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## Coercive Assimilationism: The Perils of Muslim Women's Identity Performance in the Workplace

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COERCIVE ASSIMILATIONISM:  
THE PERILS OF MUSLIM WOMEN'S IDENTITY  
PERFORMANCE IN THE WORKPLACE

Sahar F. Aziz\*

*Should employees have the legal right to “be themselves” at work? Most Americans would answer in the negative because work is a privilege, not an entitlement. But what if being oneself entails behaviors, mannerisms, and values integrally linked to the employee’s gender, race, or religion? And what if the basis for the employer’s workplace rules and professionalism standards rely on negative racial, ethnic or gender stereotypes that disparately impact some employees over others? Currently, Title VII fails to take into account such forms of second-generation discrimination, thereby limiting statutory protections to phenotypical or morphological bases. Drawing on social psychology and antidiscrimination literature, this Article argues that in order for courts to keep up with discrimination they should expansively interpret Title VII to address identity-based discrimination rooted in negative implicit stereotypes of low status groups. In doing so, the Article brings to the forefront Muslim women’s identity performance at the intersection of religion, race, gender, and ethnicity—a topic marginalized in the performativity literature.<sup>1</sup> I argue that Muslim female employees at the intersection of conflicting stereotypes and contradictory identity performance pressures associated with gender, race, and religion are caught in a triple bind that leaves them worse off irrespective of their efforts to accommodate or reject coercive assimilationism at work.<sup>2</sup>*

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1. Jen’nan Read & John Bartkowski, *To Veil or Not to Veil? A Case Study of Identity Negotiation Among Muslim Women in Austin, Texas*, 14 GENDER & SOC’Y 396 (2000). Kimberly A. Yuracko, *The Antidiscrimination Paradox: Why Sex Before Race?*, 104 NW. U. L. REV. 1, 7 (2010); Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 661-62 (2006).

2. Irene Browne and Joya Misra, *The Intersection of Gender and Race in the Labor Market*, 29 ANN. REV. OF SOC’Y 487, 490 (2003); William H. Turner, *Myths and Stereotypes: The African Man in America*, in THE BLACK MALE IN AMERICA, 122, 122 (Doris Y. Wilkinson & Ronald L. Taylor eds., 1977); see also Floyd D. Weatherspoon, *Remedying Employment Discrimination Against African-American Males: Stereotypical Biases Engender a Case of Race Plus Sex Discrimination*, 36 WASHBURN L.J. 23, 34-35 (1996) (discussing the stereotypical perceptions of African-American men by white Americans and by foreigners); Kathryn M. Neckerman & Joleen Kirschenman, *Hiring Strategies, Racial Bias, and Inner-City Workers*, 38 SOC. PROBS. 433, 440 (1991) (finding that 47.2 percent of a survey of Chicago employers surveyed felt that inner-city African-American workers in selected occupations lacked work ethic); Yaser Ali, *Shariah and Citizenship – How*

## TABLE OF CONTENTS

INTRODUCTION.....	2
I. THEORETICAL UNDERPINNINGS OF ANTIDISCRIMINATION	
LAW AND POLICY .....	11
A. <i>Coercive Assimilationism and Multiculturalism</i> .....	13
B. <i>Social Identity Formation and Stigmatization</i> .....	15
C. <i>Essentialism and Stereotyping Theory</i> .....	18
D. <i>Intersectionality Theory</i> .....	22
II. PERFORMING IDENTITY AT WORK: THE CASE OF	
MUSLIM WOMEN OF COLOR .....	24
A. <i>Muslim Women’s Identity Performance Strategies</i> .....	25
B. <i>Group Enhancement Strategies: Refusing to Perform</i>	
<i>Coercive Assimilationism</i> .....	29
III. THE TRIPLE BIND: IRRECONCILABLE INTERGROUP,	
INTRAGROUP, AND INTERSECTIONAL IDENTITY	
PERFORMANCE PRESSURES .....	36
A. <i>Sandwiched Between Intragroup and Intergroup Identity</i>	
<i>Performance Pressures</i> .....	38
B. <i>Negotiating the Contradictions</i> .....	43
IV. EXPANDING TITLE VII JURISPRUDENCE TO KEEP UP	
WITH DISCRIMINATION .....	46
A. <i>Incorporating Implicit Bias Analysis into Title VII</i> .....	47
B. <i>Price Waterhouse Cooper and Gender Stereotyping</i> .....	51
C. <i>Applying Stereotyping To Race, Ethnicity, and Religion</i> ...	54
D. <i>Addressing the Case of Muslim Women of Color</i> .....	57
CONCLUSION .....	61

## INTRODUCTION

*As soon as Sarah Maher walked into the room, their body language became noticeably tense. She was not what they expected to see when they spoke to her on the phone. Dressed in an ornate long-sleeve top extending to her knees with hand stitched colorful Palestinian embroidery, loose black pants, and a matching headscarf, Sarah was identifi-*

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*Islamophobia is Creating a Second-Class Citizenry in America*, 100 CALIF. L. REV. 1027, 1037 (2012) (explaining that Arabs have been “collectively indicted . . . as public enemy #1—brutal, heartless, uncivilized religious fanatics and money-mad cultural ‘others’ bent on terrorizing civilized Westerners especially Christians and Jews, Arabs are brute murderers, sleazy rapists, religious fanatics, oil-rich dimwits, and abusers of women.”); Pat K. Chew, *Asian Americans: The “Reti-cent” Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 24 (1994) (Asians are stereotyped as the “model minority” implying that “Asian[] Americans, through their hard work, intelligence, and emphasis on education and achievement have been successful in American society”). *But see* Miranda Oshige McGowan & James Lindgren, *Testing the “Model Minority Myth”*, 100 NW. U.L. REV. 331, 331 (2006) (arguing that the “positive image of Asian Americans as a model minority conceals a more sinister core of beliefs about Asian Americans and other racial minorities in America”).

ably Muslim. Her dark olive complexion, long slender nose, and high cheek bones revealed her Arab roots. And yet, she had no foreign accent, she wore makeup, and exhibited a strength of personality and self-confidence that contradicted her conservative dress. Within a matter of minutes, she had lost her audience. Despite having been raised in the United States, her headscarf quickly marked her as an outsider. Her Arab features betrayed her seemingly Anglo sounding name. And her assertive personality came across as pushy with a tinge of self-entitlement. Sarah had failed to assimilate her religious, ethnic, and gender identity in accordance with the predominant social groups' norms. Although the company boasted women, Muslims, and racial minorities among their employees, Sarah was not the "right kind" of minority employee. Unlike the other Muslim and minority employees, Sarah openly expressed her identity through her dress rather than attempt to cover it. Her strong personality and unabashed self-confidence was off putting for the women and men in the room whose expectations of professional women included deference, discreteness, and humility. Although the interviewers included a woman, a Muslim, and white Christian male, they each followed and expected others to follow assimilationist demands, as had they. In the end, they agreed that though Sarah Maher was well qualified on paper, she just was not the right fit for the company's culture.

Unlawful discrimination continues to ail American workplaces.<sup>3</sup> Despite the prevailing narrative that America is now "post-racial" after the election of its first African American president, equal opportunity still eludes many Americans.<sup>4</sup> For Americans who belong to racial, ethnic, or religious groups stigmatized as the "other," their opportunities to access quality education, political office, and equal opportunity in the workplace are stunted.<sup>5</sup>

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3. Minna Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1498 (2008).

4. See Mahzarin R. Banaji & Anthony G. Greenwald, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* 86, 186 (2013); Richard Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803, 1808 (1999); Deborah N. Archer, *The Challenge of Teaching the Next Generation of Civil Rights Lawyers in a "Post-Racial" Society*, 4 COLUM. J. RACE & L. 55, 56 (2013). For racial disparities on full display, one need look no further than the criminal justice system and the ongoing protests across the country challenging the failure to indict police officers who shot Michael Brown in Ferguson, Missouri and choked to death Eric Garner in Staten Island, New York. David Theo Goldberg, *Revelations of "Postracial" Ferguson*, TRUTHOUT.COM (Dec. 3, 2014), <http://www.truth-out.org/news/item/27773-revelations-of-postracial-ferguson>; Terrence McCoy and Abby Phillip, *Eric Garner's Killing and Why the Police Chokehold is so Racially Charged*, WASH. POST (Dec. 4, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/12/04/why-the-police-chokehold-is-so-racially-charged/>.

5. See Camille Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1163 (2004). Indeed, for the past 17 years the Equal Employment Opportunity Commission has reported annual increases in employment discrimi-

When Title VII of the 1964 Civil Rights Act was passed, victims often experienced explicit biases against their protected group.<sup>6</sup> The law's immediate effect was to ban overt prejudice causing disparate intergroup discrimination on the basis of race, ethnicity, color, gender, or religion.<sup>7</sup> But, as the data show, the absence of discriminatory policies on paper does not always translate into a discrimination-free workplace in practice.<sup>8</sup> Rather, it pushes bias into more covert manifestations wherein facially neutral factors become proxies for unlawful discrimination.<sup>9</sup> Title VII, therefore, has been relatively successful in rooting out explicit bias in employment while leaving implicit bias untouched.<sup>10</sup>

More specifically, Title VII is ill-equipped to prevent two increasingly prevalent forms of discrimination: (1) implicit bias arising from negative stereotypes of protected classes; and (2) disparate treatment of subgroups of protected classes who do not conform to coercive assimilationist pressures.<sup>11</sup> Taking this into account, courts should not exclude intra-group comparative evidence or singularly focus on inter-group

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nation charges based on race, gender, and ethnicity. See EEOC Charge Statistics FY 1997 Through FY 2013, available at <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

6. Yuracko, *supra* note 1, at 1-2; BANAJI & GREENWALD, *supra* note 4, at 169. See Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1032 (2006).

7. Krieger & Fiske, *supra* note 6, at 1009.

8. *Id.* at 1001; Rich, *supra* note 5, at 1190-91; see Johanna Shih, ' . . . Yeah, I Could Hire this One, but I Know It's Gonna Be a Problem': How Race, Nativity and Gender Affect Employers' Perceptions of the Manageability of Job Seekers, 25 ETHNIC & RACIAL STUD. 99, 116 (2002); see also BANAJI & GREENWALD, *supra* note 4, at 86, 148.

9. See e.g., Rich, *supra* note 5, at 1136-37. (describing how "voluntary actions" against facially neutral regulations resulted in "discrimination by proxy"); See generally Elizabeth A. Deitch et al, Subtle Yet Significant: The Existence and Impact of Everyday Racial Discrimination in the Workplace, 56 HUMAN RELATIONS 1299, 1300-03 (2003).

10. See D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got To Do With It?*, 79 U. COLO. L. REV. 1355, 1362 (2008) [hereinafter Greene, *Title VII*]; see, e.g., Krieger & Fiske, *supra* note 6, at 1032; see also Laura Morgan Roberts & Darryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL'Y 369, 369 (2007).

11. Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 837-39 (1994); Krieger & Fiske, *supra* note 6, at 1026-27; Mark R. Bandsuch, *Dressing Up Title VII's Analysis of Workplace Appearance Policies*, 40 COLUM. HUM. RTS. L. REV. 287, 289-90 (2009). See Ian Ayres, *Is Discrimination Elusive?*, 55 STAN. L. REV. 2419, 2421 (2002-2003) (noting that much of disparate treatment that occurs today is based on unconscious biases); see also BANAJI & GREENWALD, *supra* note 4, at 158-59 (discussing the increase in "aversive racists" who earnestly describe themselves as egalitarian but nevertheless display subtle forms of race discrimination, such as being more ready to offer help to whites than Blacks, or subconsciously holding stereotypes against non-whites); see also Roberts & Roberts, *supra* note 10, at 387.

comparative evidence in ascertaining whether unlawful discrimination was the motivating factor for the adverse employment action.<sup>12</sup>

Of course, if the different treatment among the subgroups is based on performance and skills directly related to the work at issue, then no liability should attach. But that is not always the case. Disparate treatment of members of the same protected class may arise from negative racial, ethnic, gender, or religious stereotypes that privileges those able and willing to perform their identity to appease assimilationist demands of the majority group.<sup>13</sup> Such pressures to perform one's identity in accordance with the high status groups' norms and values produce what I call "coercive assimilationism." The effect of failing to adhere to coercive assimilationism is intergroup discrimination based on intragroup differences rooted in implicit or explicit negative stereotyping.<sup>14</sup>

Female employees who fall under multiple protected classes face an intersection of identity performance pressures as women, racial or ethnic minorities, and religious minorities.<sup>15</sup> The dominant group's expectations of how women or members of minority groups should behave, dress, and communicate in order to be "professional" are often contradictory due to conflicting stereotypes.<sup>16</sup> A Black woman, for example, who is assertive, ambitious, and exhibits leadership qualities associated as masculine characteristics risks being stigmatized as aggressive, insubordinate, and threatening because of negative stereotypes of Blacks.<sup>17</sup> Simultaneously, her behavior contradicts gender conformity norms that women should be deferential, gentle, soft spoken, and pleasant.<sup>18</sup> And if she is a Muslim, then

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12. Devon W. Carbado and Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 714-19 (2001) [hereinafter Carbado & Gulati, *The Fifth Black Woman*]; Krieger & Fiske, *supra* note 6, at 1059; Kotkin, *supra* note 3, at 1491.

13. See, e.g., Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 628 (2006); Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595, 596 (1999); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decision-making*, 104 YALE L.J. 2009, 2011 (1995); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 771 (2002).

14. Rich, *supra* note 5, at 1144, 1163-64; see, e.g., Krieger & Fiske, *supra* note 6, at 1026; Angela P. Harris, *Theorizing Class, Gender, and the Law: Three Approaches*, 72 LAW & CONTEMP. PROBS., 37, 39 (2009) [hereinafter Harris, *Theorizing Class*]; Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2509 (1993). For an example of explicit stereotyping against an African American female employee performing her identity contrary to her supervisor's norms, see *Bryant v. Begin Manage Company*, 281 F. Supp. 2d 561 (2003).

15. See *infra* notes 70-73, 169-174, 262. See Abrams, *supra* note 14, at 2495; Kotkin, *supra* note 3, at 1474.

16. Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 387 (1991).

17. *Id.*; Yuracko, *supra* note 1, at 33. See, e.g., Abrams, *supra* note 14, at 2529, 2537 (where a plaintiff in a sexual assault case was described as "loud, assertive, and abrasive" by the court).

18. Caldwell, *supra* note 16, at 387, 394 n.96. Yuracko, *supra* note 1, at 33.

her behavior triggers stereotypes of Muslims as terrorists, disloyal, foreign, and suspect.<sup>19</sup> Such stigmatization may occur notwithstanding that these very traits are necessary for effective performance of the job and would be viewed as strengths if exhibited by male white employees.

For workplace anti-discrimination laws to eradicate these multiple binds that disparately impact women of color,<sup>20</sup> this Article argues that Title VII jurisprudence should take into account intergroup discrimination based on intragroup identity performance to assure all employees within protected classes, not just a subset, are covered by workplace anti-discrimination law.<sup>21</sup> I draw on Kenji Yoshino's work on identity performance in the workplace that theorizes prejudice coping mechanisms by members of low valued groups.<sup>22</sup> Yoshino identifies three ways minorities attempt to avoid the costs of their devalued group membership and attain the benefits of the socially dominant group: converting, passing, and covering.<sup>23</sup>

I also incorporate Devon Carbado and Mitu Gulati's scholarship that examines the great lengths to which minorities go to efface their Black, Latina, Asian or other low value traits and behaviors in order to reassure colleagues and supervisors that they are not dangerous, loud, immoral, lazy, or possess few interests in common with the majority-race crowd.<sup>24</sup> The minority female employee thus does double duty—she must complete her work as well as expend significant energy communicating to her co-workers that she is just like them.

Coercive assimilationism exacts a disproportionately high toll on members of non-dominant social groups<sup>25</sup> as facially neutral rules mask a

19. See, e.g., *Zayed v. Apple Computers*, No. C 04-01787 JW, 2006 WL 889571, at \*7 (N.D. Cal. Apr. 5, 2006) (involving employees placing red, white, and blue ribbons outside of every employee's office door as a symbol of unity and patriotism and not placing a ribbon on Egyptian Muslim woman employee's door); Trina Grillo & Stephanie Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -isms)*, 1991 DUKE L.J. 397, 404 (1991); Caldwell, *supra* note 16, at 365, 387.

20. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); see also Greene, *Title VII*, *supra* note 10, at 1370 (describing a workplace policy prohibiting employees from wearing all-braided hairstyles); Reva Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 79 (2000); Caldwell, *supra* note 16, at 394-95.

21. See *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 142 (2000) (to prevail on a claim for discrimination under Title VII based on circumstantial evidence, Maynard must show that: (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) he was replaced by a person outside his protected class or was treated less favorably than a similarly-situated individual outside his protected class).

22. Yoshino, *supra* note 13, at 772-73; BANAJI & GREENWALD, *supra* note 4, at 118-19.

23. Yoshino, *supra* note 13, at 773.

24. See generally Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262, 1279 (2013) [hereinafter Carbado & Gulati, *Working Identity*].

25. AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* 25 (2001); Yuracko, *supra* note 1, at 42; Rich, *supra* note 5, at 1170.



bias towards the needs, interests, and inherited circumstances of the dominant group.<sup>26</sup> Minority employees find themselves expected to behave, talk, and dress in ways that emulate the dominant group, or at the very least do not threaten their power to define professional norms.<sup>27</sup> By the same token, subjective aesthetic values determine who and what is valued and entitled to control the workplace, and by extension the distribution of wealth.<sup>28</sup> Racial or ethnic minorities who engage in cultural displays and exhibit behaviors disfavored or out of sync with the dominant white, Protestant, heterosexual male culture find themselves deemed unprofessional or incompetent, resulting in their exclusion or marginalization in the workplace.<sup>29</sup> While members of the dominant group are able to live and work with minimal pressure to compromise their cultural values and norms, those deemed outsiders are coerced to relinquish or at the very least hide their foreign languages, clothing, cultural practices, hairstyles, and associations with other outsiders to obtain gainful employment.<sup>30</sup>

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26. SHACHAR, *supra* note 25, at 25; *see also* Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103, 107 (2000) [hereinafter Carbado & Gulati, *Conversations at Work*] (explaining that “the employee uses her speaking opportunities to ‘signal’ that she has certain characteristics that the employer values. The employer, in turn, ‘screens’ the employee’s statements in order to evaluate whether the employee in fact has those characteristics.”); Krieger & Fiske, *supra* note 6, at 1013.

27. Gowri Ramachandran, *Intersectionality As “Catch 22”: Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 303-04 (2005). Since 9/11, the cases of Muslim women not hired or terminated because they wore a headscarf on grounds of violating a dress policy has noticeably increased. Due to religious accommodation doctrines favoring employees, many of these women have won their religious accommodation claims in stark contrast to disparate treatment claims based on race or ethnicity. *Elwakin v. Target Media Partners Operating Co.*, No. 11-2648, 2012, WL 669068, (E.D. La. Feb. 29, 2012); *EEOC v. Abercrombie & Fitch*, 798 F. Supp. 2d 1272 (N.D. Okla. 2011); *EEOC v. White Lodging Servs. Corp.*, No. 3:06CV-353-S 2010 U.S. Dist. LEXIS 32492 (W.D. Ky. Mar. 31, 2010); *Mowafy v. Noramco of Del.*, 620 F. Supp. 2d 603 (D. Del. 2009); *EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006); *Zayed v. Apple Computers*, No. C 04-01787 JW, 2006 WL 889571, at \*2; *Tyson v. Clarian Health Partners, Inc.*, No. 1:02-cv-1888-DFH-TAB, 2004 U.S. Dist. LEXIS 13973 (S.D. Ind. June 17, 2004).

28. Roberts & Roberts, *supra* note 10, at 370; Rich, *supra* note 5, at 1157.

29. *See e.g.*, *Mirza v. Neiman Marcus Group*, No. 06-cv-6484, 2009 WL 3824711, at \*3 (N.D. Ill. Nov. 13, 2009) (order denying motion for summary judgment) (Muslim woman of Pakistani descent alleged preferential treatment to non-Muslim, Caucasian employees, inferior work assignments, and excluded from company holiday parties); Roberts & Roberts, *supra* note 10, at 370; Greene, *Title VII*, *supra* note 10, at 1357-58 (2008).

30. Press Release, Equal Employment Opportunity Commission, Skilled Healthcare Group, Inc. to Pay Up to \$450,000 for National Origin Discrimination (April 4, 2009) available at <http://eeoc.gov/eeoc/newsroom/release/4-14-09.cfm> (describing a case of Spanish speakers prohibited from speaking Spanish in the workplace); Press Release, American-Arab Anti-Discrimination Committee, ADC Welcomes Jury Award for Muslim Woman (June 4, 2007) available at [http://www.adc.org/index.php?id3117&no\\_cache=1&sword\\_list\[ \]=hijab](http://www.adc.org/index.php?id3117&no_cache=1&sword_list[ ]=hijab) (where a woman was fired for refusing to remove her hijab); Hamillah Abdullah, *Amy’s ban on dreadlocks, other styles seen as offensive to some African-Americans*, CNN, Apr. 11, 2014, available at <http://>



The effect is what Laura Roberts and Daryl Roberts call “cultural profiling” where people who fail to show that they fit into a company’s culture are not invited to join or are purged if they later exhibit non-assimilationist identities.<sup>31</sup> Behaviors or traits that remind the employer of the employee’s low social status and potential to thwart cultural hegemony in the workplace result in adverse employment actions.<sup>32</sup> In contrast, members of minority groups who perform their identities in accordance with coercive assimilationist demands receive better treatment than members in the same group who fail to do so.<sup>33</sup> As a result, members of low status groups must exert more energy than members of high status groups to assuage their employers that they are not a threat to the organization’s culture.<sup>34</sup> The heightened sense of self-consciousness regarding all aspects of their cultural and status displays imposes psychological stress and health costs on minority employees that go unnoticed by employers and courts.<sup>35</sup>

While the anti-discrimination literature is replete with articles on African Americans, African American women, and LGBT communities,<sup>36</sup> little is written on Muslim women of color. Accordingly, this Article makes a scholarly intervention by examining the complexities of Muslim

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[www.cnn.com/2014/04/08/politics/army-hairstyle-ban-debate/](http://www.cnn.com/2014/04/08/politics/army-hairstyle-ban-debate/) (African American women’s hairstyles being banned).

31. Roberts & Roberts, note 10 at 369; Green, *supra* note 10, at 627. See *Abercrombie*, 798 F. Supp. 2d 1272, 1272-78 (recognizing that Abercrombie did not hire a Muslim teenager who applied for a job at the store in Woodland Hills Mall in 2008 because, as a Muslim, she wears a head scarf and the Abercrombie “Look Policy” prohibits sales models from wearing head wear); Roberts & Roberts, *supra* note 10, at 370.

32. Roberts & Roberts, *supra* note 10, at 392; see also Shih, *supra* note 8, at 106 (noting employers’ definition of a “good work ethic” as a willingness to work at any job regardless of working conditions and to obey the orders and authority of employers); Rich, *supra* note 5, at 1142; Greene, *Title VII*, *supra* note 10, at 1355.

33. Roberts & Roberts, *supra* note 10, at 388.

34. *Id.* at 381; Claude Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 617 (1997).

35. Roberts & Roberts, *supra* note 10, at 399; Mayida Zaal, Tahani Salah & Michelle Fine, *The Weight of the Hyphen: Freedom, Fusion and Responsibility Embodied by Young Muslim-American Women During a Time of Surveillance*, 11 APPLIED DEV. SCI., 164, 171 (2007).

