Marginal Whiteness

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ABSTRACT

How are whites injured by minority-targeted racism? For years, American anti-discrimination scholars and judges have not looked beyond the familiar answers provided by Civil Rights Era norms. According to these norms, the primary injuries whites suffer due to minority-targeted discrimination are denial of the enjoyment of a colorblind workplace or frustration of their interest in diversity, including the opportunity to associate with minorities. Consistent with this view, Title VII interracial association doctrine — the vehicle that permits whites to sue for minority-targeted discrimination in the workplace — only recognizes these two narrow categories of injury. However, review of failed Title VII interracial association cases provides a far richer account of how whites are injured by minority-targeted discrimination, one that forces us to re-evaluate our focus on Civil Rights Era understandings of white injury. Relying in part on these failed interracial association cases, this Article offers a new theory called "marginal whiteness," to provide a conceptual understanding of this broader set of injuries. What the marginal whiteness framework reveals is that many low-status, or "marginal whites" are secondary casualties of higher-status whites' attempts to discriminate against minorities. After identifying some of the concrete economic and social costs "marginal whites" suffer from minority-targeted discrimination, the Article explores how the recognition of marginal whites will force antidiscrimination scholars to develop more nuanced complex understanding of white privilege. It discusses the repercussions of this insight for Title VII law, Critical White studies and for antidiscrimination scholarship more generally.

MARGINAL WHITENESS[1]

Introduction

How are whites injured by minority-targeted racism? Prior to filing her Title VII interracial solidarity suit[2], Betty Clayton thought she knew. For years, Clayton, a white cafeteria worker employed by the White Hall School District, was given a non-residency privilege that allowed her to enroll her daughter in one of the District's schools.[3] This was a special arrangement, as neither she nor her daughter lived within the District's boundaries.[4] This special arrangement, however, abruptly came to an end when one of Clayton's black coworkers learned of the arrangement, and asked the District for the same privilege.[5] The District refused his request and, to rebut his claim of racial favoritism, rescinded Clayton's right to the privilege as well.[6] The District then reinstituted an old rule providing that only "certified, administrative" workers were entitled to the non-residency benefit,[7] thereby ensuring that Clayton and her black coworker were ineligible.

The District's prior discrimination, the timing of the rule change, and the absence of a reasonable justification for a return to the old rule — numerous factors told Clayton that the rule's reinstatement was motivated by discrimination. Yet the Court was not interested in this evidence of discriminatory intent when Clayton filed suit. Instead, it held that Clayton was not truly harmed, asserting that she was not a *bona fide* victim of the District's alleged discrimination.[8] More specifically, Clayton's interracial solidarity claim was rejected, not for lack of proof [9] – but because it did not comport with federal courts' normative assumptions about how whites are harmed by minority-targeted discrimination. These normative standards, derived from Civil Rights era premises[10], posit that whites may sue over minority-targeted racism only when their *primary* motive is

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[2] Title VII "interracial solidarity" claims are claims that allow white workers to sue for workplace discrimination directed at racial and ethnic minorities.

[3] *Clayton v. White Hall School Dist.,* 875 F.2d 676, 678 (8th Cir. 1989).

[4] *Id.* at 678.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id*. at 680

[9] *Id*.

[10] The Civil Rights era "norms" or premises, referred to here, are understandings based on the assumption that whites stand to gain illicit economic and social benefits from white privilege. Consequently, these Civil Rights norms posit that whites committed to racial equality must be trained to reject the illicit advantages provided by white privilege in favor of the higher order moral and psychological benefits they will enjoy by working to achieve the goal of racial equality. Civil Rights norms, however, obscure the fact hat many whites are *not* economically and socially benefited by white privilege. Consequently, the Civil Rights framework does not offer whites the opportunity to discuss their first order, basic self interested reasons for challenging white privilege.

to advance the social project of racial equality. Clayton's claim instead primarily was motivated by self interest, a desire to re-secure her child's residency exemption. Consequently, Clayton seemed more like a random self involved complainer or, even worse, as a villain — as she hadn't complained about the District's discrimination while she was a beneficiary.

Clayton's case works well as a morality tale, but from a policy perspective, the resolution of the case should cause some unease. Certainly, it was important that the court reaffirm the normative principle that whites have a moral investment in racial equality. However, the dismissal of Clayton's case also deprived Title VII of an important enforcement opportunity. That is, Clayton identified a likely Title VII violation, and the violator would have been punished had she prevailed on her claim. Yet Clayton is prevented from serving this role because her claim does not meet the court's normative expectations about whites' relationship to discrimination.

The Clayton case should not be regarded as an oddity, as it reflects a far broader legal phenomenon. For, at present, American judges and scholars hew so closely to Civil Rights accounts of whites' interests and moral norms, that they are dismissive of whites' Title VII claims when they exceed these normative assumptions. The Claytons of the world, however, have an important role to play in antidiscrimination efforts. To harness this promise, courts must abandon their skepticism about the claims of "marginal" whites,[11]" those Title VII plaintiffs whom are not motivated by the traditional Civil Rights era account of whites' interests. These marginal whites, instead, file suit because their economic and dignitary interests are directly harmed by other whites' attempts to engage in minority-targeted discrimination.

Although the court attacks Clayton's claim of injury, her problem more accurately stem from the theory of causation on which her claim rests. Specifically, Title VII on its face only protects a plaintiff from being denied "a privilege or benefit of employment" *because of that individual plaintiff's race*.[12] Clayton was able to identify a concrete injury she suffered because of the District's discrimination — indeed, she suffered the identical harm as the black target of the District's campaign.[13] What she could not show was that she was discriminated against *because of her race*, as she was not targeted because she was a white person.

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[11] The term "marginal white" is defined in more detail in the sections that follow. However, at the most basic level, this term refers to white persons who, out of choice or necessity, have developed an ambivalent relationship to white identity. One of the key ways a white person often becomes aware of his or her status as a "marginal" white person is when higher status whites implement race neutral procedures designed to discriminate against minorities that end up compromising the low status white person's personal economic and dignitary interests. Some marginal whites are passive in the face of discrimination; others are active. This discussion explains what makes marginal whites actively oppose discrimination.

[12] Title VII provides that "it shall be an unlawful employment practice for an employer" . . . "to discriminate against any individual with respect to his compensation, terms, conditions and privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. s 2000*e*2(a)(1)

[13] The injury that both Clayton and her black coworker suffered was the denial of the residency exemption.

To overcome this problem, Clayton offered a new theory of causation, alleging she was a victim of "friendly fire" in the District's campaign to discriminate against a black employee. She argued that the District would not have taken away her residency exemption, *but for* her employer's bare desire to discriminate against a black employee.[14] The court, however, rejected her "friendly fire" interpretation of Title VII, explaining that Title VII only allows whites to bring suit about minority targeted discrimination when their claims track established "interracial solidarity" doctrine. This doctrine only recognizes two harms whites can suffer from minority-targeted discrimination, both of which draw heavily on Civil Rights era assumptions.

The first injury courts recognize under interracial solidarity doctrine is the frustration of a plaintiff's associational interests. This injury is based on the Civil Rights era norm establishing that whites are entitled to the benefits of diversity — *i.e.* the cultural, economic and educational relationships they could form by associating with minorities.[15] The second injury recognized is the violation of a plaintiff's right to a "non-discriminatory workplace." This injury is based on the Civil Rights norm that whites should strive for a colorblind society. It is based on the idea that racial prejudice is a moral wrong because it compromises the struggle to make America a race blind meritocracy.[16] Courts have been reluctant to elaborate on the established Civil Rights era norms used to define whites' prejudice related injuries when interracial solidarity doctrine was created. Yet these norms do not account for the kind of harm Clayton's claim concerned — the allegation that whites' strategies to exclude minorities and maintain "white privilege," can inflict high costs on low status white persons. To coin a phrase, neither of the Civil Rights era concepts of harm considers how the "technologies of whiteness" can inflict serious damage on the concrete economic and dignitary interests of some white persons.

In short, the result in the *Clayton* case highlights the need for additional theorizing about how whites are injured by minority-targeted racism. For, surprisingly, neither legal doctrine nor antidiscrimination scholarship has provided an account of how some whites' strategies to maintain white privilege directly harm other white persons. Instead, existing theories concentrate on the "moral" or second order harms proposed by Civil Rights influenced models describing whites' reactions to discrimination. This Article addresses this theoretical oversight in legal scholarship and offers a new account of what I call "marginal whiteness." It draws attention to what I consider to be the true "white man's burden" in a discriminatory world: the costs high status whites require low status whites to

[14] *Id.* at 678.

[15] *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (O'Connor)(discussing whites' educational benefits from diversity)

[16] The colorblindness model is the one currently preferred by the majority of the justices on the Supreme Court. See Ian Haney Lopez, *A Nation of Minorities: Race, Ethnicity and Reactionary Colorblindness* 59 Stan. L. Rev. 985 (2007) (discussing evolution of colorblindness discourse in Supreme Court doctrine) It has been thoroughly criticized by many legal scholars, and characterized as one of the primary obstacles to achieving racial equality. *See e.g.,* John C. Duncan, Jr., *The American 'Legal' Dilemma: Colorblind I/Colorblind II--The Rules Have Changed Again: A Semantic Apothegmatic Permutation, 7 Va. J. Soc. Pol'y & L. 315, 319-21 (2000)* (discussing and describing several understandings of colorblindness

endure to ensure the existence of exclusively white advantages.[17] My goal is to show that Title VII is, at present, these low status whites last and best hope for securing relief when they are injured by other whites' strategies to maintain white privilege.

Judges and scholars will find that marginal whiteness, as a conceptual framework, has immediate value, as it allows them to make the paradigm shifts necessary to provide a full doctrinal account of how whites are economically and psychically harmed by minority-targeted discrimination. For one, marginal whiteness allows courts and scholars to abandon the dated assumption naturalized by Title VII that whiteness is a stable identity category.[18] Marginal whiteness teaches instead that whiteness' "constituents"[19] change; the term white refers to a fluid and changing community. Relatedly, the marginal whiteness framework allows judges and scholars to acknowledge that many whites find that their claim to whiteness is occasionally contested.[20] In these moments of contestation, these persons become "putative" whites and may be denied some if not all of the privileges associated with a white identity.[21] The marginal whiteness framework suggests that, in many cases, putative whites will find their interests better served by threatening to sue discriminating whites, as opposed to struggling to get whites to admit them to the circle of privilege. Putative whites will only take this option, however, if it is clear that Title VII provides them with a remedy.

Second, the marginal whiteness framework allows courts and scholars to recognize that whites can and do sacrifice the interests of other whites when it is necessary to maintain white privilege — that is, to prevent minorities from enjoying certain benefits. These excluded whites may also try to initiate antidiscrimination claims, as this is the *only* way they can challenge the rules or structures that disadvantage them.[22] As the *Clayton* case shows, whites currently in this predicament, cannot be sure Title VII will provide them with a remedy.

In short, because interracial solidarity doctrine has not incorporated the propositions described above, it has not provided relief for a broad array of whites' prejudice related

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[17] Because this Article is the first of its kind, it does not attempt to provide a comprehensive account of all marginal white subjects. It is intended to function as an introduction to this framework, and create a space for future theorizing.

[18] *See e.g.,* France W. Twine, *The Future of Whiteness: A Map of the 'Third Wave'*. 31(1) ETHNIC AND RACIAL STUDIES 4, 6 (2007) ("whiteness is not now, nor has ever been, a static uniform category of social identification.").

[19] *See generally*, Jennifer L. Eichstedt, *Problematic White Identities and a Search for Racial Justice*, 16 (3) SOCIOLOGICAL FORUM 445 (2001).

[20] See Ruth Frankenberg, *Mirage of an Unmarked Whiteness* in The Making and Unmaking of Whiteness (eds. Brigit Brander Rasumssen, Eric Klinenberg, Irene J. Nexica & Matt Wray)

[21] *See* Eichstedt, *Problematic White Identities* at 450 ("the benefits of white privilege are not evenly distributed and this leads to different phenomenological relationships to the fact of whiteness.")

[22] To be clear, "putative whites" are whites who find that their morphology causes them to be placed alternately inside or outside of the category of whiteness, depending on social context. In contrast, "marginal" whites are persons who because of ethnicity, gender, sexual orientation etc. have only partial access to white privilege. All putative whites are marginal whites, but not all marginal whites are putative whites.

harms. Because antidiscrimination scholars have not incorporated these ideas into their analyses, they have naturalized the social understanding that the only harms whites suffer from the operation of white privilege are the second order, moral injuries they suffer when exposed to other whites' discrimination. In order to provide a fuller account of whites' prejudice related harms, Part I of the Article introduces the concept of "marginal whiteness," drawing on insights from sociological and critical theory.[23] This Part explains why low status whites who historically have tolerated economic and dignitary slights caused by higher status whites' privilege maintenance strategies, have become more likely to side with minorities in disputes about white privilege.

Part II explores marginal whites' experiences in the past, describing how these plaintiffs have fared when they bring Title VII interracial solidarity claims, as this is the cause of action designed to allow whites to sue for harms caused by minority-targeted racism. Part II shows that interracial solidarity doctrine thus far has not fulfilled its promise to address whites' prejudice related harms because judges have forced "marginal white" plaintiffs to articulate their injuries using Civil Rights era concepts of injury. Part II also shows how these Civil Rights era concepts of white harm have compromised interracial solidarity doctrine more generally, as they have allowed courts to sidestep some of the hardest but most important policy questions that should be resolved to ensure consistency in the adjudication of whites' complaints about minority-targeted racism.

Part III shows that the marginal whiteness framework is likely to have substantial appeal for whites that entered adulthood after the Civil Rights movement.[24] It explores research in social psychology showing that, because of demographic shifts and related attitudinal changes, Civil Rights era norms are only having limited success in encouraging today's white plaintiffs to bring interracial solidarity cases. I suggest that a doctrine that is structured to account for "marginal whites" concerns would be likely to encourage post

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[23] Although the theory of "marginal whiteness" whiteness offered here is entirely my own creation, it was influenced by the work of other scholars. *See* MATT WRAY, NOT QUITE WHITE: WHITE TRASH AND THE BOUNDARIES OF WHITENESS (DURHAM: DUKE UNIVERSITY PRESS, 2006) (discussing boundary theory) ; MIKE HILL, AFTER WHITENESS: UNMAKING AND AMERICAN MAJORITY (New York: NYU Press, 2004) (discussing strategies for disrupting whiteness); Ruth Frankenberg, *The Mirage of an Unmarked Whiteness*, in THE MAKING AND UNMAKING OF WHITENESS (discussing needs to deconstruct whiteness); Ladelle McWhorter, *Where Do White People Come From?*: *A Foucaultian Critique of Whiteness Studies*, 31 PHILOSOPHY & SOCIAL CRITICISM 533 (2005) (discussing limitations in current scholarship's representations of white privilege); France W. Twine, *The Future of Whiteness: A Map of The 'Third Wave'*. 31(1) ETHNIC AND RACIAL STUDIES 4 (2007)(discussing influence of post structuralist theory on race theory); Joel Olsen, *Whiteness and the Participation-inclusion Dilemma*, 30 POLITICAL THEORY 384 (2002)(discussing changes in whites' valuation of white privilege).

[24] Throughout the piece I often refer to "today's whites" or "post Civil Rights era whites." Both terms refer to white persons who came of adulthood at least two decades after the Civil Rights movement. These terms collectively refer to at least three generations — colloquially referred to as Gen Xers, Gen Yers and millenials. My analysis should be limited to the perceptions of this group because the psychological research I rely on describing significant "changes" in whites' attitudes are studies performed after the late 1990s on white college students. Consequently, most test subjects were born in the late 1970s and thereafter. *See, e.g.*, Swim & Miller, *White Guilt*, supra note __ at 503 (testing 102 white University of Pennsylvania undergraduates in 1999); Spanierman & Heppner *supra* note __, at 252 (describing test subjects as 230 self identified white undergraduates).

Civil Rights era whites to initiate interracial solidarity actions. Part IV examines potential theoretical concerns about the concept of "marginal whiteness." It explains that, rather than replacing existing normative and descriptive accounts of whites' interests, the concept of marginal whiteness provides an essential supplement to existing accounts of harm.

PART I DEFINING MARGINAL WHITNESS

Part I offers a sketch of the "marginal white" subject. In this section I provide an overview of the premises that inform a "social constructionist" approach to racial identity, and use this framework to theorize about "marginal white" plaintiffs' experiences and preoccupations.

