via Group-Based Empathy and Intergroup Emotions*, 58 BRIT. J. SOC. PSYCH. 211 (2019).

295. *Id.* at 222.

humiliation cannot be adequately understood without recognizing that the dignity of a collective is at stake.[296] For that purpose, he has proposed a model that outlines three ways of humiliating collectives, of which the most relevant to the current discussion is the path he calls "representative group humiliation."[297] As Neuhäuser explains it, the term refers to the humiliation that occurs when "a whole group is humiliated through the humiliation of one or more of its members."[298]

Other studies offer support for this idea, showing that belonging to a group that experiences humiliation makes people feel humiliated by virtue of their group identity.[299] One study that is especially relevant to the exclusion of groups from the market has focused on collective humiliation caused by rejection.[300] Relying on the general premise that "when group membership is salient, the ingroup becomes part of the psychological self,"[301] the researchers created a series of three experiments to test this idea in the context of group-based humiliation caused by rejection. They compared being directly excluded to merely witnessing the rejection of other group members.[302] Their study found that "without being targeted personally, people can experience negative rejection effects . . . just by observing their ingroup being rejected."[303]

Notably, the same study covered not only the occurrence of the group-based experience but also its intensity. It found that "[p]articipants who had observed rejection of an ingroup member felt *as humiliated as* participants who were personally rejected and significantly more humiliated than participants who observed the rejection of an outgroup."[304]

Recognizing how individual rejections generate group-based humiliation is a key to any realistic evaluation of the harm caused by the

296. Neuhäuser, *supra* note 288, at 3.

297. *Id.* at 25. Another relevant path to group-based humiliation is through harming symbols of the group—what Neuhäuser calls "symbolic group humiliation." *See id.* at 23. Cases like *Chelsey Nelson Photography* epitomize an even more straightforward effect on the entire group. Because these cases allow public announcement of broad refusal to deal with LGBTQ customers they operate as *symbols* of rejection directed at the entire group.

298. *Id.* at 25.

299. MANN, *supra* note 216, at 109 (referencing several empirical studies on group-based humiliation).

300. Tinka M. Veldhuis et al., *Vicarious Group-Based Rejection: Creating a Potentially Dangerous Mix of Humiliation, Powerlessness, and Anger*, 9 PLOS ONE 1 (2014).

301. *Id.* at 2.

302. *Id.*

303. *Id.* at 8.

304. *Id.* at 5–6 (emphasis added).

behaviors discussed in this Article. Because the rejections target people based on an identity salient to the victim (factor #5 of the profile),[305] they necessarily touch others for whom the same identity matters. Consequently, each time businesses refuse to serve LGBTQ people, drive people with disabilities, or handle African American clients appropriately, their respective communities and their allies are hurt as well.

In addition, many times, the rejection itself is articulated by reference to the larger group to which the victim belongs, such as when the landlord told Ms. Kozera he would not rent to people with children,[306] or when Ms. Reynolds's boss stated how tired he was of fat people.[307] Accordingly, the larger communities associated with the actual victims are implicated and impacted each time seemingly-isolated incidents occur and get publicity.[308] Consider, for example, the feelings of people with disabilities, especially those relying on wheelchairs or service animals, whenever news outlets report that a rideshare driver refused to serve someone similar to them.

The mechanism of disseminating humiliation from individuals to their respective groups is at work regardless of *how* the original incidents reach wider audiences. However, the damage proliferates when incidents are exposed via litigation which ends with victims' loss. Courts are official representatives of organized society and hold significant expressive and educational powers to influence what people perceive as adequate and moral.[309] When they side with the perpetrator and fail to protect the victim—the disappointing result of many discrimination disputes—they legitimize the humiliation behavior and thus *participate* in generating collective humiliation of anyone identifying with the victim.

This last point draws on Neuhäuser's work on collective humiliation. As he explains it, authoritative permission to humiliate creates an amplified negative impact due to the salient role of society in our lives.[310] Much as it works at the individual level, the humiliation of

305. *See supra* Section II.B.5 (discussing the factor of targeting identities, one of six identified characteristics that constitute a profile of the humiliation act).