36. E.g., KATIE R. EYER, PROTECTING LESBIAN GAY BISEXUAL AND TRANSGENDER (LGBT) WORKERS 13-16 (2006), available at <http://ssrn.com/abstract=1441282> (discussing the ways that common law claims have been utilized to protect the rights of LGBT victims of harassment and discrimination); Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467 (2000) [hereinafter Carbado, *Black Rights*]; Matthew Clark, *Stating a Title VII Claim for Sexual Orientation Discrimination in the Workplace: The Legal Theories Available After Rene v. MGM Grand Hotel*, 51 UCLA L. REV. 313 (2003); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989); Mary Elizabeth Powell, *The Claims of Women of Color Under Title VII: The Interaction of Race and Gender*, 26 GOLDEN GATE U. L. REV. 413 (1996). See generally Henry L. Chambers, *Discrimination, Plain and Simple*, 36 TULSA L.J. 557 (2001); William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447 (2013).

women's experiences through the lens of identity performance theory. Part I lays out the theoretical underpinnings of anti-discrimination law and social psychology including the scholarly debates between assimilationism and multiculturalism, intersectionality theory, social identity formation, stereotyping theory, and essentialism. Although rarely discussed in court opinions, social psychology theories illuminate the gravity of the harms caused by assimilationist pressures on low status groups to perform their identities to the liking of high status groups.<sup>37</sup>

Part II applies social psychology and anti-discrimination theories to the case of Muslim women of color in the workplace, an under-researched area in legal scholarship.<sup>38</sup> In doing so, I examine the identity performance challenges and contradictions faced by Muslim women of color as "intersectionals" facing stereotypes against (1) Muslims as terrorists, violent, and disloyal;<sup>39</sup> (2) Muslim women as meek, oppressed, and lacking individual agency;<sup>40</sup> (3) women as sexualized,<sup>41</sup> terminally second best to men, and uncommitted to their careers;<sup>42</sup> (4) immigrants as forever foreign and un-

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37. Krieger & Fiske, *supra* note 6, at 999-1000 (arguing for courts to incorporate social psychology into antidiscrimination doctrine to ensure antidiscrimination laws are keeping up with the changing forms of bias from explicit to implicit in the United States); BANAJI & GREENWALD, *supra* note 4, at 158-59; Nyla Branscombe, Richard Harvey & Michael Schmitt, *Perceiving Pervasive Discrimination Among African Americans: Implications for Group Identification and Well-Being*, 77 J. PERSONALITY & SOC. PSYCHOL. 135 (1999).

38. Gowri Ramachandran, *Intersectionality as "Catch 22": Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 326 (2005); Janet K. Swim, Laurie L. Cohen & Lauri L. Hyers, *Experiencing Everyday Prejudice and Discrimination*, in PREJUDICE: THE TARGET'S PERSPECTIVE 38, 38 (Janet K. Swim & Charles Stangor eds., 1998). See generally George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321, 322-23 (1997).

39. See Abu Dhabi Gallup Center, *Muslim Americans: Faith, Freedom, and the Future*, GALLUP 7 (Aug. 2011), <http://www.gallup.com/strategicconsulting/153611/REPORT-Muslim-Americans-Faith-Freedom-Future.aspx> ("Americans of other major faiths are split on whether or not it is possible to profile a terrorist on the basis of traits such as gender, age, or ethnicity. Forty-nine percent of Jews, 46% of Catholics, and 44% of Protestants in the U.S. do not think profiling is possible."); see also Zogby International, *American Views on Arab and Muslim Americans*, ARAB AMERICAN INSTITUTE 6-7 (Sept. 2010), <http://www.aaiusa.org/reports/american-views-on-arab-and-muslim-americans-2010> (46% of Americans believe that Islam teaches hate, 47% disagree that Islam is a religion of peace, and only 52% of Americans disagree that Muslims tend to be religious fanatics); Wolfgang Wagner et al., *The Veil and Muslim Women's Identity: Cultural Pressures and Resistance to Stereotyping*, 18 CULTURE & PSYCHOL. 521, 533-34 (2012).

40. Nadine Naber, ARAB AMERICA GENDER, CULTURAL POLITICS, AND ACTIVISM 170 (ed. Matthew Jacobson, Werner Sollors, New York University Press 2012); see Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 24 IMMIGR. & NAT'LITY L. REV. 295, 309 (2003) (arguing that "Arab women are often portrayed as weak, mute, covered in black, or as scarcely clad belly dancers").

41. LILA ABU-LUGHOD, DO MUSLIM WOMEN NEED SAVING? 127 (2013); but see Wagner et al., *supra* note 39, at 531 (2012); Naber, *supra* note 40, at 2-3.

42. See, e.g., SHERYL SANDBERG, LEAN IN, 98, 115, 161 (2013). Despite rises in women's educational attainments and entrance into the workforce, women still do the vast majority of

deserving of equal treatment;<sup>43</sup> and (5) ethnic minorities from the Middle East and South Asia as barbaric, misogynist, and anti-American.<sup>44</sup> I conclude that Muslim women of color are at risk of falling between the cracks of Title VII jurisprudence due to courts' unwillingness to recognize the harms and the triple binds caused by coercive assimilationist pressures to conform one's identity to comport to high status group norms.

Part III highlights the triple bind in which many Muslim women of color find themselves wherein they cannot simultaneously adhere to the various identity demands. Facing the brunt of negative stereotypes of Muslims as terrorists, gender stereotypes of Muslim women as weak and oppressed, and stereotypes specific to her race or ethnicity, a Muslim female employee is caught in a triple bind.<sup>45</sup> If she assertively expresses her independent views, demonstrates ambition for promotion, and dresses in Western attire; her coworkers will admire her for defying the stereotype of the meek, oppressed Muslim woman. At the same time that she is admired for defying the purported yokes of Arab cultural oppression, she is penalized for violating American gender norms that deem ambition and assertiveness a liability for women.<sup>46</sup> She may also trigger fears of Muslims as disloyal terrorists in waiting. But any attempts to exercise deference to allay suspicions of her loyalty reinforce stereotypes of her submissiveness and inability to lead.<sup>47</sup> Thus, she pays a high price regardless how she chooses to perform her identity.

Part IV offers a new doctrinal proposal that addresses intergroup discrimination based on intragroup differences in identity performance. Building off of Melissa Hart and Paul Secunda's work on social framework evidence in employment discrimination,<sup>48</sup> I argue that courts should incorporate social psychology theories to recognize the invidious impact of

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child care. As a result, "forty-three percent of highly qualified women with children are leaving careers, or 'off-ramping,' for a period of time."

43. See Akram & Johnson, *supra* note 40, at 316 (providing examples of undesirability of Arab immigrants, like an "INS-created strategy called 'Alien Terrorists and Undesirables: A Contingency Plan,' which called for mass arrests and detentions of noncitizens from Arab nations and Iran and suggested using ideological exclusion grounds in the immigration laws to remove noncitizens from Arab countries and Iran already in the United States"); Naber, *supra* note 40, at 196.

44. Read & Bartkowski, *supra* note 1, at 396-97; Wagner et al., *supra* note 39, at 533-34; Naber, *supra* note 40, at 92.

45. See generally Yaser Ali, *Sharia and Citizenship – How Islamophobia is Creating a Second-Class Citizenry in America*, 100 CALIF. L. REV. 1027, 1037, 1041 (2012) (describing common stereotypes of Muslims, including the stereotype of women as "weak and oppressed objects" and the "Arab terrorist stereotype").

46. See SANDBERG, *supra* note 42, at 18; see Eugene Borgida, Corrie Hunt & Anita Kim, *On the Use of Gender Stereotyping Research in Sex Discrimination Litigation*, 13 J.L. & Pol'y, 613, 620-21 (2005).

47. Read & Bartkowski, *supra* note 1, at 396.

48. See Melissa Hart and Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37 (2009). See also John

negative stereotypes in employers' purportedly objective employment decisions. Following the sex-stereotyping jurisprudence established in *Price Waterhouse Cooper v. Hopkins*,<sup>49</sup> judges should take seriously plaintiffs' circumstantial evidence that stereotypes against race, religion, and gender motivated the employer's action. While Title VII jurisprudence acknowledges the harms caused by explicit stereotyping in intergroup dynamics, it has yet to meaningfully incorporate implicit stereotyping that discriminates based on intragroup differences.<sup>50</sup> As such, this Article calls on courts to recognize the interaction between identity performance, assimilationist demands, negative stereotyping and discrimination at the intersection of race, religion, and gender.

#### I. THEORETICAL UNDERPINNINGS OF ANTIDISCRIMINATION LAW AND POLICY

Each society experiences social stratification based on the norms, values, and culture of the socially dominant group.<sup>51</sup> Currently in the United States, the socially dominant group is white, Protestant Christian, heterosexual, and male.<sup>52</sup> The privileges of membership in the dominant social group are many. Institutional rules put in place by its members allocate resources that secure their status at the top of the social hierarchy.<sup>53</sup> The

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Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715, 1718 (2008).

49. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 228 (1989) (concluding that in a Title VII case, if a plaintiff proves gender played a role in the employment decision, "the defendant may avoid a finding of liability by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account").

50. See, e.g., Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 63 (1991); Krieger & Fiske, *supra* note 6, at 1036 (2006); Grillo & Wildman, *supra* note 19, at 401.

51. Anita Christina Butera, *Assimilation, Pluralism and Multiculturalism: The Policy of Racial/ethnic Identity in America*, 7 BUFF. HUM. RTS. L. REV. 1, 5 (2001); Grillo & Wildman, *supra* note 19, 408; Naber, *supra* note 40, at 85.

52. Kenneth M. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256 (2005); Anthony P. Farley, *Perfecting Slavery*, 36 LOY. U. CHI. L.J. 225, 244 (2004); Roberts & Roberts, *supra* note 10, at 373; Abrams, *supra* note 14, at 2505; Greene, *Title VII*, *supra* note 10, at 1389. See generally Terry Smith, *Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace*, 57 AM. U. L. REV. 523, 570 (2008) (naming white Americans as the socially dominant group).

53. Scholars have noted that many people who belong to the dominant group "do not see the ways in which they are privileged, and so well-intentioned middle class, white liberals often strive to maintain privilege for their children, while denying they are doing so." Avtar Brahi & Ann Phoenix, *Ain't I a Woman? Revisiting Intersectionality*, 5 J. INT'L WOMEN STUD. 75, 80-81 (2004); BANAJI & GREENWALD, *supra* note 4, at 143-44 (noting how many "benefits of being in the in-group tend to remain invisible" because they arise from the person's family, church, school, neighborhood, and access to various institutions); Abrams, *supra* note 14, at 2524-25 (analogizing treatment of women in the workplace through sexual harassment claims to middle class white liberal maintenance of privilege).

socially dominant group defines the values, behaviors, and other characteristics that constitute what is “normal,” “competent,” “good,” and “professional.”<sup>54</sup> Others must then assimilate in order to have the opportunity to attain economic, social, and political privileges. Those unable or unwilling to do so pay a high price ranging from under or unemployment, inaccessibility to education, poor quality housing, intergenerational poverty, and targeted enforcement of criminal laws.<sup>55</sup> Coercive assimilationism, therefore, imposes dignitary and psychological harms that warrant legal redress.

As the US economy becomes increasingly corporatized, the predominantly white Christian male managers who manage them set dress and behavioral standards that affect millions of American workers.<sup>56</sup> Seemingly neutral practices ostensibly aimed at increasing productivity effectively single out members of historically disadvantaged, marginalized, and underrepresented groups.<sup>57</sup> For example, workplace rules that bar Black women from wearing corn rows in their hair, Black men from having dreadlocks, or Latinos from speaking Spanish during work breaks merely reinforce the dominant culture and exclude non-conformists.<sup>58</sup> When these practices are challenged in court, judges often defer to corporations’ subjective definitions of professionalism, even if clearly disadvantageous to racial minorities.<sup>59</sup> The courts deem cultural practices as unprotected voluntary choices distinct from protected immutable morphological characteristics.<sup>60</sup>

Although organizational culture is framed under capitalist, profit-maximizing objectives for maintaining a productive and cohesive workplace, the underlying values and norms that define the workplace culture

54. See Greene, *Title VII*, *supra* note 10, at 1363; see, e.g., Yuracko, *supra* note 1, at 19, 44 (discussing performing race and gender in keeping with socially dominant norms).

55. Naber, *supra* note 40, at 72. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2012) (examining systemic discrimination against Blacks in the criminal justice system).

56. Yuracko, *supra* note 1, at 17. Minorities account for the following percentage of CEOs in Fortune 500 companies: African-Americans: 1.2%; Asian: 1.6%; Latino: 1.6%; Women: 4.4%. white males account for over 90% of CEOs in the Fortune 500 companies. See DIVERSITYINC, *Where is Diversity in Fortune 500 CEOs?*, DIVERSITYINC (Feb. 1, 2014) <http://www.diversityinc.com/diversity-facts/wheres-the-diversity-in-fortune-500-ceos/> (last visited Feb. 1, 2014). See also Chris Isidore, *Black CEOs are Still Rare*, CNN MONEY (Mar. 22, 2012, 6:47 PM) <http://money.cnn.com/2012/03/22/news/companies/black-ceo/>.

57. Roberts & Roberts, *supra* note 10, at 371. Other stigmatized groups included Turkish, Japanese, Chinese, and Hindu. BANAJI & GREENWALD, *supra* note 4, at 173. See also Green, *supra* note 10, at 662 (noting that judges shortsightedly view particular work cultures as natural and just without inquiring into the underlying social norms that disadvantage minorities and women).

58. Roberts & Roberts, *supra* note 10, at 400; see also Bandsuch, *supra* note 11, at 287; Green, *supra* note 10, at 648; Steele, *supra* note 34, at 614.

59. Yuracko, *supra* note 1, at 3, 18; Green, *supra* note 10, at 628; Caldwell, *supra* note 16, at 371.

60. Yuracko, *supra* note 1, at 5-6; Rich, *supra* note 5, at 1137-38; Caldwell, *supra* note 16, at 378.

may stem from the socially dominant group's norms and preferences as opposed to objective criteria tied to productivity.<sup>61</sup> Indeed, it is questionable whether assimilation is in fact necessary to create a productive and cohesive workplace. In a culturally diverse American society, workplace rules based on cultural assimilationism may instead compromise the very cohesion and productivity they purport to promote by privileging some groups over others.<sup>62</sup> Indeed, assimilationist policies send a message to minority employees that their cultural displays, values, and behaviors are inferior, resulting in stigmatization.<sup>63</sup> And as long as the psychological cost of such stigmatization is imposed on low status out-groups, employers are unlikely to voluntarily change their work cultures. Thus, Title VII becomes all the more important as a mechanism for countering the harmful effects of coercive assimilationist practices, and instead, supporting a multiculturalist model.<sup>64</sup>

#### A. Coercive Assimilationism and Multiculturalism

Multiculturalists argue that colorblind policies are merely rationalizations for ignoring illegitimate racial hierarchies and racial bias.<sup>65</sup> Richard Delgado and Kevin Johnson, among other legal scholars, challenge "blindness to differences" policies and call for a multicultural citizenship model.<sup>66</sup>

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61. Roberts & Roberts, *supra* note 10, at 397; Cristina M. Rodriguez, *Language Diversity in the Workplace*, 100 Nw. U.L. REV. 1689, 1694 (2006) (discussing how pressures to suppress linguistic differences cause resentment and anxiety); Abrams, *supra* note 14, at 2533.

62. Roberts & Roberts, *supra* note 10, at 369; Rodriguez, *supra* note 61, at 1694 (discussing how pressures to suppress linguistic differences cause resentment and anxiety); Rich, *supra* note 5, at 1144; Green, *supra* note 10, at 668 (citing reasons why diversity minimizes separatism and balkanization within American society and workplaces).

63. Greene, *supra* note 10, at 628 (arguing that "behavioral expectations along a white, male norm imposes extra performance costs on outsiders and forces reconstruction of identity"). See Greene, *Title VII*, *supra* note 10, at 1356 (arguing for a broader definition of race that shifts the focus from the employer's intent to discriminates to the effects of the employment decision including the perpetuation of racial stigmatization); see *Mirza v. Neiman Marcus Group*, No. 06-cv-6484, 2009 WL 3824711, at \*25 (N.D. Ill. Nov. 13, 2009) (alleging employer's discriminatory treatment causes plaintiff anxiety and depression for which she took Prozac).

64. Yuracko, *supra* note 1, at 40. *But see* Yoshino, *supra* note 13, at 876-77 (arguing that U.S. constitutional and statutory law's fail to address compulsory assimilation due to the "assimilation bias" of anti-discrimination law that emphasizes immutability as a prerequisite for protection).

65. Ford, *supra* note 4, at 1807; BANAJI & GREENWALD, *supra* note 4, at 205-06 (discussing studies where individuals self-describe themselves as color-blind but their actions show otherwise); Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1, 12 (2013). See also Devon W. Carbado & Mitu Gulati, *What Exactly is Racial Diversity*, 91 CAL. L. REV. 1149, 1157-58 (2002) [hereinafter Carbado & Gulati, *What Exactly*] (reviewing ANDREA GUERRERO, SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION (2002)) (explaining that racial diversity promotes colorblindness by rendering the racial identities of non-white students less salient).

66. SHACHAR, *supra* note 25, at 22; Ford, *supra* note 4, at 1803-04. Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy*



They argue that a nuanced understanding of citizenship acknowledges, respects, and even nourishes group-based distinctiveness based on a belief that these cultures are intrinsically good and valuable.<sup>67</sup> Accordingly, incorporating identity performance into anti-discrimination jurisprudence is an integral part of the state's commitment to diversity.<sup>68</sup>

While multiculturalism may alleviate the harms imposed by coercive assimilationism, it is certainly not flawless. Inherent in protecting a particular culture and its adherents is defining the values, practices, and norms that distinguish that culture. In turn, mainstream society may take certain definitions as truth notwithstanding diversity within a culture.<sup>69</sup> As aptly noted by Richard Ford, should descriptions of identity become codified into law, then normative injunctions about how group members ought to act may strip individuals of the autonomy to shape their own identity within a particular social group.<sup>70</sup> Paradoxically, legally protecting cultural practices and behaviors of protected classes may in effect deny agency to members of low status groups. Courts' rulings would thus legitimize one version of a group identity above all others while reinforcing the notion that groups possess a defined essence.<sup>71</sup>

These risks have a particularly acute effect on women. Privileged male members within the cultural group are often the gatekeepers for defining the group's culture.<sup>72</sup> Their status grants them greater authority to impose patriarchal visions of the community, thereby subordinating female and other underprivileged members.<sup>73</sup> Intragroup hierarchies become reinforced to alleviate intergroup hierarchies.<sup>74</sup> As a result, feminist and progressive positions within the community that challenge existing power structures find themselves marginalized and silenced.<sup>75</sup> Moreover, the implicit deference to cultural autonomy within a multiculturalism model re-

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*Systemic Social Ills*, 77 CORNELL L. REV. 1258, 1282-83 (1992); Akram & Johnson, *supra* note 40, at 309 (2003).

67. SHACHAR, *supra* note 25, at 22; Ford, *supra* note 4, at 1807.

68. See SHACHAR, *supra* note 25, at 22; see also Siegel, *supra* note 20, at 82 (describing "anti discrimination law as a social practice that regulates the social practices of race and gender.").

69. Roberto J. Gonzalez, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2210 (2003).

70. *Id.*; Ford, *supra* note 4, at 180.

71. Roberts & Roberts, *supra* note 10, at 394.

72. See, e.g., EEOC, GLASS CEILINGS: THE STATUS OF WOMEN AS OFFICIALS AND MANAGERS IN THE PRIVATE SECTOR, <http://www1.eeoc.gov/eeoc/statistics/reports/index.html> [hereinafter EEOC Report] (asserting that even though women represent 48 percent of all employment, they represent only 36.4 percent of officials and managers).

73. SHACHAR, *supra* note 25, at 4.

74. SHAHNAZ KHAN, MUSLIM WOMEN: CRAFTING A NORTH AMERICAN IDENTITY 11-13 (University Press of Florida, 2000).

75. *Id.* at xiv.



lieves mainstream society of its responsibility for subordinating certain members of minority groups.<sup>76</sup>

In the end, the subordinated members of low status groups, often women, become the biggest losers in a multiculturalist model unless institutions equip them to dismantle the power hierarchies within their ethnic communities and broader mainstream society that subordinates them in the first place.<sup>77</sup>

### B. *Social Identity Formation and Stigmatization*

Debates on multiculturalism versus assimilationism implicate individual social identity formation because every individual has a social identity that she constructs in relation to others.<sup>78</sup> As members of particular social groups, we see ourselves as sharing specific attributes and concerns with those who share our social identity. Social identity is not static, but exists within a continuous process of negotiation and renegotiation such that social identification is a dynamic process.<sup>79</sup> The attributes, behaviors, and meanings of an identity group are socially defined both by society at large and the experiences of the in-group with whom a person identifies.<sup>80</sup> The meanings associated with a particular social category, therefore, may change as well as the importance attached to an identity by a particular individual.<sup>81</sup>

The importance of a particular group to an individual's identity is a significant determinant in how an individual perceives and copes with a discriminatory event.<sup>82</sup> Social identity theory posits that targets of prejudice are not viewed simply as individuals but rather as representatives of a group of like people possessing innate, biological traits.<sup>83</sup> Stereotypes of particular identity groups are based on assumptions held by outsiders of which the consequences are exclusionary and detrimental to the target

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76. *Id.* at 13.

77. *See, e.g.*, at 15; SHACHAR, *supra* note 25, at 3, 6.

78. *See generally*, Kay Deaux & Kathleen A. Ethier, *Negotiating Social Identity*, in PREJUDICE: THE TARGET'S PERSPECTIVE 301, 301-323 (Janet K. Swim & Charles Stangor eds., 1998).

79. *Id.* at 305.

80. *Id.* at 303.

81. Swim, Cohen & Hyers, *supra* note 38, at 53; KHAN, *supra* note 74, at xi (discrimination based on intragroup differences that do not confirm intergroup stereotypes impose false dichotomies on otherwise complex and highly diversified identities).

82. Nyla Branscombe & Naomi Ellemers, *Coping with Group-Based Discrimination: Individualistic Versus Group-Level Strategies*, in PREJUDICE: THE TARGET'S PERSPECTIVE, 243, 252 (Janet K. Swim & Charles Stangor eds., 1998) [hereinafter Branscombe & Ellemers].

83. Jean Phinney, Cindy Cantu, Dawn Kurtz, *Ethnic and American Identity as Predictors of Self-Esteem Among African American, Latino, and White Adolescents*, 26 J. YOUTH & ADOLESCENCE, 165, 166 (1996).

group.<sup>84</sup> Stigmatized individuals possess some attribute or characteristic that conveys a social identity that is devalued in a particular setting.<sup>85</sup> Determinations regarding which cultural values are devalued or which groups are stigmatized are subjective rather than objective realities.<sup>86</sup>

In the case of African Americans, for example, studies show that they encounter a set of circumstances and experiences that represent their differential treatment from European Americans.<sup>87</sup> Prejudice is manifested in various ways, including, but not limited, to verbal rejection, avoidance, discrimination, and physical attack.<sup>88</sup> In the workplace, members of stigmatized groups experience limitations in access to opportunities and resources as a result of what social psychologists call insidious trauma: chronic events linked to the social structure and institutionalized and ubiquitous forms of oppression experienced in daily life.<sup>89</sup>

The chronic experiences of prejudice produce greater general stress due in part to the cognitive appraisals of threat by the victim towards the antagonist and normative developmental events specifically linked to membership in an oppressed group.<sup>90</sup> Some targets of negative stereotyping who recognize others' negative views of their group membership internalize the negative evaluations and develop lower self-esteem.<sup>91</sup> Members of oppressed groups suffer tangible costs in terms of direct effects on life out-

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84. Deaux & Ethier, *supra* note 78, at 301-02; BANAJI & GREENWALD, *supra* note 4, at 78-79; *see, e.g.*, Zaal, Salah & Fine, *supra* note 35, at 170 (describing a young Muslim woman's frustration with being treated as an outsider when she identified herself as an American).

