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## Whiteness at Work

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## WHITENESS AT WORK

Lihí Yona\*

*How do courts understand Whiteness in Title VII litigation? This Article argues that one fruitful site for such examination is same-race discrimination cases between Whites. Such cases offer a peek into what enables regimes of Whiteness and White supremacy in the workplace, and the way in which Whiteness is theorized within Title VII adjudication. Intra-White discrimination cases may range from associational discrimination cases to cases involving discrimination against poor rural Whites, often referred to as “White trash.” While intragroup discrimination is acknowledged in sex-discrimination cases and race-discrimination cases within racial minority groups, same-race discrimination between Whites is currently an under-theorized phenomenon. This Article maps current cases dealing with racial discrimination between Whites, arguing that these cases suffer from under-theorization stemming from courts’ tendency to de-racialize Whiteness and see White people as ‘not being of any race.’ This tendency has led to a limited doctrine of same-race discrimination between Whites, affording it recognition only when racial minorities are involved. Acknowledging Whiteness as a racial project—the product of White supremacy—may enable courts to better theorize intra-White discrimination. Such possible theorization is developed via the stereotype doctrine. Accordingly, same-race discrimination and/or harassment between Whites is often a result of Whites policing other Whites to conform to stereotypes and expectations regarding Whiteness, i.e., how White people should act or with whom they may associate. Recognizing dynamics of intra-White racialization and the racial work behind Whiteness, this Article concludes, is aligned with Title VII’s anti-subordination goals, as it is in the interest of racial minorities as well.*

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## INTRODUCTION

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

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

Intragroup discrimination has long been recognized by the courts as actionable under Title VII of the Civil Rights Act of 1964. Accordingly, courts recognize the possibility that women may discriminate against other women on the basis of sex, for instance by sexually harassing female employees.<sup>1</sup> Similarly, discrimination by Blacks and other racial minorities against their own group members is recognized in Title VII jurisprudence.<sup>2</sup> Title VII has also expanded to encompass situations where men harass or discriminate against other men on the basis of sex, usually in instances where the performance of masculinity by those discriminated against does not meet their supervisor's or colleagues' expectations.<sup>3</sup> However, there is currently almost no discussion, in the courts or in legal scholarship, of the possibility that Whites may racially discriminate against other Whites. This is no coincidence. The failure to recognize most types of same-race discrimination between Whites results, this Article argues, from courts' tendency to de-racialize Whiteness. Whiteness' privilege of invisibility, which has made White norms the default, also prevents courts from recognizing Whiteness as a racial category that polices itself on its members. This inability is manifested through the courts' limited recognition of intra-White discrimination.

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

The possibility of intra-White discrimination is ever more relevant. Alt-right, White pride, and White nationalist/supremacist movements, all of which see Whiteness as a category with concrete content and distinct

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1. See, e.g., *Johnson v. Community Nursing Servs.*, 932 F. Supp. 269, 273 (D. Utah 1996) ("Title VII does not exclude from protection same-sex sexual harassment . . . . Accordingly, this court holds that a cause of action exists under Title VII for victims of same-sex sexual harassment."); *King v. M.R. Brown, Inc.*, 911 F. Supp. 161, 166 (E.D. Penn. 1995) ("This Court finds that same-sex sexual harassment is actionable under Title VII.").

2. See, e.g., *Williams v. Wendler*, 530 F.3d 584 (7th Cir. 2008) ("Light-skinned [B]lacks sometimes discriminate against dark-skinned [B]lacks, and vice versa, and either form of discrimination is literally color discrimination."); *Walker v. Sec'y of Treasury, IRS*, 713 F. Supp. 403, 407-08 (N.D. Ga. 1989).

3. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998) (concluding that "sex discrimination consisting of same-sex sexual harassment is actionable under Title VII"); *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 456-57 (5th Cir. 2013) (recognizing that "a plaintiff may establish a sexual harassment claim with evidence of sex-stereotyping" and finding that there was evidence that the superintendent in the case harassed the plaintiff because he did not think the plaintiff was "a manly-enough man").

borders maintained by its members, have become more prevalent in recent years.<sup>4</sup> These groups promote racist norms regarding Whiteness and its legitimate manifestations within American society.<sup>5</sup> Their popularity may lead to an increased number of intra-White discrimination cases involving employers who enforce such ideas of Whiteness on their White employees or White employees who harass White colleagues for failing to “act White.”

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

Part IV suggests scenarios that are missed by the current theorization and may be recognized via the stereotype doctrine. Examining stereotypes against poor rural Whites, often referred to as “White trash,” I argue that these stereotypes revolve around the “right” ways to perform Whiteness. Accordingly, discrimination against poor Whites may some-

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4. Kirk Siegler & Amita Kelly, *Alt-Right Groups Splinter, Distance from White Supremacy*, NPR (Aug. 11, 2018), <https://www.npr.org/2018/08/11/637320471/after-charlottesville-alt-right-groups-splinter-distance-from-white-supremacy> (“After the deadly violence in Charlottesville, it appears far-right groups not closely tethered to [W]hite supremacy are having their moment.”); Sarah Begley, *White Supremacist and Black Nationalist Groups Both Grew During Trump’s First Year as President*, TIME (Feb. 21, 2018), <http://time.com/5168677/donald-trump-hate-groups-splc/> (“President Donald Trump’s first year in office was marked by an increase in both [W]hite supremacist groups, as well as a backlash in the growth of [B]lack nationalist groups, according to a new report Wednesday by an organization that closely tracks what it defines as hate groups.”).

5. See *White Nationalist*, S. POVERTY LAW CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/white-nationalist> (last visited Nov. 28, 2018).

times be seen as forbidden racial discrimination, especially when the one acting in a discriminatory manner is White. Part V addresses a possible challenge to my argument based on anti-subordination theory, demonstrating the potential advantages my argument offers to racial minorities. Part VI offers a concrete suggestion as to how courts should adopt my argument.

## I. TITLE VII: FROM IDENTITY TO IDEOLOGY

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

According to anti-classification theory, the injury caused by discrimination results from the act of distinction between or classification of individuals.<sup>6</sup> Anti-classification theory, which is largely identified with ideas of formal equality, focuses on identitarian traits (e.g. race, gender, and national origin) that are seen as illegitimate grounds for classification.<sup>7</sup> The way to achieve equality, according to this theory, is to ignore these traits.<sup>8</sup> Anti-classification theory mostly focuses on disparate treatment and disregards larger questions of historical and structural inequality.<sup>9</sup>

In contrast, anti-subordination theory places historical inequality and structural modes of oppression at its center.<sup>10</sup> Under the anti-subordination view, the law should be concerned with remedying the conditions that allow for the disadvantage of historically oppressed groups.<sup>11</sup> To fully achieve justice, we must not ignore the identities of different individuals, but rather acknowledge them and their social and historical meaning. Anti-subordination theory places a heavy weight on disparate impact, as it focuses the legal system's attention to the realities of racial discrimination, even in instances where an employment decision may seem neutral or objective.<sup>12</sup>

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6. See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 UNIV. MIAMI L. REV. 9, 15 (2003).

7. Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 963 (2012).

8. *Id.*

9. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472 (2004).

10. Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 155 (2017).

11. *Id.*; See Balkin & Siegel, *supra* note 6, at 9.

12. See Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2157-58 (2012).

Writers on equality describe a turn in recent years from the anti-subordination paradigm, which reflected Title VII's origins, towards an anti-classification paradigm.<sup>13</sup> Cases like *Ricci v. DeStefano* and *Wal-Mart v. Dukes* have seriously challenged disparate-impact litigation as well as social-framework theories associated with anti-subordination.<sup>14</sup> Further, it is argued that recent anti-discrimination laws such as the Americans with Disabilities Act (ADA) and the Genetic Information Act have tilted the antidiscrimination scale towards anti-classification ideals of equality.<sup>15</sup> Part of this turn is explained through anti-subordination theory's focus on identity, which seems increasingly less relevant to lawmakers and courts that have embraced the view of a post-identity era.<sup>16</sup> This sentiment is most visible in Title VII race-discrimination cases, where the constitutional commitment to colorblindness has arguably "spilled over" into Title VII jurisprudence.<sup>17</sup>

While recent judicial and legislative developments indicate disdain for identitarian-based policies, anti-essentialist views on antidiscrimination provide an important alternative. Anti-essentialism as an approach to antidiscrimination law first emerged as a critique of racial and gender justice struggles' potential to essentialize identities and to allow courts to weigh in on questions regarding groups' and individuals' ontological traits.<sup>18</sup> Richard Ford, for instance, raised the concern that "racial culture" arguments—i.e., braids are a proxy for African American women's race—essentialize race and can potentially lead to graver racial discrimina-

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13. See Richard Primus, *Of Visible Race-Consciousness and Institutional Role: Equal Protection and Disparate Impact After Ricci and Inclusive Communities*, in TITLE VII OF THE CIVIL RIGHTS ACT AFTER 50 YEARS: PROCEEDINGS OF THE NEW YORK UNIVERSITY 67TH ANNUAL CONFERENCE ON LABOR 295 (Anne Marie Lofaso & Samuel Estreicher eds., 2015); Areheart, *supra* note 7, at 966; Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination The 40th Anniversary of Title VII of the Civil Rights Act of 1964 Symposium*, 22 HOFSTRA LAB. & EMP. L.J. 431, 463-64 (2004); Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 229, 231-32 (2010).

14. See Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 921. See generally *Wal-Mart v. Dukes*, 564 U.S. 338 (2011); *Ricci v. DeStefano*, 557 U.S. 557 (2009).

15. Areheart, *supra* note 7, at 968.

16. *Id.* at 999-1000.

17. Bornstein, *supra* note 14, at 966.

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

tion.<sup>19</sup> Other writers have developed additional critiques of both racial- and gender-justice projects.<sup>20</sup> Anti-essentialist theories “see group-based identities as constructed and contested through social interaction, not as fixed and stable properties of the individual.”<sup>21</sup> They urge us to move from identities on the ground to the ideologies that construct them. The law’s objective under anti-essentialism is to destabilize mechanisms that reinforce and construct individual and group identities.<sup>22</sup> Accordingly, Title VII and other antidiscrimination legislation under an anti-essentialist framework are aimed at combating oppressive ideologies such as White supremacy, racism, sexism, hetero-normativity, and ableism.