306. Granger v. Auto-Owners Ins., 40 N.E.3d 1110 (Ohio 2015).

307. Reynolds v. Robert Hasbany MD PLLC, 917 N.W.2d 715, 717 (Mich. Ct. App. 2018).

308. *See generally* Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CALIF. L. REV. 1271 (2006).

309. Hila Keren, *Guilt-Free Markets? Unconscionability, Conscience, and Emotions*, 2016 BYU L. REV. 427, 435.

310. Neuhäuser, *supra* note 288, at 29.

larger groups comes from a threat to the sense of social belongingness.[311] When a society—via its official representatives—explicitly or even implicitly *allows* the humiliation of some group members to continue, other members of the group will be humiliated due to recognizing that they live in "a society where nobody cares about this humiliation."[312] Further, the realization that society refuses to protect others with which one identifies puts every group member at constant risk of similar mistreatment. Exposure to such risk is significant enough to generate a feeling that one is *already* "not a full member of society."[313]

Note that Neuhäuser's general analysis applies to courts with special strength because they possess not only official status but also the ultimate power to declare humiliating acts illegal and deter people from engaging in them by instituting remedies. When courts write, for example, that verbal assaults were "highly offensive"[314] or "abusive"[315] but not illegal, they condone rather than condemn the initial humiliation. Regardless of formal reasoning, such statements involve courts in the humiliation of numerous others who see themselves as similar to the insulted victim.

Probably related to a broader racial reckoning signified by the rise of Black Lives Matter,[316] a new wave of works has revived the discussion of "Shopping While Black," insisting with renewed energy that the problem is *social* and criticizing the courts' meager treatment of it.[317] This wave indicates that scholars have begun to develop a less individualistic view of the issue, linking it to systemic social conditions. Yet, these emerging discussions can further benefit from accounting for the operation of collective humiliation, which explains how the legal disregard of social and emotional contexts is making things worse.

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311. *Id.*

312. *Id.*

313. *Id.*

314. Lester v. BING the Best, Inc., No. 09-81525-CIV, 2010 WL 4942835, at *3 (S.D. Fla. Nov. 30, 2010).

315. Khalaf v. Ford Motor Co., 973 F.3d 469, 488 (6th Cir. 2020).

316. *Black Lives Matter Movement*, HOWARD UNIV. L. LIBR., https://library.law.howard.edu/civilrightshistory/BLM [https://perma.cc/W53J-3NB6] (summarizing the founding and growth of the movement that "began with a social media hashtag, #BlackLivesMatter," developed into a national movement in 2014 "after the deaths of Michael Brown in Missouri and Eric Garner in New York," and became a global movement after the murder of George Floyd in Minnesota in 2020).

317. *See generally* SHAUN L. GABBIDON & GEORGE E. HIGGINS, SHOPPING WHILE BLACK: CONSUMER RACIAL PROFILING IN AMERICA (2020); Pittman, *supra* note 14; DUNLAP, *supra* note 186; Thomas, *supra* note 10; Furth-Matzkin, *supra* note 286.

The last point highlights the possibility that the entire humiliation process—not only the emotion of humiliation—operates at the collective level. Nowhere is this point more evident than in the politically organized market attack on the LGBTQ community described in Part I. The humiliation dynamics at play in the battles led by the ADF on behalf of religious business owners are collective from day one. In particular, the strategy of preemptive litigation, in which businesses sue *before* they reject anyone to get advance permission to discriminate, is purely collective. It starts by targeting the entire group and seeking general, not individual, permission to reject its members. And it directly leads to collective results when the ADF wins, and anti-LGBTQ publicity with broad hostile signs follows. Therefore, when the Supreme Court rules on *303 Creative v. Elenis*[318] and considers whether the state has a compelling interest in demanding businesses to serve all, it should be recognized that granting permission to discriminate would make the Court itself participate in the collective humiliation of LGBTQ people.