85. Steele, *supra* note 34, at 623. Delgado & Stefancic, *supra* note 66, at 1282-83.

86. Deaux & Ethier, *supra* note 78, at 303.

87. Branscombe & Ellemers, *supra* note 82, at 251. Deaux & Ethier, *supra* note 78, at 303, 306; BANAJI & GREENWALD, *supra* note 4, at 47, 209 (reporting that 75% of those who take the Race IAT on the internet or in laboratory studies reveal an automatic white preference).

88. Branscombe & Ellemers, *supra* note 82, at 250.

89. *Id.* Notably, courts fail to recognize as adverse employment actions verbal abuse, insults, unfair criticism, or excessive scrutiny notwithstanding the stigmatizing effects of such treatment. *See, e.g.*, *Smalls v. Allstate Ins. Co.*, 396 F. Supp. 2d 364, 371 (S.D.N.Y. 2005); *Bennett v. Watson Wyatt & Co.*, 136 F. Supp. 2d 236 (S.D.N.Y. 2001). *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002) (finding for the discriminated employee but stating that even though Title VII is violated when "discriminatory intimidation, ridicule, and insult," the behavior has to be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment"). *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2441 (2013) ("In such cases, we have held, the plaintiff must show that the work environment was so pervaded by discrimination that the terms and conditions of employment were altered.")

90. Branscombe & Ellemers, *supra* note 82, at 247, 258 (defining stress as an environmental demand linked to major life changes or stressors as well as daily hassles and chronic strains, with a range of physical and psychiatric distress).

91. Branscombe, Schmitt & Harvey, *supra* note 37, at 146; BANAJI & GREENWALD, *supra* note 4, at 93. *But see* Branscombe & Ellemers, *supra* note 82, at 248 (other members of stigmatized groups respond to criticism by refusing to attribute their poor outcomes to personal inadequacies rather than group-based discrimination as a means of preserving self-esteem and retain feelings of self-control).

comes such as “rates and experiences of unemployment and underemployment, income level and social status, infant mortality, physical health and injury, emotional distress, and psychopathology.”<sup>92</sup> This is consistent with studies finding that the more women or African Americans perceive themselves as victims of gender or racial discrimination; the more they exhibit adverse psychiatric and physical health symptoms including higher levels of depression.<sup>93</sup> Prejudices from the dominant out-group that view a woman as the “other” trigger feelings of helplessness, resentment, and anger.<sup>94</sup>

As a result, people identified as members of a stigmatized group, including Muslim women of color, find themselves facing a social world that is in part hostile. Various forms of subtle and blatant prejudice infiltrates the lives of low status group members, making prejudice an ongoing lived experience within everyday life.<sup>95</sup> In response, stigmatized individuals adopt different strategies to cope with perceived discrimination depending on the magnitude of the threat and the individual’s level of identification with a disadvantaged group.<sup>96</sup> The high identifiers with the disadvantaged group employ group-based strategies while low identifiers employ individual mobility strategies.<sup>97</sup>

Persons who self-categorize at the individual level, as opposed to the group level, respond to negative stereotypes about their social identity group by attempting to set themselves apart from fellow in-group members. This is known as identity negation.<sup>98</sup> Identity negation can take three forms: (1) eliminating an identity altogether, known as “conversion” in identity performance theory; (2) identity denial known as “passing” in identity performance theory; and (3) lowered identification known as “covering” in identity performance theory.<sup>99</sup> Ultimately, identity per-

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92. Kevin W. Allison, *Stress and Oppressed Social Category Membership*, in PREJUDICE: THE TARGET’S PERSPECTIVE 145, 145 (Janet K. Swim & Charles Stangor eds., 1998).

93. Branscombe & Ellemers, *supra* note 82, at 247. Combined with the greater life stress caused by fewer economic resources, lower income racial minorities suffer more general stress than their counterpart European American. Allison, *supra* note 92, at 153. Similarly, Muslims who perceive greater discrimination experience lower levels of self-esteem. Azadeh Ghaffari, Ayse Ciftci, *Religiosity and Self-Esteem of Muslim Immigrants to the United States: The Moderating Role of Perceived Discrimination*, 20 INT’L J. FOR PSYCHOL. OF RELIGION 14, 20 (2010).

94. Allison, *supra* note 92, at 159-60. See KHAN, *supra* note 74, at 45 (providing an example of a Muslim woman who did not succeed in passing, thereby leaving her lonely and depressed because she was excluded both from the Muslim community and mainstream society).

95. Swim, Cohen & Hyers, *supra* note 38, at 37-38 (citing short term interactions such as street remarks and glares, long discussions, and prejudice that targets the individual or the entire social group based on negative stereotypes).

96. Branscombe & Ellemers, *supra* note 82, at 243.

97. Three identity management strategies are employed by disadvantaged social groups to maintain a positive social or personal identity in the face of negative stereotypes: individual mobility, social competition, and social creativity. *Id.* at 245.

98. *Id.* at 246; Deaux & Ethier, *supra* note 78, at 307-08.

99. Deaux & Ethier, *supra* note 78, at 307-08; Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002). See Part II for a detailed explication of identity performance theory.

formance strategies are coping mechanisms in response to negative stereotypes.

### C. Essentialism and Stereotyping Theory

Negative stereotyping of low status groups perpetuates prejudice and discriminatory acts.<sup>100</sup> Stereotyping assumes individuals within a particular low status group possess the same qualities and characteristics by virtue of their common social group membership.<sup>101</sup> Negative stereotypes arise from negative associations of certain traits that reinforce notions that individuals and groups possessing such traits are intellectually, morally, and culturally inferior to members of the dominant group.<sup>102</sup> The misdeeds of one group member are attributed to other members, denying low status groups the individual agency afforded to the high status group. Yet, when a member of a low status group achieves success, she is often treated as an exception to the stereotype rather than evidence of the fallacy of the stereotype.<sup>103</sup>

Each low status group is burdened with different negative stereotypes depending on a nation's historical, political, and social circumstances. African Americans, for example, are often stereotyped as undisciplined, insubordinate, and unwilling to assimilate into America's purported "melting pot" society.<sup>104</sup> Some stereotypes are gendered. Black males, for example, are presumed irresponsible, violent, sexual predators, drug dealers, and prone to criminality.<sup>105</sup> Black women are stereotyped as sexually insatiable, promiscuous, immoral, aggressive, and tough.<sup>106</sup> When a Black woman is viewed as independent, tough, assertive, or a matriarch, these are negative attributes that place her outside of socially acceptable womanhood

100. Zoë Richards & Miles Hewstone, *Subtyping and Subgrouping: Processes for the Prevention and Promotion of Stereotype Change*, 52 PERSONALITY & SOC. PSYCHOL. REV. 52, 52 (2001) (defining stereotypes as "a type of schema or knowledge structure about social groups").

101. Thus, "members of an out-group [are] seen as less diverse and more stereotypic than members" of the in-group, also known as the "out-group homogeneity effect." *Id.* at 52; see also BANAJI & GREENWALD, *supra* note 4, at 128-129; Krieger & Fiske, *supra* note 6, at 1034.

102. Caldwell, *supra* note 16, at 387; Delgado & Stefancic, *supra* note 66, at 1282-83 (1992) (describing various negative stereotypes against African Americans, Mexicans, Asians, and Native Americans).

103. Richards & Hewstone, *supra* note 100, at 53; Delgado & Stefancic, *supra* note 66, at 1287; but see Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881, 891 (1995) (stating that "achievements by members of the privileged group are viewed as meritorious and the result of individual effort, rather than as privileged.").

104. Caldwell, *supra* note 16, at 392-93 (citing ALLAN BLOOM, *THE CLOSING OF AMERICAN MIND* 91 (1989)); Green, *supra* note 10, at 646 (describing an example of an African American woman scientist who was not promoted because her racially salient African dress, hair, and behavior was too different from the researchers she would supervise).

105. BANAJI & GREENWALD, *supra* note 4, at 102 (2013).

106. Abrams, *supra* note 14, at 2529 (citation omitted).

and labels her a “bad employee” in stark contrast to a white male who is praised for possessing similar traits.<sup>107</sup>

In the case of Muslims, religious essentialism falsely assumes a monolithic “Muslim Experience,” or “Muslim Women Experience” that imposes immutable characteristics upon all Muslims such that the essentialist is relieved of the effort to learn about the lives of individuals with all of the discomforts that it entails.<sup>108</sup> Like Blacks, stereotypes against Muslims are gendered wherein Muslim males are stereotyped as terrorists, disloyal, suspect, barbaric, and violent.<sup>109</sup> Muslim women are often stereotyped as meek, oppressed by their male relatives, discouraged by their families from pursuing their professional aspirations, pressured to be housewives, and granted less educational opportunities than their male siblings.<sup>110</sup> After the September 11th terrorist attacks, Muslim women found they were doubly burdened with gendered religious stereotypes as well as “raced” religious stereotypes where their Muslim headscarves equated them with terrorists and violence against Americans.<sup>111</sup> As a result, Muslims across the nation

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107. Caldwell, *supra* note 16, at 395. See Irene Browne & Joya Misra, *The Intersection of Gender and Race in the Labor Market*, 29 ANN. REV. OF SOC’Y 487, 490 (2003) (explaining that “stereotypes of Black women have included the asexualized Mammy, the promiscuous Jezebel, and the profligate welfare queen. These images reinforce racial divisions by denigrating Black women in comparison with White women.”). See also Adrien Katherine Wing & Laura Weselmann, *Transcending Traditional Notions of Mothering: The Need for Critical Race Feminist Praxis*, 3 J. OF GENDER RACE & JUST. 257, 259 (1999) (“Black mothers are considered the epitome of bad mothers. They are viewed as being unmarried, lazy, promiscuous, welfare queens—the opposite of the ideal mother”) (footnote omitted).

108. ABU-LUGHOD, *supra* note 41, at 70–71 (“there is no ‘Muslim woman’ and no Islam-Land. The situations of individuals, regions, countries, and classes differ”). See also Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) [hereinafter Harris, *Race and Essentialism*]; D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FLA. INT’L. U. L. REV. 333, 355 (2013) [hereinafter Greene, *A Multidimensional Analysis*] (explaining that because of their religious beliefs “Muslim women are marked as racial and gendered ‘others,’ as they do not represent the prevailing white, female, Protestant normative standard of womanhood and they are deemed ‘radical’ or ‘militant’”).

109. BANAJI & GREENWALD, *supra* note 4, at 135 (discussing how an act of terrorism committed by a member of a foreign group leaves a more lasting stereotype than a similar act of terrorism committed by a member of the in-group); Akram & Johnson, *supra* note 40, at 302.

110. See, e.g., *Tyson v. Methodist Health Grp., Inc.*, 2004 WL 1629538, at \*7 (S.D. Ind. June 17, 2004) (supervisor mocked Senegalese Muslim woman questioning why a married Muslim woman was still working implying that her religion required her to stay home to serve her husband); ABU-LUGHOD, *supra* note 41, at 88 (noting the long history of gendered orientalism wherein pictorial and literary depictions portray Muslim women as culturally distinct and mirror opposites of Western women as downtrodden victims or sensually exotified). See also SUSAN MOLLER OKIN ET AL., *IS MULTICULTURALISM BAD FOR WOMEN* (1999).

111. Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim American Women in the Cross-hair of Intersectionality*, 9 HASTINGS RACE & POVERTY L.J. 191, 193 (2012); Ghaffari & Ciftci, *supra* note 94, at 15; see also Neil Gotanda, *In the Issue: Race, Religion, and Late Democracy: The Racialization of Islam in American Law*, 637 ANNALS AM. ACAD. POL. & SOC. SCI. 184, 186 (2011); see also Naber, *supra* note 40, at 252–53; see, e.g., *Ara v. Tedeschi Food Shops, Inc.*, 794

in schools, on the streets, on buses and metros, and at work found themselves the objects of intensified suspicion and surveillance.<sup>112</sup>

The psychological and physical health costs of stereotyping are significant. Stigmatization arising from negative stereotypes stifles motivation and energy and diverts attention away from performance towards affective and behavioral regulation.<sup>113</sup> This translates into limited access to resources and produces lower job performance and lower income.<sup>114</sup> To cope, some members of oppressed groups minimize their investment and personal identification with specific domains of performance in which they are stereotyped as incompetent.<sup>115</sup> For example, women and African Americans are stereotyped as unable to succeed in math and engineering thereby discouraging many members of these low status groups from pursuing certain careers.<sup>116</sup> Moreover, when women and racial minorities have opportunities in workplaces with small representations of their in-group, they may opt not to pursue them due to fears they will unlikely be accepted as equals.<sup>117</sup> By avoiding potential rejection, these women seek to spare themselves the interpersonal stress associated with being a minority.<sup>118</sup> They end up settling for an objectively less desirable job with less pay, prestige, and growth opportunities.<sup>119</sup>

Despite temptations to attribute negative stereotyping to merely cognitive errors by well-intentioned actors, American history provides multiple examples of how stereotypes were used as a control device to justify oppression, assuage whites' guilt for slavery, and perpetuate economic privileges along racial and gender lines.<sup>120</sup> Though the most egregious manifestations of such stereotypes are now condemned, their pernicious influence remains, albeit in subtle forms. For example, Samuel Huntington

F. Supp. 2d 259, 261 (D. Mass. 2011) (involving a Muslim woman of Bangladeshi descent alleging her manager showed her a picture of Sadaam Hussein after he was killed and told her "your leader is finished," stated that Bangladesh was the number one terrorist country, and threw out all job applications by applicants with Muslim sounding names).

112. Zaal, Salah & Fine, *supra* note 35, at 164 (quoting Sunaina Maira, *Youth Culture, Citizenship, and Globalization: South Asian Muslim Youth in the United States After September 11th*, 24 COMP. STUD. OF S. ASIA, AFR., AND THE MIDDLE E. 219, 219 (2004)).

113. See generally Allison, *supra* note 92, at 145-70; See Lorraine P. Sheridan, *Islamophobia Pre- and Post-September 11th, 2001*, 21 J. OF INTERPERSONAL VIOLENCE 317, 317-22 (2006) (discussing a study documenting the rise of "Islamophobia" before and after September 11th).

114. *Id.* at 163.

115. *Id.* at 156.

116. See *id.* at 156; see also BANAJI & GREENWALD, *supra* note 4, at 88-89; see also Steele, *supra* note 34, at 615.

117. Swim, Cohen & Hyers, *supra* note 38, at 39-40; see Green, *supra* note 10, at 650, 660 (discussing the *Sears* case, in which a court accepted the argument that there were fewer women working at Sears because of their own work preferences, not discrimination).

118. Swim, Cohen & Hyers, *supra* note 38, at 39-40.

119. *Id.* at 41.

120. Delgado & Stefancic, *supra* note 66, at 1287.

and Lino Graglia argue that disparities in educational achievement, socioeconomic status, and professional success are attributable to particular cultures' failure to value education and hard work.<sup>121</sup> Similarly, others argue that women are not senior executives in corporations and law firms because they are unwilling to make a commitment to their careers or simply do not have the willpower and intellect to handle the stress.<sup>122</sup> In the end, stereotypes allow the public to shift the blame on targets of disparate outcomes rather than address the systemic societal inequities perpetuated by the stereotypes.

Although all humans make use of stereotyping, social psychologists have found that stereotyping is commonly practiced by people who perceive human groups as rigid, undifferentiated, and dichotomous.<sup>123</sup> To these essentialists, human attributes are biologically based rather than socially constructed, and thus stereotypes are justified as a reflection of innate and inherent factors possessed by a particular group.<sup>124</sup> Essentialists impose cultural group responsibility such that a group's culture causes inferior outcomes for a low status group.<sup>125</sup>

Studies by social psychologists Zoe Richards and Miles Hewstone show that the more familiar a person is with a particular group, the more variable the group is perceived.<sup>126</sup> However, when some perceivers are faced with disconfirming information that challenges their stereotype, they tend to maintain the stereotype by grouping together disconfirming members into a subtype and treating them as an exception unrepresentative of

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121. Samuel Huntington, *The Hispanic Challenge*, FOREIGN POLICY, Mar./Apr. 2004 at 30, 44, available at [http://www.foreignpolicy.com/story/cms.php?story\\_id=2495&print=1](http://www.foreignpolicy.com/story/cms.php?story_id=2495&print=1) (warning that influx of immigrants may cause division of the United States into "two peoples, two cultures and two languages"); Sonia Smith, *UT Law Prof. Lino Graglia Says Black and Hispanic Students are Less "Academically Competent" Again*, TEX. MONTHLY, Dec. 11, 2012, 11:41 PM <http://www.texasmonthly.com/story/ut-law-prof-lino-graglia-says-black-and-hispanic-students-are-less-%E2%80%9Cacademically-competent%E2%80%9D>; Sam Howe Verhovek, *Texas Law Professor Prompts A Furor Over Race Comments*, N.Y. TIMES, Sept. 16, 1997, <http://www.nytimes.com/1997/09/16/us/texas-law-professor-prompts-a-furor-over-race-comments.html>.

122. SANDBERG, *supra* note 42, at 92-94.

123. BANAJI & GREENWALD, *supra* note 4, at 91-92; see also Nick Haslam, Louis Rothchild & Donald Ernst, *Are Essentialist Beliefs Associated with Prejudice?*, 41 BRIT. J. SOC. PSYCHOL. 87, 87 (2002) (explaining that one aspect of the prejudiced personality is a "rigid, dichotomous and ambiguity-intolerant to cognitive style.").

124. Brock Bastian & Nick Haslam, *Psychological Essentialism and Stereotype Endorsement*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 228, 228 (2006); See BANAJI & GREENWALD, *supra* note 4, at 191.

125. BANAJI & GREENWALD, *supra* note 4 at 191. See, e.g., Huntington, *supra* note 121, at 37 (Mexican immigrants lag behind U.S. norms for percentages of high school degrees, percentages of post-high school degrees, rates of managerial positions, and rates of home ownership.).

126. Richards & Hewstone, *supra* note 100, at 64.



the group.<sup>127</sup> In identity performance theory, this phenomenon is known as racial exceptionalism wherein the majority points to a select number of minorities they have hired to disprove allegations of unlawful bias.<sup>128</sup> Often times those individuals possess the phenotype of their race or ethnicity that may be the basis for forming the stereotype but perform their identities in accordance with the demands of the majority group. Thus, calls for increased interaction between different identity groups should not be limited to intergroup interactions but also exposure to the various intragroup differences that dispel homogenizing stereotypes.<sup>129</sup>

#### D. Intersectionality Theory

Any discussion of women of color and discrimination law entails examining how belonging to multiple low status groups further complicates intergroup dynamics. The intersection of identities confounds the essentialist discriminator while also leading to uniquely tailored stereotypes of Black women, Latina women, or Muslim women, among others.

Intersectionality theory interrogates the interplay between gender, race, religion, and other categories of differences in individual lives, social practices, institutional arrangements, and cultural ideologies.<sup>130</sup> Rather than examine prejudice and discrimination through binaries of solely race, gender, or religion, intersectionality theorizes identity in a more complex manner.<sup>131</sup> It posits that legal theory and social policy that focuses on discrimination against individuals on the basis of protected traits as separate and distinct from each other, rather than interactive with each other, fails to uncover the gender components of racism, race components of sexism, and the gender and race components of religious bias.<sup>132</sup> As such, intersectionality affects outcomes of power, access to resources, and distribution of wealth.<sup>133</sup> Social and material realities of women of color's lives are af-

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127. *Id.* at 56; GORDON ALLPORT, *THE NATURE OF PREJUDICE* 20, 21, 23 (1979). In contrast, subgrouping is a process that promotes stereotype change because it causes the perceiver to organize information into multiple clusters of individuals who are similar to one another in some way and different from other group members. Examples include career women, housewives, and feminist women within the larger stereotype of women. Richards & Hewstone, *supra* note 100, at 61.

128. Carbado & Gulati, *What Exactly*, *supra* note 65, at 1156 (explaining that racial exceptionalism may lead to racial conflict and alienation and that it does not necessarily produce belonging).

129. Rich, *supra* note 5, at 1268.

130. Kathy Davis, *Intersectionality as Buzzword*, 9 *FEMINIST THEORY* 67, 77 (2008); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality Identity, Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1241 (1991); Harris, *Race and Essentialism*, *supra* note 108, at 585-90 (1990).

131. Jennifer Nash, *Re-thinking Intersectionality*, 89 *FEMINIST REV.* 1, 2 (2008).

132. See Caldwell, *supra* note 18, at 374.

133. Leslie McCall, *The Complexity of Intersectionality*, 30 *CHI. J.* 1771, 1789-91 (2005).

fectured by how their race, class, and gender identities interact to produce and transform power relations to the disadvantage of low status groups.<sup>134</sup>

Focusing on Black women's experiences,<sup>135</sup> Kimberlé Crenshaw and Angela Harris argue that the distinct history of Black women and the negative stereotypes associated with them dictates a tailored analysis of discrimination that expounds on how their interactive low status identities impact access to equal opportunity in the workplace.<sup>136</sup> Absent recognition of the interaction of multiple identities, Black women are at risk of being denied the same protections available to other individuals protected by antidiscrimination law.<sup>137</sup> Indeed, courts consistently fail to comprehend intersectionality. They incorrectly assume that racism and sexism operate independently such that a Black woman must show either that she was discriminated against because she was a woman or because she was Black rather than because she was a Black woman.<sup>138</sup> An employer, therefore, may defeat the Black female plaintiff's prima facie case by pointing to other women or other Black males who were not subjected to the alleged disparate treatment.<sup>139</sup>

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134. Intersectionality theory offers a theoretical tool to underscore the lived multidimensionality of marginalized subject's experiences to combat feminist hierarchy, male or race hegemony, racial exclusivity. Jennifer Nash, *Re-thinking Intersectionality*, 89 FEMINIST REV. 1, 2 (2008).

135. Kimberlé Crenshaw, *supra* note 130, at 1241-42 (arguing that that many of the experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination); *see generally* Kimberlé W. Crenshaw, *Close Encounters of Three Kinds: on Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151 (2010). *See also* Jennifer C. Nash, "Home Truths" on Intersectionality, 23 YALE J.L. & FEMINISM 445 (2011).

136. *See* Crenshaw, *Close Encounters*, *supra* note 135; *see* Harris, *Race and Essentialism*, *supra* note 108; Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation* 45 LAW & SOC'Y REV. 991, 993 (2011) (providing an example of "an employer [who] might hire both white women and black men but refuse to hire black women because he stereotypes them as desperate single mothers[, and] since this stereotype is specific to black women, it cannot be explained as the summed effects of racism and sexism." (citation omitted)); Browne & Misra, *supra* note 107, at 500 ("For instance, employers depict low-skill young Black men from the inner city as lazy, belligerent, or dangerous (Kirschenman & Neckerman 1991, Moss & Tilly 2001), but they stereotype low-skill Black women as single mothers who are either distracted or desperate for a paycheck"); Bradley Allan Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. C.R. L.J. 199, 200 (2006).