Legal scholars have, for many years, offered analyses exploring the social constructed nature of race, in particular those scholars working in legal history.[25] Some have focused more specifically on the socially constructed nature of whiteness, in particular those scholars working in Critical White Studies ("CWS") [26] and Critical Race Theory ("CRT"). Yet most of the CWS and CRT scholars have concentrated on whiteness's perceived core,[27] as opposed to the margins of the category. Relatedly, many working in CWS have posited that whites experience whiteness as a fully sutured experience, indicating either that whites enjoy a feeling of racelessness[28] or invisibility.[29]

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[25] *See generally* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 YALE L. J. 109 (1998)(analyzing court analyses and race determinations in 19th Century cases concerning slave codes); IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (discussing 19th and 20th century citizenship cases).

[26] *See* Barbara J. Flagg, *Was Blind But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2013 (1995).

[27] Examples are too common to provide any useful overview here. For representative works, *see* Cheryl Harris, *Whiteness as Property,* 106 HARV. L. REV. 1707, 1761 (1993) ("The wages of whiteness are available to all whites regardless of class position, even to those whites who are without power, money, or influence."). Although Harris notes that the complete parcel of material benefits regarded as "white privilege" accrue to relatively few white persons, she does not privilege this insight in her theoretical account of whiteness. *See also* Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences through Work In Women's Studies* 293-294 in CRITICAL WHITENESS STUDIES, LOOKING BEHIND THE MIRROR (EDS. RICHARD DELGADO AND JEAN STEFANCIC) (recognizing potential variations in experience of whiteness but listing 46 ways in which white privilege benefits all whites regardless of class and gender position).

[28] Of course, some research based on the premise of white "invisibility" has been extremely effective, particularly when they are used to examine unspoken assumptions made in employment decisions and when used to analyze assumptions and defaults in court doctrine that serve to advantage white persons. *See* Flag, supra note ___. Russell Robinson, *Perceptual Segregation*, UCLA L. REV. (discussing discrepancies between white and black persons perceptions of discrimination and ways to account for the racial imbalance in the judiciary tending white persons' perceptions) ; Mitu Gulati & Devon Carbado, Devon W. Carbado and Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (discussing interpretational challenges workers of color encounter because their behavior is not interpreted against a default white norm). However, this notion of "white invisibility" seems increasingly less compelling to whites as they perceive their numbers to be shrinking and that the cultural landscape is more and more dominated by minorities. As Ruth Frankenberg explains, "the current conditions and practice of whiteness render the notion that

More recently, however, scholars working in sociology, political philosophy and critical theory have argued against this "invisibility" thesis, positing instead that whiteness is invariably a palpable experience to those who claim white identities. These scholars have called for additional theorizing based on the idea of "palpable whiteness," and for additional attention to be paid to the experiences of persons with more attenuated, complex relationships to whiteness as an identity category. This Article responds to this call, and is the first in legal scholarship to use this understanding of "palpable whiteness" to explore whites' relationships to antidiscrimination law. More specifically, it explores white workers' anxieties about and their relationship to strategies to maintain whiteness's social dominance, and the potential for whites to find themselves on the margins of this social category.

The Article also sounds a corrective note, urging judges and scholars to abandon overly reductionist understanding of white privilege. This correction is essential as the previously overly simplified accounts of white privilege included in Civil Rights era models of whiteness have compromised these models credibility with many whites, particularly those who reached adulthood after the late 1970s. Additionally, I argue that until we recognize whites' anxiety about the social significance of their whiteness and their varied experiences of access to white privilege, we will be unable to construct compelling arguments about whites' contemporary relationships to racism. This complex approach to white privilege is a cornerstone feature of "marginal whiteness" as a conceptual framework, and this aspect of the framework makes it more likely that the insights it generates will resonate strongly with whites whom have otherwise disengaged from discussions about racism.

A. Identifying the Marginal White Subject

Marginal whites are white persons who only enjoy white privilege in contingent, context specific ways. For these whites, the social privilege of being recognized as white and the attendant access to material and dignitary benefits are not always assured.[30] Because of their relative insecurity about their access to privilege, marginal whites share special insights, and they face different incentives when other whites subtly and not so subtly invite them to engage in minority-targeted racism.

To better understand marginal whites and the special perspective that unites the group's members, one needs a clear understanding of how whiteness works in American society. Whiteness has two dimensions: it is a personal identity a putative "white" person

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whiteness might be invisible . . . bizarre in the extreme." *See* McDermott & Sampson *infra* ___ (citing Frankenberg at 76).

[29] EDUARDO BONILLA SILVA, RACISM WITHOUT RACISTS: COLORBLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 103-129 (Lanham: Rowman & Littlefield)(2006) (describing whites tendency to see race as something that constructs minorities experiences rather than their own).

[30] This is increasingly likely as multiracials increasingly decide to identify themselves as white persons. See Twine, *supra* note ___ at 14 (noting that half of multiracial offspring who identified one parent as white in the 2000 National Health Interview Survey identified their primary identity as white in follow up interviews).

claims, and simultaneously a passive experience of being socially recognized as a white person.[31] Importantly, just because one claims a "white" identity, this does not mean that one will be socially recognized as a white person.[32] Consequently, some people who identify as white live in a liminal state of anxiety, fearing public misrecognition. While anxieties about racial misrecognition trouble all persons invested in maintaining their racial identities, whites' anxieties are particularly acute, as being socially recognized as white carries a raft of social and material benefits (*i.e.* the benefits of white privilege). Stated alternatively, putative whites know that misrecognition is not merely a source of irritation, embarrassment or inconvenience, as it might be experienced by a minority person improperly not identified with her chosen racial group. Rather, misrecognition carries significant material costs for putative whites that can affect their life chances.

The above account describes the anxiety some whites have about the risk of phenotypical misrecognition; however, many whites also have similar anxieties about being denied white privilege even when their phenotypic claim to whiteness is not being challenged. To understand this second source of anxiety, one must first acknowledge that whiteness, for persons who claim the identity, is always defined by a host of additional hidden modifiers,[33] including gender, class, ethnicity, sexual orientation and religious identity. So, for example, the experience of whiteness for white women is always complicated by gender.[34] Also, the experience of whiteness for gays is always qualified by homosexuality. [35] Poor and working class whites are also aware that class shapes their experiences of whiteness. Even ethnic male whites are aware that national origin can complicate their ability to claim the advantages that are alleged to accrue to all white persons.[36]

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[31] See Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. Rev.1134 (2004)(describing an individual's desire to be publicly recognized as a member of his chosen racial identity category).

[32] Lewis, *What Group, supra* note ___ at 624 ("Self identification processes are linked with but not equivalent to external ascriptions of racial categorization."). Indeed, a person may not claim to be white at all, but still experience privilege because their morphological causes them to be regarded as white even when they stand passive. *Id.* at 628.

[33] *See, e.g*., Eichstedt, *Problematic White Identities* at 450 ("the benefits of white privilege are not evenly distributed and this leads to different phenomenological relationships to the fact of whiteness.")

[34] *See* Twine at 6 (discussing feminists scholars work showing how "whiteness and gender shape racialized identities" and how identity construction . . . is linked to racism, nation and class location"); *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 874 (1990) ("A theory that purports to isolate gender as a basis for oppression … reinforces other forms of oppression.")

[35] McDermott & Samson at 249 ("Poor, gay and otherwise marginalized whites are likely to have a different experience of their privileged racial identity than are others able to see the direct payoff of white skin privilege."); Alan Berube, *How Gay Stays White* in THE MAKING AND UNMAKING OF WHITENESS 234 (discussing experiences in which he began to notice the degree to which gay identity as a default functions as a modality of white identity); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 637 (1997);("Although [several white gay critics] contend that race, class, and gender detract-or are separate-from gay politics, the political vision they prescribe rests firmly upon racial, class, and gender privilege.")

[36] This multi-vectored approach to race has also been associated with the "Third Wave" of Whiteness studies, as described in sociological theory. Of course, persons who have multiple alternate social identities

While many sociologists have acknowledged the relationship between race and other aspects of social identity, [37] Matt Wary, a sociologist working in whiteness studies, talks more explicitly about the need for a theory that maps the interrelation of multiple aspects of social identity, and their complementary roles in achieving the project of racial subordination. Wray explains, that "[i]t is now common parlance in whiteness studies to speak about the racialization of sex and class, and the gendering of race or the sexualization of race and class." [38] He continues,

> this new awkward way of talking makes [it] clear that the modal categories of race, class, gender, and sexuality --- the Big Four -- are more interrelated and interdependent than current theoretical models allow. Instead of trying to account for domination and inequality by focusing on the Big Four as distinct relatively autonomous processes, might not we see them as four deeply related subprocesses of a single larger process of social differentiation?"

My theory of marginal whiteness is a response to Wray's call for a "unifying theory of social difference and inequality." Marginal whiteness, as a conceptual framework, posits that factors such as race, class, sex, gender, religion, ethnicity and sexual orientation identities are essentially linked in a single process of racial subordination.[39]

Translated into simplest terms, the marginal whiteness framework is based on the proposition that when <u>whites</u> imagine the full experience of whiteness their reference point is the experience of a white, non-ethnic, middle class, heterosexual male.[40] For

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experience whiteness through the prism created by multiple vectors of social disadvantage. See Twine at 6 (explaining that new sociological models "see whiteness as a multiplicity of identities that are historically grounded in class specific, politically motivated and gendered social locations").

[37] As Ruth Frankenburg observes, "whiteness as a site of privilege is not absolute but is cross cut by a range of other axes of relative advantage and subordination; these do not erase or render irrelevant race privilege, but rather inflect or modify it." *See* Twine at 7 (quoting Frankenburg 2001)

[38] WRAY, NOT QUITE WHITE, at 5.

[39] This approach might be perceived by some to invert the propositions that inform intersectionality theory, a framework that calls on us to consider the ways in which different vectors of difference combine to create special forms of disadvantage for persons belonging to multiple socially subordinated identity categories. *See generally Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STANFORD LAW REVIEW 1241-1299 (1991). Rather than privileging that specificity, marginal whiteness suggests that these differences can be treated as historically grounded rhetorical strategies used to create and distance outgroups, thereby insurance the maintenance of privilege for a core group of white males.

[40] This observation is not to suggest that white heterosexual middle class non-ethnic males never experience social stigma or disadvantage. Rather, one obvious additional base point for supremacy is religion, which could be included in the list of modifiers offered in my theory. Also, white males may be subject to stigma based on their perceived failure to comply with normative standards for the default identity they hold: males teased about their masculinity, etc. However, again this merely further proves the point that the paradigmatic citizen with full rights, is always imagined as a white male heterosexual middle class person. It need not matter that this person does not often exist in the world, as the ideal subject functions in part as a fantasy.

example, when white women believe they are being denied the full experience social equality, the full experience of white privilege, they do not look to the experiences of minority male comparators or gay white men.[41] Rather, they look to the experiences of white straight middle class men. When white gay men assert that they do not enjoy true equality, or the full measure of white privilege, they do not compare their circumstances against those of straight Asians, Latinos or African Americans, or white women. Rather, they also look to the experiences of white straight middle class men.[42] The essential truth of this claim becomes clear when whites make complaints about affirmative action, on the grounds that they do not really enjoy white privilege.[43] The comparison on which they base their complaints is that they do not enjoy all of the benefits of white middle class heterosexual males. By making these arguments, whites reveal their understanding of the paradigmatic or true white subject against which all other claims of whiteness are compared.[44]

Having recognized the multiple identity factors that can compromise the experience of whiteness one can see why many whites' experiences of whiteness are characterized by a feeling of "lack" and incompleteness. That is, because many whites are aware that they only have partial access to white privilege, which Civil Rights laws tell them they enjoy by default, they are plagued by anxiety. These "marginal" whites chafe at being described as being oppressors in discussions of race, as they often have no experiences in which they consciously have played this role.[45] Additionally, they chafe at being asked to bear the costs of social justice programs to improve the standing of

[41] This default assumption that informs marginal whiteness is well grounded in American legal history. White, heterosexual, middle class males were the original citizens: their experiences are the template on which outsider groups typically measure whether they have full access to the benefits of society. Only more recently, in the last twenty years have we seen white males claiming disadvantage compared to women and/or minorities, typically in response to employers overzealously enforcing formal and informal affirmative action measures.

[42] *Cf.* Wendy Brown, *Wounded Attachments*, POLITICAL THEORY 21: 390-410 (1993) (noting that social justice movements focused on equality should consider the degree to which they have limited calls to change to simply extending the parcel of rights white single middle class males to all persons regardless of race, gender and sexual orientation) Brown argues that, by doing so, we have given up the opportunity to imagine alternative social arrangements.

[43] Indeed, even the argument that class rather than race should be the basis for affirmative action pits working class whites against minorities. However, it also points to a recognition among whites that "white privilege" includes an important class component.

[44] Twine supra note __ at 6 (noting that the "Third Wave" of whiteness studies calls attention to the "discursive strategies used to maintain and destabilize white identity and privilege). By talking about race, sex and sexual orientation as separate and discrete discriminations we lose the opportunity to talk about how these discriminations work in conjunction to facilitate certain social arrangements. While this way of speaking has been naturalized by various social justice movements organized around particular aspects of social identity, as well as by Title VII itself, it is not the sole way for understanding how discrimination works.

[45] *See* Storrs, supra note __ at 571 (discussing email from white student complaining, "We have all the advantages in this country, but once again, this isn't our fault. We didn't ask to be born white males.")

minorities, as they do not perceive that they enjoy the raft of benefits, the white privilege, that should require them to bear these costs.[46]

The observations I have made about the fractured experience of white identity should not be read to suggest that marginal whites do not enjoy any race based advantages. Rather, my purpose is merely to point out that marginal whites' attentions when they think about racism, tend to be focused on their perceived *lack* of access to privilege, those aspects of whiteness just beyond their reach. This focus on "lack" shapes marginal whites' reactions to discussions about whites' comparative social advantages.

Of course, marginal whites' frustrations about their lack of access to privilege can take two forms: it can be directed at higher status whites who enjoy greater access to privilege, or at minorities, who draw attention to current inequalities. The success of the New Right is demonstrated by the fact that it has convinced many marginal whites to focus their attention on minorities' claims for advancement, by suggesting these advances inevitably must come at the cost of low status white persons. Marginal whites, however, occasionally have experiences that concretely demonstrate that high status whites are actually forcing them to subsidize the maintenance of white privilege. Increasingly, they have experiences like Clayton, in which high status whites consciously sacrifice the interests of low status whites when necessary to bar minorities' access to certain privileges. These experiences tend to alienate marginal whites even further from whiteness, a dynamic discussed in further detail in the sections that follow.

B. *Marginal Whites Reactions To Discrimination: The Role of Rational Cost Benefit Calculations*

What do these understandings about "marginal whites" offer us in interpreting antidiscrimination law? They suggest that marginal whites face special incentives when confronted with racism. The conventional account under Title VII which, again, is based on Civil Rights norms, posits that a white person will be offended by discrimination because it threatens his ability to enjoy a colorblind workplace or his ability to form valuable relationships with minorities. While these are social goods that many whites would enjoy, to many post Civil Rights era whites, they often seem like secondary considerations. Instead, because many of today's whites are frustrated about their inability to fully access white privilege, and are resentful of race conversations that seem to penalize them as though they actually enjoy unqualified privileged status, these whites require an antidiscrimination framework that acknowledges their feelings of marginality.

The marginal whiteness framework acknowledges whites' emotional difficulties, and suggests that when marginal whites are faced with overtures to engage in (or tolerate) racism, they experience these moments as offering illicit temptation. Marginal whites know in these moments that they are being asked to cast their lot with discriminatory system that only occasionally and intermittently benefits their social and economic

[46] Sean Brayton, *MTV's Jackass: Transgression, Abjection and the Economy of White Masculinity*, 16 JOURNAL OF GENDER STUDIES 57-72 (2007).

interests. They must choose to assist with the maintenance of discriminatory arrangements (in the hope that they deliver benefits to them personally), or cast their lot with outsiders and disrupt discrimination (based on the concern that discriminatory arrangements ultimately work to their disadvantage). Some whites in these moments will accept the invitation to discriminate; others will adopt an antidiscrimination perspective that challenges white privilege.[47] The question for antidiscrimination law is, what is it that triggers a marginal white to choose the side of racial equality?

The marginal whiteness model suggests that the answer marginal whites generate is based on pragmatic considerations. Unlike Civil Rights influenced models of whiteness, it does not suppose that marginal whites primarily experience these overtures to discriminate as "moral moments," although they undoubtedly have a moral dimension. Instead, the marginal whiteness model suggests that "marginal whites" tend to be more cautious and passive when presented with an opportunity to discriminate. They focus on short-term cost-benefit calculations rather than long-term moral, social and economic goals. That is, marginal whites *only* react strongly to race discrimination when their economic or dignity interests are immediately threatened. Interestingly, marginal whites focus on short term calculations makes them difficult to handle for both Civil Rights influenced models of whiteness (which assume whites are motivated primarily by long term goals such as the promise of racial equality) but also for models predicting discriminatory behavior (which also assume whites will be primarily motivated by the long term goal of maintaining white privilege). At present, neither of these models provides a sufficient account of many contemporary whites' behavior.