IV. CURTAILING MARKET HUMILIATION

The previous parts have revealed a significant gap between the state of the law, on the one hand, and a social problem with dire consequences, on the other. This part aims to bridge that gap by proposing ways in which legal norms can better operate in an effort to cultivate and defend *market citizenship* for all. When I first coined the term market citizenship,[319] I was inspired by a concurring judge who insisted that a photography business should not be allowed to humiliate LGBTQ parties due to its owner's religious beliefs.[320] Although he didn't use the phrase "market citizenship," Judge Bosson's reasoning emphasized the duties that come with citizenship, applied to the context of the market. He wrote: "In the . . . world of the marketplace, of commerce, of public accommodation, the [owners] have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. . . . In short, I would say to the [owners], with the utmost respect: *it is the price of citizenship*."[321]

318. 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022).

319. Keren, *supra* note 12, at 907, 911.

320. Elane Photography, LLC v. Willock, 309 P.3d 53, 80 (N.M. 2013) (Bosson, J., concurring).

321. *Id.* (emphasis added).

While the words cited above emphasize the price of citizenship in market transactions, using the term market citizenship has broader goals that go beyond cost to cover both rights and duties. On the rights side, the term highlights that general citizenship depends on market activity and, therefore, no one has real (general) citizenship without being a full citizen of the market. This means that those excluded from sections of the marketplace, or mistreated while participating in the market, are deprived of the rights of membership and belonging inherent in full citizenship. In other words, full market participation is necessary for civil citizenship and not only for economic reasons.[322]

As to the duties side, the term emphasizes that, much like general citizenship, market citizenship comes with many privileges but at the same time includes some expectations and restraints. Accordingly, by proposing how to use the law to define and protect market citizenship, this part links the rights that everyone should have vis-à-vis the market to the corresponding duties of all market actors to respect those rights.

Significantly, market citizenship broadly relates to *any* activity in the marketplace, actual or desired. It is also a type of citizenship that all individuals and groups must enjoy, and no objecting individual or group should be able to undermine it. At the end of the day, under a legal regime that guarantees market citizenship for all, victims of market humiliations would have access to remedies when their rights as market citizens are compromised. Simultaneously, businesses would owe a duty—flowing from their own market citizenship—not to humiliate, with the corresponding liability in cases of breaching that duty.

Before delving into concrete proposals and their justifications, two preliminary clarifications seem valuable. First, the limited legal understanding of the whole process of market humiliation is a problem shared by most.[323] Thus, not only libertarians and strict liberals can benefit from learning how far the legal assumptions are from reality. Others who are generally more oriented toward securing an egalitarian society can also find value in the following discussion. Particularly,

322. I also prefer "market citizenship" to "economic citizenship" because the former highlights a locus of importance even when the dynamic in that locus has a relatively insignificant economic value such as in the case of using Uber or buying a burger and fries. *But cf.* William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 U. PA. J. LAB. & EMP. L. 697 (2000) (defining "economic citizenship" as a government right for all people to make a decent living).

323. *See* discussion *supra* Part I.

advocates seeking to expand the protections under nondiscrimination laws and lawyers fighting in courts on behalf of humiliated clients might improve their ability to achieve their goals by integrating market humiliation insights into their work.

Second, and more modestly, it is crucial to remember the limits of the power of law in changing widespread realities. Surely, law matters much to what people perceive as right or wrong and can certainly mobilize behavioral changes. For example, with all their flaws, the Civil Rights Laws described in Part I had an immense impact on businesses' market behavior and the experiences of those they used to exclude. However, the progress of society and the mobilization of change cannot be achieved by law alone; much is left, and indeed *should* be left, to social, political, and educational work.

With that in mind, what comes next draws on the previous parts to propose and justify revisions to the legal cause of action and the remedies that should follow it in cases of market humiliation. These changes should significantly expand protections in cases of market humiliation. To mirror the obstacles described in Part I, the necessary steps described below relate to both the legislation and its judicial interpretation. They also include a call to reopen the discussion regarding remedies.