137. *See* Areheart, *supra* note 136, at 214 (asserting that a "double standard appears to exist, whereby white male . . . litigants enjoy additional legal protections which do not extend to non-white male intersectional claimants.").

138. *See* Jennifer Nash, *Re-thinking Intersectionality*, 89 FEMINIST REV. 1, 8-9 (2008) (critiquing the treatment of black women as unitary and monolithic such that "class and sexuality [ ] are obscured in the service of presenting 'black woman' as a category that opposes both 'whites' and 'black men'.").

139. *See* ABU-LUGHOD, *supra* note 40, at 132 (noting that a "discriminatory legal system compounds the problems for women and girls" in a particular society); *see, e.g.*, Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, *supra* note 12, at 714 (providing an example of a Black woman in the workplace who deals with discrimination because "black women exist only

I argue the same analysis applies to Muslim women of color with the addition that they face a triple bind. They face stereotypes unique to Muslim women that depict them as oppressed, subjugated, unable to lead, and in need of saving by American notions of gender equality. Muslim women also find themselves discriminated against as women expected to be feminine, deferential to male authority, and attractive at work.<sup>140</sup> And they are stigmatized as suspect Muslims with covert terrorist agendas.<sup>141</sup> Their intersectional identities destabilize notions of a universal woman, Muslim, Arab, or other low status group by highlighting that multiple sites of oppression intersect to the terms and relations of power in society, including in the workplace.<sup>142</sup>

The next section incorporates the fore-mentioned legal and social psychology theories into an examination of how Muslim women of color, an under-researched group, have performed their multiple identities in a workplace infected by coercive assimilationism. I proffer a nuanced explication of the contradictory identity performance pressures that leave many of them unprotected by current Title VII jurisprudence—regardless whether they reject or succumb to coercive assimilationism. For these reasons, Part IV offers doctrinal recommendations calling for more expansive interpretations of Title VII to address these forms of latent discrimination.

## II. PERFORMING IDENTITY AT WORK: THE CASE OF MUSLIM WOMEN OF COLOR

The antidiscrimination literature is replete with articles on African Americans, African American women, and LGBT communities,<sup>143</sup> but lit-

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to the extent that their experiences comport with the experiences of black men or white women.”).

140. See Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 530 (1982) (Contemporary industrial society’s version of a woman is “docile, soft, passive, nurturant, vulnerable, weak, narcissistic, childlike, incompetent, masochistic, and domestic, made for child care, home care, and husband care. . . Women who resist or fail, including those who never did fit—for example, black and lower-class women who cannot survive if they are soft and weak and incompetent, assertively self-respecting women, women with ambitions of male dimensions—are considered less female, lesser women.”).

141. KHAN, *supra* note 74, at 50; see, e.g., *Ara v. Tedeschi Food Shops, Inc.*, 794 F. Supp. 2d 259, 261 (D. Mass. 2011) (involving a Muslim woman of Bangladeshi descent alleging her manager showed her a picture of Sadaam Hussein after he was killed and told her “your leader is finished,” stated that Bangladesh was the number one terrorist country, and threw out all job applications by applicants with Muslim sounding names); *Mowafy v. Noramco of Del.*, 620 F. Supp. 2d 603, 607-08 (D. Del. 2009) (coworker asked Egyptian Muslim woman why Muslims produce so many terrorists and screaming in fright upon observing her conducting her daily prayers at work).

142. Jennifer Nash, *Re-thinking Intersectionality*, 89 FEMINIST REV. 1, 3 (2008).

143. See, e.g., Henry L. Chambers, Jr., *Discrimination, Plain and Simple*, 36 TULSA L.J. 557, 563 (2001) (discussing sexual orientation in relation to employment discrimination); Katie R. Eyer, *Lesbian, Gay, Bisexual, and Transgendered Employees*, in REPRESENTING LESBIAN, GAY, BISEXUAL, AND TRANSGENDERED CLIENTS IN PENNSYLVANIA, 81, 99-102 (Pa. Bar. Inst. pub.

tle is written on Muslim women of color. Accordingly, this Section expands the literature through an examination of the complexities of Muslim women's experiences through the lens of identity performance theory. Section A describes the unique ways in which Muslim women adopt the individual identity performance strategies of converting, passing, and covering. Section B turns to group level strategies wherein Muslim women increase their identification with Muslim communities, also known as identity enhancement or social competition group strategy, to maintain a positive social identity and self-esteem in the face of prejudice. By expounding on individual and group level strategies, this Section offers a nuanced perspective on how Muslim women's identity performance pressures are both similar and different than those faced by other women of color. As a result, Muslim women adopt coping strategies unique to their cultural, religious, and racial circumstances all of which should be considered by courts presiding over employment cases involving intergroup discrimination against Muslim women based on intragroup difference.

#### A. *Muslim Women's Identity Performance Strategies*

Social psychology scholars Branscombe and Ellemers find that when presented with opportunities to gain membership in higher status group, most people will attempt to negate their identities associated with the devalued group and pursue individual mobility strategies.<sup>144</sup> Such findings corroborate racial hierarchy theory in critical race studies wherein members of stigmatized races may discriminate against other stigmatized races as a means of increasing their association with the dominant white race.<sup>145</sup>

Along those lines, identity negation entails a willingness to make significant changes to one's self-definition in order to decrease or eliminate the negative consequences of an existing identification.<sup>146</sup> Some individuals eliminate an identity by labeling themselves as an "ex-member" of the group that has been abandoned. Others go so far as derogating other in-group members as inferior to distance themselves from the stigmatized group.<sup>147</sup> Similarly, identity denial occurs when an individual denies her

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2008) (discussing the ways that common law claims have been utilized to protect the rights of LGBT victims of harassment and discrimination); see generally Carbado, *Black Rights*, *supra* note 36; Matthew Clark, *Stating a Title VII Claim for Sexual Orientation Discrimination in the Workplace: The Legal Theories Available After Rene v. MGM Grand Hotel*, 51 UCLA L. REV. 313 (2003); William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447 (2013); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989); Mary Elizabeth Powell, *The Claims of Women of Color Under Title VII: The Interaction of Race and Gender*, 26 GOLDEN GATE U. L. REV. 413 (1996).

144. Branscombe & Ellemers, *supra* note 82, at 246-47.

145. See note 252, *infra*; Rich, *supra* note 5, at 1389-90.

146. Branscombe & Ellemers, *supra* note 82, at 308.

147. *Id.* at 245.

identity and attempts to pass as a member of the majority. In the workplace, successful individual mobility strategies can lead to increased opportunities for higher quality work, business development opportunities, good evaluations, promotions, and higher pay.<sup>148</sup> Towards those ends, three individual mobility strategies are most often employed: converting, passing, and covering.

“Converting” entails changing one’s underlying identity altogether. A Muslim woman converts by converting out of Islam into Christianity, the religion of the dominant social group. She legally changes her birth name from a Muslim, Arab, or non-white name to an Anglo sounding name. Her wardrobe and lifestyle eliminate all traces of her Muslim or non-white identity. She marries a Christian, white male with whom she socializes in his dominant social group. Their children are raised Christians with Anglo Saxon names and socialize with other white, Christian children. In the end, the converted Muslim woman completely disassociates from her Muslim and ethnic identity as she converts into her Christian, white identity. In her mind and the minds of others, she is a member of the socially dominant group.

“Passing” occurs when the underlying identity is retained but masked.<sup>149</sup> A Muslim woman who passes hides her Muslim identity by adopting an Anglo nickname, such as Katy instead of Khadija, but does not legally change her birth name.<sup>150</sup> Although she may associate with some Muslims privately, she hides these associations from her white, Christian co-workers. Instead, she strategically socializes with dominant group members to avoid the stigmatization of being associated with her low status group.<sup>151</sup> She partakes in traditionally American social activities such as dancing, drinking, and having American boyfriends—all of which are at odds with the Islam practiced by her in-group.<sup>152</sup> Her western American wardrobe does not disclose her ethnic roots or religious identity, and her marriage to a fair skinned man who also passes as white further obscures her racial and ethnic identity.<sup>153</sup> When her underlying identity is discov-

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148. See, e.g., *Zayed v. Apple Computers*, No. C 04-01787 JW, 2006 WL 889571, at \*7 (N.D. Cal. Apr. 5, 2006) (involving an Egyptian Muslim woman who alleged she was deprived of “(1) opportunities to visit customer sites, (2) one-on-one support, and (3) mentoring opportunities”).

149. See Yoshino, *supra* note 13, at 773.

150. See, e.g., Zaal, Salah & Fine, *supra* note 35, at 171 (describing a young Muslim woman’s fear of being rejected for jobs and other opportunities on account of her Muslim name).

151. See Roberts & Roberts, *supra* note 10, at 382. Cf. Green, *supra* note 10, at 645 (noting that informal socialization is an important way that employees obtain coveted work assignments and promotions).

152. See generally *EEOC v. Abercrombie & Fitch*, 798 F. Supp. 2d 1272 (N.D. Okla. 2011).

153. See KHAN, *supra* note 74, at 37, 40; see also *id.* at 44 (noting that members of the elite of counters who were colonized caused the population to idolize European culture and demean

ered, she is often told “I had no idea you were a Muslim or an Arab” to which she may respond dismissively as an accident of birth and irrelevant to her self-identification.

The option to convert or pass is available only to persons whose skin color and phenotype “look white” enough for the dominant social group to believe they are in fact members of the high status group.<sup>154</sup> Otherwise, attempts to convert or pass leave the person worse off as she is rejected both by her low status group and the high status group.<sup>155</sup> Due to the non-European geographic origins of most Muslim immigrants in America, converting and passing is available to very few.<sup>156</sup> Thus, covering is adopted by Muslims whose phenotype and physical characteristics are perceived as typical of a particular low status group. It is the most common form of identity performance employed to avoid stigmatization.<sup>157</sup>

Covering entails adopting appearances, associations, speech, and behaviors that allay the dominant social group’s discomfort with or fear of the low status group. The minority engages in racial comforting by allaying the guilt caused by the dominant group’s bias against her low status group.<sup>158</sup> She also engages in racial distancing from her low status in-group so that she can be viewed as the exception to negative stereotypes, thereby avoiding stigmatization.<sup>159</sup> Ultimately, the individual does not want to be perceived as “too Black,” “too Muslim,” “too feminist,” or “too Arab” depending on the stigmatized groups to which she belongs. She seeks to assuage the dominant group that she will not come to work one day with a headscarf on, start praying at her desk, or proclaim “Allah Akbar” when she receives good news. Whether or not she wants to engage in such acts is irrelevant because her individuality is subsumed in the negative stereotypes presumed about her low status group.

In covering her identity, a Muslim woman retains and discloses her underlying identity but performs it in such a way that makes it more palatable for the socially dominant group to not feel threatened by her pres-

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local culture, and thus passing is a continuation of post-colonial cultural developments in the Muslim woman’s country of origin). Grillo & Wildman, *supra* note 19, at 406 (describing “being black and looking white”).

154. See KHAN, *supra* note 74, at 40.

155. Branscombe & Ellemers, *supra* note 82, at 258; KHAN, *supra* note 74, at 32 (discussing case of woman whose phenotype looked non-white and stereotypically Muslim within Canadian society such that she was subjected to anti-Muslim bias even though she converted out of Islam).

156. See Sahar F. Aziz, *Sticks and Stones, The Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33 (2009) (providing a summary of the diverse races and ethnicities that comprise the Muslim community in the United States).

157. Green, *supra* note 10, at 652 (pressuring minority women to take on behavioral traits stereotypically associated with and defined by white men and women devalues her race). See e.g. Gonzalez, *supra* note 69, at 2201-06 (discussing the prevalence of “covering” as an identity deflection technique).

158. See Yoshino, *supra* note 13, at 778.

159. Roberts & Roberts, *supra* note 10, at 382.

ence. She does not wear a headscarf, she does not speak Arabic or another foreign language in front of her colleagues, she speaks in the local vernacular accent, straightens her hair, and wears clothes viewed as Western and liberal as opposed to overly conservative and Islamic.<sup>160</sup> She chooses names for her children that are both Arabic and English such as Sara, Adam, Zack, Miriam or Sophia so that her children can also cover their Muslim and ethnic identities.<sup>161</sup> She makes an effort to inform her coworkers about her active participation in traditionally American activities such as the Parent Teacher Association, volunteering at the Salvation Army, leading her daughter's Girls Scouts troop, donating to the United Way, and other typically American extracurricular activities. Even though she may be a practicing Muslim, she does not publicize her religiosity or seek religious accommodation at work. Nor does she inform her coworkers of her trips back to her country of origin as this may be perceived as evidence of divided national loyalties.<sup>162</sup>

A Muslim woman who covers her identity also goes out of her way to express her patriotism and does not criticize American foreign policy.<sup>163</sup> In attempting to racially comfort her colleagues, the Muslim woman laughs with her colleagues, rather than complains about, bigoted jokes about Muslims or her ethnic group, she does not challenge stereotypes that Muslims are more prone to terrorism or Muslim women are oppressed.<sup>164</sup> Indeed, she may go so far as to engage in self-hating humor about her backward country of origin and fanatical religion to validate mainstream stereotypes.<sup>165</sup> She becomes a “cultural Muslim” rather than a

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160. See KHAN, *supra* note 74, at 117-18. For instances of women facing work-related consequences for a more overt performance of Muslim identity, see Complaint at 3-7, *Spence v. LaHood*, No. 11-3972 JBS/AMD, 2013 WL 355913 (D.N.J. July 5, 2011) (alleging several of plaintiff's co-workers made negative comments about her Muslim head covering); Second Amended Complaint at 3-13, *Amna v. N.Y. State Dep't of Health*, No. 08-CV-2806 (CBA)(LB) (E.D.N.Y. Apr. 29, 2009) (alleging Muslim female of Pakistani descent plaintiff's supervisor yelled at her for speaking in her native language and verbally insulted plaintiff in front of co-workers concerning plaintiff's English speaking skills).

161. Changing Muslim names to English sounding names became a common practice after September 11. *Muslim Americans Changing Arabic-sounding Names*, USA TODAY, Mar. 20, 2002, <http://usatoday30.usatoday.com/news/nation/2002/03/20/arab-names.htm>.

162. See, e.g., *Amna*, 2011 WL 4592787, at \*2 (E.D.N.Y. Sept. 30, 2011) (alleging that coworker asking female employee of Pakistani descent whether she vacationed in Iraq as implicitly accusing her of supporting terrorism).

163. See KHAN, *supra* note 74, at 14.

164. *Amna*, 2011 WL 4592787, at \*3 (complaining of being subjected to cartoons offensive to Muslims). See, e.g., Swim, Cohen & Hyers, *supra* note 38, at 50 (discussing nonassertive responses to prejudice in the form of humor and attempts to placate or appease the perpetrator); BANAJI & GREENWALD, *supra* note 4, at 49 (laughing at anti-Black racial humor and rating it as funny is an example of a predicted behavior by automatic white preference).

165. ABU-LUGHOD, *supra* note 41, at 114 (noting that in the West, Muslim communities are regularly portrayed as backward and prone to violence); Steele, *supra* note 34, at 621 (discussing how “negative stereotypes about one's group eventually become internalized and cause re-



“real” (bad) Muslim whose embrace and practice of her Islamic and ethnic identity are viewed as a threat by her coworkers.<sup>166</sup> The identity covering Muslim woman becomes the person her employer points to counter allegations of anti-Muslim, anti-Arab, or even anti-women bias and tout the employer’s workplace diversity. As a result, her willingness to accommodate coercive assimilationist pressures makes her more vulnerable to being a token.<sup>167</sup>

B. *Group Enhancement Strategies: Refusing to Perform  
Coercive Assimilationism*

Not all members of stigmatized groups respond to prejudice through identity negation or dissociation.<sup>168</sup> Individuals highly identified with their devalued group defend their in-group and derogate the out-group.<sup>169</sup> Indeed, some high identifiers respond with anger to the negative perceptions of their group.<sup>170</sup> They view discrimination against their in-group by the dominant group as a “badge of distinction rather than a mark of shame.”<sup>171</sup> To the high identifiers, the poor outcomes of the in-group in terms of employment, education, and other socio-economic factors are a product of discrimination that illegitimately and collectively devalue the entire group.<sup>172</sup> As a result, they are likely to reject dominant group standards, engage in separatism, and place greater value on how they differ from the dominant group.<sup>173</sup>

Increased identification with a low status group, also known as identity enhancement or social competition group strategy, maintains a positive

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jection of one’s own group, even of oneself—self-hating preferences.”); Swim, Cohen, & Hyers, *supra* note 38, at 50 (noting the use of humor to deflect discrimination).

166. KHAN, *supra* note 74, at 100 (describing an interview with a Muslim woman who refused to define Muslim identity based on active religious community participation, but rather based on an intellectual, objective interest in studying Islam as a culture).

167. Branscombe & Ellemers, *supra* note 82, at 258-59 (noting that “only a few token members [of a devalued group] are selectively admitted by the higher status group,” meanwhile continuing the system that is not in fact providing equal chances for all).

168. Roberts & Roberts, *supra* note 10, at 380 (“belonging to stigmatized or socially-devalued identity groups does not mean that one personally ascribes to all of the negative connotations that society has associated with one’s group”).

169. Branscombe & Ellemers, *supra* note 82, at 252.

170. *Id.* at 251.

171. *Id.* at 256.

172. *Id.* at 256.

173. Jolanda Jetten, Nyla Branscombe, Michael Schmitt, Russell Spears, *Rebels with a Cause: Group Identification as a Response to Perceived Discrimination from the Mainstream*, 27 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 1204, 1205 (2001) (noting that the costs of being targeted for discrimination can be offset by the psychological benefits derivable from increased identification with other in-group members); Branscombe & Ellemers, *supra* note 82, at 259.

social identity and self-esteem in the face of prejudice.<sup>174</sup> As a consequence, many members of socially devalued groups derive great pride from their group membership as was the case with Black consciousness movements in the United States during the Jim Crow era and currently evinced in gay pride parades.<sup>175</sup> Similarly, many Muslims coalesce around their faith communities to cope with the distress from post-9/11 discriminatory experiences.<sup>176</sup> If a person believes that her group's low status might be improved and that its low status was assigned illegitimately, then she is more willing to engage in collective efforts to improve the group's position.<sup>177</sup>

But group-based identity strategies carry significant risks. Highly identified group members are more susceptible than low identified members to discrimination by dominant groups who respond defensively and try to strike back at attempts to effectuate social change.<sup>178</sup> Refusal to adhere to the norms set by the dominant social group and negation of intergroup similarities can preclude the in-group member from access to valued outcomes such as jobs, access to good schools, and wealth.<sup>179</sup> For example, African Americans who are less acculturated into mainstream (white) society and more immersed in African culture are more likely to report experiences of prejudice.<sup>180</sup> The highly identified person is viewed by the higher status group as an extremist or troublemaker, which further blocks the possibility of acceptance into the higher status group.<sup>181</sup>

Meanwhile, identity enhancement strategies also entail benefits. Members of devalued groups who view their common identity with in-group members improve their psychological well-being and fulfill their need to belong.<sup>182</sup> One study of African American women found that, "those who feel excluded by their minority group and also perceive high

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174. Branscombe & Ellemers, *supra* note 82, at 244-45; *see also* Allison, *supra* note 92, at 156 (summarizing identity formation in three phases: preencounter, immersion/emersion, and internalization wherein the immersion/emersion phase causes the individual to strongly identify with one's ethnic group, reject the majority culture, and find ethnic and racial discrimination more salient).

175. Roberts & Roberts, *supra* note 10, at 380 (2007).

176. Ghaffari & Ciftci, *supra* note 93, at 22.

177. Branscombe & Ellemers, *supra* note 82, at 249.

178. *Id.* at 261.

179. *Id.* at 259.

180. Allison, *supra* note 92, at 161.

181. Branscombe & Ellemers, *supra* note 82, at 259; Delgado & Stefancic, *supra* note 66, at 1282-83.

182. Branscombe & Ellemers, *supra* note 82, at 250; Krieger & Fiske, *supra* note 6, at 1028 (noting "core social motive to get along with and feel accepted by one's group"). In contrast, rejection by the woman's in-group results in stress, depression, alienation, and other mental health problems. Branscombe & Ellemers, *supra* note 82, at 258. Several studies link the experience of discrimination to emotional distress and adverse health outcomes. Sexist discrimination faced by women of color, for example, "accounted for more variance in premenstrual, depres-

discrimination from the majority exhibit significantly lower self-esteem than those who feel accepted” by the in-group or out-group.<sup>183</sup> Similarly, studies of Muslims find that higher religiosity is linked to positive methods of coping with post-9/11 discrimination.<sup>184</sup> Strong identification with one’s devalued group, therefore, can buffer against the negative psychological effects that accrue from feeling excluded from the dominant group.<sup>185</sup>

Due to the heavy psychological costs and risks arising from identity negation strategies, some members of low status groups respond to prejudice through intensified group contact with their in-group.<sup>186</sup> Such contact enhances self-esteem and assists them in coping with stigma as a means of counteracting discrimination.<sup>187</sup> With the endorsement of others in their in-group, low status members affirm the value of their group membership rather than incorporate the negative views of the high status group.<sup>188</sup> They voluntarily segregate by seeking refuge in their communities where they can limit interactions with prejudiced high status groups.<sup>189</sup>

Examples of group enhancement strategies include attending houses of worship where attendees are exclusively members of the in-group, limiting socialization outside of work with families within the in-group, enrolling their children in private schools wherein most of the students are members of the in-group, and living in neighborhoods where the in-group is the majority.<sup>190</sup> Through these activities, individuals develop a commitment and sense of belonging to the group, a positive evaluation of the group, and an investment in the success of the group.<sup>191</sup> In practicing what social psychologists call avoidance, the in-group members “move away from the oppressor” by developing separatist communities, migrating to less discriminatory locations, and reducing contacts with the majority.<sup>192</sup> The in-group members develop a secure sense of self and a strong

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sive, obsessive compulsive, somatic, and total psychiatric and physical symptoms than generic stress.” Allison, *supra* note 92, at 161.

183. Branscombe & Ellemers, *supra* note 82, at 251.

184. Ghaffari & Ciftci, *supra* note 93, at 14–15; see, e.g., Zayed v. Apple Computers, No. C 04-01787 JW, 2006 WL 889571, at \*7 (N.D. Cal. Apr. 5, 2006) (involving an Egyptian Muslim woman who contends that her work environment at Apple changed significantly for the worse after the September 11th attacks).

185. Branscombe & Ellemers, *supra* note 82, at 251.

186. *Id.* at 255.

187. DEAUX & ETHIER, *supra* note 78, at 311.

188. *Id.*

189. See Swim, Cohen & Hyers, *supra* note 38, at 39.

190. See, e.g., Wildman & Davis, *supra* note 103, at 900–01 (discussing how “in most places we spend time we are in white settings, unless we act affirmatively to seek a racially integrated environment”); Kotkin, *supra* note 3, at 1453.

191. Phinney, Cantu & Kurtz, *supra* note 83, at 178.

192. Swim, Cohen & Hyers, *supra* note 38, at 40.

ethnic identity, which bolsters their self-esteem.<sup>193</sup> Although such strategies may preserve the in-groups' collective self-esteem, it relieves the majority group of the responsibility for systemic biases as they justify the segregation and disparate outcomes as reflecting the minority group's disinterest in racial integration and attendant opportunities.<sup>194</sup>

Collective social change is another group identity enhancement strategy. Social change strategies aim to change beliefs and behaviors of the socially dominant group. They seek systemic changes to the social system to facilitate expression and recognition of their identity without stigmatization. Public education, public relations campaigns, large protests, and high impact litigation are among the various tactics used to challenge unfair institutional practices and rebuke negative stereotypes.<sup>195</sup>

In the case of Muslim women, those facing discrimination who respond through group enhancement strategies tighten their grip over their Muslim identity.<sup>196</sup> They believe that Islamic rules and prescriptions can provide solutions to their everyday problems, including the psychological pressures arising from coercive assimilation and negative stereotypes about Islam, Muslim women, and their ethnic group.<sup>197</sup> By wearing a headscarf,

193. See Phinney, Cantu & Kurtz, *supra* note 83, at 166 (highlighting that numerous studies found that a strong ethnic identity is positively associated with self-esteem).