This Article shares the view that Title VII jurisprudence should be developed along the theoretical lines of anti-essentialism. Anti-essentialism—which shares both anti-subordination theorists’ goal of dismantling structures of power as well as anti-classification theorists’ disinclination towards identity-based policies—can potentially help refocus Title VII on historical and structural forms of oppression. An anti-essentialist view would be less concerned with advancing the number of categories protected by antidiscrimination legislation and more concerned with how workplaces are gendered and raced according to different con-

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

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

21. Clarke, *supra* note 10, at 145.

22. *Id.*

servative ideologies (e.g. hetero-patriarchy,<sup>23</sup> White supremacy) that disadvantage anyone who does not fit these ideological expectations.<sup>24</sup>

Despite its seemingly radical position towards social institutions (such as the law itself),<sup>25</sup> anti-essentialist theories are consistent with Title VII's language. Jessica Clarke argues that, unlike the ADA, which defines "people with disabilities" as its protected class, Title VII is a symmetrical law that does not designate any protected class.<sup>26</sup> Section 703(a), which defines unlawful employment practices as those discriminating against any individual "because of such individual's race, color, religion, sex, or national origin,"<sup>27</sup> forbids racial discrimination against racial majority and minority group members alike.

Clarke further argues that, while it is possible to see the original language of Title VII as focused on the identitarian traits of individuals, the 1991 amendment that added Section 703(m) reinforced Title VII's non-identitarian slant.<sup>28</sup> Section 703(m) states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice."<sup>29</sup> The provision not only signals a move away from identity-based jurisprudence—shifting the Archimedean point of proving discrimination claims from the victims' identity to the motivation behind the discriminatory act—but also signals a step towards ideol-

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23. Hetero-patriarchy fuses two ideological systems that often work conjointly: heterosexism/heteronormativity and patriarchy. As Francisco Valdes describes it, the ideology of compulsory heteropatriarchy rests on four key tenets: 1) the bifurcation of personhood into "male" and "female" components under the active/passive paradigm; 2) the polarization of these male/female sex/gender ideals into mutually exclusive, or even opposing, identity composites; 3) the penalization of gender atypicality or transitivity; and 4) the devaluation of persons who are feminized. The combined impact of these four tenets is compulsory hetero-patriarchy. Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins Symposium*, 8 YALE J.L. HUMAN. 161, 170 (1996).

24. See generally Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (1999) (arguing that traditional notions of the "working identity" that apply pressure on employees to conform to certain behaviors at work are a form of employment discrimination) [hereinafter Carbado & Gulati, *Working Identity*].

25. Anti-essentialism may seem more radical as it tries to combat discrimination through a challenge to its root causes—the structures that constitute the identities that are discriminated against—rather than through forbidding classification between identities or protecting subordinated identities once they are formed. See *supra* notes 20 and 23.

26. Clarke, *supra* note 10, at 110.

27. Title VII § 703(a).

28. Clarke, *supra* note 10, at 114.

29. Title VII § 703(m). See also Clarke, *supra* note 10, at 114 (providing that § 703(m) "includes no limitation based on an individual's own identity").

ogy-based claims.<sup>30</sup> Under Section 703(m), an individual must demonstrate that the *ideology* behind the relevant employment practice was wrongfully motivated by race, color, religion, etc.<sup>31</sup> Put differently, Title VII is not aimed at protecting women in the workplace but rather at forbidding sexism in the workplace; it is designed not to protect Black and Latino workers but to forbid racism as a motivation behind employment decisions or conduct.

Anti-essentialist theory is relevant to intragroup discrimination because the motive behind such acts of wrongful discrimination is usually ideological, not identitarian. Under this framework, when a female employer discriminates against women in the course of hiring for a position, the relevant factor is arguably not the identities of the parties involved but the ideology that dictates or motivates the act: chauvinism, sexism, or heteronormativity. Similarly, when a Black employer harasses a Black employee by giving him harsher assignments and referring to him as a n-word, anti-essentialist theory would characterize it as an act of echoing and reproducing White supremacist ideological norms. Cases of intragroup discrimination often force courts to acknowledge the ideology behind patterns of discrimination, following along the theoretical lines of anti-essentialism. Furthermore, it allows the acknowledgment of intragroup discrimination's role in *constructing* group identities.

Anti-classification theory is limited in analyzing such cases, as the theory does not recognize concepts such as stigma, structural ideological oppression, or internalized racism or sexism. Therefore, anti-classificationists' ability to theorize such dynamics is limited, and the discriminatory act itself might be seen as perplexing and thus resulting from other, non-forbidden reasons. The strong identitarian grip of anti-subordination theory also limits its ability to theorize intragroup discrimination, as doing so requires moving beyond fixed identity classifications rather than deferring to the employer's identity.<sup>32</sup>

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30. For a discussion on the motivational efficacy of ideology within workplaces, see Ysanne M. Carlisle & David J. Manning, *The Concept of Ideology and Work Motivation*, 15 ORGANIZATIONAL STUD. 683, 685 (1994) (stating, "just as technology concerns an awareness of the motive power of controlled energy systems, and theology concerns an awareness of God and the motivation of religious practice, so an ideology is concerned with an awareness of the self and the motive sense of self-enactment in human conduct including that 'at work'").

31. Notably, this amendment was added, among other reasons, to account for cases involving stereotyping, following *Price Waterhouse v. Hopkins*, 490 U.S. 228, 280 (1989). See Clarke, *supra* note 10, at 114. As I will argue later in this Article, stereotype doctrine is closely linked to the ideology of the workplace, rather than to the individual identity traits of the plaintiff.

32. See Clarke, *supra* note 10, at 147. While Clarke focuses on anti-subordination theory's fixation on the identity of the *plaintiff*, I utilize her argument to challenge anti-

## II. A TAXONOMY OF INTRAGROUP RACE DISCRIMINATION

The U.S. Supreme Court has recognized the possibility of intraracial discrimination on three notable occasions. First, in *Castaneda v. Partida*, a jury-selection case involving a Mexican American, the Supreme Court stated that “[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group.”<sup>33</sup> Second was *Saint Francis College v. Al-Khazraji*, a case regarding §1981 discrimination<sup>34</sup> against an Arab employee who argued racial discrimination.<sup>35</sup> Given that his Arab identity was categorized as part of the “White race” by the Court, the Court addressed the possibility of intraracial discrimination. Rejecting the biological understanding of race as a criterion for evaluating discrimination claims, it stated that

It has been found that differences between individuals of the same race are often greater than the differences between the “average” individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological in nature.<sup>36</sup>

This case was understood by lower courts to open up the possibility for same-race discrimination claims under both § 1981 and Title VII.<sup>37</sup> Finally, Justice Scalia in *Oncala v. Sundowner Services* referenced the possibility of same-race discrimination to support his finding that Title VII applies in

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subordination theory’s fixation on the identity of both plaintiff and defendant. *Id.* Further, while Clarke focuses primarily on missed identification cases when discussing discrimination against Whites, this Article focuses on situations where Whites discriminate against other Whites specifically due to acknowledging their Whiteness, thus assigning to it specific racial expectations. *Id.*

33. *Castaneda v. Partida*, 430 U.S. 482, 499 (1977).

34. § 1981 secures African Americans’ rights to make and enforce contracts. 42 U.S.C. § 1981 (2012). Courts have interpreted it as prohibiting racial discrimination in hiring and employment. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). § 1981 applies to all private employers, as well as to state and local governments. Courts have recognized a “necessary overlap” between § 1981 and Title VII. *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 445 (2008).

35. *Saint Francis Coll. v. Al-Khazraji*, 41 U.S. 604, 606 (1987).

36. *Id.* at 614 n.4.

37. *See, e.g., Hansborough v. City of Elkhart Parks & Recreation Dep’t*, 802 F. Supp. 199, 206 (N.D. Ind. 1992) (stating “[c]ertainly, this Supreme Court decision has made clear that discrimination claims should not be barred merely because the plaintiff(s) and defendant(s) belong to the same race”).

same-sex discrimination cases.<sup>38</sup> The case dealt with a man who claimed he was sexually harassed by male coworkers who taunted and sexually abused him.<sup>39</sup> In his opinion, Scalia acknowledged same-sex discrimination and harassment, and also directly addressed same-race discrimination: “In the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race.”<sup>40</sup>

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

#### A. Same-race Discrimination Between Racial Minorities

The overwhelming majority of same-race discrimination cases recognized and discussed by the courts involve racial minorities discriminating against their fellow group members. These cases are discussed at length by Enrique Schaerer,<sup>41</sup> so I will mention them here only briefly.

Same-race discrimination between racial minorities was recognized by courts with few complications. In *Walker v. Secretary of Treasury, I.R.S.*, the court declared that “[i]t would take an ethnocentric and naive world view to suggest that we can divide Caucasians into many sub-groups but somehow all Blacks are part of the same sub-group. There are sharp and distinctive contrasts amongst native Black African peoples (sub-Saharan) both in color and in physical characteristics.”<sup>42</sup> Similarly, in *Williams v. Wendler* the Seventh Circuit posited that “there can, it is true, be ‘racial’ discrimination within the same race, broadly defined, because ‘race’ is a fuzzy term . . . Light-skinned [B]lacks sometimes discriminate against dark-skinned [B]lacks, and vice versa, and either form of discrimination is literally color discrimination.”<sup>43</sup>

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38. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998).

39. *Id.* at 77.

40. *Id.* at 78.

41. Enrique Schaerer, *Intragroup Discrimination in the Workplace: The Case for Race Plus*, 45 HARV. C.R.-C.L. L. REV. 57, 64-76 (2010) (reviewing race discrimination cases between racial minorities to argue courts should develop a “race plus” doctrine similar to the “sex plus” doctrine used for intragroup sex discrimination).

42. *Walker v. Sec’y of Treasury, IRS*, 713 F. Supp. 403, 407-08 (N.D. Ga. 1989).

43. *Williams v. Wendler*, 530 F.3d 584, 587 (7th Cir. 2008).