1. Marginal Whiteness and Intragroup Esteem Payments

The marginal white's cost/benefit approach to invitations to discriminate is best explained by a rational actor account of discrimination,[48] in particular the "intragroup esteem" model offered by Richard McAdams.[49] My decision to integrate a rational actor model created by a law and economics scholar into my analysis of racial anxiety may seem strange, particularly because the concept of marginal whiteness draws its primary insights from sociology and critical theory. The boundary between McAdams analysis and sociological discussions of race, however, is more porous than it might initially seem. McAdams work is influenced by sociologist Lawrence Bobo, who posited that racism is produced by and engenders "group status conflicts" over resources. McAdam's uses Bob's insights to supplement the traditional rational actor model used to describe discrimination, and explains how irrational status benefits individuals derive from racial identity also are factored into an individual's rational cost benefit calculations. Bobo's

[47] The reference above to "overtures" to discriminate refers to explicit overtures as well as the much more common subtle invitations to engage in discrimination, often articulated in race neutral terms. While subtle invitations are more common, for the reasons discussed above, the Title VII cases also indicate that explicit overtures remain a problem.
[48] Richard H. McAdams, *Cooperation and Conflict, The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1030, 1038 (1995).
[49] *Id.*

work on race based group status conflicts also informs my prior work on racial anxiety. Specifically, I explain why Title VII should protect workers engaging in "race performance," as symbolic "performances" of racial identity can trigger invidious group-based status anxiety in an individual's co-workers.[50] In this piece, McAdams granular analysis of individual whites' group status calculations when asked to discriminate provides a useful framework for explaining how and why the cost benefit analysis that structures whites' relationships to white privilege has changed. His analysis provides a framework for understanding why marginal whites have more ambivalence about whiteness and white privilege in an era shaped by antidiscrimination law.

McAdams explains that, historically, whites have maintained their socially dominant position by incentivizing other whites to engage in outgroup discrimination, even when this discrimination was not economically profitable.[51] The incentive structure whites used was based on the exchange of intragroup esteem or "status" benefits, which motivated whites to take less attractive economic bargains that insured certain benefits and resources were only available to white persons.[52] These "esteem" or "status" benefits were particularly valuable to whites in the decades after Jim Crow because they had immediate social and economic benefits. That is, in an era in which whites' privilege maintenance efforts were the norm, whites could depend on other whites to recognize their prior economic sacrifices and, in turn, compensate them with social and economic benefits for having complied with white privilege maintenance norms.[53] McAdams extends his analysis to cover the period shortly after the Civil Rights movement, and notes that the entire intragroup esteem system depended on whites continuing to value these esteem credits highly. [54]

The marginal whiteness framework posits that whites no longer highly value these esteem payments for a number of reasons, all stemming from the effectiveness of antidiscrimination protections like Title VII. Specifically, Title VII has complicated whites' ability to exchange intragroup esteem (and relatedly preserve workplace benefits for whites) for at least four reasons: [55] (1) it has muddied or blurred norms about white preferences; (2) complicated communication between potential discriminators; (3) created sanction risks and (4) prevented the consistent delivery of reciprocal benefits between white persons. Stated simply, because these complications undercut the effectiveness of the "intragroup esteem" system, it has reinforced whites' beliefs that they cannot expect

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[50] *Id.* at 1040, n. 169. I have previously relied on Bobo's work to theorize about group dynamics in the workplace in another Title VII project exploring race based anxiety and performativity. *See* Rich, *Race Performance and the Future of Title VIL*, *supra* note __at 1185-1192 (discussing relevance of group position theory to racial anxiety model)

[51] McAdams, *Cooperation and Conflict, supra* note ___, *at* 1040-1048.

[52] McAdams explains that "[a]bsent the desire for intragroup status, selfish individuals would not make the material sacrifices that discrimination requires." *Id.* at 1007

[53] McAdams's paradigmatic example is of a white person who accepts a lower bid on his house from a white buyer, instead of accepting a higher bid offered by a black buyer. The white buyer who does so takes this action in expectation that he will receive intragroup esteem or "status" payments from other whites.

[54] McAdams, at 1008

[55] *Id.* at 1009

consistent payoffs from white privilege. Each of these complicating factors is dealt with more specifically in the discussion that follows.

The first development that has complicated whites' exchange of intragroup esteem is the reforming effect Title VII has had on whites' norms and, relatedly, their ability to communicate discriminatory intentions.[56] For, at present, most whites believe that persons who engage in explicit, dominative racism are deviant, and even psychologically flawed.[57] Consequently, discriminators typically do not want to be seen as overtly racist, and therefore try to use coded race neutral language and rules to achieve their goals. This shift causes two problems. First, these coded terms are often alienating to marginal whites as they may feel implicated by whatever "race neutral" category is picked out for disfavor. So, for example, when a discriminating white admissions officer attempts to keep blacks out of Harvard, and uses terms like "persons from a culture of poverty" to describe undesirables, a working class or poor white person is likely to feel implicated by the negative thrust of this coded reference.[58] Over time, the use of these coded references are likely lead to resentment between the admissions officer attempting to signal discriminatory intent to a poor white person, a dynamic which compromises their ability to work collectively. Relatedly, when the coded markers for discrimination highlight other identity salient features significant to disfavored groups (*e.g.* class, region, culture and religion), the discriminator encourages his white coworker to privilege other non-racial aspects of his identity, making the importance of whiteness and white privilege seem less rather than more significant. So, for example, the discriminating admission officer's reference to applicants that represent the "urban poor" primes his coworker to think class is an important part of the discriminator's calculations, drawing attention to the coworker's class standing as a source of potential vulnerability.[59]

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[56] Discriminating whites also face challenges in dealing with "race traitors," whites whom proactively seek to disrupt white privilege. *See generally*, NOEL IGNATIEV AND JOHN GARVEY, RACE TRAITOR (Routledge 1996). The discriminating white may fear that this "progressive" or "race traitor" white will formally or informally sanction him if they perceive that he has engaged in explicitly prejudiced behavior. Race traitors also compromise discriminating whites' ability to sanction and ostracize nonconforming whites, as whites who refuse to maintain white privilege can always find other communities of whites outside of the workplace that will reward them for nondiscriminatory behavior. Indeed, one of the challenges the discriminating white faces is determining whether the workplace contains a critical mass of whites necessary for an intragroup esteem system to function.

[57] Laura Smith, *et. al., The Territory Ahead for Multiracial Competence: The Spinning of Racism,* 39 PROFESSIONAL PSYCHOLOGY, RESEARCH AND PRACTICE 337-345 (2008)

[58] Carole Marks, *The Urban Underclass*, 17 ANNUAL REVIEW OF SOCIOLOGY 445-466 (1991) (describing ideological work performed by the terms "culture of poverty" and "urban poor," and their role as coded racial signifiers)

[59] The references used here (e.g. "culture of poverty") have been used so frequently in conjunction with African Americans that they may function much more effectively than other proxies. Their existence, however, suggests that there may be a well established lexicon of coded references that whites may use to signal each other without facing confusion difficulties. However, because of whites desire to avoid appearing explicitly racist, as a term become more established as a discriminatory reference to blacks it becomes less useful as a coded form of communication. Consequently, discriminating whites must

Second, whites' inability to explicitly communicate about intragroup esteem makes a white worker unsure whether he will be rewarded by other white persons if he engages in discrimination. That is, the discriminating admissions officer who ensures that applicants from "a culture of poverty" do not enroll at Harvard is unsure whether other white actors will recognize his intentions, and therefore whether he will be properly rewarded. A discriminator in most workplaces knows he must pursue his ends with great care, as he may be socially sanctioned, and even lose his job because he has violated Title VII. He must weigh his interest in securing other discriminating whites' intragroup esteem against the very real threat of sanctions.

Last, because of their ambivalent relationship to whiteness, many whites are focused on short-term assessments of their individual interests, rather than what they believe is required for the long term maintenance of whites' advantageous social standing.[60] Consequently, they are more concerned about angering an employer by engaging in discriminatory behavior and less concerned about any esteem payments they might receive for maintaining arrangements that privilege white persons. Indeed, for many of these whites, overtures to discriminate may be perceived as *harassment*: whites will feel they are being asked to perform a kind of illicit "racial labor" when they receive requests to preserve preferences for whites, yet they know this racially biased system does not consistently confer benefits, and could even get them fired. Consequently, today's whites are more likely to complain about overtures to discriminate when they believe that the potential rewards of discriminating are low, and when they have protection from the retribution of disgruntled prejudiced coworkers.

As a separate matter, demographic changes and cultural changes have made it more likely that the white individual being courted to participate in the exchange of intragroup esteem is a "marginal white" — and therefore has previously been denied some benefit he believed he was entitled to as a white person.[61] He may have experienced exclusion based on the use of coded criteria that happen to apply to him as well as minority targets. He may have experienced exclusion because of the use of some other politically salient aspect of his identity, or because his morphology causes people to question his standing as a white person. For this individual, subsequent overtures to discriminate may be influenced by resentment he feels based on another circumstance in which he was denied the full privileges of a white identity.

The easiest example of this phenomenon is the experience of a mixed race person who identifies as white. His claim of whiteness may be accepted at work, but is suddenly denied when he visits his employer's Scarsdale neighborhood and meets the employer's

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perpetually find new proxies to describe unwanted groups, further compromising their ability to communicate with one another.

[60] Jaret, *supra* note ___ at 711 (noting that contemporary studies on whiteness "have uncovered a mixture of pride, denial and ambivalence in the way people incorporate whiteness into their self concepts.").

[61] Third wave whiteness recognizes that "white privilege at the same time a taken for granted entitlement, a desired social status, a perceived source of victimization, and a *tenuous situational identity." (emphasis added)* Twine *supra* note ___ at 7.

friends. Because the intragroup esteem system depends on meeting participants' expectations and providing consistent payoffs, these inconsistent results are a problem. Marginal whites periodic experiences of indignity and exclusion from the benefits of whiteness can make them particularly sensitive and prickly about future overtures to discriminate.[62] If a prior denial of whiteness is particularly traumatic, a marginal white may not only refuse future overtures to discriminate, he may even request that the person making the overture be sanctioned. [63]

Students of history may ask, "What has changed?" They know that marginal whites have always been subordinated to serve the interests of higher status white persons, but historically have been willing to bear these burdens.[64] I argue that, although marginal whites previously were willing to bear the costs of maintaining white privilege, they will be less inclined to do so now that this intragroup esteem system cannot provide them with consistent benefits for their sacrifices. For example, in the era of Jim Crow, discriminating whites received compensation daily for the work they did to maintain white privilege, as blacks were continually required to publicly demonstrate their social subordination.[65] Now that these clear markers of dominance are gone, whiteness has greater difficulty establishing its immediate value for white persons. Although today's whites still enjoy social numerous social advantages, they are less likely to notice the

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[62] A biracial Asian and white interviewee in the Miville Study, with phenotypically white characteristics recounts an experience when he submitted an application for a job, but was not called for an interview. When he stopped by his potential employer's office, the person conducting the job search quickly offered him the job. He quickly deduced that he had not been called for an interview because of his Asian sounding name. He recalled that he said to her,

> 'I never said my name. My last name is . . . She looked at me very confused. I said, "I am the same person that turned in the application twice before now. So obviously, to me if you are looking for a person [to be] hired for this long, then you didn't call me back for the simple acknowledgment of my name. You thought that, maybe you thought that I was a minority, maybe I was Japanese, or Asian, or that I could not speak English well, maybe you are just discriminating against [minorities] in hiring practices.' So I said "Thank you for the job, but you know, here is the opportunity for you to learn that not everybody looks the same." And I just walked out.

Millvile, Constantine, Baysden & So-Lloyd at 510.

[63] Some would even argue that these marginal whites are *more prone* to antidiscrimination work than other persons. Jennifer Eichstedt's argues that differential experiences of whiteness and relationships to whiteness strongly impacts . . . who is likely to become antiracism activists," pointing to the high representation of Jews in antidiscrimination groups as well as strong antidiscrimination perspectives of white gay persons interviewed in her fieldwork. See Eichstedt, *Problematic White Identities* at 450. See also Bonilla-Silva *supra* note __ at 146 (noting that racial progressives often use their own experiences of discrimination as a frame to understand the discrimination experiences of others).

[64] See generally, David R. Roedigger, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS 133-140 (VERSO: 1991)

[65] RICHARD THOMPSON FORD, THE RACE CARD 78-79 (NEW YORK: FARRAR, STRAUSS & GIROUX) (discussing the "ritual sadism" that poor white enjoyed under Jim Crow by watching blacks perform ritual rites of social subordination in public settings)

benefits they receive *more likely to undervalue them*.[66] Consequently, when asked in the short term to perform labor to maintain white privilege, many whites are likely to be resentful. However, they are also likely to try to "free ride," to passively capitalize on white privilege when they can enjoy its benefits without dirtying their hands to maintain it.

2. *Distinctions from A Behavioral Economics Account*

McAdams would likely challenge my use of his intragroup esteem model on one critical point. He would challenge my claim that class disadvantage will trigger "marginal" whites to feel ambivalent about white identity and thereby increase their skepticism about overtures to engage in racism. Instead, McAdams posits that poor or low status whites are the ones *most likely* to discriminate because they have no other means of producing status.[67] Rather than being frustrated by their "marginal white" status, these whites are more likely to emphasize their claims to whiteness.

My response to this challenge is that assumptions about working class whites' willingness to discriminate are based on a group of whites that had not been socialized to be ambivalent about white identity. In contrast, many post Civil Rights era whites do feel ambivalence about white identity, having learned about the ignoble role whiteness has played in maintaining racial inequality. I believe this attitudinal shift has pushed many whites in the direction forecast by the marginal whiteness framework. Admittedly, however, the facts are unclear. There is data to support both McAdams view and my view.[68] Consequently, rather than trying to categorically decide whether poor and working class whites are more likely biased or more likely to be marginal whites, it would be better to acknowledge that whites' responses to overtures to discriminate will dependent in part of the social context in which these overtures arise. My point is, that marginal whiteness is not offered to describe all or even most whites' behavior.[69] The framework is simply offered to understand the interests of a growing class of persons who, although they do not fully conform to Civil Rights era norms, are for other reasons interested in bringing interracial solidarity claims.[70] The reasons for the rise of this group are explored in more detail in Part III. Part II considers how these marginal white subjects have fared in prior

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[66] The Critical White Studies literature explores these in detail. They include a number of extremely socially useful benefits (e.g., the low risk of racial profiling or harassment by police, or enjoying an easier cultural fit with the baseline aesthetic of most workplaces etc.); however, today's whites are likely to regard these benefits as something they are automatically entitled to, rather than being special privileges for which they should be grateful.

[67] McAdams argues that "whites with the most limited opportunities for producing status will predictably be prepared to engage in more discrimination, because lowering the status of others is one of the last remaining mechanisms of status production." Indeed, this view is backed by numerous sociological studies establishing that working class whites are more likely than middle class or wealthy whites to hold discriminatory attitudes.

[68] See Bonilla Silva, *supra* note __ at 132, 144(explaining "common sense view" that working class whites are more racist than higher status whites, but noting that 1997 and 1998 surveys indicating young working class women were the *most* likely to have "racially progressive attitudes.")

[69] Again, many whites, particularly those that became adults during the Civil Rights movement, will find that their attitudes better described by existing Civil Rights influenced models of whites' interests.

[70] McAdams supra note ___, at 1049

antidiscrimination cases, and the special roles their claims might play in the elimination of workplace discrimination.

PART II Marginal Whites in Anti-Discrimination Cases

Sometimes legal scholars necessarily must be anthropologists as well. As we review a group of cases, we discover unorthodox plaintiffs: claimants whose normative claims do not match the norms and values of the doctrine they use to advance their interests. The stories these unorthodox plaintiffs tell, the facts they advance, and relief they seek, press us to think more deeply about the law's norms and values and the expectations of plaintiffs who seek its protection. More specifically, for antidiscrimination scholars, Title VII provides an especially rich field, allowing us to think about how workplace discrimination doctrine might change to better reflect the perspectives of the plaintiffs using it to redress their injuries.

Part II uses this anthropological perspective to show that in prior interracial solidarity cases the Civil Rights norms naturalized by the interracial solidarity doctrine ill-fit plaintiffs' expressed motivations, caused highly valuable cases to be lost, and forced courts to elaborate on a logical indefensible kind of injury. Part II then shows how the "marginal whiteness" framework offered in Part I more accurately reflects certain plaintiffs' interests, and more forthrightly maps out the currently hidden policy questions that must be resolved in cases in which whites sue over minority-targeted racism. Once these cases are properly recontexualized, judges will have a greater understanding of the role marginal whites can play in America's antidiscrimination project.