194. See Swim, Cohen & Hyers, *supra* note 38, at 40; see, e.g., Vicki Shultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1832 (1990).

195. The civil rights movement and the feminist movement, for instance, encouraged its followers to adopt assertive instead of deferential responses to prejudice. Swim, Cohen & Hyers, *supra* note 38, at 50, 52. But note that individuals involved in social change movements are at risk of burn out by becoming "fatigued from daily confrontations with perpetrators" of prejudice, resulting in their preference not to respond despite their continued commitment to their low-status group. *Id.* at 53.

196. See KHAN, *supra* note 74, at 93, 107.

197. See *id.* at 108; see generally Franchesca Benzant, *Donning the Hijab: My Day as an Undercover Muslim Woman*, CLUTCH (Dec. 9, 2011), <http://www.clutchmagonline.com/2011/12/donning-the-hijab-my-day-as-an-undercover-muslim-woman/2/> (detailing the author's experience as part of an outreach effort by the Muslim Women of Maryland challenging women to wear a hijab for a day. The author also recounted another participant's post-9/11 experience, stating, "One girl who was Muslim admitted that this was her first time wearing the hijab since 9/11. She used to be teased to the point students would yank her hijab off of her head and once it was even thrown in the toilet."); Nadine Naber, "Look, Mohammed the Terrorist is Coming!" *Cultural Racism, Nation-Based Racism, and the Intersectionality of Oppressions After 9/11*, SCHOLAR & FEMINIST ONLINE (Summer 2008), [http://barnard.edu/sfonline/immigration/naber\\_01.htm](http://barnard.edu/sfonline/immigration/naber_01.htm) (citing incidents of school children having their headscarf pulled off while commuting to school); Tanya Somanader, *Muslim College Student Reports Sexual Harassment, Gets Reported to FBI For Terrorism and Expelled*, THINK PROGRESS (Jan. 18, 2011, 1:15 pm), <http://thinkprogress.org/security/2012/01/18/406061/connecticut-muslim-studentreports-sexual-harassment-gets-reported-to-fbi-for-terrorism-and-expelled-fromuniversity/?mobile=NC>. (describing a case from 2009 when an African-American Muslim student at the University of Bridgeport was dismissed from school after another student falsely accused her of being a terrorist); Paul Harris, *Living With 9/11: The Muslim American*, THE GUARDIAN (Sept. 5, 2011), <http://www.guardian.co.uk/world/2011/sep/05/living-with-911-muslim-american>; Tarice Gray, *Muslim American Girls*

dressing conservatively in accordance with Islamic principles, and naming their children identifiably Muslim names, they are engaging in both religious and culture enhancing lifestyles. However, they fear the animus against their Muslim headscarf or other visible cultural displays will be imputed onto their children through school bullying.<sup>198</sup> This may cause them to become more insular within their religious and ethnic communities in hopes of shielding their children from exposure to alcohol, drugs, and sex as well as anti-Muslim prejudice. Group enhancing Muslim women attend their local mosque more frequently, enroll their children in full time Islamic schools, look for work at Muslim owned businesses, and socialize only with other Muslims and persons of the same ethnicity.<sup>199</sup>

Withdrawal is not available to all highly identified members of low status groups. Although some may seek out employment where their in-group is predominant, others may have no other choice than to work in an environment that defines professionalism based on the dominant social groups' norms. Moreover, some highly identified members of low status groups may "refuse to perform" their identities to accommodate coercive assimilationist pressures at work. For them, retaining an authentic racial and religious identity manifested in their dress, names, associations, behavior, language, religious practices, and other cultural displays is vital to their self-esteem and quality of life.<sup>200</sup> They view impositions of dominant social norms as a requirement for employment, promotion, and professional success as a form of prejudice, and thus contrary to antidiscrimination law and policy.

Some Muslim women invest in their Muslim identity by redefining it and taking control of it based on recognition that there is no escaping mainstream society's negative stereotypes of Muslim women and Muslims.<sup>201</sup> Accordingly, they respond to devaluation of their Muslim and ethnic identities by wearing a headscarf to emphasize their Muslim

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*Taunted, Assaulted at School for Wearing Hijab*, CHANGE (Dec. 21, 2010), [http://education.change.org/blog/view/muslim\\_american\\_girls\\_taunted\\_assaulted\\_at\\_school\\_for\\_wearing\\_hijab](http://education.change.org/blog/view/muslim_american_girls_taunted_assaulted_at_school_for_wearing_hijab) (reporting that "The Greater Los Angeles office of the Council on American-Islamic Relations (CAIRLA) says it's hearing from students and their parents saying that children are being verbally harassed and tagged with labels like 'terrorist' or 'jihadi,' just for being Muslim and that girls have reported being physically assaulted for wearing hijab, the traditional headscarf worn by Muslim women.").

198. Rhys H. Williams & Gira Vashi, *Hijab and American Muslim Women: Creating the Space for Autonomous Selves*, 68 SOC. OF RELIGION, 269, 271 (2007) (noting that Muslims with the most visibly different religious practices encountered the greatest discrimination).

199. See KHAN, *supra* note 74, at 47. Riffat Hassan, *Challenging the Stereotypes of Fundamentalism: An Islamic Feminist Perspective*, 91 THE MUSLIM WORLD 55, 57 (2011).

200. See generally DEEPAK CHOPRA, I SPEAK FOR MYSELF: AMERICAN WOMEN ON BEING MUSLIM (Maria M. Ebrahimji & Zahra T. Suratwala, eds., 2011).

201. See KHAN, *supra* note 74, at 101.

identity.<sup>202</sup> The headscarf is their way of resisting assimilationist pressures while challenging the meaning of the headscarf as a symbol of oppression.<sup>203</sup> Many of these headscarved women, as well as non-headscarved women, engage in social change by participating in public advocacy campaigns and lobbying efforts condemning the rise of anti-Muslim bias after the September 11th terrorist attacks.<sup>204</sup>

Not only do those “refusing to perform” affirmatively display their low status identity at work, but they assertively and publicly respond to prejudice. When faced with offensive behavior or stereotyping,<sup>205</sup> they visibly communicate their displeasure to the perpetrator.<sup>206</sup> They may use the opportunity to educate the perpetrator about the impropriety and harms caused by prejudice or file a formal complaint with the employer seeking reprimand of the perpetrator. Studies of Muslim women wearing headscarves report that many of them are asked questions about Islam, subjected to racial and religious slurs, or treated unfairly on account of their Muslim identity.<sup>207</sup> This compels them to “represent the race”<sup>208</sup> and dispel myths about their religion.<sup>209</sup> Despite their efforts to educate or hold

202. Wagner et al., *supra* note 39, at 528; ABU-LUGHOD, *supra* note 41, at 18; Williams & Vashi, *supra* note 198, at 271.

203. Williams & Vashi, *supra* note 198, at 284; ABU-LUGHOD, *supra* note 41, at 17-18 (noting that “[w]omen who cover themselves are assumed to be coerced or capitulating to male pressure, despite the fact that wearing an enveloping cover is mandatory (in public) in only a few settings”).

204. See CENTER FOR RELIGION AND CIVIC CULTURE’s biographies of Hind Makki, <http://crcc.usc.edu/initiatives/amcli/hind-makki.html>, Linda Sarsour <http://crcc.usc.edu/initiatives/amcli/linda-sarsour.html>, and Rabia Chaudry <http://crcc.usc.edu/initiatives/amcli/rabia-chaudry.html>. The SOUTHERN POVERTY LAW CENTER reported that the number of anti-Muslim groups tripled in 2001, jumping from 10 groups in 2010 to 30 in 2011. <http://www.splcenter.org/node/3502/activegroups>. See generally Shirin Sinar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 BROOK. L. REV. 41 (2011) (discussing potentially unconstitutional law enforcement interviews with Muslims in the US counterterrorism era following the 9/11 terrorist attacks).

205. For example, African Americans report being stared at, glared at, receiving bad service in public accommodations, and being watched in stores as a common manifestation of negative racial stereotypes. They also experience verbal expressions of prejudice in the form of racial slurs and offensive comments. See Swim, Cohen & Hyers, *supra* note 38, at 43.

206. *Id.* at 50.

207. Zaal, Salah & Fine, *supra* note 35, at 173; *Amna v. N.Y. State Dep’t of Health*, No. 08-CV-2806 (CBA)(LB) 2011 WL 4592787, at \*2 (E.D.N.Y. Apr. 29, 2009) (female employee of Pakistani descent asked by her coworker for informative literature on Islam); see *Mirza v. Neiman Marcus Grp.*, No. 06-cv-6484, 2009 WL 3824711, at \*6 (N.D. Ill. Nov. 13, 2009). See generally, Eden B. King & Afra Ahmad, *Stereotypes as Justification for Discrimination Toward Religious Minorities: Interpersonal Discrimination Toward Muslim Job Applicants*, 63 PERSONNEL PSYCHOLOGY, 881, 881-906 (2010).

208. See generally, Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1757-1817 (2003) (discussing critical race theory and its connection with representation within racial groups).

209. Zaal, Salah & Fine, *supra* note 35, at 173.

discriminators accountable, majority group members may minimize a Muslim woman's objections by suggesting she is oversensitive, paranoid, or adversarial.<sup>210</sup> In turn, this causes retaliation by discrediting the employee as a trouble maker, which can lead to poor job evaluations alleging "attitude problems," denials of promotion, job transfer, or termination.<sup>211</sup>

Although assertive responses to prejudice entail serious risk, failing to assertively respond also entails risks. The victim that passively absorbs the prejudice feels disempowered, self-disappointment, and guilt over her failure to defend herself.<sup>212</sup> She may develop displaced aggressive or passive-aggressive defiance of behavioral norms that lead to physiological effects such as higher blood pressure and stress.<sup>213</sup> Indeed, studies of African American women find that those who quietly accepted discrimination were four times more likely to report hypertension than African American women who took action or talked to others. Similarly, African American women who did not report experiencing sexism or racism had a 2.6 times greater risk of high blood pressure than African American women who reported their experiences as targets of sexism and racism.<sup>214</sup>

While the social science literature on Muslim women in the United States is still in its nascency, certain trends are clear. Like other women of

210. Swim, Cohen & Hyers, *supra* note 38, at 52-53. *See also* *Elwakin v. Target Media Partners Operating Co.*, No. 11-2648, 2012 WL 669068, at \*4 (E.D. La. Feb. 29, 2012) (alleging supervisor made negative comments about her race, national origin, and religion and required her to perform work that her coworkers were not required to perform); *Nader v. Brunalli Constr. Co.*, No. 98-2085, 2002 WL 724597, at \*1-3 (D. Conn. Mar. 26, 2002) (calling plaintiff a "Scum Arab" and telling him to "go back where [he] came from"); *Boutros v. Canton Reg'l Transit Auth.*, 997 F.2d 198, 201 (6th Cir. 1993) (calling the plaintiff a "camel jockey," a "camel rider," a "rich Arab," and telling him to "go back" to Syria); *Yasin v. Cook County Sheriff's Dep't*, No. 07 C 1266, 2009 WL 1210620, at \*4 (N.D. Ill. May 4, 2009) (calling plaintiff a "sand nigger").

211. *See, e.g., Gul-E-Rana Mirza v. The Neiman Marcus Grp., Inc.*, 649 F. Supp. 2d 837 (N.D. Ill. 2009) (alleging preferential treatment to non-Muslim coworkers resulting in lost commission and poor work assignments); *Zayed v. Apple Computers*, No. C 04-01787 JW, 2006 WL 889571, at \*7 (N.D. Cal. Apr. 5, 2006) (alleging marginalization in her practice group, denial of career opportunities, and preferential treatment to less experienced male Caucasian in the form of premier assignments and quick promotions). *See also* Swim, Cohen & Hyers, *supra* note 38, at 52 (discussing various workplace studies that show the high risks of public responses to prejudice in the workplace including negative effects on terms and conditions of employment); Green, *supra* note 10, at 641 (noting that performance evaluations are increasingly dependent on others' perceptions of an individual's ability or willingness to fit in with prevailing social expectations and work culture).

212. Swim, Cohen & Hyers, *supra* note 38, at 52. Targets of discrimination feel conflicted "between their desire [to] confront prejudice and promote change and societal pressure for them to keep quiet to avoid the stigma of the 'uppity oppressed person.'" *Id.* Complaint at 5, *Zayed*, 2006 WL 889571 (challenging employers' claim that plaintiff "had an adversarial, extremely defensive attitude" as pretext for disparate treatment that started soon after the 9/11 terrorist attacks).

213. Swim, Cohen & Hyers, *supra* note 38, at 52.

214. Allison, *supra* note 92, at 160.



color, Muslim women face stereotypes and identity performance pressures both within their religious and ethnic communities as well as mainstream society. Often times these pressures are contradictory such that regardless how a particular Muslim woman responds to coercive assimilationism—through individual mobility or group enhancement strategies—she is caught in a Catch 22.<sup>215</sup>

### III. THE TRIPLE BIND: IRRECONCILABLE INTERGROUP, INTRAGROUP, AND INTERSECTIONAL IDENTITY PERFORMANCE PRESSURES

Much of the literature on performance identity revolves around the psychological, economic, and physical harms associated with accommodating or rejecting what I call “coercive assimilationism” in the workplace. However, scholarship on women of color in the workplace has yet to address the triple bind faced by Muslim women of color, thereby making them vulnerable to discrimination irrespective of how they perform their identity.<sup>216</sup>

Women in the American workplace experience identity performance pressures to be deferential to (male) authority at work, conceal their ambition,<sup>217</sup> avoid being assertive,<sup>218</sup> be feminine but firm,<sup>219</sup> accept lower pay than their male counterpart,<sup>220</sup> and be thin and attractive but not sexy.<sup>221</sup>

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215. All the while, her choices operate within a particular political and social situation shaped more by power than individual autonomy. See, e.g., Judith Butler, *Variations on Sex and Gender: Beauvoir, Wittig and Foucault*, in *FEMINISM AS CRITIQUE: ESSAYS ON THE POLITICS OF GENDER*, 128, 139-40 (Seyla Benhabib & Drucilla Cornell, eds., 1987); see also LILA ABU-LUGHOD, *supra* note 41, at 19 (2013) (noting that Americans’ indictments of Muslim women’s relative lack of choice ignores “the extent to which all choice is conditioned by as well as imbricated with power, and the extent to which choice itself is an impoverished account of freedom.”).

216. Greene, *A Multidimensional Analysis*, *supra* note 108, at 339-40 (explaining that classifying “Muslim women’s employment discrimination claims solely under the umbrella of religious discrimination obscures the ways in which an employer’s ban against a hijab bears on the very nature of one’s identity as a woman of Muslim faith.”).

217. SANDBERG, *supra* note 42, at 17 (noting that being called “very ambitious” is not a compliment when directed at a woman, in contrast to men).

218. *Id.* at 41.

219. See Monica Diggs Mange, *The Formal Equality Theory in Practice: The Inability of Current Antidiscrimination Law to Protect Conventional and Unconventional Persons*, 16 *COLUM. J. GENDER & L.* 1, 20-21 (2007) (arguing that in a world where men and women are increasingly permitted to have both “feminine” or “masculine” preferences, the current antidiscrimination model does not adequately ensure equality for all persons).

220. SANDBERG, *supra* note 42, at 22 (noting that because men generally earn more than women, people expect women to earn less, including women). See also Harris, *Theorizing Class*, *supra* note 14, at 46 (explaining that the male-derived norm of “ideal worker” caused the gendering of wages).

221. SANDBERG, *supra* note 42, at 42 (discussing women’s experience with sexism as tied to gender stereotypes that produce objectifying sexual comments about women’s bodies and insult-

Starting at a young age, American society reprimands girls for being too bossy when they lead while boys are praised as engaging.<sup>222</sup> Girls are also acculturated to fear being disliked, drawing negative attention, or overreaching.<sup>223</sup> Thus, aggressive and hard-charging professional women violate unwritten rules about acceptable social behavior.<sup>224</sup>

Meanwhile, when women employees possess a particular skill, ability or background, such qualities tend to carry less weight based on subjectively defined “merit” systems that hostile or unsympathetic superiors can use to justify discrimination.<sup>225</sup> For instance, women leaders who exhibit professional success are stigmatized as unlikeable,<sup>226</sup> whereas “[e]ntrenched cultural ideas associate men with leadership qualities and women with nurturing qualities.”<sup>227</sup> These same nurturing qualities cause some employers to refrain from hiring or promoting women based on doubts of women’s long term commitments to the job and their careers.<sup>228</sup> Cumulatively, this leads to working women experiencing greater role conflict than men and higher stress levels.<sup>229</sup>

At the same time, parts of the American public view Muslims as highly suspect after the events of September 11th.<sup>230</sup> Muslim employees, therefore, feel pressures to prove their patriotism and be on their best be-

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ing, degrading, or sexist attitudes about women); Bethany A. Teachman et al., *Demonstrations of Implicit Anti-Fat Bias: The Impact of Providing Casual Information and Evoking Empathy*, 22. *HEALTH PSYCHOL.* 68, 68; Regina Pignitore et al., *Bias Against Overweight Job Applicants in a Simulated Employment Interview*, 79 *J.APPLIED PSYCHOL.* 909, 910. See also KHAN, *supra* note 74, at 32 (discussing Muslim women who converted out of Islam to be free of control by Muslim relatives over their sexuality only to discover that they are still subjected to sexism within mainstream society).

222. See SANDBERG, *supra* note 42, at 19; BANAJI & GREENWALD, *supra* note 4, at 88-89 (suggesting that a common stereotype is to associate men with leadership).

223. SANDBERG, *supra* note 42, at 24.

224. *Id.* at 17.

225. *Id.* at 152.

226. SANDBERG, *supra* note 42, at 161; BANAJI & GREENWALD, *supra* note 4, at 117 (reporting a study wherein job seekers were willing to accept less pay to work with a male supervisor rather than accept a higher paying job with a female boss); Borgida et. al., *supra* note 46, at 620-21.

227. SANDBERG, *supra* note 42, at 42-43; Allison, *supra* note 92, at 152.

228. See SANDBERG, *supra* note 42, at 42-43; Borgida et. al., *supra* note 46, at 616.

229. See Allison, *supra* note 92, at 152, 155 (discussing research that shows working women experience conflict between being a mother and an employee undergirded in part by gender stereotypes).

230. See, e.g., Rich, *supra* note 5, at 1250 (describing how an employer “in the wake of September 11th, issued a directive to midwestern field offices not to use persons with accents on any delivery run in a federal building because these couriers were more likely to be stopped by security”); See also King & Ahmad, *supra* note 207, at 881-901; Sheridan, *supra* note 113, at 317-22.

havior lest they be investigated for ties to terrorism.<sup>231</sup> Not only must a Muslim woman of color decide whether she is willing to succumb to coercive assimilationist demands, but she may not be able to do so in light of the contradictory demands on her identity. Being a “Good Muslim Woman” as defined by the dominant social group may avoid the adverse effects of negative stereotypes against Muslim women but at the same time trigger negative stereotypes of women, immigrants, and Muslims.<sup>232</sup>

These contradictory demands expose Muslim women of color to identity-based discrimination irrespective of their willingness or ability to accommodate coercive assimilationism in the workplace; making the incorporation of identity-based discrimination into Title VII jurisprudence all the more compelling.

#### A. *Sandwiched Between Intragroup and Intergroup Identity Performance Pressures*

Meek, oppressed, and subjugated Muslim women are purportedly in need of saving by American feminism and liberalism.<sup>233</sup> Lacking individual agency, Muslim women are viewed as charity cases adopted to appease American liberals’ ambivalence towards their government’s interventions in Muslim majority countries.<sup>234</sup> To avoid the harsh reality that America’s imperialistic endeavors make women (and men) worse off, American feminists and liberals justify military occupations in Iraq and Afghanistan as a means of liberating Muslim women from the yokes of oppressive patriarchal Islam. Hence much is vested in these negative stereotypes of Muslim women—politically and economically.<sup>235</sup>

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231. See Report Muslim Americans: *Faith, Freedom, and the Future. Examining U.S. Muslim’s Political, Social, and Spiritual Engagement 10 Years After September 11* (Aug. 2011), <http://www.gallup.com/strategicconsulting/153611/REPORT-Muslim-Americans-Faith-Freedom-Future.aspx> (A majority of Americans of every faith see Muslim Americans as being loyal to their country 93 percent of Muslims, 80 percent of Jews, but surprisingly only 59 percent of Catholics, and 56 percent of Protestants). See, e.g., *Zayed v. Apple Computers*, No. C 04-01787 JW, 2006 WL 889571, at \*1 (N.D. Cal. Apr. 5, 2006) (involving an Egyptian Muslim woman who contends that her work environment at Apple changed significantly for the worse after the September 11th attacks).

232. See, e.g., *Zainalizadeh v. Neiman Marcus Grp.*, No. C 01-4207 JL, 2002 WL 31007465, at \*1 (N.D. Cal. Sep. 4, 2002) (Muslim woman alleging that she received bad evaluations because she was “too aggressive” and “too strong”).

233. *ABU-LUGHOD*, *supra* note 41, at 95 (noting the public appetite for depictions of sordid and brutal treatment of women by Muslim or Arab men in “memoirs” of suffering by oppressed Muslim women enjoy spectacular and strangely enduring popularity).

234. *Id.* at 107 (arguing that stories of oppressed Muslim women by Muslim women in the West contribute towards normalization of political and military hostility toward countries like Pakistan, Afghanistan, Iran, and Iraq); Naber, *supra* note 40, at 193.

235. *Id.* at 20 (“Representations of the unfreedom of others that blame the chains of culture incite rescue missions by outsiders. Such representations . . . deflect attention from the social and political forces that are responsible for the ways people live.”).

After the September 11th attacks, the project to “save Muslim women” became more complicated.<sup>236</sup> The headscarf and other forms of traditional Islamic dress came to signify a threat rather than a vulnerability.<sup>237</sup> Muslim women were no longer perceived as benign, helpless creatures in dire need of rescue, but rather suspiciously associated with their terrorist husbands, sons, and fathers, and “[the label ‘terrorist’ . . . seeped corporeally and discursively onto the[ir] female Muslim bod[ies].”<sup>238</sup> American feminists and liberals found themselves conflicted between Orientalist infantilization of Muslim women<sup>239</sup> and the new clash of civilizations between the purported free Christian West and the violent Muslim East.

As Islamophobia gripped the American public,<sup>240</sup> Muslim women donning headscarves found themselves physically attacked in public, evicted from courtrooms, and their children bullied.<sup>241</sup> At work, women identifiably Muslim through dress or identity performance experienced hostile work environments as they were called terrorists, accused of disloyalty, and treated as a fifth column.<sup>242</sup> Many could not obtain employment

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236. *Id.* at 4-9.