This line of reasoning relies heavily on anti-classification logic,<sup>44</sup> which explains same-race discrimination by redrawing the lines demarcating a racial group.<sup>45</sup> Many other courts, however, have recognized same-race discrimination between racial minorities without resorting to the sub-group analyses. In *Parrott v. Cheney*, the plaintiff was a Black man who argued that his supervisor, another Black man, had discriminated against him on the basis of race and sex.<sup>46</sup> While the court dismissed his claims on the ground that he failed to prove a *prima facie* case of discrimination, it nevertheless acknowledged the possibility of similar claims and focused the criteria for recognizing such discrimination on the types of behavior the law is aimed at remedying, instead of the identities of those suffering from discrimination.<sup>47</sup> In *Belton v. Shinseki*, a Black female plaintiff claimed that her supervisor, a Black woman, discriminated against Black nurses.<sup>48</sup> Here, too, the court recognized same-race discrimination without establishing a sub-group difference between the plaintiff and the defendant. In *Mitchell v. Nat'l R.R. Passenger Corp.*, the court recognized intraracial discrimination between Blacks while rejecting the subgroup-based reasoning employed by other courts.<sup>49</sup>

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

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

46. *Parrott v. Cheney*, 748 F. Supp. 312, 313 (D. Md. 1989).

47. See *id.* at 317 (“Title VII operates ‘to make persons whole for injuries suffered on account of unlawful employment discrimination.’”) (internal citations omitted).

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

49. *Mitchell v. Nat'l R.R. Passenger Corp.*, 407 F. Supp. 2d at 236 (quoting *Saint Francis Coll.*, 481 U.S. at 613) (“Contrary to [the] contention that only ‘sub-group’ intraracial discrimination is actionable, such as [W]hite defendants acting against a [W]hite [A]rab, or light-skinned [B]lack defendants acting against a dark-skinned [B]lack plaintiff,

Courts have also recognized the possibility of same-race harassment. In *Ross v. Douglas Cty.*, Odis Ross, a Black employee at Douglas County Correctional Facility, argued that his supervisor, also a Black man, used racial epithets when addressing him, including the n-word and “[B]lack boy.”<sup>50</sup> The Eighth Circuit rejected the County’s claim that no animus could be proven in this case because Ross and Johnson were of the same race. The court reasoned that

[g]iven the *Oncala* decision, we have no doubt that, as a matter of law, a Black male could discriminate against another Black male “because of such individual’s race.” Such comments were demeaning to Ross. They could have been made to please Johnson’s White superior or they may have been intended to create a negative and distressing environment for Ross. However, whatever the motive, we deem such conduct discriminatory.<sup>51</sup>

Similarly, in *Pollock v. City of Philadelphia*, a Black employee claimed that his Black supervisor reduced his pay without cause, spat sunflower seeds and shells on the floor and ordered him to clean up the mess, referred to him as a “dumb n\*\*\*\*r with an easy job,” and yelled at him in front of others, threatening to “write him up.”<sup>52</sup> The court ruled that there was “sufficient evidence to raise a genuine issue of material fact” as to whether the hostile work environment was “motivated by racial bias,” adding that “the use of a racial slur, when combined with the broader pattern of mistreatment, is sufficient to raise an inference of racial discrimination.”<sup>53</sup>

Importantly, these cases reveal that courts are at least partially able to recognize the ideological underpinning of such behavior. Although they do not clearly articulate the possibility of internalized racism, they tie these acts back to White supremacy by suggesting that they were motivated by a desire to impress a White employer, or by assigning particular importance to the use of racial slurs. Under the anti-essentialist approach, when a Black employer discriminates against a fellow Black person or shouts racial slurs towards him or her, it should be seen as an act of conforming to White supremacy’s ideological norms.

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§ 1981 is a broad prohibition of racial discrimination, and ‘a distinctive physiognomy is not essential to qualify for § 1981 protection.’’).

50. *Ross v. Douglas Cty.*, 234 F.3d 391, 393 (8th Cir. 2000).

51. *Id.* at 396.

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

53. *Id.* at \*10.

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

### B. Same-race Discrimination Between Whites

Before I begin, it is important to acknowledge one major difference in Title VII litigation between racial-minority plaintiffs and White plaintiffs, which revolves around the extra level of protection granted to “protected classes” under Title VII. Title VII, as mentioned above, does not specify the groups it aims to protect. However, after courts recognized how difficult it is to prove discrimination, especially in hiring decisions, the Supreme Court in *McDonnell Douglas* offered an easier route to proving discrimination for those considered members of a protected class.<sup>54</sup> Under the *McDonnell Douglas* method of proof, instead of directly proving discrimination, a plaintiff may show that: (1) the plaintiff is part of a “protected class,” (2) the plaintiff applied for a job (3) for which he or she was qualified, (4) the plaintiff did not get the job, and (5) the position remained open even after the plaintiff was rejected.<sup>55</sup> If all these requirements are met, then the burden of proof shifts to the employer to provide a legitimate, nondiscriminatory reason for his or her decision, which the plaintiff may then rebut.<sup>56</sup>

Notably, because they are not members of a protected class, White plaintiffs cannot prove discrimination via the *McDonnell Douglas* test, which might explain why there seem to be fewer cases dealing with same-race discrimination between Whites.<sup>57</sup> This assumption draws further support from what Jessica Clarke has coined “protected class gatekeeping,” a tendency on the part of courts to read the *McDonnell Douglas* “protected class” requirement into all Title VII claims, limiting the ability

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54. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793 (1973).

55. *Id.*

56. *Id.* at 802.

57. White plaintiffs fail the first requirement, that they are part of a “protected class.”

of plaintiffs not from protected classes to claim discrimination under the law.<sup>58</sup>

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

A review of same-race-employment-discrimination cases between Whites reveals that they arise in three circumstances. The first two are what I call “weak” intraracial discrimination cases, meaning that the intraracial component in these cases is accompanied by another form of discrimination. The third type I call “strong” intraracial discrimination cases because discrimination by Whites against other Whites is located at the center of the legal discussion.

The first “weak” set of intraracial discrimination occur where there is an ethnic difference between the parties, but the court nevertheless refers to both as “White.” This dynamic is found in *Castaneda v. Partida* and *Saint Francis* discussed above, which recognized discrimination against Mexican and Arab Americans, respectively.<sup>59</sup> A similar analysis is at play in *Covalt v. Pintar*, which also deals with discrimination against a Mexican American plaintiff.<sup>60</sup> While these cases are interesting in terms of how courts draw and understand the borders of Whiteness,<sup>61</sup> the theoretical challenge they pose to the discussion in this Article is minimal, since it is often recognized that ethnicity is closely linked to race.<sup>62</sup> These cases can thus be framed as closer to *interracial* discrimination than *intraracial* discrimination.<sup>63</sup>

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58. See Clarke, *supra* note 10, at 104–06.

59. See *supra* notes 33–37, 44–45 and accompanying text.

60. See *Covalt v. Pintar*, 2008 WL 2312651, at \*1 (S.D. Tex. June 4, 2008).

61. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (10th ed. 2006).

62. STEPHEN CORNELL & DOUGLAS HARTMANN, *ETHNICITY AND RACE: MAKING IDENTITIES IN A CHANGING WORLD* 15 (Charles Ragin et al. eds., 2007). The courts themselves recognize this link. See *Saint Francis Coll. v. Al-Khazraji*, 41 U.S. 604 (1987); *Covalt*, 2008 WL 2312651, at \*7.

63. The relationship between ethnicity and race is, of course, much more complex than I discuss here. Questions regarding what identities are included within the borders of Whiteness and the framing of Mexicans, Arabs, and other groups as White or non-White are of great importance and relevance to this discussion, as they influence the category itself. In that sense, the difference between interracial and intraracial is often arbitrary,

The second type of “weak” same-race discrimination cases are interracial solidarity doctrine cases. Under the interracial solidarity doctrine, Whites may sue other Whites for discriminating against racial minorities in a way that violates their right to diversity or their interest in color-blindness.<sup>64</sup> One of the first cases recognizing this possibility was *Trafficante v. Metropolitan Life Insurance Co.*, a 1972 case where a White tenant filed a Title VIII housing-discrimination claim jointly with a Black tenant, both arguing against a landlord who discriminated against Black housing applicants.<sup>65</sup> The White tenant’s standing was challenged by the housing company, which argued he did not suffer any injury from the discrimination.<sup>66</sup> Nevertheless, the Court sustained his claim, ruling that the plaintiff suffered an injury to his interest in interracial association.<sup>67</sup> The interracial solidarity cases pose a greater challenge for theorizing Whiteness, as they bring to the surface instances where the interests of White individuals clash in legally recognized ways.<sup>68</sup> However, here, too, discrimination against Whites accompanies another type of interracial discrimination: that which occurs between Whites and racial minorities.

The “strong” type of cases involves claims of associational discrimination, where Whites discriminate against other Whites because of their association and relationship with racial minorities. While these cases do resemble those involving the interracial solidarity doctrine, they are distinct. Interracial solidarity cases emerge from claims of direct discrimination against racial minorities that have an indirect impact on the White plaintiff, whereas in associational discrimination cases, intraracial discrim-

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contingent upon how we draw the lines between different groups, which groups are “within” Whiteness, and which are outside it. However, given that both Mexican Americans and Arab Americans are considered to be subjected to racialization practices, and given that both groups discuss themselves as racialized, I have chosen to focus the discussion in this Article on the dynamics within Whiteness, between individuals who recognize themselves, and each other, as White.

64. Clarke, *supra* note 10, at 131–32; Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1499 (2010) (both critiquing the limited range of this doctrine).

65. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209–10 (1972).

66. *Id.*

67. *Id.* at 210–12. Different courts and the EEOC interpreted the meaning of the right to interracial association differently. See Rich, *supra* note 64, at 1538–39. While some courts have adopted this doctrine, others have narrowed its scope and application. See, e.g., *Cochran v. Five Points Temps.*, 907 F. Supp. 2d 1260 (N.D. Ala. 2012) (rejecting a claim by a White plaintiff against a racially hostile work environment); *Jerome v. Midway Holding*, 2007 WL 973968, at \*9 (D. Ariz. Mar. 29, 2007) (rejecting a racial discrimination claim by a White plaintiff based on minority-targeted racism due to her race being White). See also Clarke, *supra* note 10, at 129–30.

68. See Clarke, *supra* note 10; Rich, *supra* note 64; Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63 (2002).

ination is direct, and is the main dynamic discussed by the court.<sup>69</sup> These cases will serve as the focus for the next section.