A. The Undistinguished History of Interracial Solidarity Claims

Title VII interracial solidarity cases provide a unique opportunity to investigate judicial perceptions regarding whites' potential interest in discrimination directed against minority third parties. Because the claim is a judicially constructed cause of action, it has a potentially expansive reach. However, as explained below, despite judges' relative freedom, they have interpreted the claim to cover a very narrow field of interest.

Civil Rights era norms have had a strong influence on interracial solidarity doctrine, a fact which seems unsurprising given that the seminal decision giving rise to the doctrine was issued in 1972, on the heels of the Civil Rights movement. This decision, *Trafficante v. Metropolitan Life Insurance Company*, [71] actually involved a Title VIII housing discrimination claim. In *Trafficante*, the Supreme Court created a new cause of action under Title VIII, [72] allowing a white tenant to join with a black tenant in a housing discrimination suit against a landlord for discriminatorily rejecting qualified blacks'

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[71] Indeed, the status of interracial solidarity claims under Title VII is still in question. At present, the Circuits are divided. The 4th, 5th, 7th, 10th and 11th have determined that Title VII does not permit interracial solidarity claims. The 6th, 8th and 9th Circuits have permitted these claims to go forward, and therefore there are a very small number of claims available for analysis. This Article explains, however, that the use of Civil Rights norms to interpret these claims likely stunted the doctrine's growth.

[72] *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205, 209 (1972)

applications for housing.[73] The landlord sought dismissal of the case on two grounds. First, he argued the white tenant could not sue based on the alleged housing discrimination because he could not establish he had "Article III" standing to litigate his claim, as the housing discrimination had not directly caused the white tenant injury. Turning next to issues of statutory construction, the landlord argued that the white tenant's claim should be dismissed because of "prudential limitations" on standing, which require a plaintiff's claim to fall within the "zone of interests" Congress intended to protect when it drafted Title VIII. The landlord argued that Title VIII only allowed "aggrieved persons" as defined by the statute to sue for housing discrimination, and white bystanders to minority-targeted discrimination were not the kind of "aggrieved persons" Congress contemplated when it drafted Title VIII.

The *Trafficante* Court disagreed. First, it ruled that the white tenant had suffered an "injury in fact" sufficient under Article III's standing requirement, because the housing discrimination had caused the tenant to "los[e the] . . . important benefits of interracial association." This same interest, the Court explained, satisfied the "prudential limitations" inquiry required by principles of statutory construction. The Court held that the interest in interracial association fell within the zone of interests Congress contemplated at the time the statute was created, as evidenced by the legislative history of the statute and the terms of art used. These factors, the Court explained, as well as the structure of the statute, counseled that Congress intended "aggrieved persons" to have a broad meaning and include whites injured by minority targeted discrimination. While antidiscrimination scholars have for the most part praised this ruling[74], the Supreme Court's decision actually compromised the future of interracial solidarity doctrine in the moment it created it. For the Court declined to define what it meant by a plaintiff's "interest in interracial association" leaving all definition of the pleading and proof requirements necessary to sue over this kind of harm to the lower courts.[75]

The *Trafficante* Court's failure to define the right of "interracial association" under Title VIII made many courts treat interracial solidarity doctrine as a quirk in the case law, and they refused to recognize the cause of action as a viable basis for a Title VII workplace claim.[76] Instead, they restricted "interracial solidarity" doctrine as it came to be called, to the small set of Title VIII cases where white plaintiffs brought suit to insure their housing complexes became integrated.[77] When plaintiffs attempted to raise interracial

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[73] *Id*.

[74] See Joseph C. Feldman, *Standing and Delivering on Title VII's Promises: White Employees Ability to Sue Employers for Discrimination Against Non-Whites*, 25 N.Y.U. REV. L. & SOC. CHANGE 569 (1999) (recognizing value of the doctrine and calling for it's expansion); Noah Zatz, *Beyond the Zero Sum Game: Toward Title VII Protection for Intergroup Solidarity,* 77 Ind. L.J. 63 (2002)(applauding the creation of the doctrine but calling for broader construction of whites' interests) *But see* Lee, *White Privilege or Blessing*, *infra* note __ (outlining claim's potential distortion effects).

[75] *Id.*

[76] See, e.g., *Childress v. City of Richmond*, 907 F. Supp. 934, 938 (E.D. Va. 1995), claims dismissed by 919 F. Supp. 216 (E.D. Va. 1996), vacated and remanded by 120 F.3d 476 (4th Cir. 1997) (panel opinion), panel opinion vacated and judgment below aff'd en banc by 134 F.3d 1205 (4th Cir. 1998) (per curiam).

[77] *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205, 209 (1972)

solidarity claims under Title VII courts quickly disposed of them, arguing that plaintiff's failed to establish an "injury in fact" as required by Article III, or that "prudential considerations" prevented them from recognizing the interest in "interracial association" as a cognizable interest under Title VII. They pointed to differences between Title VIII and Title VII's statutory provisions, legislative history and enforcement structure, holding that these considerations counseled that white secondary victims of minority targeted discrimination were not covered under Title VII.

Those courts that *did* allow plaintiffs to bring interracial solidarity claims picked up on the Civil Rights norms that governed in the *Trafficant*e case. The paradigmatic plaintiff became the selfless white person who sued for discrimination directed at third parties, a plaintiff who faced no real economic or dignitary injury himself. Instead, courts required plaintiffs to plead claims involving expectancy interests or imagined possibilities of minority association that come with racial diversity. Alternatively, they focused on the moral and psychological harms suffered when one finds one is not working in a colorblind workplace.

For example, some courts adopted an interpretation of "interracial association" based on the *Trafficante* litigants' allegations in their brief. These courts read the interest in interracial association as being the lost "personal, professional or business contacts" the white plaintiff imagined he would have formed in the absence of discrimination.[78] On its face, this interpretation seems to make room for claims of economic injury - but, importantly, it is very narrow class of injuries. In order to qualify as "economic harm" the plaintiff needed to allege that he was deprived of the potential (or expected) business opportunities the white employee would have derived from his interaction with minorities. On its face, the doctrine did not allow for any other economic claims to be filed. Because of this construction, as a practical matter white plaintiffs only used this cause of action to allege they had suffered social and psychological harms because they worked in a racially discriminatory environment.

A second group of courts read the right to "interracial association" to mean that whites could sue when they were deprived of the "benefits of interracial harmony,"[79] another term that emphasized an atmospheric interest, the deprivation of which caused moral and psychological injury. The third definition, offered by the Equal Opportunity Commission, was even more diffuse.[80] The agency interpreted *Trafficante* to give whites a

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[78] A prime example of this analysis is provided in *EEOC v. Bailey*, 563 F.2d at 454. The court explained that "[t]he purposes and effects of Title VII in the employment field are identical to the purposes and effects of Title VII in the housing field. . . . The provision for such opportunities and the ending of discrimination declared unlawful by Title VII and VIII will affect housing patterns and employment practices and thus increase interracial contact in both home and work environments. The loss of benefits from the lack of interracial association is as real at work as it is at home because interracial contacts occur in both places."

[79] *Waters v. Heublein, Inc.,* 547 F.2d 466, 469 (9th Cir.1976) ("The possibility of advantageous personal, professional or business contacts are certainly as great as work as at home. The benefits of interracial harmony are as great in either locale."); *National Organization for Women v. Sperry Rand*, 457 F. Supp. 1338, 1345 (D.C. 1978) (same)

[80] *Sperry*, 457 F. Supp. at 1345.

broad right to a "non-discriminatory workplace." This interpretation was so broad and amorphous that it concerned many courts, given its potential expansive reach and unclear definition.[81]

Courts that refused to recognize interracial solidarity claim should not be judged too harshly, as they had valid concerns about allowing whites to sue based on the expectancy interests they had regarding interactions with minorities. Chief among these concerns are the difficulties in quantifying this expectancy interest or determining its scope. How does an employer figure out how much "interference" with a white employee's interracial solidarity interests can be tolerated before it counts as a violation of Title VII? Even worse, how are judges to decide the appropriate compensation for the frustration of one's interracial association interests? Even antidiscrimination advocates might be concerned about the expectancy theory the Supreme Court offered about whites' projected interest in interacting with minorities, as this construction comes very close to "commodifying" diversity, to rendering interracial association a guaranteed monetizable interest possessed by all white persons.

Courts that recognized interracial solidarity claims also should not be judged to harshly, for there is certainly some value in incentivizing whites to reveal minority targeted discrimination in their workplaces. Moreover, these courts' reliance on Civil Rights era norms to identify whites' prejudice related injuries was not misguided. As a normative matter, it seems worthwhile to encourage whites to focus on the moral and psychological harms discrimination can cause, and to provide whites who experience these harms with a clear remedy. These courts should be faulted, however, for their singular focus on the two kinds of injury they identified from Civil Rights norms, in particular, because they saw numerous cases that suggested the doctrine did not adequately describe many compelling cases that appeared to deserve a remedy. Instead of acknowledging this discrepancy, or acknowledging the need for more expansive doctrine, courts chose to mask their efforts to recognize novel injuries. [82] Indeed, when one reviews the interracial solidarity cases, it is clear that most plaintiffs were not primarily suing to vindicate an interest in interracial association. Instead they sued over the harms relevant to marginal whites: economic and dignitary injuries they suffered as a direct consequence of higher status whites efforts to maintain white privilege.

B. Understanding Marginal Whites Role In Interracial Solidarity Cases

The marginal whiteness framework highlights three kinds of cases that are compromised by the current "associational interest" model used in interracial solidarity cases: (1) economic injury cases; (2) linkage cases and (3) "racial labor" cases. As we use the framework to analyze the cases, several things become clear. For one, the associational account distorts plaintiffs' claims when they fall into these categories. In the worst cases, it causes otherwise strong claims to be dismissed. In others, it allows questionable claims to proceed. Second, the associational account has allowed judges to

[81] *See EEOC v. Bailey Co*. 563 F.2d 439 (6th Cir. 1977)
[82] Zatz, *Beyond the Zero Sum Game*, supra note ___, at __.

sidestep critical questions that should be addressed in order for courts to better understand the role Title VII intends whites to play in the enforcement of antidiscrimination protections when they are aware of minority targeted discrimination. Third, the associational account's distortion of plaintiffs' claims' discourages many potential future claimants from initiating actions, as their interests are not reflected in the doctrine. Last, the associational account leaves courts in the uncomfortable position of attempting to build doctrine on an unstable and indefensible concept of injury. Each of these problems is explored in the section that follows.

1. Marginal Whiteness -- Economic Injury Cases

Economic injury cases are cases in which a marginal white alleges that pay, benefits or other privileges associated with his position are being allocated according to facially colorblind procedures that are intended to disadvantage minorities. His claim is that these invidious policies compromise his interests in an *identical* fashion. Whites frequently suffer these injuries because Title VII requires that most if not all workplace allocation rules be facially race neutral; consequently, facially race neutral policies that are designed to be discriminatory in operation quite often inflict injury on whites as well.

Economic injury cases are based on the proposition that an employer should not (and indeed cannot) avoid a charge of discrimination under Title VII merely by ensuring that some whites are also disadvantaged by an intentionally racially discriminatory policy. Rather the invidious impulse to create racially discriminatory benefit and wage policies, restricting benefits to the smallest number of minority employees (or conversely the greatest number of white employees), is still a basis for a Title VII claim. Because disadvantaged white employees "stand in the shoes" of the targeted minority employees in these cases, they litigate over precisely the same set of facts, and present identical evidence of discriminatory intent. Arguably, then, these whites are just as well suited to initiate discrimination claims as the minority targets of these policies.

The *Clayton* case, explored in the introduction, illustrates the basic propositions that inform the "economic injury" cases. Clayton argued that the White Hall School District was looking for a way to ensure that it's residency exemption program (which allowed non-resident employees' children to attend the District's Schools) was only used by white employees or, at the very least by as few black employees as possible. Consequently, it reinstated it's old rule permitting only "certified administrative personnel" to be eligible for the exemption. The evidence Clayton would have offered to prove discriminatory animus, would have been the same evidence that would have been offered by the affected black employee to establish his disparate treatment claim. Specifically, she intended to offer circumstantial evidence, showing that when a black employee requested the residency exemption, which had previously been awarded on request to white employees, the district denied his request *and*, without justification, the District instituted a new race neutral rule that prevented him from accessing the benefit. Although Clayton was not the intended target of the exclusionary practice, because the new rule affected her as well, she had a vested interest in challenging the reinstatement of the restriction.

The plaintiff's loss in the *Clayton* case is particularly disturbing when one reviews the case history, as it reveals Clayton doggedly tried to assert her claim in its proper form —emphasizing her economic interests, only to be told she had not stated a cognizable claim. Indeed, in its initial review of the case, the court categorically informs Clayton that she *could not* have suffered any economic harm from the District's policy, even if her allegations were true, as by her own account the District's intent was to harm the black worker.

The Clayton case is additionally disturbing when one realizes that eight years earlier, in *EEOC v. Time Freight*, the Fifth Circuit took the exact opposite view, yet, this contrary analysis is never acknowledged. Specifically, in *Time Freight*, two white truck drivers pressed their claim before the Fifth Circuit, alleging they had been subject to the same facially neutral but discriminatory non-transfer policy their employer designed to prevent blacks from gaining access to preferred line driver jobs. In a follow-up dispute concerning seniority credits, the court recognized that the white drivers had suffered the same economic injury as the black drivers had under the policy, and granted them the same relief. The *Clayton* Court perhaps should be forgiven for not noticing the discrepancy, as the relevant holding is buried in a footnote and articulated in less than clear terms. However, the Fifth Circuit recognizes the concern that some of the drivers suing over the implementation of a racially discriminatory policy are white, even though the drivers being targeted by the employer's facially race neutral policy were African American. The Fifth Circuit determined, however, that Title VII interracial solidarity doctrine covered the white truckers' claims. It noted that the white truckers "claim[ed] a deprivation of the same employment opportunity denied to the black claimants," a clear economic interest. However, it also cited the men's right to a "work in an environment unaffected by racial discrimination," [83] as a basis for its ruling, language more closely tracking interracial solidarity doctrine. The court did not, however, explain whether this "right to a nondiscriminatory work" environment was an overlapping right that captured the economic interest it had already mentioned, or was some independent and free standing source of injury.

But the most disturbing aspect of the *Clayton* decision is its long term effects, as no economic injury claims were filed after this decision. Yet, there is ample evidence that the harm she warned of is a major labor market phenomenon. Economists have shown that employers tend to decrease wages for certain jobs when they appear to be dominated by or "overpopulated" by minorities, and whites who are employed in these positions experience the same drop in wage levels.[84]

[83] (citing Mississippi College)

[84] Donald Tomaskovic-Devey GENDER AND RACIAL INEQUALITY AT WORK: THE SOURCE AND CONSEQUENCES OF JOB SEGREGATION. (ILR Press,1993) (noting employers tendency to devalue jobs associated with or dominated by minority workers and that white workers in these devalued occupations "were paid the wages associated with their job, not their race") Julie A. Kmec, *Minority Job Concentration and Wages*, 50 SOCIAL PROBLEMS 38-59 (2003) (discussing same)

In summary, the economic injury cases present a unique opportunity for courts to expand the number of Title VII disparate treatment cases that can be litigated, if they are willing to allow a white plaintiff to stand in the shoes of minority person when the white person is injured by the same discriminatory policy. Whites can bring economic injury cases when they have been stripped of certain compensation, benefits or other privileges because their occupation is now actually or perceived to be dominated by minorities. Similar to traditional disparate treatment claims brought by minority plaintiffs, economic injury claims can be proved with direct evidence—explicit discriminatory comments made by the employer when the race neutral policy is instituted. Alternatively, the claims can be proved with circumstantial evidence such as suspicious timing, or inconsistent or insubstantial justifications for the race neutral change in policy.

Some, however, will not be convinced that this unique opportunity is one worth taking. Critics will likely contend that these economic injury cases create an unreasonable litigation risk for employers, as they are based on an untenable standard for identifying discrimination. They will worry that every time an employer changes a race neutral policy in such a manner that it confers benefits solely on white employees he will have to brace himself for a lawsuit. However, this fear would be unwarranted. These economic injury plaintiffs would be subject to the same rigorous evidentiary standards for establishing discriminatory intent under Title VII disparate treatment analysis.[85] The standard provides that the risk of liability is low when an employer can demonstrate that it has a valid economic or administrative justification for its decision.[86] Of course, if the concern is that employers will be afraid of litigation, even if the risk is not real, this is not a negative development. Rather, if the potential for claims leads employer to self police, and spend more time thinking about whether proposed race neutral policies are systematically disadvantaging minorities, this behavioral change would be consistent with Title VII's antidiscrimination goals.