A. Expanding Statutory Protections

The most straightforward treatment of market humiliation is to close current gaps in the nondiscrimination laws that cover the marketplace at both federal and state levels. Since the patchwork of norms is so complex and the loopholes are countless, the needed revisions are too many to map out here. That said, the biggest challenge is less defining what the needed changes are and more cultivating the will to bring them about—a task taken up in the previous parts.

At the federal level, there is an immediate need to fortify the regulation of the supply of goods and services in the open market. Possible models can be the acts that regulate other sections of the market, such as the workplace,[324] the housing market,[325] and the supply of

324. Title II of the Civil Rights Act, 42 U.S.C. § 2000a(b) (narrowly defining public accommodations as including: "any inn, hotel, motel, or other establishment which provides lodging to transient guests," and "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, . . . or any gasoline station").

325. Title VIII of the Civil Rights Act, 42 U.S.C. §§ 3601–3619.

credit.[326] For that purpose, the conventional referral to "public accommodation" can be kept or removed, but in any case, the loopholes that currently allow retail stores, digital platforms, online merchants, and other businesses to attempt to avoid responsibility by arguing they are not "public accommodations" must be closed. On this point, the guiding principle should be a broad definition of the marketplace, avoiding arbitrary segmentation that makes some zones less protected than others and increases the cost of seeking legal help.[327] In short, the message should be that the entire market should be completely and equally open for all.

Indeed, significant steps in this direction are currently included in the proposed Equality Act.[328] For example, the proposal consists of important expansions of the definition of public accommodations in the Civil Rights Act of 1964 to include currently disputed providers such as stores, shopping centers, online retailers, salons, and banks.[329]

In the same vein, nondiscrimination laws must be revised to much more robustly defend groups currently unprotected or partially protected. One way to achieve this expansion is to enumerate additional groups next to those already protected. For example, the proposed Equality Act seeks to protect members of the LGBTQ community by adding the categories of sexual orientation and gender identity to varying federal nondiscrimination laws.[330] Similarly, the Elliott-Larsen Civil Rights Act in Michigan was amended to include several categories seldom protected elsewhere, including height, weight, and familial status.[331] Recognizing additional groups in this manner at the federal level would therefore present a major step toward market citizenship for all. Consider, for example, the improvement it can bring to the life of those who, like Deborah Reynolds, are humiliated for being fat in a world in which weight-based discrimination is "one of the most prominent forms of discrimination in the United States."[332]

326. 15 U.S.C. § 1691(a)(1).

327. *See, e.g.*, Shaun Ossei-Owusu, *Velvet Rope Discrimination*, 107 VA. L. REV. 683 (2021) (highlighting a particular problem with dress codes and gender-based pricing at restaurants and nightclubs).

328. Equality Act, H.R. 5, 117th Cong. (2021).

329. *Id.* at 13.

330. *Id.*

331. MICH. COMP. LAWS SERV. §§ 37.2101–37.2102 (LexisNexis 2022) (amended to include weight and height in 1979 and familial status in 1992).

332. Lihi Yona, *Identity at Work*, 43 BERKELEY J. EMP. & LAB. L. 139, 164 (2022).

That said, there are many difficulties with trying endlessly to prolong the list of protected groups.[333] Thus, a better way might be to supplement the list of enumerated groups with an inclusive "catch-all" standard. Because those who humiliate target traits that are salient to their victims' identity (factor #5),[334] the addition proposed here will extend protection to those discriminated against and humiliated for reasons related to an aspect significant to their identity but unrelated to the market arrangement at play.

The proposal made here to add a catch-all category is novel and warrants clarification. Its primary value is shifting attention from the categories themselves to the wrongful behavior that targets them. Why would it matter, for example, if a retailer humiliates a person of color or a fat individual despite their will and ability to complete the transaction like any other customer? In both cases, the humiliation dynamic initiated by the retailer operates to induce injury that is severe, credible, and calls for remedy because the humiliator targets an *identity* irrelevant to the exchange, regardless of the specific category to which this identity belongs.[335]

Beyond changes at the federal level, states and localities can attempt to increase protections on a smaller scale to at least foster market citizenship, however incrementally and sporadically. Such local enhancements are not insignificant. For example, Michigan's ban on discrimination based on height or weight may have a limited practical meaning, but it does have considerable expressive value.[336] The main problem, of course, is that in many states, which tend to be on the right side of the political map, even the rights of federally recognized groups are unrecognized in a manner that leaves their residents highly unprotected. For example, although the decision in *Bostock v. Clayton County*[337] extended important protections to LGBTQ people based on the ban on sex discrimination, its impact is limited to nondiscrimination laws that enumerate sex.