### III. THEORIZING INTRA-WHITE DISCRIMINATION VIA THE STEREOTYPE DOCTRINE

#### A. *The Current Framework—Associational Discrimination*

Title VII's language does not recognize associational discrimination expressly.<sup>70</sup> While some recognition of associational discrimination claims is found in the lower courts,<sup>71</sup> for many years federal courts did not recognize associational discrimination claims, adhering to a strict interpretation of Title VII.<sup>72</sup>

However, in *Parr v. Woodmen of the World Life Insurance Co.*, the Eleventh Circuit—basing its decision on Title VII's goals—recognized the possibility of race-based associational discrimination.<sup>73</sup> The plaintiff in *Parr* was a White man who was rejected from a sales position after the manager discovered he was married to a Black woman. The court acknowledged that this employment decision was made “because of race.”<sup>74</sup> Similar claims, revolving around interracial marriage, were later recognized by the Sixth and Fifth Circuits.<sup>75</sup> In all these cases, the courts stressed that it was because of *the plaintiffs’* race that they faced discrimination.<sup>76</sup>

69. See, e.g., *Parr v. Woodmen of the World Life Ins.*, 791 F.2d 888 (11th Cir. 1986).

70. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2017).

71. See, e.g., *Reiter v. Ctr. Consol. Sch. Dist.*, 618 F. Supp. 1458, 1459 (D. Colo. 1985); *Robinett v. First Nat'l Bank of Wichita*, 1989 WL 21158, at \*2 (D. Kan. 1989); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1365 (S.D.N.Y. 1975).

72. Jessica Voegelé, *Associational Discrimination: How Far Can It Go?*, 32 *TOURO L. REV.* 921, 927 (2016).

73. *Parr*, 791 F.2d at 889.

74. *Id.* at 889.

75. See, e.g., *Tetro v. Elliott Popham Pontiac*, 173 F.3d 988 (6th Cir. 1999); *Deffenbaugh-Williams v. Wal-Mart Stores*, 188 F.3d 278 (5th Cir. 1999).

76. *Parr*, 791 F.2d at 892 (“Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race.”); *Tetro*, 173 F.3d at 994 (“A White employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is a prejudice against the biracial child.”); *Deffenbaugh-Williams*, 188 F.3d at 280. See also *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008) (“We reject this restrictive reading of Title VII. The reason is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee’s own race.”).

Associational discrimination claims filed by White plaintiffs based on a friendship or workplace relationship with racial minorities rather than marriage proved more challenging. In *Barrett v. Whirlpool Corp.*, three White female plaintiffs claimed they suffered a hostile work environment due to their association with Black colleagues.<sup>77</sup> One plaintiff testified that she was called “a bitch” after commenting on racial remarks directed at Black employees. White coworkers stopped talking to her and gave her “strange looks” every time she was friendly to Black colleagues. Her supervisor began treating her worse than her colleagues. Another plaintiff testified that she was mocked and made fun of whenever she complained against the usage of the n-word and was told to “stay with her own kind.”<sup>78</sup> Further, she argued that when she sought a promotion she was told by her supervisor that she would never be promoted due to her relationships with African American coworkers.<sup>79</sup> The district court rejected the plaintiffs’ claim, reasoning that they failed to demonstrate that their relationship with their Black coworkers constituted a sufficient associational claim. The district court concluded that there is “no evidence, however, that those friendships constituted anything other than the casual, friendly relationships that commonly develop among co-workers but that tend to be limited to the workplace.”<sup>80</sup> The Sixth Circuit reversed, arguing that Title VII protects individuals, even when they are not members of a protected class, if they are victims of discrimination due to their association with protected individuals.<sup>81</sup> Furthermore, the court clarified that if a plaintiff shows discrimination based on association with a racial minority, the degree of association is irrelevant.<sup>82</sup>

Similarly, in *Reiter v. Center Consolidated School District No. 26-JT*, a White teacher claimed that her employment was not renewed due to her “close association with the Spanish citizens of the district.”<sup>83</sup> The court accepted her claim, arguing that “[t]he underlying rationale in these cases is that the plaintiff was discriminated against on the basis of his race because his race was different from the race of the people he associated with.”<sup>84</sup> In *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, the plaintiff argued that her “casual social relationship” with a Black man led

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77. *Barrett v. Whirlpool Corp.*, 556 F.3d 502 (6th Cir. 2009).

78. *Id.* at 510.

79. *Id.*

80. *Barrett v. Whirlpool Corp.*, 543 F. Supp. 2d 812, 826 (M.D. Tenn. 2008).

81. *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 512 (6th Cir. 2009).

82. *Id.* at 513. The Sixth Circuit adopted the Seventh Circuit’s holding in *Drake v. Minnesota Mining & Manufacturing Co.* 134 F.3d 878 (7th Cir. 1998).

83. *Reiter v. Center Consol. Sch. Dist. No. 26-JT*, 618 F. Supp. 1458, 1459 (D. Colo. 1985).

84. *Id.* at 1460.

to her discharge from the church.<sup>85</sup> The Southern District of New York held that “the plaintiff’s race was as much a factor in the decision to fire her as that of her friend. Specifying as she does that she was discharged because she, a White woman, associated with a Black, her complaint falls within the statutory language that she was ‘discharge[d] . . . because of [her] race.’”<sup>86</sup>

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

### B. *The Problem with the Existing Framework*

The reasoning offered by courts to explain why associational cases are considered racial discrimination provides little to work with. In most cases, judges merely declare that discrimination due to one’s association with racial minorities is discrimination “because of race” but do not explain how or why that is the case or why such discrimination is because of the plaintiff’s race, rather than the race of those with whom the plaintiff associates.<sup>87</sup>

Some courts, however, provide a limited explanation for their decisions. One example is found in *Barrett*.<sup>88</sup> The court reasoned that, even though the White plaintiffs were not a member of a protected class, one of them did suffer “direct harassment resulting from her associations with [B]lack employees”—i.e. protected individuals.<sup>89</sup> Here, it seems, the protection the court grants to White plaintiffs is contingent upon the protection Title VII and the *McDonnell Douglas* test grant to racial minorities. Put differently, the White plaintiff’s protection latches onto the protected-class status of racial minorities.<sup>90</sup> This line of reasoning explains the

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85. *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1365 (S.D.N.Y. 1975).

86. *Id.* at 1366.

87. See, e.g., *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581 (5th Cir. 1998); *Alizadeh v. Safeway Stores, Inc.*, 802 F.2d 111 (5th Cir. 1986).

88. *Barrett v. Whirlpool Corp.*, 556 F.3d 502 (6th Cir. 2009)

89. *Id.* at 519.

90. Clarke argues that the protected class rationale of the *McDonnell Douglas* framework, developed to allow plaintiffs a shortcut when discrimination is hard to prove, is now examined even when the shortcut is not needed, thus creating a phenomenon she

turn some courts have taken in examining the degree of association between the plaintiff and the racial minorities with whom he or she is associated: if these minorities' protection rubs off on the White plaintiff, it must be restricted to cases where the degree of association between them and the plaintiff is more than casual.<sup>91</sup> Notably, despite courts' rejection of this criterion over the years, recent cases have reopened these debates by rejecting claims of associational discrimination based on more nominal levels of association with racial minorities.<sup>92</sup>

A similar but distinct line of reasoning is found in *Reiter* and *Holcomb*. While in *Barrett* the court recognized the plaintiff's standing as deriving from the racial minority in the situation,<sup>93</sup> in these cases courts explain that associational discrimination is "because of race" by focusing on the association itself.<sup>94</sup> In *Holcomb*, the court argues: "because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's own race."<sup>95</sup> *Reiter* further develops this logic, adding that the key point is that the plaintiff's race "was different from the race of the people he associated with."<sup>96</sup> Here, too, the problem is not the plaintiff's race *per se*, but rather the entanglement of the plaintiff's race with African Americans, Hispanics, or other racial minorities. This reasoning leads back to courts' scrutiny of the type of "protected associations" that may justify court intervention.

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

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coins "protected class gatekeeping." Protected class gatekeeping occurs when courts read a protected class requirement into Title VII. See Clarke, *supra* note 10, at 104.

91. See, e.g., *Barrett v. Whirlpool Corp.*, 543 F. Supp. 2d 812, 826 (M.D. Tenn. 2008).

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

93. *Barrett v. Whirlpool Corp.*, 556 F.3d 502 (6th Cir. 2009).

94. *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008); *Reiter v. Center Consol. Sch. Dist. No. 26-JT*, 618 F. Supp. 1458, 1460 (D. Colo. 1985).

95. *Holcomb*, 521 F.3d at 139.

96. *Reiter*, 618 F. Supp. at 1460. Similar reasoning is found in *Tetro v. Elliott Popham Pontiac*, 173 F.3d 988, 994-95 (6th Cir. 1999) ("[T]he essence of the alleged discrimination in the present case is the contrast in races between Tetro and his daughter.").

to acknowledge racial discrimination when other racial minorities are in the picture.<sup>97</sup>

In that sense, both signify one major privilege of Whiteness: its invisibility.<sup>98</sup> According to the invisibility thesis, one of the major privileges associated with being White is that White people do not belong to “a race”—only racial minorities do.<sup>99</sup> Under the ideological regime of White supremacy, “White” norms, codes of behavior, and perspectives are considered the default, and thus are neutralized and seem to be objective and colorless.<sup>100</sup> Accordingly, courts in both associational discrimination cases and interracial solidarity doctrine cases do not see the color White, but only the shadows cast onto it by Black or Brown people. Only their presence allows courts to recognize racial discrimination against White individuals. By limiting same-race discrimination to instances in which racial minorities are present, intraracial discrimination between Whites is recognized only in a rigid set of circumstances.

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

The stereotype doctrine first originated in sex discrimination jurisprudence.<sup>101</sup> Within that context, courts have managed to recognize intragroup discrimination between men, usually in same-sex *harassment* cases.<sup>102</sup> This is important, as men are characterized by the “invisibility” of their gender just as Whites are characterized by the “invisibility” of their race. In the coming section, I thus detail doctrinal and theoretical developments in same-sex stereotyping and harassment cases to draw lessons for intragroup race-based discrimination between Whites.

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97. See, e.g., *Traficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972) (applying the interracial solidarity doctrine); *Barrett*, 556 F.3d 502 (applying the associational discrimination doctrine).