Skeptics may also argue that it simply is *not* discrimination when an employer creates a race neutral policy that adversely impacts both white and minority employees. However, this complaint turns the principle of discriminatory animus on its head. Title VII has always been interpreted in a manner that privileges sanctioning actors whom posses specific intent to subordinate or disadvantage minorities in the workplace. While there is doctrine to address when employers do not act with an explicitly discriminatory mindset, Title VII doctrine has remained centrally focused on actors who possess wrongful intent, and would not exempt these wrongful actors from sanctions merely

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[85] Some may question whether marginal whites should be granted standing to bring disparate impact claims as well. Because the scenarios anticipated here involve positions that are *about* to become minority dominated or are in the process of becoming minority dominated, the facts will not lend themselves well to a disparate impact analysis. However some of the same policy reasons that control the judgment for disparate treatment cases also govern this debate. [Reconsider/Revisit]

[86] This assertion is based on the basic doctrinal structure articulated in *McDonald Douglas*, allowing an employer to rebut a prima facie case of discrimination with evidence that its decision rested on a legitimate business reason. Of course, an employee still may try to claim discrimination was at play using the "motivating factor" analysis under *Desert Costa* or by claiming pretext; however, as long as the employer can demonstrate that it would have made its decision regardless of race, it will not be subject to liability.

because they found a way to include whites as well as minorities in a disadvantaged category.[87] Stated alternatively, if an employer *intends* to discriminate against minorities, the mere fact that he institutes a strategy that harms whites as well is not be sufficient to remove his actions from Title VII's reach.[88]

Some will be concerned that the economic injury cases create perverse incentives: anytime white working class workers are frustrated with an employer's policies, they will look to see if the decision made disempowering them was motivated by discriminatory intent. However, rather than being a criticism, this charge actually helps make my normative point. It would be a *good* thing if white workers grew accustomed to asking these questions, rather than their current tendency to blame minority workers themselves for the downturn in wages and benefits that occur when minorities increase their share of positions in a given occupation.

Critics may also argue that the framework is actually an attempt to turn Title VII into a vehicle to address class-based discrimination. However, this is simply not possible as a doctrinal matter. Title VII will only allow a plaintiff to initiate suit if he can show evidence of race-based discriminatory intent. If a policy is motivated by nothing else except a bare desire to compromise the interests of poor workers, it may be morally troubling, but it would not be actionable under Title VII.

Last, critics will argue that these economic injury cases will invariably turn into comparable worth cases, which have their own unique set of problems. Specifically, they may argue that white plaintiffs bringing these claims about cuts in wages and benefits for a particular position will compare their job's treatment against the treatment afforded another majority white job in the company -- turning these cases into comparable worth cases. Many scholars have written about the conceptual difficulties involved in comparing seemingly equal positions in a company, as well as challenging employers' economic decisions with regard to how to best set wages and allocate benefits in light of their particular economic situations. Claims structured in this way may be difficult to adjudicate. However, this comparable worth approach is an *optional* evidentiary strategy some plaintiffs may decide to pursue in economic injury cases, rather than a requirement that characterizes all cases. As in traditional disparate treatment cases involving minority plaintiffs, plaintiffs bringing economic injury cases may decide to prove disparate treatment in less complicated and less controversial ways. They may point to evidence regarding how the position they hold historically has been compensated and point to dramatic changes when minorities are hired. Alternatively, they may point out how wages for the same position in other companies have held steady when the position continued to be dominated by white workers.

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[87] Title VII has made limited provisions for looking primarily at effects, in disparate impact cases. White economic injury plaintiffs may determine that this tougher evidentiary standard, which involves more complicated questions of statistical proof, provides an alternative means for proving their claims.

[88] Because of certain ambiguities in Supreme Court doctrine on comparable worth, there have been only a paltry few comparable worth cases involving minority plaintiffs raising race discrimination claims. Consequently, we are unlikely to see a large number of race based comparable worth claims raised by white plaintiffs.

2. Marginal Whiteness and Linkages Between Discriminations

The second group of cases, linkage cases,[89] are cases in which a marginal white brings her own Title VII discrimination claim based on race, sex, or national origin and *supplements* her primary claim with one based on interracial solidarity. The supplementary "interracial solidarity" claim typically identifies some form of disparate treatment (failure to recruit, hire or promote or hostile environment[90]) directed at another minority group, and alleges the discriminatory practice has decreased the interracial solidarity plaintiff's opportunities for interaction with minorities.[91] The linkage cases are, perhaps, the most troubling in the doctrine, as courts have allowed these claims to go forward where the allegations regarding associational barriers are at best questionable.

For example in *EEOC v. Mississippi College*, a white female adjunct professor sued her employer for sex discrimination for its failure to hire her full time when a position at the College opened. The plaintiff also added an interracial solidarity claim alleging that in addition to discriminating against her, the College had failed to interview any candidates of color as well and, consequently, deprived her of her associational interest in interacting with minorities. Plaintiff's claim of interracial association seemed weak on the facts of the case, as she never complained about the College's failure to interview minorities for the professor's job until *after* she was denied the position. The claim for interracial association seems equally strange because it was unlikely that the College's decision to interview minority applicants for the professorship would have increased the plaintiff's opportunities for interracial association. Also, even if the College had hired a minority for the professor's job (thus depriving plaintiff of the job she believed she was entitled to), the addition of one minority professor would not have greatly increased her opportunities for interracial association. The court however does not press the plaintiff for specifics about her lost associational opportunities, and instead allowed the case to proceed to trial.

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[89] *EEOC v. Mississippi College,* 626 F.2d 477, 483 (5th Cir. 1980).

[90] Interracial solidarity cases concerning the creation of a "hostile environment" for non targets raise distinct concerns, which are not discussed here. There is certainly psychological research to support the recognition of such claims. See K. S. Douglas Low, Kimberly T. Schneider, et. al. Th*e Experiences of Bystanders of Workplace Ethnic Harassment*, 37(10) JOURNAL OF APPLIED SOCIAL PSYCHOLOGY, 2261–2297(2007) (explaining that whites are often psychologically injured by discrimination directed at minorities). There are risks, however, about tainting the workplace for minority workers when one allows a white person to bring a claim alleging the discriminatory treatment of others caused them a secondary injury. If the primary target was not offended, the argument goes, why should we be concerned about secondary targets? The practical concern with hostile environment interracial solidarity claims is that white claimants may then politicize the workplace in a manner that ultimately does not inure to the benefit of the alleged minority targets. These problems, however, are largely eliminated by examining these hostile environment cases as "racial labor cases," as the "racial labor" construct shows why these seemingly indirect commentsshould analytically be treated as directed at the complaining white employee.

[91] *See,e.g.*, *Stewart v. Hannon*, 675 F.2d 846 (7th Cir. 1982) (challenging screening test that disqualified her from a position on grounds of sex and raising an interracial solidarity claim alleging the test also had a disparate impact on African Americans)

The court's decision in the *Mississippi College* case seems incomprehensible until one uses a marginal whiteness framework, as it helps explain both the plaintiff's motivations and the court's treatment of her allegations. The plaintiff sued because of feelings of marginality: the College had maneuvered to ensure that all of the full time positions would be filled by white men. Once the plaintiff compared her situation to the full parcel of benefits she perceived white men to enjoy, she brought suit to challenge College's discriminatory practice broadly, believing that the race discrimination was probative of the College's general hostility towards all outgroup members (candidates whom were not white men). Recognizing that the race based Title VII violation plaintiff alleged was part of a campaign of outgroup discrimination, the court allowed her to plead facts showing the role of sex and race discrimination in the hiring process.

One can see from the *Mississippi College* case why the linkage cases are sometimes disturbing. Some are concerned that the plaintiff's interracial association claim in these cases is merely a strategic choice to supplement the evidence on her primary discrimination claim rather than vindicate the interests of minorities. The harshest version of this critique is that the supplementary "interracial solidarity" claim is an attempt to "bootstrap" one's way into victory on one's primary Title VII claim.[92] Another version of this complaint is, that the interracial solidarity claim acts insurance, adding an alternative basis for damages should the plaintiff's primary Title VII claim fail. Additionally, the claim disturbs some because of its symbolic result: the doctrine seemingly transforms a deeply self interested plaintiff into a heroic character out to vindicate the civil rights of minorities.

There are also more practical concerns about linkage cases. Critics worry that claimants in such cases will end up with high damage awards based on the employer's wrongful conduct against people of color, diverting damages away from those most injured by the discrimination. [93] Even those sympathetic to these plaintiffs' cause worry that the interracial solidarity plaintiff cannot present adequate facts to truly assess the effects of the disparate or discriminatory treatment, and may cause the court to pay damages without fully understanding the extent of harm the discrimination caused.

While these criticisms are troubling, the counterargument for allowing Title VII "linkage" cases is also compelling. For, these claims are little different than those brought by primary victims from an enforcement perspective. A successful interracial solidarity claim secures the guarantees of Title VII equality in the workplace for other employees in the years that follow, regardless of what the individual plaintiff's motivations might be in the suit that corrects the violation. Her suit allows the court to address conduct violative

[92] *Sidari*, 174 F.R.D. at 284 (expressing concern that plaintiff was attempting to prove his primary Title VII claim based on religion and national origin by proving race discrimination against someone else)

[93] *See also* Yoonjo J. Lee, *White Privilege or Blessing: Standing to Sue As Non-Targeted Bystanders of Racial Discrimination In Housing And Employment*, 28 HAMLINE J. PUB. L. & POL'Y 557 (2007) ((arguing that extending standing to white plaintiffs does not empower minority plaintiffs, re-establishes whiteness as the objective frame for establishing whether harm has occurred, and generally favors the "powerful over the powerless").

of Title VII that would otherwise have gone undiscovered. While her claim may not be sufficient to understand the full scope of the employer's decision, it is better to present some proof on the claim, rather than allowing the claim to go unlitigated. No one should underestimate the difficulties involved in resolving the policy issues at stake in the linkage cases. My point, however, is that in order to honestly engage with the arguments on both sides of the "linkage" debate we must strip away the arguments about "association" that currently dominate these cases.

The marginal whiteness framework further improves our ability to rigorously analyze these "linkage" cases, as the framework posits that plaintiffs will often see "discriminations" as linked to a general campaign of discriminatory differentiation from whiteness, making her feel both attuned to and threatened by the disparate treatment of "other" minority groups. That is, she may see these various forms of discrimination as efforts to draw up boundaries favoring an ingroup, progressively disfavoring outgroups as their relationship to a white male center grows more attenuated.[94] While controversial, some scholars like Clark Freshman have argued that Title VII should recognize these kinds of connections.[95] And, more recent empirical work by Ian Ayers shows that in some interactions white males did tend to discriminate against the opposite gender and racial outgroups, expressing ingroup preferences as opposed to specifically targeted dislike for one or two outgroups.[96]

The case for recognizing "linkages" in our doctrine is further made by the events in some interracial solidarity cases, particularly in *Sidari v. County of Orleans.* Sidari was an Italian-American Catholic male who worked in a predominately white Protestant male squadron at the Orleans County jail. His coworkers made it clear he was not white;[97] they labeled him a "Dago," and told than an Italian was a "nigger turned inside out." Additionally the officers humiliated black prisoners in his presence, referring to the

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[94] Evidence suggests the employee may be right in her assessment. *See* Jacqueline A. Gilbert & Millicent Lownes-Jackson, *Blacks, Whites and the New Prejudice: Does Aversive Racism Impact Employee Assessment?* 35 JOURNAL OF APPLIED SOCIAL PSYCHOLOGY 1540 -1553 (2005). The authors explain, "studies have found that a key factor determining the quality of supervisor-subordinate ties is relational demography, or the degree to which individuals are similar in their demographic attributes (e.g., gender, race, age) Demographic attributes are a proxy for attitudinal homophily, or the perception that others are similar in terms of values, attitudes, and experiences.

[95] Clark Freshman, *What Ever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between Different Minorities*, 85 Cornell L. Rev. 313 (2000) (arguing for the utility of a theory of "generalized discrimination" that would allow a litigant to raise evidence of discrimination against other outgroup members by the majority group to bolster her claim that she was discriminated against based on "difference" rather than particular animus towards her racial or ethnic group); Clark Freshman, *Beyond Atomized Discrimination: Use of Acts of Discrimination against "Other" Minorities to Prove Discriminatory Motivation under Federal Employment Law,* 43 STANFORD LAW REVIEW 241-273 (1990).

[96] Ian Ayers has done field work studying white male car salesmen's behavior which illustrates this concept of general outgroup discrimination, and layers or levels of biased treatment to different outgroup constituencies. *See* IAN AYERS, PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION (Chicago: University of Chicago Press, 2001) 69-73.

[97] *See Sidari v. Oreleans County*, 174 F.R.D. 275 (W.D.N.Y. 1996)

inmates as "niggers" and "DANS.[98]" When Sidari brought a Title VII national origin and religious discrimination suit, he thought it natural to include an interracial solidarity claim, alleging that the treatment of black prisoners was relevant to his claim. Indeed the harassing officers' decision to label him as a "nigger" and their subsequent maltreatment of the black prisoners seemed intended to heighten his level of humiliation.

The *Sidari* case also illustrates why the focus on "associational interests" and Civil Rights norms in interracial solidarity cases provides no assistance, as the court concluded that Sidari had no valid interest in "associating" with the black prisoners, as he was supposed to guarding not communing with them. One could resuscitate Sidari's claim within a Civil Rights era framework, by arguing the court had simply imposed a definition of associational interests that was too restricted in scope. This in fact is what the court did on appeal. Yet this minor correction does not get at the heart of the *Sidar*i case - as the plaintiff believed that the discrimination directed at blacks was linked to the discrimination he faced as an Italian. Only the marginal whiteness framework fully explains the harm, as Sidari experienced these discriminations as an orchestrated way of cordoning off whiteness. The facts in the *Sidari* case make one re-evaluate whether the charges of "bootstrapping" against marginal whites are fair or appropriate.

The linkage cases quite rightly seem quite controversial, yet they have been among the *most successful* claims under current interracial solidarity doctrine. In a range of cases concerning everything from hostile environment discrimination to claims about discriminatory hiring, white plaintiffs have been permitted to bring claims discussing evidence of discrimination against members of other groups, arguing it is relevant to their claims of interracial association.[99] Those who are opposed to this kind of linkage evidence should be deeply concerned for, as a practical matter, evidence of "linked" discrimination is already being presented in many of the cases involving interracial solidarity claims. Additionally, those who would support an evidentiary rule allowing linkages to be made between discriminations should also be concerned as, the current doctrine does not give adequate notice of the propriety of such claim, nor does it articulate clear standards plaintiffs can use to structure their cases.

Once the linkage cases are stripped of their superficial analysis regarding "interracial association," we can see that that they present key questions about the validity of proxy based suits concerning employment discrimination. The question is, should we allow white plaintiffs to stand in as proxy plaintiffs, particularly when there is no ready and willing minority plaintiff to bring a discrimination claim? Should this analysis change when the proxy suit is brought as a companion claim with the plaintiff's primary discrimination claim? Is risk of evidentiary bootstrapping too great to permit such companion claims, or is this appropriate in light of empirical evidence that discriminators

[98] DANS was an acronym for the term "dumb ass nigger."

[99] This linkage phenomenon can even be seen in cases that do not concern interracial solidarity claims. *See, e.g., EEOC v. St. Anne's Hospital* (Jewish Hospital Worker bring retaliation claim when she is subject to anti-semitic and racist comments after she hires the first black worker at the hospital where she was employed).

are motivated by ingroup preferences rather than specific and discrete animus against particular racial and gender outgroups? At present, courts avoid these questions by offering varied interpretations of what they mean by frustrated associational interests. However, the failure to squarely address these issues leads to inconsistent and unprincipled adjudication of current linkage cases and discourages new claims.

3. Marginal Whiteness and Racial Labor Cases

The "racial labor cases" are the third and last group of cases revealed by the marginal whiteness framework. In these cases whites are asked to do some work to assist with "the technologies of whiteness," the strategies whites use to ensure that certain benefits and privileges are only extended to white persons. In some of the cases white employees are asked to perform functions to facilitate the exclusion or disadvantage of minority employees in the workplace. These strategies include requests from one white person to another to refuse to refer minorities to jobs, exclude them from meetings or otherwise marginalize minorities in the workforce. They can also involve more passive interactions, where an employee is forced to listen to racist jokes and comments on a regular basis. Even in those circumstances where whites are required to "stand mute" in the presence of explicit discriminatory conduct these cases should be interpreted as requiring some labor, as evidenced by the complaints of employees subject to these situations.[100]

Bermudez v. TRC Holdings[101] gives some insight into the experiences of workers in a "racial labor" scenario. In *Bermudez*, plaintiff, a white female employee employed at a temporary worker referral agency, brought a Title VII suit alleging her coworkers asked her to engage in behavior violative of Title VII, and also engaged in a pattern of discriminatory behavior in her presence. She specifically alleged that she was asked to search through a pile of resumes for a "white sounding name" to send out for an interview, and was also asked to inquire of an employer whether he was willing to accept a black employee to fill a position. Although the white plaintiff, Schlichting, refused to comply she noticed that other employees who did cooperate appeared to receive benefits for their adherence to the discriminatory norms in her workplace. Unfortunately, however, the court concluded that interracial solidarity doctrine did not provide relief in her case.