All in all, legislative efforts to suppress market humiliation and establish fuller market citizenship are urgently needed. In this respect,

333. *Id.* at 169 (noting three examples of "liminality" for fat people under anti-discrimination laws).

334. *See infra* Section II.B.5.

335. *See* Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV 101 (2017).

336. *See* Omer Kimhi, *Falling Short: On Implicit Biases and the Discrimination of Short Individuals*, 52 CONN. L. REV. 719, 764 (2020).

337. Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

the passing of the proposed Equality Act may be a significant step in the right direction. And yet, it seems that the hope for statutory changes at the federal level, and in many states, is constrained by lingering ideological and political resistance to norms of equality.

B. Reforming the Judicial Approach

As Part I has shown, many flaws of the legal response to market humiliation originate in the judiciary's way of applying existing nondiscrimination norms. In general, courts' inclination is to handle complaints with suspicion, read the relevant laws narrowly, amass unusual burdens of pleading and proof, and distrust and discount harm to emotions. Recall, as a leading example, cases such as Shanta Lester's evident humiliation at McDonald's,[338] in which courts repeatedly decided that whenever a contract was made, offenses that came with it were not actionable.

Changing the judicial inclination to favor humiliating businesses at the expense of their victims is an uphill battle. However, to the extent it is not an impossible mission, the analysis of humiliation from the previous parts can offer an essential pathway to a more generous reading of nondiscrimination laws.

In preparation for integrating Parts II and III into judicial analysis, it is valuable to go backward in time to the birth of the Thirteenth Amendment and the statutes executing its promise. Highlighting this background can remind courts that the idea of market citizenship presented here flows directly from a constitutional principle that must inform the way they apply the law. Succinctly, the Thirteenth Amendment instructs courts to make sure that every member of society has the same ability to partake in the market and enjoy its benefits.

The Thirteenth Amendment and the cluster of statutes that sought to implement it establish the right to be active in the market, namely a right to "make and enforce contracts."[339] Some scholars have claimed

338. Lester v. BING the Best, Inc., No. 09-81525-CIV, 2010 WL 4942835, at *1 (S.D. Fla. Nov. 30, 2010).

339. 42 U.S.C. §§ 1981–1986; *see also* Hila Keren, "*We Insist! Freedom Now": Does Contract Doctrine Have Anything Constitutional to Say?*, 11 MICH. J. RACE & L. 133, 145–46 (2005) (explaining that section 1981 was "[o]riginally enacted as part of the Civil Rights Act of 1866" and "was intended to implement the promise of the Thirteenth Amendment by translating the Amendment's declaration into 'market language' and concentrating on practical economic matters"); Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 1007 (2002) (maintaining that in the absence of a state action requirement, the Thirteenth Amendment has a significant bearing on private social and economic relationships).

that this right reflects a broader promise to protect individuals' ability "to make and pursue meaningful life decisions."[340] And, they added, such decisions must include the ability of all people to "buy and sell when they please,"[341] thus establishing a general "freedom TO contract."[342] As Robin West explained, "participation in the commercial sphere [is] a vehicle for inclusion in civil life in market economies."[343] Similarly, the Thirteen Amendment empowered the legislation of a right to "full and equal enjoyment" of public accommodations.[344] This right currently suffers from underappreciation, but this Article offers important reasons for enhancing its enforcement. It does so to supplement arguments on behalf of such enforcement made in several recent works.[345]

The right to full and equal enjoyment of public accommodations was first included in the Civil Rights Act of 1875. The Act was then deemed unconstitutional by the decision in *The Civil Rights Cases*.[346] However, many states have adopted the Act's language,[347] and the case that struck it down included an important comment. In *The Civil Rights Cases*, the Supreme Court explained that even without the Act, some businesses are legally bound to serve "all unobjectionable persons who in good faith apply for them."[348]

Based on these historical sources related to the Thirteenth Amendment's promise, this Article proposes a way to articulate more

340. Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 361 (2004) (exploring the historical and contextual background of the Thirteenth Amendment and the changing approaches to its scope and arguing for a broad interpretation).

341. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968).

342. Keren, *supra* note 339, at 172 (proposing to recognize within the general freedom of contract the freedom to have a contract when one wishes and naming this type of freedom "freedom TO contract"); *see also* EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS, AND MORALITY 225–55 (2010) (discussing the deontological argument against market discrimination as the adequate basis for understanding nondiscrimination laws).

343. ROBIN L. WEST, CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION 185 (2019); *see also* Keren, *supra* note 339, at 164 (arguing in the context of racial discrimination that contract and contract law are essential to a sense of social belonging).

344. *See* Thomas, *supra* note 10, at 149–52.

345. Sepper, *supra* note 45; *see also* Nancy Leong, *Enjoyed by White Citizens*, 109 GEO. L.J. 1421 (2021); Aderson Bellegarde François, *A Lost World: Sallie Robinson, the* Civil Rights Cases, *and Missing Narratives of Slavery in the Supreme Court's Reconstruction Jurisprudence*, 109 GEO. L.J. 1015 (2021).

346. The Civil Rights Cases, 109 U.S. 3, 25 (1883).

347. Sepper, *supra* note 45, at 577–78.

348. *Civil Rights Cases*, 109 U.S. at 25 ("Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation[s] to all unobjectionable persons who in good faith apply for them.").

inclusive protection of the rights that come with market citizenship under current nondiscrimination laws. Suppose we put pieces of the language cited above together. In that case, it is possible to reconstruct the idea as follows: "all unobjectionable persons who in good faith apply for"[349] goods and services shall have "a right to make and enforce contracts"[350] to obtain them with "full and equal enjoyment."[351]

This formulation relates directly to several key limitations imposed by contemporary courts through a narrow interpretation of existing laws. First, in terms of scope, everyone is entitled to the right defined herein regardless of affiliation with specific recognized groups, which is valuable for members of unprotected groups in cases of interpretive doubt. Second, the right broadly pertains to market activities based on contracts, which helps to cope with problems coming from the definitions of public accommodations. Third, the right includes not only the exchange itself but also the ability to enjoy the process before, during, and after the exchange. Such configuration calls for attending to humiliating behaviors currently not captured by many courts, i.e., those that did not prevent contracting but certainly undercut enjoyment.

The proposed reconstructed right to full and equal enjoyment of the market should guide federal and state courts whenever they apply nondiscrimination laws to concrete disputes. Yet, heightened burdens of pleading and proof still present significant challenges. On this point, the profile of market humiliation defined in Part II is particularly instructive. Accordingly, the proposal below tracks the profile's six factors to assist victims and their advocates in making compelling pleadings and offering convincing evidence. Concretely, the proposal is that, in determining whether a defendant discriminated against a plaintiff in the market by humiliating him or her, courts will consider the following factors:

1. The extent to which the defendant's behavior excluded the plaintiff from participating in the selected market activity or prevented the plaintiff from fully enjoying such activity (factor #1).

349. Language taken from *id*.
350. Language taken from 42 U.S.C. §§ 1981–1986.
351. Language taken from 42 U.S.C. § 2000a(a)and many state laws of the period.

2. The extent to which the defendant had control over the plaintiff's market experience or power advantage over the plaintiff (factor #2).
3. The extent to which the defendant's behavior would have defeated reasonable expectations of parties engaged in a similar market activity or deviated from standards of good faith and fair dealing (factor #3).
4. The extent to which the defendant's behavior demonstrated hostility towards the plaintiff (factor #4).
5. The extent to which the defendant's behavior addressed aspects of the plaintiff's identity unrelated to the selected market activity (factor #5).
6. The extent to which other people witnessed the defendant's behavior (factor #6).