98. Writers on Whiteness have long stressed this major feature of Whiteness. See Rich, *supra* note 64, at 1511.

99. *Id.*

100. See, e.g., Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2013 (1994).

101. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

102. See, e.g., *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998).

*C. Lessons From Same-sex Stereotyping and Harassment*

The doctrine of sexual harassment, as well as the doctrine of sex stereotyping, both emerged from the “traditional” feminist paradigm of a female plaintiff and a male wrongdoer.<sup>103</sup> Sexual harassment was first recognized as sex discrimination in *Meritor Savings Bank v. Vinson*, where Mechelle Vinson sued her employer for forcing her to have sexual relations with him, touching her, and forcefully raping her on multiple occasions.<sup>104</sup> Justice Rehnquist declared that Title VII’s language is not limited to “tangible” discrimination and recognized sexual harassment, both in the form of quid pro quo sexual advances and hostile work environments as sex discrimination.<sup>105</sup> Three years after *Meritor Savings*, the Supreme Court’s *Price Waterhouse* decision first introduced the idea of sex stereotyping as a form of sex discrimination into Title VII.<sup>106</sup> Ann Hopkins, an exemplary employee, claimed that she was denied partnership due to sex discrimination, because of her failure to conform to feminine stereotypes.<sup>107</sup> She was described as “overly aggressive” and was advised to dress “more femininely” and attend “charm school” in order to improve her chances of partnership, despite the fact that aggressiveness and toughness were qualities the firm sought in partners.<sup>108</sup> The ruling in *Price Waterhouse* determined that stereotypes regarding how women should behave, how they should talk, or dress, or conduct themselves in general, amount

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

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

105. *Meritor Sav. Bank*, 477 U.S. at 64–65.

106. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). A Seventh Circuit decision from 1971 made a short reference to stereotypes as a form of sex discrimination, arguing that in “forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” See *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971). This statement was later cited and adopted in *Price Waterhouse*. 490 U.S. at 251. The stereotype doctrine was first developed within the constitutional framework of Equal Protection, where this theory was litigated in a series of constitutional cases of Equal Protection by Ruth Bader Ginsburg, then head of the ACLU Women’s Rights Project. See Bornstein, *supra* note 15, at 937. Notably, most of the petitioners in these cases were men, challenging stereotypical norms regarding childcare responsibilities. *Id.*

107. *Price Waterhouse*, 490 U.S. at 233–34.

108. *Id.* at 235–36.

to sex discrimination prohibited under Title VII.<sup>109</sup> Justice Brennan specifically condemned the “Catch 22” for women in the workplace: “out of a job if they behave aggressively and out of a job if they do not.”<sup>110</sup>

Despite the *intergroup* origin of these doctrines, both progressed beyond their initial categories to account for intragroup discrimination, including discrimination between members of the dominant group. At first, courts were reluctant to recognize same-sex harassment cases involving men.<sup>111</sup> Critiquing this tendency, Katherine Franke argued these cases ought to be recognized as same-sex harassment, as they “clearly show how sexually harassing conduct can effectively enforce particular gender orthodoxies in the workplace.”<sup>112</sup> Describing the “wrong” of sexual harassment from the margins of same-sex harassment cases, Franke argues that sexual harassment should be seen as a form of sex discrimination because it operates as a “technology of sexism.”<sup>113</sup> That is, “[i]t is a disciplinary practice that inscribes, enforces, and polices the identities of both harasser and victim according to a system of gender norms that envisions women as feminine, (hetero)sexual objects, and men as masculine, (hetero)sexual subjects.”<sup>114</sup> Same-sex harassment between men is thus theorized as the way in which members of the dominant group police fellow members in order to preserve the ideological paradigm that grants them this exact dominance.<sup>115</sup> Anita Bernstein makes a similar argument with regard to stereotyping in general, arguing that stereotyping is a “technology of prejudice,” which places an unjustifiable constraint on its subjects.<sup>116</sup>

One year after Franke’s article, the Supreme Court decided *Oncale*, officially recognizing same-sex harassment as sex discrimination under Title VII.<sup>117</sup> Joseph Oncale worked on an oil platform in the Gulf of Mexico where he was repeatedly subjected to severe sexual harassment by his colleagues and supervisors, who called him names “suggesting homosexuality,” threatened him with rape, and sodomized him with a bar of

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109. *Id.* at 241-42, 250-51.

110. *Id.* at 251.

111. Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 698 (1997).

112. *Id.* at 698.

113. *Id.* at 694, 696.

114. *Id.* at 693.

115. *Id.*

116. Anita Bernstein, *What’s Wrong with Stereotyping*, 55 ARIZ. L. REV. 655, 680 (2013).

117. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77-79 (1998). The case came out one year after Katherine Franke’s Article and therefore is not discussed in her paper, but its facts clearly demonstrate and echo her argument.

soap.<sup>118</sup> Justice Scalia, delivering the opinion of the court, clarified that Title VII protects both men and women and, accordingly, grants protection from same-sex harassment.<sup>119</sup>

The *Oncale* ruling, combined with the concept of sex stereotyping developed in *Price Waterhouse*, has led lower courts to theorize same-sex harassment according to the stereotype doctrine.<sup>120</sup> In these cases, sex stereotyping and harassment are discussed jointly, with sexual harassment as the discriminatory practice and stereotypes regarding how men should behave (according to masculine standards) providing the proof that the harassment was “because of sex.”<sup>121</sup>

This case study of same-sex harassment and stereotyping demonstrates the possibilities that open up once a theory of discrimination moves from identity to ideology. Sexism as ideology, these cases and Franke’s theory indicate, must enforce itself on all parties within the workplace in order to maintain its societal grip.<sup>122</sup> Sexual harassment under this conceptualization is not an expression of sexual desire or of men demonstrating dominance over women. Instead, it is a technology through which sexism and stereotypes regarding masculinity and femininity are enforced on all members of the workplace.<sup>123</sup>

Same-sex stereotyping and harassment cases should provide a relevant framework from which to draw insights into same-race discrimina-

118. *Id.* at 77; *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118-19 (5th Cir. 1996).

119. *Oncale*, 523 U.S. at 78-79.

120. See, e.g., *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444 (5th Cir. 2013); *Bibby v. Phila. Coca Cola Bottling Co.*, No. 00-1261, 2001 WL 919976, at \*1 (3d Cir. Aug. 1, 2001); *infra* note 130.

121. In *Boh Bros. Constr. Co.*, a male ironworker claimed that he was sexually harassed by his employer who referred to him as “ ‘pu—y,’ ‘princess,’ and ‘fa—ot,’ ” because he “did not conform to [his employer’s] view of how a man should act.” 731 F.3d at 449. The Fifth Circuit argued that gender stereotyping may provide proof that the harassment was “because of” sex. *Id.* at 456. Similarly, in *Bibby*, a gay employee claimed sexual harassment by his employer. 2001 WL 919976, at \*1. The Third Circuit argued that a plaintiff can prove that same-sex harassment is discrimination “because of” sex by showing that “the harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender.” *Id.* at \*5. See also *Prowel v. Wise Bus. Forms Inc.*, 579 F.3d 285 (3d Cir. 2009); *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001); *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997). For a similar discussion about the links between same-sex harassment and stereotyping, see Bernstein, *supra* note 117, at 683-4.

122. Franke, *supra* note 111, at 693. In Althusserian terms, to reproduce the relations of production. See Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 127, 128 (Ben Brewster trans., Monthly Review Press 1971) (1968). I will elaborate on this concept later in this Article, see *infra* Part III d.

123. See Franke, *supra* note 111, at 693.

tion. Framing harassment and stereotyping as technologies of sexism in the workplace, made effective through the subordination of both men and women, invites a parallel discussion in race.

Such an analogy should be approached with caution, as gender and race operate differently as systems of “othering.” Accordingly, gender stereotypes play a pivotal role in enforcing the gender binary, whereas in the racial context racial minorities are often pressured to present themselves according to White norms.<sup>124</sup> However, race, like gender, is an ideology and a disciplinary practice, and, like gender, it enforces and polices identities.<sup>125</sup> As critical race theorists explain, race forms through daily meeting points of institutional and individual power.<sup>126</sup> Thus, “we are raced through a constellation of practices that construct and control racial subjectivities.”<sup>127</sup> The applicability of principles underlying same-sex discrimination jurisprudence is particularly evident in associational discrimination cases, as acts of associational discrimination serve to enforce and maintain a racial binary.<sup>128</sup>

#### D. *Back to Race—Intra-White Discrimination as Stereotyping*

The understanding of race as a technology of production rather than an identity, as a relational dynamic that produces subjectivities and allocates resources and opportunities rather than a state of being, prompts us to isolate and study these technologies. When a White employee is told to “stay with her kind,”<sup>129</sup> more than just associational discrimination is at play. This is a specific type of racial work aimed at subjecting that employee to stereotypes regarding Whiteness held by her supervisor or

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124. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006). I will elaborate on the differences between race and sex further in this Article.

125. See, e.g., LÓPEZ, *supra* note 61, at 82-84, 91-93.

126. Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1806-07 (1993).

127. *Id.* See also JOHN A. POWELL, *RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY* 49, 53 (2015) (“In other words, before someone can be said to possess a racial characteristic or identity, there first must be a process of “racing.” This requires the social creation of racial categories, the assignment to categories, and determination of the meanings associated with each category.”). Notably, this position must be distinguished from colorblindness. While both stances hold race to be fictional, each take a different route in addressing racism. For a discussion on the differences between the two, as well as the importance of acknowledging race and racism to combat both, see LÓPEZ, *supra* note 61, at 26-125; Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1 (1991).

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

129. *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 510 (6th Cir. 2009).

colleagues. Under this paradigm, Whiteness is seen as “pure,” an asset that may be diminished by the act of mixing.<sup>130</sup> “Strange looks” in the hallway at White employees who associate with Black coworkers send a message that the plaintiff has failed to conform to her White colleagues’ expectations of her as a White person.<sup>131</sup>

Such discrimination, manifesting as hostile work environments, echoes *Oncale* and other same-sex discrimination cases involving men. In both scenarios, members of the dominant group police their fellow members in order to maintain the group’s identity, content, and borders. And, following the main logic of *Price Waterhouse*, this discrimination stems from wrongful stereotypes (as expectations) regarding race.