237. *Id.* at 17-18; Aziz, *supra* note 111, at 192; Greene, *A Multidimensional Analysis*, *supra* note 108, at 340 (explaining that “in a post-9/11 context, for some, a hijab is a symbol of racialized, religious, and gendered otherness denoting patriarchal subordination, and attendant radicalism and violent threats to socio-political normativity as well as national security, which justifies governmental and private measures to shrink its visibility in myriad spheres”); see, e.g., Arshad Imtiaz Ali, *Finding Home: Formulations of Race and Nationhood Among Muslim College Students in Southern California* (2009) (unpublished Ph.D. dissertation, University of California, Los Angeles).

238. Zaal, Salah & Fine, *supra* note 35, at 175.

239. KHAN, *supra* note 74, at xii (arguing that Muslim women are often viewed in simplistic and limiting ways as part of an undifferentiated and homogenized “Muslim woman” who cannot be thoughtful, independent, and progressive if she identifies with her religious community).

240. An April 2013 Economist poll found that 44 percent of Americans believe Muslims are less patriotic than other Americans, 51 percent of Muslims are as patriotic as other Americans, and 5 percent believed that Muslims are more patriotic than other Americans. See, e.g., *Zayed v. Apple Computers*, No. C 04-01787 JW, 2006 WL 889571, at \*1 (N.D. Cal. Apr. 5, 2006) (involving employee placing red, white, and blue ribbons outside of every employee’s office door as a symbol of unity and patriotism and not placing a ribbon on Egyptian Muslim woman employee’s door).

241. Aziz, *supra* note 111, at 239; see also Akram & Johnson, *supra* note 40, at 296 (asserting that “after September 11, hate crimes against Arabs, Muslims and others rose precipitously.”).

242. Aziz, *supra* note 111, at 211. See, e.g., *Ara v. Tedeschi Food Shops, Inc.*, 794 F. Supp. 2d 259, 261 (D. Mass. 2011) (involving a Muslim woman of Bangladeshi descent alleging her manager showed her a picture of Sadaam Hussein after he was killed and told her “your leader is finished,” stated that Bangladesh was the number one terrorist country, and threw out a job application by applicant with Muslim sounding name); *Mowafy v. Noramco of Del.*, 620 F. Supp. 2d 603, 607-08 (D. Del. 2009) (coworker asked Egyptian Muslim woman why Muslims produce so many terrorists and screamed in fright upon observing her conducting her daily prayers at work); *Zayed*, 2006 WL 889571, at \*1 (involving employees placing red, white, and

without removing their headscarves while others refrained from requesting religious accommodation from fear of retaliation.<sup>243</sup>

Facing the brunt of both negative stereotypes of Muslims as terrorists and gender stereotypes of Muslim women as weak and oppressed, Muslim female employees are caught in a triple bind. The more assertive Muslim women behave to cast off misperceptions of their passivity, the more threatening they are as Muslims to their coworkers. At the same time, Muslim women's assertiveness may violate gender norms further exposing them to discrimination based on gender stereotyping. But any attempts to exercise deference to allay suspicions of their loyalty reinforce stereotypes of their submissiveness and inability to lead.<sup>244</sup> And further complicating their predicament, the women's non-white status imputes upon them additional negative stereotypes specific to their ethnicity or race.<sup>245</sup>

Muslim women also experience pressures to perform their identities to accommodate intragroup gender norms. Many Muslims in the United States are first or second generation immigrants of non-European origin.<sup>246</sup> Similar to other immigrant communities, they are developing new identities shaped by American culture, cultural practices from their coun-

blue ribbons outside of every employee's office door as a symbol of unity and patriotism and not placing a ribbon on Egyptian Muslim woman employee's door).

243. See, e.g., *EEOC v. Abercrombie & Fitch*, 798 F. Supp. 2d 1272, 1279 (N.D. Okla. 2011) (In 2006, Abercrombie's human resources department approved a head scarf exception to its "Look Policy," but later denied employment to a Muslim teenager who wore a head scarf).

244. Read & Bartkowski, *supra* note 1, at 396; Yuracko, *supra* note 1, at 7.

245. Browne & Misra, *supra* note 107, at 490; William H. Turner, *Myths and Stereotypes: The African Man, in America*, in *THE BLACK MALE IN AMERICA* 123 (Doris Y. Wilkinson & Ronald L. Taylor eds., 1977); see also Floyd D. Weatherspoon, *Remedying Employment Discrimination Against African-American Males: Stereotypical Biases Engender a Case of Race Plus Sex Discrimination*, 36 *WASHBURN L.J.* 23, 34-35 (1996) (discussing the stereotypical perceptions of African-American men by white Americans and by foreigners); Kathryn M. Neckerman & Joleen Kirshenman, *Hiring Strategies, Racial Bias, and Inner-City Workers*, 38 *SOC. PROBS.* 433, 440 (1991) (finding that 47.2 percent of Chicago employers surveyed felt that inner-city African-American workers in selected occupations lacked work ethic); Yaser Ali, *Shariah and Citizenship – How Islamophobia is Creating a Second-Class Citizenry in America*, 100 *CALIF. L. REV.* 1027, 1037 (2012) (explaining that Arabs have "collectively been indicted. . .as public enemy #1 – brutal, heartless, uncivilized religious fanatics and money-mad cultural 'others' bent on terrorizing civilized Westerners, especially Christians and Jews. . .Arabs are brute murderers, sleazy rapists, religious fanatics, oil-rich dimwits, and abusers of women"); Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 *WM. & MARY L. REV.* 1, 24 (1994) (Asians are stereotyped as the "model minority" implying that "Asian Americans, through their hard work, intelligence, and emphasis on education and achievement, have been successful in American society"). *But see* Miranda Oshige McGowan & James Lindgren, *Testing the "Model Minority Myth"*, 100 *Nw. U. L. REV.* 331, 331 (2006) (arguing that the "positive image of Asian Americans as a model minority conceals a more sinister core of beliefs about Asian Americans and other racial minorities in America").

246. See Gallup Report, *supra* note 231, at 5.

tries of origin, and religious practices.<sup>247</sup> As a consequence, Muslim communities are experiencing significant tensions arising from disagreements between immigrant and American born members and various ethnic groups with competing visions of the future of Islam in America.<sup>248</sup> Intra-community gender norms are currently under pressure to adapt to the new economic and social environment where many Muslims are experiencing for the first time the stigma attendant with ethnic and religious minority status.<sup>249</sup> Yet, they still face pressures to conform to cultural traditions and practices based on Islamic principles or cultural practices from their country of origin.<sup>250</sup>

Within some Muslim communities, Muslim women face familial pressures to control their sexuality and mobility because women's morality reflects on the morality of their families and religious and ethnic communities' writ large.<sup>251</sup> As a result, many Muslim women are pressured to follow in-group gender norms that mandate finding a suitable husband approved by their families and preserving the family's reputation. Indeed, unmarried Muslim women often lament the pressures of living between different worlds wherein they worry about the social price their parents may pay for their choices in violation of traditional Islamic gender norms.<sup>252</sup>

Having to compartmentalize parts of their identities to exist in their different worlds at home, school, and their peer worlds, Muslim women face contradictory identity pressures.<sup>253</sup> Conscious of being scrutinized by the government, their religious communities, and their families, young Muslim women carry a heavy burden of living between and within multiple cultures and selves.<sup>254</sup> As wives, they are expected to prioritize their family's needs over their own professional ambitions resulting in "off ramping" from their careers, an experience affecting many American

247. See generally Cyra Akila Choudhury, *Terrorists & Muslims: The Construction, Performance, and Regulation of Muslim Identities in the Post 9/11 United States*, 7 RUTGERS J.L. & RELIGION 1, 4 (2006) (disproving the notion that there is a "singular Muslim world, a Muslim culture, a singular Muslim community and to challenge various other reductionist tendencies that elide and repair fragmentations of identity in most Muslims in the West in ways that describe caricatures rather than complex realities.").

248. See, generally, NABER, *supra* note 40 (describing the complex and contradictory cultural and political processes through which Arabness is forged within the United States).

249. See Choudhury, *supra* note 247, at 22.

250. See KHAN, *supra* note 74, at 59.

251. *Id.* at 37, 59; see, e.g., NABER, *supra* note 40, at 164–65.

252. Zaal, Salah & Fine, *supra* note 35, at 172. See generally, LOVE, INSHALLAH: THE SECRET LOVE LIVES OF AMERICAN MUSLIM WOMEN (Nura Maznavi & Ayesha Mattu eds., 2012) (discussing the varied experiences of Muslim American women who are caught between traditional values and pressures of the modern world). See, e.g., Shabana Mir, MUSLIM AMERICAN WOMEN ON CAMPUS: UNDERGRADUATE SOCIAL LIFE AND IDENTITY (UNC Press 2014).

253. Zaal, Salah & Fine, *supra* note 35, at 169.

254. *Id.* at 172.

working mothers.<sup>255</sup> The more conservative her religious and ethnic community, the more socially conservative and traditional she is expected to behave, including devoting her life to working inside the home. Failure to accommodate what she views as misogynist or anachronistic cultural practices may result in expulsion from her religious and ethnic community, which entails significant psychological costs.<sup>256</sup>

At work, Muslim mothers face the same pressures as other women who struggle to balance their careers with their family commitments. They, too, are suspected by their employer of prioritizing family over work such that higher quality work, promotions, and opportunities that lead to long term success and prestige are denied.<sup>257</sup> To offset this stereotype, they feel pressure to work more hours than their male colleagues and demonstrate their willingness to put work over family even if the same is not expected of male colleagues.<sup>258</sup> All the while, they must be firm but pleasant leaders who keep a smile on their face while male colleagues are forgiven for emotional outbursts caused by the stresses of the job.<sup>259</sup>

Like other women, Muslim women must cautiously guard their professional ambition so as to avoid triggering resentment for being “too political,” “too aggressive,” or “not a team player.”<sup>260</sup> And their personal presentation must adhere to traditional notions of femininity and attractiveness, but be careful not to be seen as too sexy such that they will not be taken seriously or invite sexual harassment.<sup>261</sup> In the end, Muslim women’s appearances and behaviors are heavily scrutinized and judged based on prevailing gender stereotypes.

But the scrutiny does not end there. They are also subject to stereotypes of Muslims in general and Muslim women in particular. The American public views Muslims as highly suspect, inclined to engage in or support terrorism, and foreigners from uncivilized nations.<sup>262</sup> Muslim

255. SANDBERG, *supra* note 42, at 98.

256. Branscombe et al., *supra* note 37, at 137 (noting that social exclusion caused by feelings of rejection due to cultural estrangement has been found to result in anxiety, depression, and lowered self-esteem); KHAN, *supra* note 74, at 15.

257. See SANDBERG, *supra* note 42, at 114.

258. See Gene Marks, *Why Most Women Will Never Become CEO*, FORBES (Oct. 31, 2011, 7:42 PM), <http://www.forbes.com/sites/quickerbetteertech/2011/10/31/why-most-women-will-never-become-ceo/>.

259. SANDBERG, *supra* note 42, at 43, 165 (“When a woman does anything that signals she might not be nice first and foremost, it creates a negative impression and makes us uncomfortable.”) (footnote omitted) (internal quotation marks omitted).

260. *Id.* at 40-41.

261. Swim, Cohen & Hyers, *supra* note 38, at 47 (highlighting that compared to men, women report experiencing nearly twice as many total number of sexist events directed at themselves and their own gender group).

262. Leti Volpp, *Citizenship Undone*, 75 FORDHAM L. REV. 2579, 2583 (2007); Ramzi Kassem, *Implausible Realities: Iqbal’s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 144 PENN ST. L. REV. 1443, 1457 (2009-2010) (“[S]urveys of the general Ameri-



communities are accused of treating Muslim women as property who must obey their husbands and fathers.<sup>263</sup> Muslim women, therefore, are pressured to perform a “Good Muslim Woman” whose assertiveness counters misperceptions about her inability to lead and think independently. Her liberal Americanized dress, consumption of alcohol, and romantic relations with non-Muslims signals full assimilation into American culture. She must also be a “Good Muslim” who repeatedly expresses her patriotism, criticizes her country of origin as backwards, agrees that Islam breeds terrorists, and supports selective counterterrorism enforcement against Muslims as necessary for America’s national security.

Regardless of how each woman responds to these conflicting identity pressures, she is often assumed to lack agency by the dominant social group or the Muslim community who view her behavior as a product of coercion or brainwashing by the other group.<sup>264</sup> The same rebellious nature she employs to fight against coercive assimilationism at work may cause her grief within the Muslim community she seeks to defend, reform, and belong. Her demands to reinterpret Islamic doctrine and practices, particularly as they apply to women, invite accusations of religious subversion.<sup>265</sup> As she is pulled in multiple directions by pressures to perform TO intra-group and intergroup identity demands, each woman struggles to negotiate the contradictions to develop an authentic identity that allows for both professional success and psychological well-being.<sup>266</sup>

### B. *Negotiating the Contradictions*

As women at the intersection of various stereotypes, Muslim women of color form a hybridized identity that rescripts notions of what it means to be a Muslim woman, a Muslim, a member of her ethnic or racial group, and a woman.<sup>267</sup> They negotiate their sense of self in a politically charged

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can public confirm that Muslim Americans are widely viewed with distrust and that anti-Muslim sentiment has burgeoned in the United States post-9/11. A 2004 poll found that 47% of respondents believed that Islam is more likely to encourage violence compared to other religions, and 44% agreed that the government should subject Muslim Americans to additional scrutiny, such as mandatory registration with the federal government, targeted profiling of citizens based on their Muslim or Middle Eastern background, increased surveillance of mosques, and use of undercover law enforcement agents in mosques and Islamic civic organizations.”) (footnotes omitted). *See, e.g.,* *Amna v. N.Y. State Dep’t of Health*, No. 08-CV-2806 (CBA)(LB) 2011 WL 4592787 at \*2 (E.D.N.Y. Sept. 30, 2011) (alleging that coworker asking female employee of Pakistani descent whether she vacationed in Iraq as implicitly accusing her of supporting terrorism).

263. *See, e.g.,* NABER, *supra* note 40, at 165-66.

264. ABU-LUGHOD, *supra* note 41, at 17-18 (noting that Muslim women’s quest for equality is hostage to political forces including the war on terror and intracommunity patriarchal interpretations of Islam); NABER, *supra* note 40, at 170.

265. *See, e.g.,* KHAN, *supra* note 74, at 48-49.

266. *See, e.g., id.* at 34.

267. *See id.* at 105.

environment marred by intolerance within mainstream society, and at times, within their Muslim communities.<sup>268</sup> They resist and destabilize assumptions about members of their identity groups to show the dynamic nature of identity.<sup>269</sup>

As hybridized subjects, they reject the polarity between Orientalism,<sup>270</sup> that imposes racist colonial imagery of Muslims as savages and Muslim women as their oppressed victims, and politicized Islam, that essentializes the ideal Muslim woman as an obedient wife, self-sacrificing mother, and apolitical follower of male religious leadership.<sup>271</sup> Notwithstanding their intragroup contestations, many Muslim women deem the cases of female oppression over-emphasized by out-group Western authors as bad faith and profit-driven efforts to reinforce cultural hierarchy and racism against Muslims.<sup>272</sup> Seldom do Western audiences contextualize the extreme cases within the victim's socio-economic, geographic, and individual circumstances.<sup>273</sup> Nor are Western audiences informed that the male bad actors are violating Islamic beliefs.<sup>274</sup> Refusing to be pigeon holed as either oppressed or liberated, Muslim women in the United States are negotiating their identities into the politics of race, ethnicity, migrant communities in the diaspora, and their family life.<sup>275</sup>

Women who identify as Muslims vary “greatly in terms of their levels of religiosity, [ ]ranging from cultural to spiritual” to devout.<sup>276</sup> Some Muslim women accept religious and cultural rituals as integral to what they deem is their authentic identity, while at the same time rejecting the sexism found in some Islamic practices. The headscarf, for example, allows many women to create cultural space that reflect their hybridized identities.<sup>277</sup> Some Muslim women who choose to wear the headscarf do so to insulate themselves from intracommunity restrictions that accompany their status as unmarried women.<sup>278</sup> Other Muslim women don a headscarf as a

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268. Zaal, Salah & Fine, *supra* note 35, at 168.

269. KHAN, *supra* note 74, at xi.

270. See generally, EDWARD SAID, ORIENTALISM (1979) (defined political accounts concerning the Orient, its people, customs, ‘mind,’ destiny ,and so on).

271. See KHAN, *supra* note 74, at 21-22 (arguing that “both poles essentialize the ideal Muslim woman and reduce her to similar symbols and icons.”).

272. See generally ABU-LUGHOD, *supra* note 41, at 113-28 (discussing the way Westerners popularized honor crimes to the detriment of Muslims.).

273. See *id.* at 128.

274. See *id.* at 139.

275. Zaal, Salah & Fine, *supra* note 35, at 168; see KHAN, *supra* note 74, at 2, 97 (noting that some women react to Orientalist and racist stereotypes by identifying as a Muslim woman but refusing to accept male-centric visions of Islam).

276. Zaal, Salah & Fine, *supra* note 35, at 169.

277. See EEOC v. Abercrombie & Fitch, 798 F. Supp. 2d 1272, 1276 (N.D. Okla. 2011) (noting the plaintiff considers her headscarf “a representation and reminder of her faith, a religious symbol, a symbol of Islam and of modesty”); Williams & Vashi, *supra* note 198, at 272.

278. See generally Greene, *A Multidimensional Analysis*, *supra* note 108, at 354.

form of resistance against the sexualization of women in American society.<sup>279</sup> In doing so, their headscarves signal to society, and men in particular, their religiosity and adherence to Islamic tenets of pre-marital abstinence.<sup>280</sup> By using the headscarf to elude gendered restrictions, they are able to take advantage of educational and employment opportunities while retaining their membership within their traditional Muslim community.<sup>281</sup>

Some Muslim women embrace parts of traditional Muslim female identity arising from a subconscious need to belong to the community or genuine spiritual belief in such practices.<sup>282</sup> But these same women may refuse to perform other parts of traditional Muslim female identity based on their individualized conception of Muslim feminism.<sup>283</sup> They conduct their own research of Islam and decide what they will accept or reject, thereby bestowing upon themselves agency to decide how to shape their intersectional identities.<sup>284</sup> As a result, they may contest the traditional view that the headscarf is mandatory.<sup>285</sup> Instead, they may view the headscarf as either optional or a patriarchal tool to control women originating in male, not divine, prerogatives.<sup>286</sup> They claim a space for themselves within their diverse Muslim communities through a rereading of Islamic codes and practices, and negotiate a hybridized Muslim female identity.<sup>287</sup> In the end, having the space to develop an authentic identity that reflects a Muslim woman's individual values, norms, and religious beliefs free of disparate treatment is consistent with the purpose and spirit of Title VII.

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279. See, e.g., *id.* at 354.

280. Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441, 449 (2008); Greene, *A Multidimensional Analysis*, *supra* note 108, at 354 (recognizing that “many Muslim women wear a head covering as a reflection of their spiritual and physical modesty in observance of their religious beliefs”).

281. Williams & Vashi, *supra* note 198, at 272; Read & Bartkowski, *supra* note 1, at 405 (noting some women believed that hijab allowed them to engage in public-sphere pursuits free of the over-sexualization of women). See *Abercrombie & Fitch*, 798 F. Supp. 2d at 1276 (noting the plaintiff considers her headscarf “a representation and reminder of her faith, a religious symbol, a symbol of Islam and of modesty”).

282. KHAN, *supra* note 74, at 34 (finding that some women become depressed when they are unable to resolve the multiple contradictions and develop an aversion to both their Muslim community and mainstream society, leaving them feeling with no sense of belonging to any particular group); Wagner et al., *supra* note 39, at 533 (2012).

283. KHAN, *supra* note 74, at 46, 114 (observing that structural contradictions in Muslim women's identity do not pose a problem because they reject sexist interpretations of the Quran and consequent practices and stereotypes).

284. *Id.* at 114.

285. Read & Bartkowski, *supra* note 1, at 407; see also Williams & Vashi, *supra* note 198, at 270 (noting that many, though not all, Muslims consider wearing the headscarf as theologically mandated).

286. Read & Bartkowski, *supra* note 1, at 407-08.

287. KHAN, *supra* note 74, at 42.

Current workplace antidiscrimination doctrine, however, fails to take these nuances into account. The following section makes recommendations on how Title VII jurisprudence can be better informed by the complex ways identity performance pressures disproportionately impose harms on protected classes of employees.

#### IV. EXPANDING TITLE VII JURISPRUDENCE TO KEEP UP WITH DISCRIMINATION

Although the harms caused by pressures to perform one's identity to comport with coercive assimilationism are well documented,<sup>288</sup> the question still remains as to whether the law can provide adequate relief without unduly burdening employers. Courts are understandably skeptical of deputizing employers to serve as identity gatekeepers. Similarly, employee advocates do not seek to legitimize essentialist portrayals of low status groups—a real risk that comes with granting employers authority to define what traits are authentic to a particular identity such that they are protected by Title VII. Hence the law and the courts must be careful to balance the interests of employees' legal rights to meaningful equal opportunity with the employer's interest in evaluating employees based on bona fide job related qualifications.

This section proposes that existing Title VII jurisprudence prohibiting employment discrimination based on sex stereotyping should be expanded to include ethnic, racial, and religious stereotyping to protect employees who competently perform their jobs but do not or cannot perform their identities in accordance with coercive assimilationism. Such protections are especially important for Muslim women of color who are faced with the triple bind of having to perform the conflicting identity demands of the “Good Muslim Woman,” the “Good Woman,” and the “Good Muslim.”

Part A starts by arguing that courts should expand Title VII jurisprudence by incorporating social psychology and implicit bias studies. In turn, Part B proffers that the seminal gender stereotyping case *Price Waterhouse Cooper v. Hopkins* provides a doctrinal foundation for applying stereotyping theory to Title VII jurisprudence. Part C examines how courts have failed to incorporate race and ethnicity into workplace stereotyping doctrine, leaving racial, ethnic, and religious minority plaintiffs subject to coercive assimilationist pressures based on negative implicit stereotypes with no legal recourse. Finally, Part D analyzes the unique case of Muslim women of color as further support for the claim that courts are failing to keep up with the changing nature of discrimination. For these reasons, courts should incorporate stereotyping and implicit bias theory into disparate treatment jurisprudence such that intergroup discrimination based on in-tragroup differences falls under Title VII's protection.

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288. Yoshino, *supra* note 13, at 787.

### A. Incorporating Implicit Bias Analysis into Title VII

While Title VII makes it unlawful to discriminate, courts are tasked with defining what discrimination means and what actions meet the definition.<sup>289</sup> Notwithstanding advances in the understanding of bias and discrimination in the social psychology literature, judicial constructions of discrimination rely on the courts' layperson understandings of the nature of psychological processes that produce bias.<sup>290</sup> For instance, implicit stereotyping theory has minimally influenced federal disparate treatment jurisprudence notwithstanding its prevalence in the social psychology literature on bias.<sup>291</sup> Moreover, the belief that America is "post-racial" such that systemic discrimination is now a thing of the past causes judges to recognize only the most egregious forms of discrimination while overlooking the rise in discrimination caused by implicit bias and stereotyping.<sup>292</sup>

For a plaintiff to prove a prima facie discrimination case under Title VII's disparate treatment theory, the plaintiff must establish the following three things: (1) she is a member of a Title VII protected class; (2) she was subjected to some negative employment action such as failure to hire or promote, termination, demotion; and (3) her protected group status was a "motivating factor" in the challenged employment action.<sup>293</sup> The burden of proof then shifts to the employer to produce a legitimate nondiscriminatory reason for the adverse employment action. Upon doing so, the employee must then prove the employer's proffered reasons were pretext for discrimination.<sup>294</sup>

To prove that her protected group status was a "motivating factor" in the challenged employment action, courts require plaintiffs to bring forth persuasive evidence of the employer's intent to discriminate or that impermissible stereotypes played a role in the employer's decision making.<sup>295</sup> In

289. Krieger & Fiske, *supra* note 6, at 1030.

290. *Id.* at 1030-31.