The first reason the *Bermudez* case is significant is because it again reveals the weaknesses of interracial solidarity doctrine, even when a court is fairly supportive of solidarity claims. The Seventh Circuit indicated that Title VII "interracial association" claims could be brought in its jurisdiction; however, it rejected Schlichting's claim because she failed to plead any facts showing she lost associational opportunities. The court noted that, during the period Schlitling identified in her complaint, she had successfully interacted with her only black coworker and continued to refer black applicants to jobs despite her coworkers' attitudes. The court concluded that since there

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[100] See *Childress*, *supra* note __ (complaining that their supervisor required them to listen to racist jokes and comments about minority coworkers but had not specifically asked them to discriminate).
[101] *Bermudez*, 138 F.3d 1176(7th Cir. 1998)

was no evidence that her associational opportunities were compromised, Schlichting's claim simply was that she was "discomforted" by other discriminatory employees' attitudes. This discomfort, the court ruled, was insufficient basis for an interracial solidarity claim.

The *Bermudez* plaintiff found herself in a relatively bizarre situation. Because she resisted her coworkers requests for her to discriminate, and because she persisted and interacted with her black coworker, the court ruled that the discriminatory overtures by her white coworkers had not caused her injury. The court's decision, in effect, establishes a regime in which the white plaintiffs most motivated to preserve their interracial association opportunities, those most likely to protect the interests of minorities in the workplace, will find themselves unable to bring interracial solidarity claims because their success in thwarting discrimination proves that they actually were not injured.

The *Bermudez* case is also significant because it reveals how the "racial labor" construct as used in a marginal whiteness framework would better assist courts in resolving hostile environment cases. The *Bermudez* Court rejected the plaintiff's claim on the theory that she was not the direct addressee of the discriminatory comments or attitudes. Yet, fairly viewed, some of the comments the plaintiff complained of were directed at her: the requests that she engage in racial labor, by ensuring white applicants received preferences in assignments. The court however, fails to acknowledge this problem. It explains,

> "A reasonable person in Schlichting's position may have become angry or sorrowful on learning that people on Trinity's staff violated the legal rights of applicants in order to receive candy and flowers, but no reasonable jury could conclude that these comments made Schliting a victim of [] discrimination . . . Although the comments of which Schlichting complains reflect actionable discrimination against applicants for employment, a reasonable person in Schliting's shoes would have merely found them offensive *because they posed no threat to her personally.* The directly injured persons, rather than bystanders appalled to learn what is ongoing, are proper plaintiffs in a situation of this kind."

Bermudez, 138 F.3d at 1181. Ironically, a district court in the Eighth Circuit court issued a contrary ruling two years later, without even noting the split among the courts on this question.[102]

The value of the "racial labor" construct is it allows us to understand these overtures to discriminate as a kind of harassment Schlitling suffered because of her race. As explained in Part I, most whites have adopted the understanding that explicit race discrimination is wrong; consequently, they are likely to view direct overtures to

[102] See *Golleher v. Aerospace District Lodge* 837, 122 F. Supp. 2d 1053, 1063 (E.D. Mo. 2000) (allowing white plaintiff to avoid summary judgment on interracial solidarity claim based on testimony that workplace verbal discrimination against blacks "deeply offended" her and "caused her to "suffer[] emotional distress")

discriminate as coarse, offensive, irritating, and potentially even threatening (given that compliance could cause them to lose their jobs). The marginal whiteness framework would help courts to understand that the actual overtures to discriminate, as well as the "discrimination in the air," could cause harm to a plaintiff, allowing them to analyze cases like *Bermudez* as a classic disparate treatment cases. The framework helps one understand that the plaintiff in such cases has been targeted *because of her race* to do certain labor to maintain white advantages. This classic disparate treatment approach is far superior to the current strained cause of action based on Title VII's protection of whites "associational interests."

Noah Zatz, the only other scholar to conduct an in-depth analysis of the interracial solidarity cases, has suggested the cases I refer to as "racial labor" cases actually should be brought as "race performance" cases. Specifically, he argues that judges could adjudicate these cases under Title VII disparate treatment doctrine as cases where whites discriminate against other whites for their failure to "perform" or comply with stereotypical expectations regarding how to fulfill one's role as a white person.[103] The strength of this doctrinal analysis, to the degree it is premised on the prohibition on gender based stereotyping in *Price Waterhouse v. Hopkins,*[104] has been thrown into question by more recent grooming code cases that seemingly do allow employers to engage in some sex based stereotyping.[105] However, putting this particular doctrinal question aside, there are other reasons to be concerned about a model of performative identity that treats racially discriminatory conduct as a kind of identity performance moment. [106]

Race performance models posit that in response to the desire to be socially recognized as a member of a given identity category, individuals engage in "performative acts" that signal to others that they have claimed membership in a particular race or ethnic group.[107] Sometimes people will rely on grooming or stylistic choices (the African American

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[103] *See* Noah Zatz, *Beyond the Zero Sum Game* at 63.

[104] The strength of this doctrinal analysis, to the degree it is premised on the prohibition on gender based stereotyping in *Price Waterhouse v. Hopkins,* has been thrown into question by more recent grooming code cases that seemingly do allow employers to engage in some sex based stereotyping. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that a plaintiff could successfully raise a sex discrimination claim based upon sex-stereotyping). *Cf. See Jespersen v. Harrah's Operating Co*., 444 F.3d at 1106, 1111(permitting enforcement of grooming code that imposed arguably stereotypical standards of femininity on female employees)

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[106] For one, this does match up with whites descriptions of how they experience whiteness, as they sometimes claim that the see themselves as being unmarked by expectations about stereotypes. *See* Lewis, at 636 (noting that many whites lack self conscious understanding of themselves as racial actors). See McDermott & Samson at 248 (noting that "high school and college students are often unable to articulate what it means to be white, describing it instead as nothing or a vacuum"). I have some skepticism about this view, as it is likely premised on the existence of relatively culturally homogenous communities in terms of culture and class, and consequently does not give whites the opportunity to compare their practices against other distinct groups of white persons. Rendered in its simplest terms: while the Kennedys and the Bush family are both white, they do not perform whiteness in the same ways. Consequently, the arguments about the unmarked white subject do not form a strong basis for arguments against using performativity to understand white identity.

[107] Rich, *supra* note __ at 1139, n. 12 (identifying scholars using race performance theories)

woman's dredlocks or the Indian woman's choice to wear a sari are examples). Sometimes individuals use particular speaking styles or accents to establish their claim to a given identity (e.g. a Latino person's use of Spanglish). Sometimes individuals engage in behavior or make expressive choices that they do not notice and therefore do not know have a race based expressive meaning (e.g. a black person's use of Black English). I have previously argued that Title VII has much to learn from identity performance theory, as the theory helps show why our Title VII's antidiscrimination norms counsel against allowing employers free discretion to prohibit these racially and ethnically marked performances. More specifically, I argue that employers should be required to make a showing that the employee's behavior (or expressive choice) is truly interfering with the employee's performance of his job.

While I generally believe that performance theory provides assistance in resolving many Title VII disputes, I have been careful to limit my analyses to cases where a worker's race/ethnnic performance is either culturally based or merely involves a feature accidentally acquired as a consequence of racial segregation.[108] Stretched to the limit, my work also supports the use of performativity theory to justify granting workers protection to express race related political views, as long the employee's behavior does not violate the antidiscrimination rights of other coworkers.[109] In my view, the theory of race performance used by courts should not acknowledge "so called" performative behavior that violates the Title VII rights of another employee; these acts should merely be treated as illicit activity.[110] The reasons for this are clear.

When an employer sanctions individuals for "performance," for the expression of racial identity, in the absence of a legitimate, non-discriminatory reason, our equality norms should be offended. No one should be subject to a higher level of scrutiny merely because the cultural default of the workplace makes his or her grooming or stylistic choices suspect. It is quite different, however, for an anti-discrimination regime to *punish* an employee for freedom of expression, or to provide expressive protection for *only those employees whose political views support its continued* enforcement. If Title VII protects only "non-discriminatory" forms of white "race performance" but allows employers to sanction employees for what it believes are discriminatory versions of whiteness, it is arguably subsidizing one kind of speech over another.[111] Race performance regimes are

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[108] Indeed, a performativity model would require that Schlitling's coworkers, working from stereotyped assumptions, would punish her for all her non-conforming conduct, including interacting with minorities. Yet Bermudez's coworkers did not highlight how she acted towards blacks; instead they sought her participation or passive assent to the discriminatory practices they chose to engage in.

[109] Rich, *supra* note __ at 1176 -1186 (laying out theory of race performance)

[110] Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII* 79 N.Y.U. L. REV. 1124,1258-1259 (2004) (the expression of prejudice *may* be regarded as a form of race performance). However, I explain that it is not a kind of "race performance" the law should recognize as "an employee's right to engage in race/ethnicity performance ends when she begins to trample on the interests [or rights] of other employees."

[111] One could argue that my regime, which simply refuses to treat any discriminatory conduct as a race performance practice is equally hostile to discriminatory speech but it does no *narrowly*, only to the extent the specific practice has actually injured another worker. Instead, broad protection of "non discriminatory

only viable to the extent they avoid these questions about which antidiscrimination norms may be expressed.[112]

Also, treating discriminatory behavior as a "stereotype" associated with the performance of a certain kind of whiteness conflates two different kinds of practices: expressive practices that are constitutive of that identity and practices that only have expressive value because they maintain material privileges for persons claiming to belong to an identity category.[113] Title VII may prohibit actions that attempt to hold resources hostage for the benefit of a particular group without offending anyone's First Amendment sensibilities.

Zatz, however, is right that Title VII needs a way to prohibit overtures to engage in discriminatory conduct, as those overtures are made between rank and file employees.[114] By constructing these overtures as "racial labor" cases we can allow Title VII to protect an individual (whatever her racial or ethnic membership) whenever a high status group attempts to force that individual to do work to maintain privilege or status for any racial or ethnic group. The racial labor construct could even be used in cross race cases when, for example, a minority worker is asked to do labor to assist in the maintenance of white privilege. If a white worker at an employment agency asks a Latino employee to look for a resume with a white sounding name for a particular job, she would be asking the Latino employee to engage in a kind of racial labor, with the promise that he will be granted certain esteem. She would not be asking him to "perform" a stereotyped version of white identity.

Importantly, the racial labor cases are consistent with one of the propositions that informs the marginal whiteness framework: the expectation that many whites experience overtures to discriminate with anxiety, and will report the harasser for reasons solely related to self interest. The "marginal whiteness" framework also allows courts to see how some whites privilege maintenance strategies can be experienced by marginal whites as "dignitary assaults," as requests that they perform uncompensated "racial labor" which many perceive as dangerous and threatening.

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performances of whiteness" and a crack down on discriminatory performances invites the courts into a quagmire of determinations about when a form of white identity performance counts as discriminatory.

[112] I reserve judgment on whether antidiscrimination law should facilitate the dissolution of whiteness or stand mute on the subject as whites attempt to forge a progressive account of white identity. See Wellman at 339-340 (describing some theorists efforts to create a "positive, proud, attractive white anti-racist identity that is empowered to travel in and out of various racial/ethnic circles with confidence and empathy" but worrying that such efforts simply refocus attention on whites without sufficiently attending to the continuing problem of inequality) (quoting *White Reign)*; *Cf.* Oliver, at 1272 (describing the New Abolitionists call for the eradication of whiteness as a necessary condition for eliminating racial inequality. *See also* Olsen, (arguing dissolution is required.

[113] A person may feel he is "expressing" his belief in white supremacy by refusing to refer blacks to a particular employer. However, aside from its material effect in shifting resources it has no expressive dimension. In contrast, a southern white person's decision to wear a cowboy hat to express a white identity has expressive register with no material repercussions.

[114] Zatz, *Beyond the Zero Sum Game* at 63.

C. Interracial Association and Civil Rights Norms

Given the limitations these Civil Rights era norms have imposed on the development of interracial solidarity doctrine, and courts seeming awareness of the problem in many circumstances, one wonders why these norms have continued to play such a dominant role. One explanation is that interracial solidarity doctrine was never expected to play a significant role in clearing the market of discrimination; instead it was created because of its "expressive function." As Cass Sunstein explains, judges occasionally create common law rules (or judicially constructed causes of action) because of the statement they send, rather than their potential to deter wrongful conduct or provide remediation.[115] Proponents of this view would argue that, it is more important to preserve interracial solidarity doctrine as a tool of the noble civil rights soldier, one committed to racial justice above all else. This normative project should be pursued even if it means we miss certain opportunities to address Title VII violations. Indeed, because interracial solidarity doctrine specifically celebrates the value of "interracial association," activity believed to be central to the project of racial equality, it makes sense to create a Title VII suit that clearly reflects the value we attach to cross racial relationships.

Sunstein expresses some doubt about whether "expressive" laws, are truly effective in particular, because there are many barriers that present easy communication of judicial decisions to lay persons.[116] He notes that, even when these expressive statements in law reach their intended public targets, they have been so filtered that one cannot be sure the original message's integrity has been maintained or disseminated widely.[117] Assuming, however, that we have the institutional mechanisms in place that allow widespread quality transmission of judicial pronouncements, there is much to be gained if courts recognize injuries as framed under the marginal whiteness paradigm as well. For the new kinds of injury recognized under a marginal whiteness framework send other important antiracism messages thus far unexplored. Chief among them, the message sent is that strategies to maintain white privilege can economically injure whites and well as minorities in precisely the same ways. It sends a message to whites that strategies to maintain privilege can directly compromise one's ability to experience dignity at work. In expanding the statements that interracial solidarity sends, we do risk losing our primary message about Civil Rights norms. If this is truly a grave concern that prevents interracial solidarity claims of the kind I have described from being recognized, we should consider complementary causes of action that allow marginal whites to sue, rather than a regime that silences these plaintiffs entirely.

In summary, although the Civil Rights era norms that inform interracial solidarity doctrine still serve an important function, Part II shows that our exclusive focus on them has had a number of costs. First, the Civil Rights era norms have stunted interracial solidarity doctrine's growth, forcing courts to elaborate on a logically indefensible concept of injury. Second, courts' focus on these historically specific norms has prevented them

[115] Cass Sunstein, *The Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996)
[116] Sunstein, *The Expressive Function of Law* at 2024-25.
[117] *Id.*

from recognizing a broader range of whites' prejudice related injuries. The case analyses performed in Part II are intended to give courts the confidence necessary to recognize some of the additional interests at stake in interracial solidarity cases. It demonstrates that when marginal whites bring claims which, on their face, are primarily designed to address their individual dignitary concerns or to pursue economic self interest, courts should not be immediately skeptical. Instead, they should consider the larger question: whether the ultimate effect the suit has on workplace inures to the benefit of vulnerable minority employees. If courts can develop some comfort with this approach, they could reinvigorate interracial solidarity doctrine, opening the door to a new era antiracism litigation.

Part III Contemporary Whites' Attitudes and Marginal Whiteness

Part III looks to the future. Section A demonstrates the emergence of a new class of whites, persons whose attitudes about discrimination and racial identity are fundamentally different from whites from the Civil Rights generation. Importantly, because interracial solidarity doctrine has remained fixated on Civil Rights era norms, it has ceased to be compelling to those white persons socialized in an environment oriented to post Civil Rights era norms. Section B demonstrates how the marginal whiteness framework better comports with these post Civil Rights era whites' understanding of their relative social position. Additionally, it shows that Title VII, properly construed to recognize marginal whites' injuries, has the potential to further weaken the attraction of whiteness for this new generation of whites, as well as focus whites' attention on the interlocking nature of multiple systems of social subordination.

1. Whites Beliefs About Racism

Many post Civil Rights era whites appear to be suffering from what I call "racial fatigue," which is characterized by a disengagement from antidiscrimination struggles and the adoption of a passive attitude towards race discrimination.[118] These whites explicitly reject dominative or Jim Crow style discrimination, characterizing it as a social evil.[119] They would never make explicit claims about white superiority, or engage in overtly racist actions.[120] Yet, despite their general adoption of Civil Rights era norms, these whites are not actively interested in the problem of discrimination. Rather, "racially fatigued" whites

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[118] Lisa B. Spanierman & Mary J. Heppner, *Psychosocial Costs of Racism to Whites Scale* (PCRW)*: Construction and Initial Validation*, 51(2) J. OF COUNSELING PSYCHOL. 249, 250-51 (2004).