One of the key stereotypes regarding Whiteness is indeed its purity.<sup>132</sup> Law and social practice, from the notorious “one drop rule,”<sup>133</sup> to prohibitions of interracial marriage,<sup>134</sup> to de facto and de jure segregation of schools, neighborhoods, and workplaces,<sup>135</sup> not only reflect expectations regarding Whiteness’s purity and inherently assumed supremacy,<sup>136</sup> but they are also the mechanisms that maintain it as such.<sup>137</sup>

The associational discrimination cases demonstrate that within workplaces governed by White supremacist ideologies, we can detect racial work at play through intragroup dynamics between Whites. Indeed, workplaces are not only gendered, but also raced.<sup>138</sup> As Devon Carbado and Mitu Gulati argue, workplaces are often governed by racial ideologies.<sup>139</sup> Thus, a Black employee may be incentivized to conceal racial critique or opinions in order to avoid appearing to be “racially sensitive, uncollegial, a potential troublemaker.”<sup>140</sup> Carbado and Gulati’s work, as well as other scholarly work on workplace racialization, revolves mostly around how such racialization affects racial minorities and the extra burden it places on their shoulders. Such arguments are important, as they allow antidiscrimination theory to recognize the often-hidden ways in

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

131. *Barrett*, 556 F.3d at 509.

132. See *infra* notes 143–145.

133. See F. JAMES DAVIS, WHO IS BLACK?: ONE NATION’S DEFINITION (2010).

134. See SHERYLL CASHIN, LOVING/: INTERRACIAL INTIMACY IN AMERICA AND THE THREAT TO WHITE SUPREMACY (2017).

135. Rosenthal, *supra* note 12.

136. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

137. LÓPEZ, *supra* note 61, at 84, 91–3.

138. Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEG. ISSUES 701, 702 (2000) [hereinafter Carbado & Gulati, *The Fifth Black Woman*]; Carbado & Gulati, *Working Identity*, *supra* note 24, at 1262.

139. See Carbado & Gulati, *Working Identity*, *supra* note 24, at 1262–63, 1263 n.8.

140. *Id.* at 1289–90.

which racism and racial stereotypes intermingle with inequality. However, little attention has been paid to how the White workplace inherently requires racial work within the White racial group in order to subject its members to racial expectations regarding Whiteness.

Importantly, Whiteness, like masculinity, is performed.<sup>141</sup> As with any ideology, nonconformity by group members threatens its sustainability.<sup>142</sup> Some-sex discrimination cases illustrate the point perfectly. When men behave or perform their identity in ways that do not conform to the ideal of masculinity, they risk devaluating the “worth” of masculinity, which is associated with dominance and control of women.<sup>143</sup> Thus, group members are prompted to police men’s behavior in order to force them to conform to patriarchy’s ideological lines.<sup>144</sup>

Louis Althusser’s idea of interpellation—specifically the act of “hailing”—helps crystallize how same-race discrimination cases work within the workplace.<sup>145</sup> Althusser’s concept of interpellation is relevant here, as it ties together ideology and interpersonal exchange. Ideology, according to Althusser, constitutes concrete subjects through the act of interpellation.<sup>146</sup> The ideological apparatus manifests itself through rituals and practices in which individuals take part.<sup>147</sup> When individuals are recognized and recognize themselves and their designated role in said rituals, they are *interpellated* into this ideology and thus become its subjects.<sup>148</sup> When a police officer, for instance, hails you in the street, saying “Hey, you there!” and you turn around, you become a subject via the mere act of turning because you recognize this hail as being addressed to you and you take

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141. Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 *YALE L.J.* 109, 156 (1998); John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 *YALE L.J.* 817, 820 (1999).

142. Cf. Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 *ALSA F.* 32 (1982) (discussing the importance of political legitimacy as well as the consent of the governed to the exercise of political domination: “It is the notion that, in order to understand the modern industrial state, one has to understand its ideological power to generate consent from the masses through the creation of institutions, and organizations, and social patterns that appear legitimate to the masses of the people.”).

143. See, e.g., Franke, *supra* note 111, at 693.

144. *Id.*; R. W. CONNELL, *MASCULINITIES* 77–79 (2005).

145. Althusser, *supra* note 122, at 170–77.

146. The term “ideology,” Althusser clarifies, is “pure illusion,” *Id.* at 159. It represents the “imaginary relationship of individuals to their real conditions of existence.” *Id.* at 162. However, it has material manifestations. *Id.* at 166. The ideological apparatus is the source of an individual’s ideas, which are manifested through his material actions into material practices. *Id.* at 169. These practices themselves are also governed by rituals that the ideological apparatus defines and charges with meaning. *Id.* at 168.

147. *Id.* at 166–68.

148. *Id.* at 173.

part in the practice or ritual of the governing ideology. You are formed as a specific type of subject—a citizen that follows the instructions and rituals of the regime, and inherently, its ideological apparatus.<sup>149</sup>

Althusser's idea of interpellation is aimed at highlighting subject formation through ideology in more subtle interactions. However, his argument should apply *a fortiori* to harsher interactions of harassment and discrimination. As previously mentioned, Bernstein describes stereotypes as a “technology of prejudice” that unjustly constrains the individual.<sup>150</sup> These constraints, she argues, emerge from both external and internal stereotyping.<sup>151</sup> I argue that this claim ought to be understood, in Althusserian terms, as the way in which stereotyping as interpellation produces individuals as subjects who recognize themselves in the relevant ideological apparatus regulating the workplace. Internal constraints are therefore also inherently the outcome of external constraints that form the individual as a specific subject through interpellation. Put differently, when someone forces us to recognize ourselves in societal stereotypes, and we perceive them to be directed at us, they can also become internal(ized) constraints. Understanding how ideology functions in situations of workplace discrimination is important because it helps highlight the structural problem arising from workplace discrimination as well as the reason such discrimination is “because of race.” Comments such as “stay with your kind,” we now see can echo a specific type of ideology, and interpellate employees into its subjects.

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

#### IV. NEW AVENUES FOR INTRA-WHITE DISCRIMINATION: “WHITE TRASH” AS FAILING WHITE PERFORMATIVITY

The value of Whiteness—or the property interest in Whiteness<sup>152</sup>—for White supremacy is not threatened solely by the act of mixing, although it is one of the perceived “threats” to it.<sup>153</sup> Examining other stere-

149. *Id.* at 174. Notably, interpellation does not necessarily require a state agent. See Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 124 (David Kairys ed., 1998); Gildden, *supra* note 20.

150. Bernstein, *supra* note 116, at 680.

151. *Id.* at 667.

152. Harris, *Whiteness as Property*, *supra* note 130, at 1713.

153. LÓPEZ, *supra* note 61, at 82.

otypes regarding Whiteness as key in the production of Whiteness and White supremacy may open other avenues for combating regimes of Whiteness within the workplace. Such dynamics do not have to include racial minorities for courts to recognize that race is at play.

One example of intra-White discrimination may illuminate such possibilities. Camille Gear Rich discusses in her article “Marginal Whiteness” the category of “low-status Whites.” Marginal Whites, according to Rich, are those who “have more limited access to White privilege”<sup>154</sup> and enjoy it only in “contingent, context-specific ways.”<sup>155</sup> Further, Rich argues, high-status Whites may impose economic and dignitarian costs on low-status Whites in order to preserve resources for themselves or in order to disguise anti-Black discrimination as racially neutral.<sup>156</sup> These dynamics, however, are not translated to legal language via current antidiscrimination doctrine.<sup>157</sup>

Indeed, similar to the understanding that Blackness is not one singular racial experience, as Gulati and Carbado’s *The Fifth Black Woman* illustrates, there are varying ways to perform Whiteness, and some are more socially acceptable and socially rewarded than others.<sup>158</sup> To expand upon Harris’ idea of Whiteness as property,<sup>159</sup> not all types of Whiteness performativity yield similar “value.”

The type of discrimination suggested by Rich—between low- and high-status Whites—could potentially be litigated via the stereotype doctrine in cases where the circumstances indicate that the motivation for discrimination was based on stereotypes or expectations regarding the “right” way to perform Whiteness.<sup>160</sup>

One such argument is presented by both Matt Wray and Nancy Isenberg, who study the social othering of poor rural Whites, or “White

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154. Rich, *supra* note 64, at 1505.

155. *Id.* at 1516.

156. *Id.* at 1503-04.

157. *Id.* at 1504. While Rich focuses her critique on the interracial solidarity doctrine, my argument applies to all intra-White discrimination dynamics stemming from stereotypes regarding Whiteness.

158. Carbado & Gulati, *The Fifth Black Woman*, *supra* note 138, at 701-03.

159. Harris, *Whiteness as Property*, *supra* note 130.

160. Using Rich’s argument regarding marginal Whiteness prompts me to make one important distinction between her argument and mine. While Rich’s move is to acknowledge “marginal Whites” or “low-status Whites” as a unique and distinct social group, existing between and in addition to other categories, my suggestion is rather to complexify our understanding of how the racial binary is maintained via technologies of racism aimed at policing individuals to adhere to norms regarding Whiteness.

trash.”<sup>161</sup> As Wray argues, individuals referred to as “White trash” were historically seen by high-status Whites as a social group threatening the “contamination” of the White race and were accordingly perceived as “filthy,” “lazy,”<sup>162</sup> and morally and evolutionarily inferior.<sup>163</sup> Isenberg adds that White trash individuals were socially understood as those “who lack the *civic markers of stability, productivity, economic value, and human worth.*”<sup>164</sup> This is specifically relevant to our discussion as stereotypes regarding White trash collide with qualities employers seek in potential employees. Accordingly, stereotypes against poor rural Whites can lead to employment discrimination.<sup>165</sup>

Stereotypes associated with poor rural Whites should not be mistaken as merely class stereotypes. Importantly, they were always created to distance White trash from the core of Whiteness, not affluency;<sup>166</sup> scientists described their “yellowish”, tallow-colored skin, which was explained both through the depiction of them as “clay eaters” as well as through interracial sex “leaving traces” of “negro blood.”<sup>167</sup>

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

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161. MATT WRAY, NOT QUITE WHITE: WHITE TRASH AND THE BOUNDARIES OF WHITENESS (2006); NANCY ISENBERG, WHITE TRASH: THE 400-YEAR UNTOLD HISTORY OF CLASS IN AMERICA (2016).

162. WRAY, *supra* note 161, at 22, 65.

163. *Id.* at 16, 96.

164. ISENBERG, *supra* note 161, at 315 (emphasis added).

165. As Gulati and Carbado rightly stress, not all stereotypes are necessarily negative, and at times employees can “use prejudice” for their advancement, for instance stereotypes according to which Korean Americans are hard-working and technically inclined. Carbado & Gulati, *Working Identity*, *supra* note 24, at 1304-05. Therefore, acknowledging the conflicting nature of the stereotypes against poor rural Whites and what is considered to be necessary within the workplace highlight the potential of anti-White-trash stereotypes to lead to discrimination.