291. *Id.* at 1032; Greene, *Title VII*, *supra* note 10, at 1379-80; Rich, *supra* note 5, at 1383-84.

292. *See generally* Evan P. Apfelbaum, Michael I. Norton, Samuel R. Sommers, *Racial Color Blindness: Emergence, Practice, and Implications*, 21 CURRENT DIRECTIONS PSYCHOL. SCI., 205-209 (2012); Tessa M. Ditonto, Richard R. Lau & David O. Sears, *AMPing Racial Attitudes: Comparing the Power of Explicit and Implicit Racism Measures in 2008*, 34 POLIT. PSYCHOL. 487 (2013); Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV., 1023, 1048-49 (2010).

293. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92-93 (2003).

294. *See generally* *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973); *Mirza v. Neiman Marcus Grp. Inc.*, 649 F.2d 837, 849 (N.D. Ill. 2009); *Zayed v. Apple Computers, No. C 04-01787 JW*, 2006 WL 889571, at \*9-11 (N.D. Cal. Apr. 5, 2006) (showing a protected characteristic was a motivating factor for the adverse employment action is required to establish Title VII liability).

295. Per *McDonnell-Douglass*, at the prima facie stage, in order to justify mandating an employer to produce a legitimate, nondiscriminatory reason for the adverse employment action, the plaintiff must produce persuasive evidence that raises a presumption of unlawful discrimina-

*Price Waterhouse Cooper*, Justice Brennan explained that a protected class is a motivating factor “if we asked the employer at the moment of the decision what its reason were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.”<sup>296</sup> Brennan’s reasoning assumes the discriminator was conscious that he was discriminating at the time he made the decision.<sup>297</sup> However, numerous social psychology studies demonstrate that “disparate treatment can result from . . . implicit stereotypes” and subconscious biases, in addition to “deliberate, fully conscious” bias.<sup>298</sup>

Whether implicit bias contributes to discrimination depends on “the extent to which particular social norms are [ ] salient in [a] particular situation[ ], [the] decision makers’ perceptions of control,” “relevant information” available, and the decision maker’s “motivation to avoid biased decision making.”<sup>299</sup> A well-meaning decision maker may be unaware that her employment decision was based on her biased judgment of a negatively stereotyped employee.<sup>300</sup> And yet, courts often reject implicit stereotyping because judicially constructed understandings of discrimination follow Justice Brennan’s reasoning that presumes bias is explicitly expressed and operates with the discriminator’s knowledge.<sup>301</sup>

As shown in Part I, the psychological science has increasingly refined understandings of how implicit prejudices bias the social judgments and choices of people. Subjective construal of a situation is influenced by a variety of factors arising from social stereotypes such that biases may oper-

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tion. 411 U.S. 792; *see also* *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133 (2000). After *Desert Palace* and the 1991 Civil Rights Act, if the plaintiff has produced sufficiently persuasive evidence that an impermissible characteristic is a motivating factor for the adverse employment action, then the plaintiff has established Title VII liability. 539 U.S. 90, 92-94. Doing so then shifts the burden of production and persuasion on the employer to demonstrate that it actually relied upon the proffered legitimate nondiscriminatory reason in its decisionmaking process and that it would have made the same decision regardless of the impermissible characteristic (which the plaintiff has successfully demonstrated was a motivating factor in the adverse employment decision). *But see* the cases involving the Age Discrimination in Employment Act where courts acknowledge that an employer can be “motivated” by an applicant or employee’s age through the operation of implicit stereotypes. *Syock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155 (7th Cir. 1981) (holding that age discrimination may arise from an unconscious application of stereotyped notions of ability); *La Montagne v. Am. Convenience Prods., Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984) (“Age discrimination may be subtle and even unconscious.”); *Burlew v. Eaton Corp.*, 869 F.2d 1063, 1066 (7th Cir. 1989) (holding that age discrimination may exist absent an intent to discriminate).

296. *Price Waterhouse Cooper v. Hopkins*, 490 U.S. 228, 250 (1989); *see also* *Krieger & Fiske*, *supra* note 6, at 1030.

297. *Krieger & Fiske*, *supra* note 6, at 1030.

298. *Id.* at 1059, 1032-33.

299. *Id.* at 1036, 1050.

300. *Id.*

301. *Id.* at 1030; *Greene, Title VII*, *supra* note 10, at 1379.

ate outside of the perceiver's conscious, attentional focus.<sup>302</sup> Decision makers, therefore, may believe their lukewarm or negative evaluations of employees are based exclusively on legitimate non-discriminatory reasons when in fact they may be based on perceptions and judgments tainted by stereotypes.<sup>303</sup> They may subconsciously give high status group members the benefit of the doubt, be more forgiving of their mistakes, and mentor them while imposing a higher burden to prove competency on low status group members.<sup>304</sup>

As a consequence, Muslim women of color face three dilemmas with regard to their social identity. First, Muslim women are pressured to perform their identity to assimilate into the dominant social group's norms and culture<sup>305</sup> while facing intragroup pressures by their communities that contradict assimilationist demands.<sup>306</sup> Second, Muslim women of color who choose to succumb to assimilationist identity pressures may find it is simply not possible to evade adverse treatment. The multiple stereotypes and contradictory performance expectations related to their multiple identities as women, Muslims, ethnic minorities, and Muslim women create a no-win situation. Third, the diversity among headscarved and non-headscarved Muslim women of color is obscured by an artificial polarity between assimilation and multiculturalism, stripping them of individual agency—the same Orientalist critique directed at Muslim societies.<sup>307</sup> Ultimately, Muslim women face a false binary between full assimilation requiring that they dis-identify completely from their low status identities or reject altogether dominant group standards, when in reality, their social identities fall within a wide spectrum between multiple poles.

Incorporating stereotyping and implicit bias into Title VII is certainly not risk free. Richard Ford reasonably argues that identity-based claims

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302. Krieger & Fiske, *supra* note 6, at 1027 (noting, however, that social stereotypes “can be controlled . . . through . . . effortful, deliberate, cognitive ‘correction’”); Delgado & Stefancic, *supra* note 66, 1288.

303. Krieger & Fiske, *supra* note 6, at 1051-52.

304. See, e.g., Rich, *supra* note 5; see also *Zayed v. Apple Computers*, No. C 04-01787 JW, 2006 WL 889571, at \*1 (N.D. Cal. Apr. 5, 2006) (alleging marginalization in her practice group, denial of career opportunities, and preferential treatment given to less experienced male Caucasian employees in the form of premier assignments and quick promotions).

305. TERRY EAGLETON, *THE IDEA OF CULTURE* 28 (2000) (defining culture as a “quasi-deterministic concept, meaning those features of social life – custom, kinship, language, ritual, mythology – which choose us far more than we choose them”); Green, *supra* note 10, at 631 (noting the common understanding of culture in American society as a tool to “distinguish the other. . . in social rather than biological terms”).

306. ABU-LUGHOD, *supra* note 41, at 117.

307. See, e.g., EDWARD SAID, *ORIENTALISM* (1970). ABU-LUGHOD; *supra* note 41, at 117; MAHMOOD MAMDANI, *GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR, AND THE ROOTS OF TERROR* (2004). See generally Kyle Spencer, *Fraternity Life, Islamic Style*, N.Y. TIMES (Feb. 6, 2014), [http://www.nytimes.com/2014/02/09/education/edlife/greek-life-islamic-style.html?hp&\\_r=0](http://www.nytimes.com/2014/02/09/education/edlife/greek-life-islamic-style.html?hp&_r=0) (showing how Muslim Americans in general struggle with dual identities and seek multiculturalism model).



should not be actionable because of the difficulty in determining what constitutes unlawful discriminatory.<sup>308</sup> Identity-based rather than phenotype-based discrimination—the existing doctrinal model—entangles courts in defining the “wrong type” of Black, Latino, Muslim, woman, or other protected group such that an employer is guilty of discriminating against a subset of a protected class.<sup>309</sup> Identity-based claims also risk essentializing protected groups into a pre-determined list of behaviors, attitudes, norms, and values that must be shown to prove unlawful identity-based discrimination.<sup>310</sup> The criteria are often defined by male gatekeepers of a particular minority community, which can perpetuate intra-group disparities based on gender and minority status within the group.<sup>311</sup>

While such critiques are well founded, they under-estimate the harm caused by pressures to assimilate into an identity imposed by the dominant group to perpetuate a system that subordinates minority groups—precisely what the Civil Rights Act was aimed to prohibit.<sup>312</sup> Institutional pressures to emulate and assimilate into the norms, values, and behaviors of the dominant group signals to low status groups that their cultural and racial characteristics are unbecoming of a “professional” workplace, and as a result are unwelcome.<sup>313</sup> Moreover, coercive assimilationist policies, even if implicitly enforced through identity performance pressures, create a dispiriting environment that penalizes individual authenticity,<sup>314</sup> stifles creativity, increases health risks, and creates hierarchies of power among out-groups based on their ability to effectively perform their identity to serve the interests of the dominant group.<sup>315</sup> All the while, the dominant social group’s work performance is unimpeded by coercive demands to

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308. Ford, *supra* note 4, at 1811. See also Ayres, *supra* note 11, at 2432 (discussing the “special rights backlash” when the extent and nuances of discrimination is disclosed to the majority group); *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545 (1999) (noting that Title VII’s primary objective was not merely to provide redress but to prevent harm); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998).

309. Yuracko, *supra* note 1, at 3; RICHARD T. FORD, *RACIAL CULTURE: A CRITIQUE*, 188-90 (2005).

310. Gonzalez, *supra* note 69, at 2198, 2211. See, e.g., Richard T. Ford, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics*, in *LEFT LEGALISM / LEFT CRITIQUE* 38-40 (Wendy Brown & Janet Halley eds., 2002).

311. See NABER, *supra* note 40, at 159, 188 (2012). See generally KHAN, *supra* note 74.

312. Yuracko, *supra* note 1, at 19 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971)); see also Gonzalez, *supra* note 69, at 2213 (warning against taking to the extreme critiques of essentialism because it invites a debilitating regime of formalistic color-blindness).

313. See SHACHAR, *supra* note 25, at 25.

314. But see Naber, *supra* note 40, at 247-48 (noting the conflicted negotiations of Arab American concepts of “cultural authenticity” entangled in dominant U.S. Orientalist concepts of Arabness).

315. Branscombe, Schmitt & Harvey, *supra* note 37, at 145 (arguing that the experience of repeated rejection by others, especially those in the dominant social group, leads to feelings that one’s existence is meaningless and without value); Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C.L. REV. 379 (2008); but see Green, *supra*

look, act, speak, and live like someone else, which frees them to channel their mental energy and time towards bona fide work performance rather than stereotype-based identity performance.<sup>316</sup>

As discussed in the next section, the Supreme Court in *Price Waterhouse Cooper v. Hopkins* struck down workplace rules that placed women in a double bind, such that accommodating one stereotype triggers violation of another stereotype resulting in adverse treatment regardless how the woman behaves. Similar considerations should be made in cases involving Muslim women who face a more taxing triple bind.

### B. *Price Waterhouse Cooper and Gender Stereotyping*

Stereotyping can be ascriptive or prescriptive.<sup>317</sup> Ascriptive stereotyping “assumes that an individual possesses certain traits and attributes because of her group membership.”<sup>318</sup> Her ascriptive status is not dependent on her individual conduct, cannot be changed, and is presumed to be determined at birth.<sup>319</sup> In ascriptive gender stereotyping, for example, women are assumed to be genetically inferior to men in intelligence. Long before the Supreme Court ruled in favor of Ann Hopkins in *Price Waterhouse Cooper v. Hopkins*, ascriptive sex stereotyping had been struck down as unlawful.<sup>320</sup> Prescriptive gender stereotyping, however, is permissible.

Prescriptive stereotyping occurs when an employer requires that an employee exhibit certain traits or attributes because of her group membership.<sup>321</sup> In the case of Hopkins, her employer demanded that she “walk

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note 10, at 629 (acknowledging that using law to eliminate assimilationist work cultures risks sanitizing rather than equalizing relations in the workplace).

316. See Yuracko, *supra* note 1, at 31 (noting that workplace conformity demands require minority workers to do extra work to meet demands that are coded culturally white). See also Martinez, *supra* note 38, at 330 (analyzing how dominant-group controlled institutions may use power over minority group identity to reinforce group oppression). See generally, DEVON CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA* (2013).

317. Yuracko, *supra* note 1, at 7.

318. *Id.*

319. *Id.* at 35.

320. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989); see also *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (striking down a federal statute that provided dependent benefits for all spouses of male service members, but provided the same benefits to the spouses of female service members only upon their showing actual dependence on their wives for more than one-half of their support, because it was based on an assumption that women do not support their husbands); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198-99 (7th Cir. 1971) (striking down the employer’s no-marriage rule, which applied only to female flight personnel, because it was based on sex stereotypes about women’s domestic role); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544-45 (1971) (Marshall, J., concurring) (arguing that an employer may not discriminate against female employees with young children based on an assumption that women generally have more child-care responsibilities than men).

321. Yuracko, *supra* note 1, at 7.

more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” because she was a woman.<sup>322</sup> When she failed to do so, she was denied a promotion notwithstanding her successful management of a multi-million government contract.<sup>323</sup> Her superiors criticized her for being “overly aggressive” and “overcompensat[ing] for being a woman.”<sup>324</sup> She was advised to “take a course at charm school” even though her male counterparts were not penalized for similar behavior. In its opinion, the Supreme Court concluded that “we are beyond the day when an employer can evaluate employees by assuming or insisting that they match the stereotype associated with their group.”<sup>325</sup> While the Court’s ruling suggested a new anti-assimilationist antidiscrimination doctrine, the conception of stereotyping struck down by the Court was limited to consciously held beliefs about how women should behave.<sup>326</sup> Implicit stereotyping perpetuating gender conformity arguably remained outside the decision’s scope.

Kimberly Yuracko has noted that prior to *Price Waterhouse’s* rhetorical ban on sex stereotyping, courts finding in favor of female plaintiffs relied on an unequal burdens test to differentiate between acceptable and unacceptable gender conformity demands, as defined by the social norms of the time.<sup>327</sup> So long as the sex-based dress or appearance codes did not place a disproportionate burden on workers of one sex, whether male or female, workplace requirements that differentiated based on sex were lawful under Title VII.<sup>328</sup>

The unequal burden test is narrowly interpreted to apply only when gender conformity demands are not justified by conventionally gendered professional norms.<sup>329</sup> Some courts, however, have struck down gender

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322. *Price Waterhouse*, 490 U.S. 228 at 272.

323. *Id.* at 233–34.

324. *Id.* at 235.

325. *Id.* at 251.

326. Krieger & Fiske, *supra* note 6, at 1030–31.

327. Yuracko, *supra* note 1, at 20; *cf.* *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc) (“Under established equal burdens analysis, when an employer’s grooming and appearance policy does not unreasonably burden one gender more than the other, that policy will not violate Title VII.”); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000) (“A sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as a [bona fide occupational qualification].”).

328. Yuracko, *supra* note 1, at 20.

329. *See, e.g., id.* at 23; *see also* *Fagan v. National Cash Register*, 481 F.2d 1115, 1124–25 (D.C. Cir. 1973) (upholding a short hair requirement for male employees because

Perhaps no facet of business life is more important than a company’s place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an employer’s proper desire to achieve favorable acceptance. Good grooming regulations reflect a company’s policy in our highly competitive business environment.

specific workplace practices that stigmatize women. In the case of *O'Donnell v. Burlington Coat Factory Warehouse, Inc.*, for example, the court struck down the requirement that women wear uniforms while men could wear professional business attire of their choosing.<sup>330</sup> The court reasoned that sex differentiation consistent with conventional gender norms stigmatizes female employees.<sup>331</sup>

The linchpin of *Price Waterhouse* lies in the double bind test. The Court held that employees were prohibited from imposing gender conformity demands that conflicted with professional role demands.<sup>332</sup> In Hopkins' case, her employer demanded that she be demure, ladylike and hide her ambitions notwithstanding that successful performance of her job required her to be assertive and overtly competitive—traditionally male attributes.<sup>333</sup> Hopkins was in a double bind wherein her employer placed her in “an intolerable and impermissible Catch 22: out of a job if [she] behave[d] aggressively and out of a job if [she] d[id] not. Title VII lifts women out of this bind.”<sup>334</sup> Consequently, the court applied the double

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*See also* *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971) (holding that “a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide” is “tangential to the essence of the business involved”). *But see* *Jespersen*, 444 F.3d at 1111-12 (holding that casino was not in violation of Title VII in requiring female employees to wear makeup at work whereas men were not required to do the same).

330. *O'Donnell v. Burlington Coat Factory Warehouse, Inc.*, 656 F.Supp. 263 (S.D.Ohio 1987).

331. *Id.* at 266.

332. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

333. *Id.* at 235. *But see* *E.E.O.C. v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1353 (N.D. Ill. 1986) *aff'd*, 839 F.2d 302 (7th Cir. 1988) (holding women's lack of interest in a job that was advertised as requiring a person with a lot of drive and physical rigor, socially dominant, and has an aggressive, assertive, and competitive personality was due to the masculine job description and hiring criteria notwithstanding that such criteria was not proven necessary for successful job performance).

334. *Price Waterhouse*, 490 U.S. at 251. Subsequent cases brought by male employees relied on *Price Waterhouse* to claim that they were discriminated against for acting overly feminine. *See, e.g.*, *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 869 (9th Cir. 2001); *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997). Several other circuits have endorsed similar protection in principle. *See, e.g.*, *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262-63 (3d Cir. 2001) (“[A] plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender.”); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999). Female workers harassed for their perceived masculinity have also received protection. *See, e.g.*, *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224, 1229 (D. Or. 2002) (denying the employer's motion for summary judgment because the plaintiff had presented evidence such that a jury could find she had been harassed because she was deemed inappropriately masculine in her traits and appearance). *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907, 908 (2d Cir. 1996); *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401 (6th Cir. 1977); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685, 685 (2d Cir. 1976); *Earwood v. Cont'l Se. Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976); *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir.

bind principle broadly to include tensions, in addition to direct conflicts, between gender conformity demands and professional role demands.<sup>335</sup> Although the double bind concept would logically be extended to racial, ethnic, and religious conformity demands arising out of stereotyping and implicit bias, the courts have declined to do so.

### C. *Applying Stereotyping To Race, Ethnicity, and Religion*

In stark contrast to gender, courts are unsympathetic to claims based on racial, ethnic, or religious identity demands.<sup>336</sup> Some scholars argue this is a result of a pervasive belief within the judiciary that most Americans are now “colorblind” such that courts make minimal effort to understand the various stereotypes and racialized performance demands that minorities have to comply with in order to acquire and maintain employment.<sup>337</sup> So long as conformity demands fit conventional professional norms—even if defined by white, middle-class, male dress and behavior—courts are unconcerned with the extra burdens in time, money, and energy costs imposed on minority employees.<sup>338</sup> Courts often accept non-gender related conformity demands as uniform such that whatever burdens on racial or ethnic minorities exist are not the burdens that courts recognize for purposes of Title VII stereotyping jurisprudence.<sup>339</sup>

And yet employers may use workplace rules to communicate and reinforce their antipathy for particular racial and ethnic groups.<sup>340</sup> When such practices are challenged in court, employers successfully argue that requirements to speak only English in the workplace;<sup>341</sup> prohibit cornrows, braids, or dreadlocks;<sup>342</sup> or uncover one’s hair are voluntary. Courts routinely discount the psychological and dignitary harms suffered by employees pressured to perform their racial or ethnic identities in accordance with the socially dominant group’s demands.<sup>343</sup> Employees who perform

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1975); *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1091-92 (5th Cir. 1975); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 896, 898 (9th Cir. 1974); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973).

335. Yuracko, *supra* note 1, at 28.

336. Greene, *Title VII*, *supra* note 10, at 1355; Yuracko, *supra* note 1, at 44.

337. Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 13-17, 55-57 (forthcoming, copy on file with author), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2409691](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2409691).

338. Yuracko, *supra* note 1, at 31-32.

339. *Id.* at 31-32.

340. Rich, *supra* note 5, at 1140-41.

341. See *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1483 (9th Cir. 1993).

342. *Rogers v. American Airlines*, 527 F. Supp. 229, 231-32 (S.D.N.Y. 1981) (finding that braided hairstyles are a personal choice rather than a protected immutable racial or gender characteristic). See also Michelle L. Turner, *The Braided Uproar: A Defense of My Sister’s Hair and a Contemporary Indictment of Rogers v. American Airlines*, 7 *CARDOZO WOMEN’S LJ.* 115, 136-40 (2001).

343. Rich, *supra* note 5, at 1140-41.

their racial or ethnic identities in ways that trigger a cultural code associated with a low status group find themselves penalized and stigmatized.<sup>344</sup> In the case of Black women, for example, they must straighten out, curl up, or cover their natural hair to be accepted by and assimilate into white majoritarian society.<sup>345</sup> In the case of Muslim women, they must uncover their hair and bodies and disassociate from their purportedly backward religion and culture. But courts overlook the racial or ethnic animus rooted in negative stereotypical assumptions that causes an employer to categorically bar certain racial or ethnic behaviors.<sup>346</sup>

Courts' narrow interpretations of Title VII, therefore, protect only involuntary displays of biological or visible characteristics or morphologies associated with a low status racial or ethnic group.<sup>347</sup> Performed traits of a person that are part of an employee's racial, ethnic, or religious identity are viewed as outside Title VII's purview, notwithstanding the absence of a Congressional record barring claims involving voluntary performance identity.<sup>348</sup> This leaves employers with unfettered discretion to discriminate among low status employees based on appearance, behavior, or other traits. Employees who are able or willing to perform their identities to comport with coercive assimilationist demands will be hired, retain their jobs, and receive higher quality assignments, better training opportunities, promotions, and pay increases.<sup>349</sup> The same members of the low status group who do not or cannot convert, pass, or cover their low status identities find themselves adversely treated with no legal recourse under Title VII.<sup>350</sup>

Courts glean over the underlying biases and instead interpret the employer's behavior and dress codes as a matter of personal choice rather than racial or ethnic status.<sup>351</sup> Indeed, if choice and personal preference are the

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344. *Id.* at 1165.

345. *Id.* at 1387.

346. *See id.* at 1162.

347. *Id.* at 1140.

348. Greene, *Title VII*, *supra* note 10, at 1355; Rich, *supra* note 5, at 1138; Perea, *supra* note 11, at 839-40; Yoshino, *supra* note 13, at 937.

349. *See, e.g.,* Green, *supra* note 10, at 638-40 (discussing the business literature about the ways firms use cultural "fit" to decide whether to hire an applicant or promote an employee).

350. Take for instance *García v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), where Latino bilingual workers challenged the employer's English-only rule as national origin discrimination. The employer prohibited workers from speaking Spanish in the workplace including during breaks. In coming to this conclusion, the court focused on whether the requirement was a matter of choice and personal preference while overlooking the implicit stereotyping arising from this rule. *Id.* In coming to this conclusion, the court focused on whether the requirement was a matter of choice and personal preference while overlooking the implicit stereotyping arising from this rule. In effect, the employer's No English rule communicated an antagonism towards Hispanics that retained their Spanish language. *Id.*

351. Yuracko, *supra* note 1, at 43 (noting that courts focus on compliance costs and if they are deemed low, then employer rules are viewed as a matter of permissible personal choice and

proper criteria, then Ann Hopkins should have lost her case as she could have voluntarily chosen to wear makeup, act more stereotypically feminine, and dress in skirts and heels. But the court found such expectations were discriminatory because they imposed gender stereotypes on female employees not imposed on male employees when no evidence existed that the gender conformity demands objectively related to work performance.