Note that the proposed test does not require indications of a high level of a problem in each factor. Instead, the more factors exist, and the more those that exist indicate the severity of the defendant's behavior, the more a judicial finding of a humiliating act should be made.[352] For example, in Ms. Krueger's case, the second factor may be missing or offering limited indication because she was an independent contractor rather than an employee. Similarly, in the case of Mr. Foster, the sixth factor is missing, while the fourth may offer a limited indication as the Uber driver only nodded his head without speaking. Nevertheless, both cases demonstrate many indications of humiliation through the remaining factors, enough to justify a finding that humiliating acts indeed took place.

Next, once the occurrence of a humiliating act is established, the proposal continues to suggest using the information included in Part III concerning the resulting humiliation. This should be done without repeating formulas that associate humiliation with embarrassment and frustration. Adding to such thicker-description data regarding the health and social consequences of the emotion of humiliation can further contribute to the coherence and credibility of the claim while helping to devise policy arguments.

352. To achieve that, the structure of the proposal follows the Restatement's model for determining whether a failure to render or to offer performance of a contract is material. *See* RESTATEMENT (SECOND) OF CONTRACTS § 241 (AM. L. INST. 1981).

All told, greater awareness of the history of the legislation that demands market equality calls for and justifies a new articulation of the claim of market humiliation, highlighting the infringement on the right to enjoy full market citizenship. To establish such a claim, the proposed test, which relies on an understanding of the humiliation dynamic, should be utilized to assist courts in distinguishing unpleasant miscommunications that are acceptable from legally meaningful incidents that require redress.

C. Enhancing Remedies

The above sections have proposed possible avenues to establish the illegality of market humiliation via expanded nondiscrimination laws. However, improvements in available causes of action are of limited value without adequate remedies. Drawing on the Latin maxim *ubi jus ibi remdium*, where there is a right, there *should be* a remedy.[353] As Part I described, in cases of market humiliation, the remedial problem is rooted in reducing the injury to merely emotional and then denying remedies tailored for emotional harms.

Solutions thus hinge on coping with both aspects of the problem. First, it is necessary to insist—as Part II and III have already done—that market humiliation involves much more than emotions. The emotional component of humiliation, while important, is critically the inevitable *result* of specific blameworthy behaviors (defined earlier) *and* the known *cause* of additional serious injuries that have significant health implications. Second, and relatedly, it is essential to be adamant about the credibility and gravity of emotional harms, which make it critical to respond to them with substantial redress. The latter point is particularly urgent in light of the recent decision in *Cummings*, which reflects a new level of hostility to remedies for emotional distress.[354]

One of the biggest obstacles to receiving significant damages for emotional distress is the myth that anyone can fake and exaggerate emotional injuries to earn unjustified or at least excessive damages. Another central barrier is the presumption that even if they truly occurred, injuries to emotions are transient and easily go away, and thus do not require external remedies. I have generally discussed these fallacies elsewhere, criticizing the law's enigmatic reluctance to

353. *Ubi Jus Ibi Remedium*, OXFORD REFERENCE, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803110448446 [https://perma.cc/49FM-6N6F].

354. *See* analysis *supra* of *Cummings* in Part I.

compensate for emotional harms while showing full commitment to compensating for many other injuries.[355] I have shown that the assumptions animating the reluctance are baseless and that the "devaluation of emotional harms is unjustified, injurious to victims, and toxic to relational norms of behavior."[356]

In addition to those general arguments, the non-legal knowledge regarding humiliation offered in previous parts and the test for humiliating behavior proposed in this part suggest concrete ways to cope with the reluctance to allow recovery for emotional injuries. To start, simply understanding that humiliation is a defined process with a significant behavioral component can solve much of the credibility problem. The six factors proposed above can be used to help courts assess the credibility of a claim that a given incident inflicted deep feelings of humiliation. The more indications of a humiliating behavior are demonstrable, the more believable the claim becomes and vice versa.