166. See WRAY, *supra* note 161, at 139 (discussing the idea of “lack of whiteness” possessed by poor Whites).

167. ISENBERG, *supra* note 161, at 151; WRAY, *supra* note 161, at 40, 77. Interestingly, the 19<sup>th</sup> century accusation of White trash and “scalawag” as associating too much with “freedmen,” see ISENBERG, *supra* note 161, at 184, is at the intersection of both lines of stereotyping developed in this Article: the discussion regarding associational discrimination and the discussion regarding White trash. This is perhaps not surprising, given the framework that sees them both as limbs of one body, that of Whiteness policing. Accordingly, stereotypes regarding the “right” way to perform Whiteness go hand in hand with efforts to keep Whiteness pure. Furthermore, this dynamic, which ties together hostile positions towards “White trash” and racial minorities, is also apparent in present day Title VII discrimination litigation. See *infra* Part V.

[b]ehaviors and attitudes regarding conventional morality and work were particularly salient here, with the lower classes and lower races typically characterized as holding deep aversions to both. Also highly salient in the minds of observers were behaviors regarding cleanliness—the lower sorts were consistently characterized as dirty, smelly, and unclean. What is striking about reading historical documents of the period then is the similar ways in which poor Whites, Indians, and Blacks are described—as immoral, lazy, and dirty.<sup>168</sup>

Certainly, stereotypes regarding Whites as clean, moral, and hard-working historically constituted the racial lines between Whites and Blacks in the U.S. and thus constituted the core around which the concept of Whiteness was formed.<sup>169</sup> Accordingly, discrimination against White trash could be analyzed as stemming from their failing performance of Whiteness.

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

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

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168. WRAY, *supra* note 161, at 23. For more on that similarity, see for instance this 1956 quote with which Thomas Sowell opens his *Black Rednecks and White Liberals*: “These people are creating a terrible problem in our cities. They can’t or won’t hold a job, they flout the law constantly and neglect their children, they drink too much and their moral standards would shame an alley cat. For some reason or other, they absolutely refuse to accommodate themselves to any kind of decent, civilized life.” THOMAS SOWELL, *BLACK REDNECKS AND WHITE LIBERALS* 1 (2005). As he immediately states, while many would mistake this quote as referring to racial minorities, it was said about poor Whites living in Indianapolis. *Id.*

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

## V. THE ANTI-SUBORDINATION CHALLENGE

At the beginning of this Article, I presented three competing views on antidiscrimination to argue that anti-essentialism is favorable both in advancing Title VII's goals and in dealing with intragroup discrimination.<sup>170</sup> However, my argument regarding intraracial racialization may also resonate with both anti-classification and anti-subordination theorists.

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

Anti-subordination theorists might have a harder time accepting my proposition. Some might fear that allowing White plaintiffs to sue for racial discrimination is the legal manifestation of "all lives matter"<sup>171</sup> and that it risks ignoring the reality in which racial minorities are the primary targets of racial discrimination in the workplace. Further, and especially due to the damaging effect that White plaintiffs have had on the advancement of Title VII litigation, for instance in *Ricci*,<sup>172</sup> anti-subordination theorists might argue that opening up more legal avenues for Whites to claim racial discrimination requires meaningful justification. In this section, I dispel some of the apprehension this argument might cause and present several arguments that illustrate how the under-theorization of intra-White discrimination is harming racial minorities' interests, thus highlighting the positive externalities of my suggestion for the goals of anti-subordination theory.

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170. See *supra* Part I.

171. Clarke, *supra* note 10, at 156.

172. In *Ricci v. DeStefano*, 557 U.S. 557 (2009), a group of White firefighters claimed discrimination under Title VII after city officials chose to ignore the results of a test they had all passed, qualifying them for a promotion. The city's invalidation of the test result stemmed from the fact that no Black firefighters passed it, and officials feared that accepting the results would expose them to a disparate impact discrimination lawsuit from the Black firefighters. The Supreme Court held that the decision to ignore the test results was in violation of Title VII as it was an impermissible race-based decision, adding that the city could have ignored the results only if it had a "strong basis in evidence" that, had it not taken the action, it would have been liable to a disparate impact claim. *Ricci*, 557 U.S. at 563.

A. *De-racialization of Whiteness Grants White Employers  
Immunity From Lawsuits*

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

Recall that under the courts' broad understanding of same-race discrimination between racial minorities, discrimination "because of race" has been analyzed and understood according to the relevant circumstances of each case and includes acts of racial harassment in the form of repeated racial slurs.<sup>173</sup>

In striking contrast, and in keeping with the example of high/low-status Whites, a review of all Title VII cases including the phrase "White trash" or "hillbilly" reveals that there are almost no cases in which White employers have been sued for referring to their employees as "White trash."<sup>174</sup> Rather, the majority of those accused of using this term within these cases are racial minorities,<sup>175</sup> either in "reverse racism" discrimination cases<sup>176</sup> or when racial minorities sue for racial discrimination, and then face accusations that they themselves engaged in a racially charged manner by referring to colleagues or supervisors as "White trash."<sup>177</sup>

This is not a reflection of societal reality, but rather of the narrow range of cases that find a place within Title VII courts. It thus appears

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173. See *supra* Part IIa.

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

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

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

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

that within the imagined borders of Title VII litigation, mostly racial minorities use the words “White trash” to refer to White colleagues and employees and, almost exclusively, they are the ones reprehended for doing so.

In only a few instances did White employees try to argue that they were harassed by other White coworkers or supervisors using the term “White trash.”<sup>178</sup> In some of them, female plaintiffs attempted to explain the use of the term by their male supervisor as creating a sex-based hostile work environment. These were mostly rejected for failing to prove that the term was motivated by their sex.<sup>179</sup> In the only case where a White employee claimed a race-based hostile work environment due to the use of the term “White trash” by her White coworkers, the court granted the defendant’s request for summary judgment on the hostile work environment claim, concluding that the plaintiff failed to prove that her colleagues had any “racial animus” towards her.<sup>180</sup>

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178. As mentioned, these cases amount to approximately 5.6 percent of the cases. See note 174.

179. See, e.g., *Schofield v. Maverik Country Store*, 26 F. Supp. 3d 1147 (D. Utah 2014); *Sacco v. Legg Mason Inv. Counsel & Trust Co.*, 660 F. Supp. 2d 302 (D. Conn. 2009). Notably, one such attempt was fruitful. See *Huff v. Sw. Va. Reg’l Jail Auth.*, No. 1:09cv00041, 2009 WL 3326889 (W.D. Va. Oct. 13, 2009). The case discussed a doctor who referred to a female nurse as “stupid,” “incompetent,” and as a “hillbilly.” *Id.* at \*1. The court found that these comments are sex-based as they were directed only at female nurses:

I find that Huff has presented sufficient evidence to show that Dr. Ofagh’s comments and behavior were based on her sex. Although the majority of Dr. Ofagh’s comments were not *directly* related to gender, Huff has testified that he spoke only to the female nurses in such derogatory terms, including “stupid,” “incompetent” and “hillbilly.”

*Id.* at \*7. The case was nevertheless dismissed, as the court ruled that Huff failed to show that the comments were sufficiently “severe and pervasive.” *Id.*

180. *Hoffman v. Winco Holdings, Inc.*, 2008 WL 5255902 (D. Or. Dec. 16, 2008). Other interesting findings from this review illustrate how some racial minorities sue for a “reverse” interracial solidarity doctrine, arguing they suffered retaliation for complaining about racial comments directed at their White colleagues. See, e.g., *Kess v. Mun. Emps. Credit Union of Balt., Inc.*, 319 F. Supp. 2d 637 (D. Md. 2004); *Ambris v. City of Cleveland*, 2012 WL 5874367 (N.D. Ohio Nov. 19, 2012); *Mosby-Grant v. City of Hagerstown*, 630 F.3d 326 (4th Cir. 2010); *Davy v. Star Packaging Corp.*, 517 F. App’x 874 (11th Cir. 2013); *Brown v. CSX Transp.*, 2013 WL 5305664 (D.S.C. Sept. 17, 2013). Finally, in many cases, the same employer targets both “White trash” and racial minorities. 26 (approximately 36.5 percent) of the cases I reviewed demonstrated patterns of combined racism to both racial minorities and “White trash.” This could potentially support a claim that the animus towards “White trash” was part of a general ideology of White supremacy. See, e.g., *Thompson v. N. Am. Terrazzo, Inc.*, 2015 WL 926575 (W.D. Wash. Mar. 4, 2015); *Okokuro v. Com. Dep’t of Welfare*, 2001 WL 185547

The current understating of same-race discrimination thus reinforces a kind of meta-inequality—inequality in the enforcement of antidiscrimination laws where White supervisors and employers receive de facto immunity from discrimination charges to which non-Whites are currently exposed. The inability to acknowledge intraracial discriminatory patterns within Whiteness, except for specific and limited circumstances, creates a shield around Whiteness that protects the most powerful members of the group.<sup>181</sup>

B. *De-racialization of Whiteness*  
*Redirects Whites' Claims Towards Racial Minorities*

If various intra-White conflicts and discriminatory practices exist in society but receive no legal redress through antidiscrimination laws, instances of discrimination remain individualized and lose social meaning and importance. The assumed cohesiveness of Whiteness within Title VII thus pits marginalized social groups from different races against each other, at times placing the advancement of Blacks and other racial minorities at risk.<sup>182</sup>

The following hypothetical might help illuminate my point. Let's assume, for this discussion, that a White person (Bob) who fails to conform to White stereotypes is subject to bias by fellow Whites. He applies for a job with a White employer, and, after several remarks from his potential employer about rural Whites not being "White enough" or good enough for the job, or questions regarding his hygienic routine, he is not accepted for the position. Now let's say that in scenario A, another White person (with different performativity markers) gets the job. In scenario B, a Black candidate (regardless of his status) gets the job rather than Bob. Under the current theorization of same-race discrimination between Whites within Title VII, only in scenario B does Bob have legal recourse, and he can only articulate it as "reverse racism" or as illegitimate affirmative action, arguing that he did not get the job because he is

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(E.D. Pa. Feb. 26, 2001); *Crawford v. BNSF Ry. Co.*, 665 F.3d 978 (8th Cir. 2012); *Williams v. Asplundh Tree Expert Co.*, 2006 WL 2131299 (M.D. Fla. July 28, 2006); *Guy v. City of Phoenix*, 668 F. Supp. 1342 (D. Ariz. 1987).