What judges fail to take into account is the racialization over time of certain social interactions, behavior, speech, religious beliefs, and physical traits other than skin color.<sup>352</sup> Just as skin color, eye color, and nose shape are associated with particular races or ethnic groups; certain dialects, aesthetics, and mannerisms are associated with race and ethnic status.<sup>353</sup> For example, all-braided hairstyles, cornrows, and dreadlocks trigger assumptions about the person's African, African American, or West Indian ancestry.<sup>354</sup> Likewise, saris, bindis, and pashminas are associated with Southeast Asian women, thereby triggering perceptions of these groups.<sup>355</sup> Categorical workplace prohibitions of Spanish, Arabic, or other foreign languages associated with low status groups reflects a discriminator's negative reactions and stereotypes of a particular racial or ethnic group. Penalizing be-

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not unlawful racial status); *see also* Rogers v. American Airlines, 527 F. Supp. 229, 231-32 (S.D.N.Y. 1981) (involving a challenge to an airline's no-cornrows requirement for flight attendants where the court emphasized that the African American female plaintiff could easily comply physically with the policy by covering her hair or wearing it in a bun). *But see* where the traits at issue have been medicalized. Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 469 (N.D. Cal. 1978) (holding that a no-beard policy was not racially discriminatory when applied to an employee whose beard was an important part of his racial identity); Keys v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi., 357 F. Supp. 376, 380 (N.D. Ill. 1973) (same); *In re* Pac. Sw. Airlines, 77 LAB. ARB. REP. (BNA) 320, 320 (1981) (Jones, Jr., Arb.) (holding that employer could enforce its no-beard policy against a pilot who "had become rather attached to [his] beard" and did not want to shave it).

352. Rich, *supra* note 5, at 1145 (defining performance-based racial and ethnic ascription as stereotypes triggered by race or ethnicity-associated behaviors); Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1692 (2000) (describing the racialization of national origin and race in Chinese culture); Naber, *supra* note 40, at 302-03 (explaining that racialization is an unstable and de-centered complex of social meanings constantly being transformed by political struggle); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 68 (Michael Apple ed.) (1986) (explaining that racialization is "an unstable and 'de-centered' complex of social meanings constantly being transformed by political struggle"); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1575-76 (2002) (discussing the racialization of Arab and Muslim Americans after the September 11th attacks).

353. Rich, *supra* note 5, at 1158.

354. *Id.* *See generally*, Greene, *A Multidimensional Analysis*, *supra* note 108, at 347.

355. Rich, *supra* note 5, at 1158. *See, e.g.*, Naber, *supra* note 40, at 302 (asserting that anti-Arab and anti-Muslim animus can be viewed as part of a dynamic process of racialization and points out three ways in which Arabs and Muslims have been racialized: through political violence exercised by extremist groups in the Middle East, by xenophobic violence targeting Arabs on the local level, and through hostility arising from international crises affecting United States and its citizens).



havior that does not mimic the social dominant group values burdens minority employees with obligations to convert, pass, or cover their identities that impose psychological and dignitary costs.<sup>356</sup>

As a result, courts should be more skeptical of vague, but unavoidably subjective, definitions of professionalism. Professionalism codes that convey a symbolic message of the inferiority of certain cultural, ethnic, or racial behaviors should be struck down. In making such determinations, courts should look at the facts from a historical and contemporary social perspective to determine if the mandated physical appearance or behavior is constitutive of race, gender, or ethnicity.<sup>357</sup> Courts would inquire into whether a significant part of the racial or ethnic community at issue would see the challenged workplace policy as racially motivated. If so, then the court would presume that socially shared, unconscious racial attitudes influenced the decision maker, causing judges to be more probing in the alleged non-discriminatory purpose of the workplace rule at issue.<sup>358</sup> For instance, judges should inquire whether the employer penalized dressing or behaving in a racially or ethnically salient manner because it caused discomfort to the socially dominant group or in fact harmed work product.

In sum, the employer's conscious deployment of negative stereotypes should not be the only means of finding a violation of Title VII. Instead, judges should acknowledge that implicit stereotypes may have infected the employer's professionalism codes such that behaviors, speech, and dress commonly associated with low status groups are banned in the workplace with no legitimate work-related justification.

#### D. Addressing the Case of Muslim Women of Color

Like other low status groups, Muslim women of color must work to prove to their employers that they do not fit multiple negative stereotypes. They must work harder to prove they are independent thinkers and able to take on responsibility to counter stereotypes that they are meek, oppressed, and subjugated.<sup>359</sup> They must work harder to prove they are loyal team

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356. Greene, *Title VII*, *supra* note 10, at 1390; *see also* Part I of this Article for a detailed discussion of the psychological harms caused by stereotyping, stigma, and prejudice.

357. Greene, *Title VII*, *supra* note 10, at 1384; Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2544 (1994); *see also* *Tyson v. Clarian Health Partners*, 2004 WL 1629538, \*6 (S.D. Ind. June 17, 2004) (describing the Seventh Circuit's consideration of a "mosaic" of circumstantial evidence in finding intent including comments by supervisors, suspicious timing, and inconsistent explanations or behaviors); *see also* Gotanda, *supra* note 50, at 39 (advocating that "judicial review of race-based legislation should recognize the historical content of race"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987) (describing racism as a part of our common historical experience to be incorporated into law).

358. Rich, *supra* note 5, at 1170; *see also* Green, *supra* note 10, at 654.

359. *See* Naber, *supra* note 40, at 82 (arguing that Arab women are often portrayed as weak, mute, covered in black, or as scarcely clad belly dancers).

players who are grateful to be in America. They must work harder to prove they are respectful of male authority and adherents to conventional American gender roles in the workplace. And as they maneuver through conflicting identity performance pressures, they not only risk failing to negotiate the contradictions but they also suffer palpable psychological costs. The disparate identity performance demands remind them of their status as members of stigmatized groups. Their mental energies are taxed attempting to accommodate the contradictions while their coworkers benefit from the autonomy to be their authentic selves. The Muslim women who fail or are unwilling to accommodate coercive assimilationism are eventually demoted or terminated only to face courts indifferent to their plight.<sup>360</sup>

After investing years of her life in college, a professional Muslim woman is vested in her career and seeks to create a better financial future for her children. Losing her job as a result of failing to accommodate assimilationist pressures threatens her aspirations for social mobility as well as her identity as a professional, career woman. At the same time, she may identify with her religious and ethnic communities that provide her with a support network, a sense of self, and a welcoming space to raise her children. But unlike women from the socially dominant group, she faces contradictory pressures to perform her identity that strips her of individual autonomy over developing an authentic hybridized identity that reflects her diverse experiences.<sup>361</sup> She seeks to rethink and reposition herself within her Muslim community as a woman who believes in gender equality and the right to choose how to live her life. She also seeks to create a space for herself within mainstream society wherein she can have access to professional success and opportunity while overtly maintaining an individualized Muslim and ethnic identity.<sup>362</sup>

Muslim women of color, therefore, find themselves in a unique position wherein they face a triple bind.<sup>363</sup> The traits necessary to succeed in a “professional” white collar work environment and a “Good Muslim Woman”—independent thinking, assertiveness, ambition, and drive—are the same traits that trigger racial, ethnic, and religious stereotypes against women, Muslims, and ethnic minorities.<sup>364</sup> Following the findings in Ann

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360. See *Mirza v. Neiman Marcus Group*, No. 06-cv-6484, 2009 WL 3824711, at \*3; Compl. for Pl., *Spence v. LaHood*, No. 1:11-cv-03972-JBS-AMD (D.N.J. July 5, 2011); Compl. for Pl. ¶¶ 11-15, *Zayed v. Apple Computer, Inc.*, No. C-04-01781 JW (N.D. Cal. Nov. 15, 2005).

361. KHAN, *supra* note 74, at 125.

362. *Id.* at 67, 70.

363. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

364. See, e.g., *Zainalizadeh v. Neiman Marcus Grp.*, No. C 01-4207 JL, 2002 WL 31007465, at \*2 (N.D. Cal. Sept. 4, 2002) (Muslim woman alleging that she received bad evaluations because she was “too aggressive” and “too strong”).

Hopkins's case,<sup>365</sup> courts should be more thoughtful and inquisitive in identifying whether stereotyping and implicit bias was a "motivating factor" in an adverse employment action.

Accordingly, this Article proposes that courts consider the following three factors in employment discrimination cases involving Muslim women of color: (1) does the employer's expectations and evaluation of the Muslim woman employee impose an unequal burden on identity performance compared to other employees who are not Muslim women of color; (2) are the employer's actions or rules motivated in part by negative stereotypes of Muslim women as meek, oppressed, or subjugated; of Muslims as terrorists, disloyal or suspect; or of the employee's racial or ethnic group as backward, barbaric, or anti-American;<sup>366</sup> and (3) does the employer's actions or rules effectively stigmatize the Muslim woman employee as an outsider within the workplace.<sup>367</sup> In doing so, courts would proactively consider these factors by looking at the evidence proffered by the parties, calling on experts in social psychology, stereotyping, and implicit bias, and holistically looking at what constitutes adverse employment action to look beyond the failure to hire or employment termination to include unequal access to training, high quality work, interaction with clients, and other opportunities that contribute towards professional growth.<sup>368</sup>

In addressing these three factors, courts should look to whether the traits the Muslim employee is criticized for possessing are traits that her male and non-Muslim coworkers also possess without penalty. Likewise, courts should thoughtfully consider whether her penalized traits—for example assertiveness, leadership, critical thinking—are traits that contribute towards success in her particular profession. Is her employer setting her up to be a "Good Woman" employee who is deferential, not ambitious in taking on leadership positions, and in conformity with conventional gen-

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365. See *Price Waterhouse*, 490 U.S. at 249.

366. See, e.g., *Amna v. N.Y. State Dep't of Health*, No. 08-CV-2806 (CBA)(LB) 2011 WL 4592787, at \*3 (E.D.N.Y. Sept. 30, 2011) (female employee of Pakistani descent complaining of supervisor calling her an "evil" in the office and a coworker saying that plaintiff prays to animals); see also Sudha Setty, *What's in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT'L L. 1, 29 (2011) (asserting that the Patriot Act and the FTO designation process results in that the post-September 11th racialized application of the label of terrorism to those perceived to be Muslim or Arab, which only serves to foment distrust among domestic and international Muslim and Arab communities).

367. See, e.g., *O'Donnell v. Burlington Coat Factory Warehouse, Inc.*, 656 F.Supp. 263 (S.D. Ohio 1987) (striking down the requirement that women wear uniforms while men could wear professional business attire of their choosing because the rule was found to stigmatize women employees); *Amna*, 2011 WL 4592787, at \*2 (alleging that plaintiff was made to feel like an outsider as the only employee not offered rides to job sites in state-provided car).

368. See *Bell v. EPA*, 232 F.3d 546, 555 (7th Cir. 2000) (holding that a cognizable adverse employment action is a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").

der norms that doom her to remain at the margins of her profession? Similarly, is her strength of personality and drive tainted by stereotypes of Muslims and her ethnic group as aggressive and backward, leading to her being labeled a trouble maker and insubordinate when others outside her identity groups are not stigmatized for similar characteristics?<sup>369</sup>

For Muslim women whose religious identity entails visual “markers” such as headscarves, noticeably conservative dress, and requests for religious accommodation, courts should look to the cumulative effect on the employee. Rather than narrowly focus on whether the religious accommodation was in fact granted, courts should inquire as to whether her Muslim identity performance resulted in retaliation through social exclusion from the workplace such that she was subjected to inferior access to training opportunities that contribute towards better work assignments, stronger work evaluations, and eventually promotions.<sup>370</sup> Courts should inquire whether the Muslim woman employee was given equal access to clients, included in relevant meetings, provided the same opportunities as her coworkers to learn the latest technologies or methodologies in her profession, and generally treated as an equal member of her team. And if other Muslim women of color were granted such opportunities, courts should ask whether the explanation is due to performing assimilationism or bona fide performance based criteria.

When Muslim women are subjected to offensive racial or religious jokes, excluded from social events, and informed of suspicions of their national loyalties, courts should not limit their analysis as to whether such acts rise to a hostile work environment claim.<sup>371</sup> As such, courts should recognize as evidence of adverse employment actions verbal abuse, insults, unfair criticism, inferior training opportunities, inaccessibility to business development opportunities, or excessive scrutiny.<sup>372</sup> Even if such acts

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369. Green, *supra* note 10, at 664 (noting that courts accept employers’ narratives that outsiders are the problem, not the employer’s work culture that produces insiders and outsiders along gender, racial, religious, or ethnic lines); *see also* Choudhury, *supra* note 247, at 4-5 (claiming that an unidimensional understandings of Muslims make subordination easier).

370. *See, e.g.*, Compl. for Pl. ¶¶ 11-15, Zayed v. Apple Computer, Inc., No. C-04-01781 JW (N.D. Cal. Nov. 15, 2005); *see* Mirza v. Neiman Marcus Grp., 649 F. Supp. 2d. 837, 845 (N.D. Ill. 2009) (alleging preferential treatment to Pakistani female plaintiff’s colleagues while threatening to fire plaintiff and giving plaintiff poor work assignments).

371. *See, e.g.*, Compl. at ¶¶ 34-35, Spence v. LaHood, No. 1:11-cv-03972-JBS-AMD, 2013 WL 355913 (D.N.J. July 5, 2011) (alleging that plaintiff’s FOIA representative said, “You know they don’t like Muslims here. You suffer the consequences of the choices that you make. You choose to come in here dressed like that.” Another coworker allegedly told her, “If you take that rag off your head, you will get somewhere in the FAA.”).

372. *But see* Smalls v. Allstate Ins. Co., 396 F. Supp. 2d 364, 371 (S.D.N.Y. 2005); Bennett v. Watson Wyatt & Co., 136 F. Supp. 2d 236, 246-48 (S.D.N.Y. 2001). Similarly, courts should not blithely disregard “back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite, or personal hostility” as non-discriminatory reasons for an employer’s actions. Fisher v. Vassar Coll., 114 F.3d 1332, 1337 (2d Cir. 1997) (abrogated on other grounds by Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000)).

alone are not sufficiently severe or pervasive to meet that standard, they may and should be considered in disparate treatment claims wherein the result was failure to promote, demotion, or employment termination. Begrudgingly tolerating employees who do not comport their identity performance to coercive assimilationist demands should not be mistaken for equality.

Courts must also recognize that promotions and pay raises do not occur in a vacuum but rather are an accumulation of work performance integrally linked to the type of work available to an employee and her social inclusion in the workplace. An employee who is not given the opportunity to take on projects that improve her skills or allow her to exhibit her leadership skills is doomed to a marginal position in the workplace and eventually expelled. Over time, this sets her up for a poor work evaluation and termination at worst or a stagnant professional path at best. Moreover, courts must scrutinize employers' common claims that the plaintiff's personality was the motivation for allegedly poor treatment. Such claims are often coded bias against minorities who do not conform to assimilationist demands.

While this Article proposes broader judicial interpretations of what constitutes disparate treatment on account of race, ethnicity and religion, it does not propose a change in existing burden shifting tests between parties. The plaintiff continues to bear the burden of proof to proffer a prima facie case of discrimination and that the employer's alleged non-discriminatory purpose was pretext for unlawful discrimination.<sup>373</sup> However, plaintiffs' evidence of the type discussed above should be more seriously considered by courts as they take on a more holistic approach that considers the totality of the circumstances. Courts should look beyond a narrow reading of a performance evaluation and ask whether the employee's racially and religiously salient identity performance caused the employer to set her up for failure in contrast to other employees' whose identities assimilated into the majority's demands. When plaintiffs introduce expert evidence by sociologists about the growing anti-Muslim sentiment after September 11th and negative stereotypes of Muslim women, courts should seriously consider how this impacts the workplace. Likewise, when social psychologists testify about the changing face of discrimination from overt to covert bias and explicit to implicit stereotypes, courts must acknowledge their responsibility in fettering out such bias.

## CONCLUSION

While this Article's proposal presents significant evidentiary challenges, it offers legal recourse to employees subject to discrimination arising from implicit biases rooted in pervasive stereotypes against low status

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373. *McDonnell Douglas-Corp. v. Green*, 411 U.S. 792, 792-93 (1973).

groups.<sup>374</sup> Victims of implicit bias manifested through coercive assimilationist pressures to perform one's identity based on the dominant social group's expectations are falling through the cracks of Title VII doctrine.<sup>375</sup> Members of negatively stereotyped groups expend significant energy "managing their self-presentation and cultural displays to ensure they communicate competence, character, and commitment in the workplace."<sup>376</sup> They must actively dispel negative stereotypes applied to their group to avoid animus and stigmatization.<sup>377</sup> Toward that end, low identifiers emulate the behaviors, preferences, and norms of higher status groups.<sup>378</sup> If successful, they not only evade discriminatory treatment but also receive assistance reserved for high status in-group members.<sup>379</sup>

In the case of Muslim women of color, not only are they denied individual agency and the choice to live their authentic selves consistent with their religious and cultural values, but they also face a triple bind. If they assert independent viewpoints, do not fear challenging male power, ambitiously seek promotion at work and dress fashionably Western, then they are admired as a "Good Muslim Woman." But the admiration for defying the yokes of purported Muslim and Arab cultural gender oppression is short lived. Their assertiveness soon becomes a liability that violates American gender norms that treat ambition as a flaw when applied to women.<sup>380</sup> Moreover, their outspoken personalities and intrepidity in expressing critical views deem them a suspicious Muslim whose loyalties are questioned as an insubordinate employee in violation of American racial hierarchies.<sup>381</sup>

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374. BANAJI & GREENWALD, *supra* note 4, at 47 (2013); Bandsuch, *supra* note 11, at 287 (footnotes and internal quotation marks omitted) (noting the replacement of extreme acts of discrimination with more subtle forms of prejudiced "second generation of trait discrimination" animated by professionalism); Krieger & Fiske, *supra* note 6, at 1035-36 (identifying the type of evidence that can be proffered to prove discrimination based on implicit bias).

375. See, e.g., Yuracko, *supra* note 1, at 4; cf. Krieger & Fiske, *supra* note 6, at 1054. The Supreme Court has repeatedly stated that, "Title VII tolerates no racial discrimination, subtle or otherwise . . ." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 526 (1993) (quoting *McDonnell Douglas Corp.*, 93 S. Ct. at 1824 (1973)). See also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 272 (1989); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 348 n.31 (1977); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 n.8 (1976).

376. Roberts & Roberts, *supra* note 10, at 379.

377. Cf. Yoshino, *supra* note 13, at 772.

378. Branscombe & Ellemers, *supra* note 82, at 254.

379. BANAJI & GREENWALD, *supra* note 4, at 142, 162 (discussing studies that showed that "White Americans consistently received more help than Black Americans," showing that harm done to Black Americans comes in the form of inaction—the absence of "in-group favoritism"—in addition to active mistreatment).

380. SANDBERG, *supra* note 42, at 17. Borgida et al., *supra* note 46, at 613, 620-22.

381. Aziz, *supra* note 111, at 227; Carbado & Gulati, *Conversations at Work*, *supra* note 26, at 103 (analyzing the repressive impact that stereotypes have on identity performance in the workplace); See generally Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997) (discussing the theory of racial

By highlighting the psychological burdens and an irreconcilable triple bind imposed on Muslim women of color, this Article echoes other scholars' calls for a broader definition of race that includes physical appearance, language, associations, cultural activities and other mutable racial or ethnic characteristics.<sup>382</sup> Rather than focus on morphology or the voluntary nature of a workplace rule, courts should determine whether certain workplace rules devalue cultural group status such that they perpetuate divisive cultural group status contests and stigmatize low status groups.<sup>383</sup> Workplace rules that impose performance behaviors that reify racial and ethnic hierarchies in the workplace, and yet have no proven effect on work performance, should be struck down as violating Title VII. And employers should bear the burden of proving that such rules do not devalue or stigmatize certain racial, ethnic, or religious groups.<sup>384</sup>

Toward that end, the Supreme Court's unequal burden test in *Price-Waterhouse* should be expansively interpreted to include the psychological and dignitary harms imposed by coercive assimilationism. Courts should take seriously plaintiffs' evidence that she had to work harder than her coworkers, not only at her job, but at overcoming assumptions of inferior competence, suspicions of disloyalty, perceptions of her foreignness, and other stigmatized traits rooted in negative stereotypes about Muslim women, Muslims, women, and her ethnic group. The more evidence she can show that she was stigmatized as an "other" in the workplace, the more a court should scrutinize the employer's allegedly non-discriminatory purpose to inquire whether in fact unlawful bias was a motivating factor in the adverse employment action.<sup>385</sup> Adverse employment actions should be interpreted broadly to include cultural profiling and imposing

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hierarchy as it relates to immigrants). See also Lisa C. Ikemoto, *The Racialization of Genomic Knowledge*, 27 SETON HALL L. REV. 937, 943-50 (1997) (discussing racial identity and the Genome Project).

382. See Greene, *Title VII*, *supra* note 10, at 1369; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987); Gonda, *supra* note 50, at 21.

383. Rich, *supra* note 5, at 1158; Greene, *Title VII*, *supra* note 10, at 1393.

384. Rich, *supra* note 5, at 1159 (noting that performance-based ascription is discriminatory when it devalues a person because she appears to belong to a particular race or ethnic group).

385. See the cases involving the Age Discrimination in Employment Act where courts acknowledge that an employer can be "motivated" by an applicant or employee's age through the operation of implicit stereotypes: *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155 (7th Cir. 1981) (holding that age discrimination may arise from an unconscious application of stereotyped notions of ability); *La Montagne v. Am. Convenience Prods., Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984) ("Age discrimination may be subtle and even unconscious."); *Burlew v. Eaton Corp.*, 869 F.2d 1063, 1066 (7th Cir. 1989). In contrast, in Title VII cases, courts do not find that increased scrutiny or reprimand by a supervisor rises to the level of a "materially adverse action." See, e.g., *Spence v. LaHood No. 11-3972 JBS/AMD*, 2013 WL 355913, at \*11 (D.N.J. Jan. 28, 2013), (citing *McKinnon v. Gonzales*, 642 F. Supp. 2d 410, 426 (D.N.J. 2009)).



work cultures based on subjective criteria defined solely by dominant social group norms.<sup>386</sup>

In the end, the excessive deference courts grant to employers needs to be reined in. At stake is far more than an employer's autonomy to conduct his workplace to pursue higher profits. The ability of a diverse society comprised of multiple religions, races, and ethnicities to be inclusive and offer a fair chance to every citizen contributes to a politically stable society not plagued by separatism and segregation. Making equal opportunity meaningfully available rather than merely empty promises in employer policies contributes towards America's success in an increasingly globalized economy.<sup>387</sup>

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386. Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN 89, 89 (2000); Green, *supra* note 10, at 627.

387. Brief for Amici Curiae, 65 Leading American Businesses in Support of Respondents at 7, *Grutter v. Bollinger*, 539 U.S. 36 (2003) (No. 02-241); Brief for Amici Curiae, Media Companies in Support of Respondents at 8, *Grutter v. Bollinger*, 539 U.S. 36 (2003) (No. 02-241).