[119] Lawrence Bobo, et. al. *Laissez-Faire Racism: The Crystallization of A Kinder, Gentler Antiblack Ideology* in RACIAL ATTITUDES IN THE 1990S: CONTINUITY AND CHANGE 15, 23-25 (Steven Tuch & Jack K. Martin eds., 1997). See also sources collected in note __.

[120] This shift in attitudes should not be read to mean that these whites are incapable of engaging in discrimination, just that many whites currently believe that inequality is a natural consequence of market vicissitudes, minorities' disadvantaging cultural practices or their tendency to use race neutral rationales and explanations to explain bias. Bobo, *Laissez-Faire Racism,* supra note ___, at 21-22 (describing rise of laissez faire racism); Michael Hughes, *Symbolic Racism, Old Fashioned Racism and Whites Opposition to Affirmative Action in* RACIAL ATTITUDES IN THE 1990S, *supra* note __ , 43, 47-49 (describing rise of symbolic racism); John B. McConahay *Modern Racism, Ambivalence and the Modern Racism Scale*, (describing rise of modern racism).

are frustrated by continuing discussions of race discrimination. In their view, the race discrimination problem has bee fundamentally solved.[121] In their view, minorities continuing complaints are overblown.[122] If discrimination still exists, they contend, it has no connection to their lives.[123] Post Civil Rights era whites however, are still deeply concerned about being labeled racist,[124] and consequently face a unique quandary. They seek to disengage from discussions of race discrimination, while at the same time maintaining a favorable view of themselves as proponents of racial equality. To maintain this favorable self image, whites suffering from racial fatigue tend to avoid interacting with minorities, as well as conversations about race.

Expectedly, whites suffering from racial fatigue are typically passive when confronted with race discrimination. In their view, they are only responsible for their own behavior, and therefore have a personal obligation to avoid overtly racist acts.[125] However, they are unmotivated,[126] disinterested and even distressed by the idea of confronting others who act in a discriminatory fashion.[127] Psychologists report that, consequently, many whites demonstrate "broad based passive acceptance" of other whites' discriminatory behavior. They have indicated that the new challenge for antidiscrimination advocates is to get whites to problematize their "silent and complicit acceptance" of other whites' discrimination.[128]

Post Civil Rights era whites' growing passivity about racism should have been expected, as many measure their primary obligations against early Civil Rights era account of whites' relationship to discrimination. Again, this early account highlighted the wrongfulness of dominative, Jim Crow style discrimination, a problem that rarely surfaces in contemporary cross racial interactions. Post Civil Rights era whites have not responded well to the new post Civil Rights command that whites should be more

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[121] Laura Smith *et. al., The Territory Ahead for Multiracial Competence: The Spinning of Racism,* 39 (3) PROF. PSYCHOL., RES. & PRAC. 337, 342 (2008)
[122] Smith*, The Territory Ahead for Multiracial Competence* at 343.
[123] *Id.* at 342 (noting tendency of white test subjects "not connect themselves or racist whites whom they know to it's existence)
[124] *See* Matthew P. Winslow, *Reactions to the Imputation of Prejudice*, 26 BASIC & APPLIED SOC. PSYCHOL. 289, 296 (2004).
[125] Smith*, The Territory Ahead for Multiracial Competence* at 338; Claire M. Renzetti, *All Things to All People Or Nothing To Some*, 54 SOCIAL PROBLEMS 161-169 (2007).
[126] Smith., *The Territory Ahead for Multiracial Competence* at 342-43 (noting many whites treat other whites racist comments and jokes as "just a matter of opinion")
[127] *See* Eduardo Bonilla-Silva, RACISM WITHOUT RACISTS 29-30, 43-47 (2d ed. 2006).
Indeed, many whites, fearing discomfort or mischaracterization will avoid people of color, discussions of race and, most important, avoid confronting friends and associates when they engage in discrimination. *See* BARBARA TREPAGNIER, SILENT RACISM: HOW WELL-MEANING WHITE PEOPLE PERPETUATE THE RACIAL DIVIDE 47-48, & 62 (2006); Smith, *et. al.*, *The Territory Ahead* at 337, 342 (noting whites tendency to dismiss associates racism as "a matter of personal opinion").
[128] Some scholars have even noted that displays of discriminatory behavior by one white subject tend to increase the discriminatory behavior of others. *See* Fletcher A. Blanchard, Christian S. Crandall, John Brigham & Leigh Ann Vaughn, *Condemning and Condoning Racism: A Social Context Approach to Interracial Settings* 79(6) Journal of Applied Psychology 993-997.

attentive to seemingly race neutral behavior that actually is motivated by racial bias.[129] Many whites are hesitant to take up this challenge given the high social costs of mistakenly labeling someone or some behavior racist.[130] They also fear the potential mirror effect (requiring them to problematize their own behavior) and know that confrontations of individuals engaged in subtle discrimination do not provide the easy psychological benefits derived from condemning explicit racists.

Additionally, these whites have grown more passive and defensive because their has been a decisive effort to shift conversations about racism away from personal interactions to the problem of "white privilege," namely the unfair cultural and structural advantages whites enjoy as a consequence of wealth distribution established during *de jure* segregation.[131] Social psychologists explain that some whites are disturbed by these conversations because of "identity threat"— by acknowledging the role of white privilege in their success, they must confront questions about their own deservingness, risking a kind of global self invalidation.[132] Additionally, pure rational self interest makes them invested in preserving and capitalizing on the facially race neutral social benefits society currently offers them. Also, whites find it difficult to feel guilty about these privileges, as they played no hand in establishing current social arrangements (or the *de jure* segregation that improved their relative cultural standing).[133] Even those more readily willing to give up certain advantages worry about the perpetual scrutiny race neutral arrangements must undergo for evidence of bias, and express concern that there is no clear stopping point for dismantling white privilege.[134] These anxieties about white privilege conversations are further aggravated by conservative politicians who foster the belief that race based social

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[129] Derald Wing Sue, Christina M. Capodilupo, Gina C. Torino, et al., *Racial Microaggressions in Everyday Life*, 62 AM. PSYCHOLOGIST 271, 271-86 (2007); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1098-99 (2008) (discussing reluctance of white viewers' reluctance to label ambiguous events as discriminatory); Madonna G. Constantine & Derald Wing Sue, *Perceptions of Racial Microaggressions Among Black Supervisees in Cross-Racial Dyads*, 54 J. OF COUNSELING PSYCHOL. 142, 148 (2007) (same).

[130] JOE FEAGIN, WHITE RACISM at 241-42 (describing "talking back" to racism "as an act of courage, an act of risk" that requires one to defy cultural norms and sometimes speak up about racism in seemingly ambiguous subtle situations); Janet Swim, et. al. *The Role of Intent and Harm in Judgments of Prejudice and Discrimination* 84 JOURNAL OF PERSONALITY & SOCIAL PSYCHOLOGY 944, 945 (noting tendency for caution in labeling a person racist because the label is difficult to disconfirm)

[131] For examples, see generally THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN (Oxford 2004) (describing the role whites' accumulated wealth plays in maintaining racial inequality); Daria Roithmayr, *Locked in Segregation*, 12 VA. J. OF SOC. POL. & THE LAW 197 (2004) (describing cumulative effects of racist homeowner associations on present day patterns of residential segregation). Some scholars have argued that whites should not in fact be treated as being responsible for these conditions, and that we now have "racism without racists." *See* RICHARD FORD THOMPSON, THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE 31-32 (FARRAR, STRAUUS & GIRROX 2008)

[132] Nyla Branscombe, Michael T. Schmidtt, & Kristen Schiffhauer, *Racial Attitudes In Response To Thoughts of White Privilege*, 37 EUR. J. OF SOC. PSYCHOL. 203-15 (2006); Janet K. Swim & Deborah L. Miller, *White Guilt: Its Antecedents and Consequences for Attitudes Toward Affirmative Action*, 25 PERSONALITY & SOC. PSYCHOL. BULL., 500, 514.

[133] *See* Bonilla-Silva, RACISM WITHOUT RACISTS, 31-39;Joel Olsen, *Whiteness and the Participation-Inclusion Dilemma*, 30 POLITICAL THEORY 384, 391(2002).

[134] *See* Bonilla-Silva, RACISM WITHOUT RACISTS, 31-39.

justice programs are putting people of color ahead of whites in the competition for social benefits. [135]

Yet these well rehearsed arguments do not tell the fully story of why white privilege discussions have alienated white persons. For, at the heart of many whites' complaints, is the belief that the benefits of whiteness are simply not that valuable. When judged from a historical vantage point, contemporary white privilege is clearly less significant. As political theorist Joel Olsen explains, after the Civil Rights movement "the possibility of aristocrati[c standing] that white privilege offered . . . disappeared." To many whites it now appears that "social advancement . . . is subject to the competitive rules of the market rather than inhering in racial privilege." Whites are generally aware that being white provides them with certain "statistical advantages," and potentially cultural capital; however, they do not perceive how these advantages assist them on a day to day basis. "It means almost nothing to a white man to know that, on average, white males live almost ten years longer than Black males. The statistical likelihood that a white child will score 200 points higher on her SAT than a Black child is no guarantee that [a particular] white child will actually perform at that level, much less get into the school of her choice." Olsen explains, "[b]ecause these [benefits of whiteness] are probabilities and not guarantees, the aggregated advantages of [contemporary] whiteness hardly seem like privileges . . . . [These] continuing wages of whiteness are small comfort to a world [of whites] used to more.[136]

Importantly, the Civil Rights era model for conceptualizing whites' prejudice related injuries does not take account of these changes in whites' attitudes about racism or white privilege. Instead, the model posits that whites know that they concretely, and meaningfully benefit from white privilege, and can only be persuaded to abandon these benefits by being told about the higher order psychological and moral harms they experience when they allow prejudice to unfairly subordinate others. [137]

In summary, the moral and psychological account of white injury does not resonate with many post Civil Rights era whites, is because discrimination conversations have fundamentally changed. Specifically, now that whites are being asked to consider whether facially race neutral ambiguous personal interactions facilitate bias, Civil Rights accounts concerning racism's ability to inflict moral harm on those involved seems strange. Whites are unlikely to believe that witnessing parties' seemingly innocent mistakes involving racial bias somehow cause them to suffer moral or psychological injury. Also, the Civil Rights era account of whites' relationship to discrimination seems even more an ill fit in discussions of "white privilege." As explained above, many whites

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[135] The converse is also true: those primed to think about the specific ways in which they were benefited by whiteness demonstrated the highest levels of modern racism. Branscombe, Schmidtt & Schiffhauer, *supra* note __ at 213.

[136] *See* Olsen, *The Participation Inclusion Dilemma* at 21.

[137] Some of the moral and psychological harms seem particularly unappealing to actors primarily focused on economic and short term considerations. *See* Spanierman, *Psychosocial Costs of Racism to Whites* at 249-62 (describing discrimination's costs to whites mental health, noting it makes a white person lose one's authentic self, develop a distorted sense of history, and spiritual depletion).

feel little risk of moral and psychological injury from using race neutral advantages that *someone else*'s discrimination may have created for them. They think it is morally wrong to ask them to abandon all social capital their ancestors accumulated merely because it was accumulated in an era tainted by racism.[138] Finally, even if this advantage taking is culpable at some level, many whites may believe that the little bit of advantage they enjoy in a situation seems something worth taking, given the existence of social justice programs that benefit minorities' interests.

Of course, the Civil Rights era account of whites' prejudice related injuries is not wholly incorrect; the moral and psychological harm bystanders of discrimination suffer has been empirically documented.[139] What this discussion demonstrates however, is that whites' devaluation of white privilege and ambivalence about white identity, now allows them to fight white privilege when they believe it disadvantages them. Because many whites feel they are being saddled with responsibility for privileges they do not enjoy, there is no way they will subsidize these privileges for other whites' gain. This insight leads one to a rather striking realization. Scholars may be complaining about changes in white identity that are actually evidence that *whites' investment in the protection of white privilege may be declining*.[140] However, things may be even worse that simply overlooking the potential breakdown of white privilege. Rather, there is evidence that scholars' current way of discussing white privilege may actually be aggravating the race problem. The next section explores this issue in more detail.

B. Rethinking White Privilege

Studies show that some whites still react constructively to discussions of white privilege; indeed, social psychologists initially predicted this was how to make whites more active in antidiscrimination efforts, by inducing collective guilt about whites' misdeeds as a group.[141] However, more recent studies have shown that some whites are actually made *more racist* by discussions of white privilege.[142] Part of the increase in racism is due to the identity threat concerns discussed above, as those most threatened by discussions about white privilege were those whites who are strongly attached to a white racial identity. Yet, importantly, most whites do not regard whiteness as their primary social identity, instead selecting more idiosyncratic or context specific distinguishing

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[138] The authors of WHITE RACISM recognize the decreasing attractiveness of this "moral and psychological account" for many white persons. They ask "Will whites forsake their material and psychological privileges out of the goodness of their hearts or because they accept the American equality creed at an abstract level?" See JOE R. FEAGIN, ET. AL. WHITE RACISM, 220-236 (Routledge 2001).

[139] Low & Schneider, *supra*, note 89 at 2261–2297

[140] *See* Sean Brayton, *MTV's Jackass: Transgression, Abjection and the Economy of White Masculinity*, 16 JOURNAL OF GENDER STUDIES 57-72 (2007)

[141] Adam Powell, Nyla Branscombe & Michael T. Schmidtt, *Inequality as Ingroup Privilege or Outgroup Disadvantage: The Impact of Group Focus on Collective Guilt and Interracial Attitudes* 31(4) PERSONALITY & SOC. PSYCHOL. BULL. 508-21 (2005).

[142] *See* Bonilla-Silva, RACISM WITHOUT RACISTS, 31-39.

factors to identify themselves.[143] However, social psychologists have noted that whites tend to *increase* their attachment to whiteness in circumstances when race based group conflicts over resources are *highlighted*.[144] When scholars talk about white privilege they risk increasing the salience of whiteness for less race identified whites, in a context that gives whites an investment to cling to a white identity.

Indeed, unwittingly contemporary discussions of white privilege fuel exactly this dynamic. Scholars tend to focus on only those aspects of white privilege that *all* whites enjoy, regardless of the other socially relevant features of a white person's identity that might limit his access to important aspects of white privilege. Scholars grow frustrated when whites mention other aspects of their identities in privilege discussions, interpreting whites' comments to be attempts to flee from social responsibility.[145] Consequently, whites are discouraged to see these alternate non-raced features as important, and told to focus on their identities as white persons. Even worse, contemporary privilege discussions have a disturbing tendency to rather painfully articulate each and every possible benefit one gains from whiteness (from the trivial to the consequential) increasing whites' anxiety about their losses with the end of white privilege.[146] What is offered in return for giving up the material and cultural capital of whiteness? Under the Civil Rights account, all that is offered is the promise of amorphous and long-term psychological and moral benefits.[147]

The discussion above, outlining the perils discussions of privilege may present, are not meant to dissuade persons from having conversations about white privilege. Rather, we must continue to discuss white privilege if there is any hope of dismantling structural and cultural arrangements that disadvantage minority persons. Yet it seems that conversations about white privilege have much more potential to recruit supporters and discourage critics if they proceed in a more nuanced fashion. The marginal whiteness paradigm offers opportunities for these more nuanced conversations.

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[143] Charles Jaret and Donald C. Reitzes, *The Importance of Racial-Ethnic Identity and Social Setting for Blacks, Whites, and Multiracials Author(s)* 42 Sociological Perspectives 711, 732 ("whites seem to build a self image that is very individualistic, colored not mainly by race/ ethnicity, class or age but instead by highly personalized qualities and idiosyncrasies that are appreciated by them and their reference groups.)
[144] *Id.* at 731 ("when people are in more diverse settings, especially if there is tension or conflict present, they are likely to make self comparisons and contrasts that elevate feelings about the importance of their racial-ethnic identity.")
[145] *See e.g.,* Charles A. Gallaher, *White Racial Formation* 9 in CRITICAL WHITE STUDIES (arguing whites claims about ethnic based subordination are part of privilege avoidance strategies); Ruth Frankenberg, *White Women, Race Matters: The Social Construction of Whiteness* 634 in CRITICAL WHITE STUDIES (warning against engagements with "white ethnic heritage that . . . evade race privilege in the present").
[146] *Id.*
[147] Discussions of whites' concrete benefits from "white privilege" tend to dominate the psychological literature as well. See Spanierman & Hepper, *Psychosocial Costs of Racism to Whites* at 2-4 (noting that "white privilege" p[rovides whites with (a) access to society's resources, (b) advanced educational opportunities; (c) life within a culture that delineates one's worldview as correct, and (d) a sense of entitlement.) Their discussion of the costs of racism focuses on "psychosocial costs," noting that racism had cognitive, behavior and affective costs for whites, such as guilt, shame, apathy, and anxiety.