181. Clarke rightly points out another pragmatic argument for allowing Whites to sue for racial discrimination: opening up more possibilities of same-race discrimination between Whites may diminish the negative incentive to hire racial minorities, as they are often seen as a "litigation risk." Clarke, *supra* note 10, at 159-61.

182. Rich talks about the risk of pitting marginalized groups against each other in her critique of the limited scope of the interracial solidarity doctrine. Rich, *supra* note 64, at 1590.

White. Perhaps due to cognitive dissonance (along with a racist bias), Bob will eventually convince himself that being *White* (rather than not being White enough) is what cost him the job. Title VII's inability to acknowledge the complex patterns of intraracial racialization prevents Bob from describing his grievance differently.

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

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

The inability to acknowledge the various intraracial discriminatory practices between Whites leads to the construction of Whiteness as a cohesive, singular, natural, and, simultaneously, invisible category.<sup>183</sup> As mentioned above, one of the main technologies of Whiteness is its ability to seem as the norm, thus masking its racial coloring.<sup>184</sup> Under this paradigm, Whiteness must be constantly constructed and concealed.<sup>185</sup> Acknowledging the racial work necessary to maintain Whiteness exposes Whiteness as a project of White supremacy. This is most evident in associational discrimination cases, in which racial work in preventing the mixing of races historically has been more visible. Revealing and exposing hidden divisions within Whiteness may also subvert the natural and neutral conventions regarding Whiteness. Acknowledging that not all Whites perform Whiteness in the same way and do not enjoy Whiteness in similar ways forces us to see Whiteness not as flowing naturally (and merely) from skin color, biology, or ancestry but rather as a mechanism of power, constructed on an ongoing basis to maintain and justify dominance and supremacy.

In addition, providing White plaintiffs with legal avenues to name, blame, and claim<sup>186</sup> intraracial racialization and discrimination may also help undermine these marginal White groups' current broad loyalty to Whiteness and fellow Whites simply due to their assumed Whiteness.

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183. I thank Ido Katri for helping me think through this point.

184. *See supra* Part IIb.

185. Gotanda, *supra* note 127, at 6.

186. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. SOC. REV. 631, 635-36 (1980).

Such a legal development may have significant implications for the viability of Whiteness as a social project.<sup>187</sup>

My project is therefore not an attempt to merely describe low-status Whites—for instance, through the rhetoric of identity politics—in what Nancy Fraser would describe as an “[a]ffirmative strategy for redressing injustice.”<sup>188</sup> Rather, my project uses divisions within Whiteness as a catalyst for transformative change towards its dismantling—one that may push people away from the fiction of Whiteness and challenge the seemingly natural/biological regime of White supremacy.<sup>189</sup>

#### D. *De-racialization of Whiteness Maintains the Whiteness of Workplaces*

One of the challenges to antidiscrimination law generally, and to the stereotype doctrine specifically, is how to address the discriminatory norms of the workplace via existing legal tools. In *Price Waterhouse*, the Court rightly recognized that the defendant’s company encouraged norms socially associated with masculinity, such as aggressiveness and toughness.<sup>190</sup> Recall Justice Brennan’s critique of the “Catch 22” for women in the workplace: out of the partnership track if not aggressive enough, and out of it if they are.<sup>191</sup> While the struggle to allow women to behave aggressively in the workplace is a necessary step towards equality, it still only challenges half of the equation, as it accepts the gendering of the workplace as masculine, leaving that aspect of hetero-patriarchy intact.<sup>192</sup> “Catch 22” arguments are thus powerful, but also limiting. When women have tried to challenge masculinity norms in the workplace, in instances without similar double binds, these attempts generally have been unsuccessful. This is effectively illustrated by cases where women tried challenging grooming codes in the workplaces,<sup>193</sup> as well by the *Wal-Mart* decision.<sup>194</sup>

187. Ian Haney López argues that the only way to dismantle racism is to dismantle Whiteness. See LÓPEZ, *supra* note 61, at 132. This last argument thus follows his argument by offering concrete legal avenues to achieve it.

188. NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION?: A POLITICAL-PHILOSOPHICAL EXCHANGE 74 (Jel Golb, James Ingram & Christiane Wilke trans., Verso 2003).

189. *Id.* at 72–78.

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

191. *Id.*

192. For an explanation of hetero-patriarchy, see *supra* note 23.

193. For cases where women tried to challenge grooming policies within the workplace, for instance, policies requiring them to wear make-up, see *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006).

194. *Wal-Mart v. Dukes*, 564 U.S. 338, 344 (2011).

Interestingly, it was the same-sex discrimination cases between men that forced courts to tackle the hyper-masculinity of many workplaces.<sup>195</sup> The male privilege of performing masculinity without being stereotyped or discriminated against rendered the “Catch 22” argument irrelevant—men simply do not face the type of “Catch 22” situation described by Brennan. However, the inability to fall back on “Catch 22” arguments focused the discussion around the various ways in which the masculinity of workplaces harmed men who failed, or simply did not want to conform to expected masculine behavior.<sup>196</sup>

Acknowledging the limited scope of “Catch 22” arguments is important when shifting our discussion from sex back to race. As Kenji Yoshino stresses, while racial minorities are often required to “cover” traits that do not conform to the dominant White culture, women are socially expected to simultaneously “cover” and “reverse cover.”<sup>197</sup> Put differently, racial minorities who “dress [W]hite” or “speak unaccented English” find safe harbor while women are generally expected to act feminine.<sup>198</sup> Therefore, “Catch 22” arguments are mostly irrelevant with regard to racial discrimination. This could explain why Title VII jurisprudence has not developed a racial stereotype doctrine alongside the sex stereotype doctrine.<sup>199</sup>

However, the general expectation that racial minorities “cover,” while sparing them the “Catch 22” scenario, does not mean they do not bear the costs of conforming to the White norms of most workplaces. The often-invisible racialization of many workplaces places a heightened burden on the shoulders of racial minorities to perform their working identity strategically. Such acts of strategic performance consume time and effort, and they often come with psychological costs and potential risks.<sup>200</sup>

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

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195. See *supra* notes 38–40 and accompanying text.

196. *Id.*

197. YOSHINO, *supra* note 124, at 145–47.

198. *Id.* Yoshino mentions the possibility of racial minorities being caught in another type of “Catch 22” situation, not by White demands alone, but rather as a result of cross-expectations from the White community and their own community—which often expects its members to stress their unique traits. *Id.*

199. See Bornstein, *supra* note 14, at 964.

200. See Carbado & Gulati, *Working Identity*, *supra* note 24, at 1278, 1291–92. Carbado and Gulati detail two such risks. First, the risk that “others will identify the performative element of an outsider’s behavior as strategic and manipulative,” and “[s]econd, when multiple interconnected stereotypes operate simultaneously, the risk exists that taking steps to negate one kind of stereotype will activate some other negative stereotype.” *Id.*

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

## VI. PRACTICAL SUGGESTION

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

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

Accordingly, the doctrine of racial stereotypes regarding Whiteness will develop on a case-by-case basis. This is important, as the content of Whiteness shifts and changes according to the needs of the ideology of White supremacy. The rise of the Alt-right and White supremacy movements since Trump’s election in 2016, for instance, could bring forth new dynamics of intraracial racialization that courts will have to address.<sup>201</sup> Such movements may charge Whiteness with new meanings that expand the inner expectation from its members beyond the idea of “purity,” already addressed under the associational cases. A flexible doctrine of racial stereotypes, and its adaptation to same-race discrimination patterns between Whites, would thus be able to accommodate such changes.

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

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201. GEORGE HAWLEY, MAKING SENSE OF THE ALT-RIGHT 113-121 (2017); James Cook, *The Rise of the Alt-Right*, BBC NEWS (Nov. 7, 2016), <https://www.bbc.com/news/election-us-2016-37899026>.

doctrinal developments, proving such patterns of same-race discrimination should become easier.

### CONCLUSION

Matt Wray finishes his book *Not Quite White* with an excerpt from Erskine Caldwell's *God's Little Acre*.<sup>202</sup> The novel depicts a group of poor southern Whites digging for gold without luck. Their "futile mining efforts are destroying what little is left of their land."<sup>203</sup> The secret to finding gold, local folk wisdom says, is finding an albino. "[A] man ain't got as much of a chance as a snowball in hell without an albino to help," one of the characters, Pluto, says at the beginning of the novel.<sup>204</sup> Albinos apparently possess the magical ability to find gold. When protagonist Ty Ty Walden inquires as to what an albino is, Pluto explains: "An albino is one of these all-white men, Ty Ty. They're all white; hair, eyes, and all, they say . . . It's the all-whiteness, Ty Ty."<sup>205</sup> So, their only way to find gold and to enjoy wealth and success is "to have pure Whiteness on their side."<sup>206</sup>

This anecdote illustrates my argument regarding Whiteness as a social goal rather than merely a biological trait. The magical albino, much like the "ultimate macho man" or the "perfect lady" (that *Price Waterhouse* executives were envisioning), serves as a mythical state of being that no one can actually fully obtain<sup>207</sup> but that everyone nevertheless seeks.<sup>208</sup> The albino here is the epitome of the White man—his blood is pure, removing any doubt or suspicions of interracial association. He is the one who can find gold and is thus the one poor Whites must aspire to find, to *be*.

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202. WRAY, *supra* note 161, at 133-4.

203. *Id.*

204. ERSKINE CALDWELL, *GOD'S LITTLE ACRE* 6 (1933).

205. *Id.* at 9-11.

206. *Id.*

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

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

The efforts to attain the idealized version of Whiteness, masculinity, or femininity define social categories and boundaries.<sup>209</sup> The inevitable gaps between the ways we perform our identities and the mythical ideals we aspire to reach are the spaces into which stereotype-based discrimination often enters. Such acts of discrimination are simultaneously a reflection of individuals' failed attempts to become the ideal subjects of hegemonic ideologies and a mechanism through which these ideologies keep individuals in line by imposing social sanctions on those who fail or refuse to fall in line.

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

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

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

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