For example, when someone is exposed to loud racial slurs as Ms. Lester was, or required to weigh herself in public, as Ms. Reynolds did, and when others were at the scene to witness and testify, any suspicion of faked emotions should evaporate. As this Article shows, feelings of humiliation are the logical response of brains and bodies to threats to survival. Thus, the more intense and indisputable the threat, the more credible the claim.

Moreover, once feelings of humiliation are established, studies should be used to refute the myth that the harm is transient or otherwise insignificant. Recall that, outside of the legal arena, it is quite substantiated that humiliation is a uniquely painful emotion that is recognized as long-lasting. Similarly, the various outcomes of humiliation discussed in Part III, such as mental health struggles, can be used to further support claims of emotional distress. Accordingly, victims' advocates can provide, and courts should seriously consider, for example, any symptoms of ensuing depression, indications of social withdrawal, and more. The more indicators exist, the greater the legal system should be willing to compensate the victims.

Recall that in *Cummings*, the majority excluded damages for the emotional injuries of a woman with severe and undisputed disabilities, relying on the perception that the availability of such damages under the relevant nondiscrimination laws depends on their availability

355. Keren, *supra* note 200, at 874–80.
356. *Id.* at 829.

under contract law. The majority assumed that damages for emotional distress are generally *unavailable* under contract law. This assumption led the majority to conclude that the humiliating business in *Cummings* could not have predicted that it would have to pay damages for emotional harm if it breached its obligation to refrain from discrimination in exchange for federal funding.

However, as shown in this Article, acts of humiliation *directly* lead to emotional harm. That makes the harm particularly foreseeable—which is the element required for awarding damages under contract law.[357] As a general rule, patients who need accommodations but instead are offered "alternatives" that only highlight their condition would have suffered, like Ms. Cummings, significant humiliation.

Last, recent works by scholars studying dignity have similarly called for adequate remedies for dignitary harms.[358] Of particular significance in this respect is a recent article by Professor Rachel Bayefsky that explores the *intersection* of remedies and dignitary concerns.[359] After establishing that federal courts could and should take dignity into account when providing remedies, Bayefsky makes a recommendation that directly responds to the problem of collective humiliation discussed in this Article. Illuminating "the collective dimension of expressive remedies," she argues that special *non-monetary* remedies may be needed to address behaviors against individual plaintiffs that inflict collective dignitary harm on their ingroup.[360] Her consideration of such "symbolic" remedies includes the idea of nationwide injunctions to restore the dignity of group members who are not parties to the litigation.[361] This Article fully embraces adding such non-monetary remedies to the damages awarded to individuals based on their concrete physical, mental, and emotional injuries due to humiliation.

CONCLUSION

The current patchwork of nondiscrimination norms repeatedly fails to prevent market humiliation. The main contribution of this Article is resisting fragmented legal treatment and general neglect of this

357. RESTATEMENT (SECOND) OF CONTRACTS § 353 (AM. L INST. 1981).

358. *See, e.g.*, Sepper, *supra* note 45.

359. Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263 (2021).

360. *Id.* at 1269.

361. *Id.*

acute problem. While most works focus on the mistreatment of a specific group (e.g., women, minorities, LGBTQ people, and more), this Article has offered an original approach that avoids rigid classifications or competition between marginalized groups in what sometimes is called the Oppression Olympics. It has provided a novel analysis of the shared harm inflicted by various market actors that attempt to mark certain transactional partners as inferior. This analysis importantly includes a behavioral model of humiliation, offering a six-factor profile of humiliating acts, followed by a scientific explanation of the injuries they cause at the emotional, medical, and social levels.

This Article has also proposed concrete normative steps to take in light of the magnitude of the problem identified. The proposals concretely rely on and utilize the profile of the humiliation process developed in this Article. They also draw on the new light the Article has shed on the severe outcomes of market humiliation.

All in all, the Article has defined market humiliation in a manner useful and valuable to jurists—from advocates to judges and scholars—and called to curtail it. The main way to do it, the Article has recommended with theoretical support, is to legally define and guarantee market citizenship—the set of rights and duties uniquely tailored to marketplace activities. Moving from market humiliation to market citizenship creates a path to a far more equitable marketplace and a significantly better society.