C. The Antidiscrimination Benefits of Marginal Whiteness

Civil Rights era scholars were right to try to motivate whites' interest in antidiscrimination efforts by drawing attention to the costs of discrimination for white persons. Even now, in the face of current growing white apathy some social psychologists have again called for additional theories that "identify costs of racism to white" persons.[148] My primary concern in Part II was to draw scholars and judges attention to some additional costs, ones that thus far are little represented in scholarship and not clearly acknowledged in legal doctrine. Part II outlined some of the potential economic costs, as well as dignitary costs (in the form of racial labor), high status whites impose on low status whites in the attempt to command their assistance or passive assent in the maintenance of white privilege. This section shows why, at a psychological level, otherwise alienated whites might be convinced to use Title VII to vindicate their interests.

First, marginal whiteness pushes whites to think about whiteness as a shifting coalition that can leave them outside of the circle of privilege in particular contexts. Consequently, it will tend to increase whites' skepticism and discomfort with white privilege when they do find themselves in the circle of advantage. Because current discussions of white privilege push whites to imagine themselves as a stable privileged group, rather than thinking about how they are periodically forced outside of whiteness' margins, it tends to unnecessarily increase whites and minorities perceptions of conflict *even in circumstances where their economic and dignitary interests are aligned*. Stated more simply a working class white person using a marginal whiteness framework is more likely to speak up if he has evidence that wages for persons in his job position have been cut because it has become a minority dominated position. He is less likely to speak up if he has been consistently told that he is a beneficiary of white privilege, and his complaints about class disadvantage are merely an excuse to avoid confronting his privileged status.

Second, marginal whiteness gives whites an incentive to examine the repercussions of race neutral arrangements with an eye toward their potential discriminatory effects. Instead of automatically assuming that the unraveling of these systems will cause them to lose "white privilege," they may instead consider whether the system also disadvantages them because of ethnicity, class, or religion. So, for example, say that a marginal white learns that the police department's qualifying test for promotion to detective tends to disadvantage black officers. Instead of automatically assuming that he will lose out when the exam is eliminated, he might consider whether ethnic whites or poor whites also do poorly on the test and will benefit from its elimination. Third marginal whiteness tends to make whites more active in circumstances where they are asked to perform "racial labor" because it urges whites to recognize the possibility of linkages between discriminations. While the presence of one type of bias in the workplace (sexism, for example) may not automatically mean that others (e.g. racism) exist, the marginal white is encourage to

[148] Lisa B. Spanierman & Mary J. Heppner, *Psychosocial Costs of Racism to Whites Scale* (PCRW)*: Construction and Initial Validation*, 51(2) Journal of Counseling Psychology 249 (2004); Lisa B. Spanierman & Patrick Ian Armstrong, *Psychosocial Costs of Racism to Whites: Exploring Patterns Through Cluster Analysis*, 53 (4) Journal of Counseling Psychology 431, 431-441 (2006).

recognize that his primary concern should be how ingroup preferences are being constructed by high status whites rather than assuming that animus against one group has no connection to his experiences. As a consequence the marginal white will have more difficulty if he is tempted to passively accept one kind of bias, and his discomfort may trigger him to complain or even sue, particularly if Title VII protections are available.

Finally, the marginal whiteness framework dovetails with many alienated whites current feelings about white identity itself. Scholars have noted that many whites at present regard white identity with a mixture of shame, pride and ambivalence.[149] Legal scholars have complained that whites tend to flee from whiteness when race discrimination is discussed, typically highlighting some other aspect of their identity.[150] However, thanks to the work of social psychologists, we now know that this is a typical reaction to identity threat, not a moral failing. And we should be less invested in preventing this kind of identity flight given the empirical evidence that forcing whites to accept a simple unqualified white identity in these conversations may do more harm than benefit. Marginal whiteness offers a way around this quandary: it keeps whites talking about white privilege, and makes them more interested in examining its effects. After having had conversations where they variously find themselves on either side of the line (enjoying unfair advantages and in others being disadvantaged) with regard to a particular workplace practice, problem or rule they will be less defensive and I predict more accountable and amenable to giving up unfair advantages.[151]

D. <u>A Future of Marginal Whiteness</u>

What might encourage whites to take up marginal whiteness? Oddly enough, discussions of the nature provided here. One of the ways to encourage whites to be more invested in racial equality is to defamiliarize self described whites from their current racial existence. Once whiteness is imagined and experienced this way, consciously as a state of yearning and lack, it is difficult to simply return to one's previous ways of experiencing racial subjectivity.[152] Ladelle McWhorter explains, this is precisely what is required to disrupt the networks of power that facilitate the exchange of benefits within white communities by subjects who do not imagine themselves to be and indeed are not consciously agents of racism. Skeptics will argue that it is unlikely that such an account will jump from legal scholarship into the cultural consciousness in this manner. And while there certainly is no clear and direct route between the two, previous accounts of white privilege, while much more threatening to whites, have managed to exert significant cultural influence.

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[149] Swim, *White Guilt* at 500, 500-501 (ambivalent relationship to whiteness). He reports on studies showing that whites often "feel guilt by association with the white race." Indeed, the experience of "discomfort, shame and sometimes anger at the recognition of their advantage of being white."

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[151] Eichstedt, *Problematic White Identities* at 463 (discussing discrimination experiences of gay whites, Jews and white women and their observations that their outsider status both allowed them to understand oppression while simultaneously taking responsibility for the white privilege they do currently enjoy)

[152] Ladelle McWhorter, *Where Do White People Come From? A Focaultian Critique of Whiteness Studies 31(6) Philosophy & Social Criticism,*533-556 (2005).

Second, much of this socialization has already occurred. Education about partial privilege is the legacy of multiple movements to politicize persons about disempowered social identities. The disability rights movement, feminist movement and movements based on class and sexuality have emphasized the social salience of these other facets of identity. To build on the work these movements have done, we must now challenge whites to think about how these identity components affect their experiences of whiteness.[153]

The last factor that may cause whites to be attracted to marginal whiteness is that the framework responds to America's changing demography. The number of multiracial persons in the United States has risen. At the same time as there has been a willingness to accept mixed race persons as being socially white. This has created a situation in which many persons socially recognized in some spaces as being white are treated as minorities in others. This split consciousness may lead multiracial persons to have a distanced relationship to whiteness similar to that predicted by the marginal whiteness model. In light of all the changes described above, scholars and courts are faced with an important question: will we construct doctrine that responds to whites' potentially critical stance on whiteness and white privilege or allow this development to go unmined?

PART IV CRITIQUES AND CONCERNS *[TENTATIVE POSITIONS]*

Having demonstrated in Parts I and II that the marginal whiteness framework is descriptively accurate, and therefore conceptually helpful in sorting through the Title VII cases, Part III showed why it is likely to be appealing to disaffected whites and encourage them to become more active in policing workplace discrimination. Part IV deals with conceptual critiques and concerns.

A. Marginal Whiteness as Carnivorous

Many people will reject the idea of marginal whiteness because it appears to be a carnivorous theoretical framework that will consume every other model of bias and discrimination. They will argue it is overly ambitious and descriptively inaccurate: treating other facets of identity, such as gender, sexual orientation and class[154] as modifiers complicating the experience of whiteness is an oversimplified representation of how discrimination works. They will point to long established historical accounts documenting the precise ways in which particular groups have been socially subordinated.

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[153] Jaret at 732 (suggesting that the reason whites may suggest that other aspects of identity such as race, class, gender) are not important to them is because they have not experienced exclusion on that basis. In the absence of discrimination they are likely to prize more idiosyncratic identities that are not correlated with an established antidiscrimination project. They note, however, that this weak identification dynamic may change when individual whites experience discrimination based on one of these politically significant identity features (such as class or gender, etc).

[154] Indeed, in McDermott and Samspon's view "working class whites are especially likely to be aware of their whiteness as well as to have a complex understanding of what it means to be white in the United States today." But there is contrary evidence as well. See McDermott & Samspon at 250.

These histories document the specific features of particular discriminations. For example, they may point to the way sexism involved associating women with the domestic sphere, treating them as the more delicate, fairer sex, and making "benevolent" judgments that disqualified women from certain opportunities. They will argue that the discrete and specific history each kind of discrimination has shows that discriminatory animus is group specific, motivated by particular reasons, and has nothing to do with whiteness. This is why Title VII requires each discrimination suit to precisely identify the kind of animus at issue, rather than just allowing plaintiffs to make general claims about outgroup discrimination and ingroup preferences.

These contentions, however, about the precise and discrete nature of particular kinds of bias, run into problems conceptually. Take for example, the above claim about the precise nature of gender discrimination. Most people reading the description will realize that the precise features of sexism it identifies are actually quite raced in nature. They do not describe the experiences of women in color, but instead describe disputes among and between whites about white womanhood.[155] The description reveals that early fights about sexism were actually mislabeled. They were actually contests in and among whites about full admission to the benefits of white privilege, rather than concerning the conditions of all women in all circumstances.

There is something to be gained, however, by examining this concern about the discrete nature of particular discriminations at a higher, more abstract level. For, I would argue, much of the resistance to dissolving other forms of difference into features of marginal whiteness comes from a fundamental mistake about the nature of discrimination. To get beyond this mistake, we must recognize that there is a distinction between the *phenomenological experience* of being the target of discrimination as opposed to the *rhetorical tools* we use to describe that experience of discrimination (i.e. the language of racism, sexism or classism). These rhetorical tools were merely designed to help us map out histories of particular ways higher status ingroups have used related rhetorical and representational techniques to create distance and subordinate disfavored outgroups and their members. And of course, we would want a precise historical accounting of how these rhetorical techniques have been used to discern when bias is at play in contemporary circumstances. However, we should not assume that these rhetorical descriptions actually mean that the victim of sexism is experiencing something fundamentally different from that of the person being targeted based on race prior to translating that experience through our current ways of talking about discrimination.

To make this point more concrete, let us return again to an example. The difficulties in sorting out distinct phenomenological experiences of otherness seems self evident to those subject to multiple kinds of "discrimination." How does the black female lesbian tell whether her white male supervisor had discriminated against her when she

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[155] As Gerald Torres explains, "the imposition of gender norms was one way that institutions of white supremacy were maintained." *Understanding Patriarchy As An Expression of Whiteness: Insights From the Chicana Movement,* 18 WASH. U. J.L. & POL'Y 129, 135 (2005)

does not get a position? Is it because of her gender, her race or her sexual orientation? Is her judgment based merely on a process of subtraction? That is, if her supervisor is also gay, can she safely assume that her sexual orientation is not at issue? Or, might the gay white male supervisor regard her performance of homosexuality as offensive, because of a tendency to reinstantiate white male homosexuality as the paradigmatic and preferred version of gay identity? Does the attempt to chase down the precise nature of this bias fundamentally help her in her negotiation of the workplace? I offer that, it does not. Rather, what she is left to do is look for evidence that her employer has used particular rhetorical strategies to represent (or rather distort) her performance that focus on particular features of difference. In the absence of this rhetorical evidence, she will look for evidence of ingroup preferences, looking at how the circle of privilege is constructed in her workplace.[156] (Is whiteness solely white men or does it include white women? Are Latinos regarded as white in this workplace?) The lesbian worker would find it difficult to precisely identify which discrimination is at play, and proponents of intersectionality theory would argue that she is on a fool's errand if she tries to sort out which discrete kind of discrimination has caused her injury.[157] What marginal whiteness does is it reminds her, as well as white workers in the workplace, that we should focus instead on how high status whites manipulate the boundaries of whiteness in particular situations to ensure that they are not systematically disadvantaged.

Importantly, by accepting this characterization of discrimination, this does not mean that legal doctrine must precisely mirror the insights of this sociological theory. Rather, for practical reasons, we may find it necessary to sort through these questions differently in the legal regime that responds to this problem. From a compliance perspective, we want employers to have incentives to require their employees to be more mindful of the rhetorical and representational strategies they use to subordinate others, and punish them when certain patterns of bias are evident. What marginal whiteness does is provide judges and legal scholars with a sociological account of how discrimination occurs in the workplace (concentrating on the overlapping and mutually reinforcing nature of discriminations), which seems to more accurately describe a disadvantaged employee's experience of workplace subordination. In short, my contention is not that Title VII should wholly abandon its functional approach of requiring specific kinds of discriminatory animus to be individually proved. I am merely saying that, at a theoretical level the inquiry can proceed quite differently. Also, if we do want doctrine to fully reflect these insights, then the linkage cases provide us with an opportunity to develop doctrine that can sort through questions about successive layers of outgroup disadvantage.[158]

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[156] *See* references at supra notes 85 & 86.

[157] *See generally Crenshaw, Mapping the Margins*, supra note 35.

[158] For some initial ideas about how we might construct a doctrinal regime that accounts for linkages see *infra* pgs. __ to __.

B. *Marginal Whiteness vs. Marginal Maleness*

Other critics, instead of questioning the need for a global theory, will take issue with me for my starting point. They may ask, why is whiteness the default position all aspire to? Why doesn't masculinity occupy this position? Relatedly, some may ask why this theory must hinge on any particular identity characteristic. Why not instead build the framework on an idea of privilege, broadly construed - which would then be defined as baseline state of true and full social equality.

My response to both concerns is based on the need for historical and cultural precision. Marginal whiteness turns on the experience of whiteness because it is the only historically grounded identity feature that has been used as the baseline account for identifying a positionality that refers to complete, unchallenged social standing. Using the more generic term privilege as a standing point would mask this reality. More importantly, it would deprive us of the opportunity to consider the rhetorical strategies and representational approaches used to broaden and contract the category of whiteness based on political considerations. Individuals' mixed feelings of desire and ambivalence about whiteness are an important part of understanding how whites, as a privileged ingroup, recruit new members in response to particular social and political pressures.

Also, maleness, while it might once have enjoyed a superordinate status similar to whiteness has been subject cultural pressures that make it a less stable candidate for acting as a superordinate identity.[159] That is, while masculinity historically has been regarded as a way of marking the rational, fully empowered citizen subject, it has come under increased scrutiny in contemporary society, including the suggestion that it should not be used as a baseline norm in assessing social privilege. Also, the core of masculinity is currently a site of cultural contestation. As a consequence, when one attempts to imagine masculinity as an unmarked category, it is difficult to identify an associated paradigmatic subject.[160] Because of the high degree of cultural uncertainty about the status of masculinity as well as its core, the construct does not provide a useful basis for understanding the basic structure of social privilege. Last, gender's boundaries, as a socially recognized category, are less porous than those of race. Consequently, many subjects, regardless of desire or interest, will not be to opt into this social category.

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[159] SEE GENERALLY HARVEY C. MANSFIELD, MANLINESS (Yale University Press 2006) (discussing current cultural pressures on masculinity raising questions about it's significance); Ronald Levant, *The New Psychology of Men* 27 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE, 259-265 (1996) (noting that men's studies scholars since the 1980s have begun to examine masculinity not as a normative referent, but rather as a complex and problematic construct, positing that traditional constructions of masculinity have put men at a social and cultural disadvantage). *See also*, *Sometimes It's Hard to Be A Male*, The Economist, Dec. 22, 2001 (discussing liberation of women under feminism giving them access to both the public and private sphere while men in contrast have a much narrower range of options).

[160] Historically white masculinity was seen as paradigmatic or unmarked. However, as questions are raised about masculinity's nature, some may question whether black or Latino performances of masculinity are closer to this paradigmatic representation of masculinity. No one "version" has claimed the center.

C. *Marginal Whiteness as Immoral*

Others may be concerned that marginal whiteness is dangerous because it invites whites to remain preoccupied with their lack of privilege rather than the relative advantages as compared to racial minorities. These critics may argue that we will do better if we convince whites to face up to whatever privilege they do enjoy, and have them focus on their moral or ethical duty to fight racism. This criticism would find its mark, but for the fact that the model I offer is *not* necessarily normative. At this juncture, it is only being offered as a *descriptive model,* one that better accounts for post Civil Rights era whites' attitudes. Regardless of how we feel about these whites' resentments and motives, if these subjects understand their experiences through a "marginal whiteness" framework they are likely to bring Title VII claims with results that inure to the benefit of minority plaintiffs. The descriptive model I have offered forces us to ask whether there is anything to be gained by denying "marginal white" plaintiffs relief.[161]

Secondly, even if one treats the "marginal whiteness" framework as providing a normative account, it is likely to have more success in getting whites to recognize their privilege than less nuanced models. First, the marginal whiteness model promises to make whites more precise about their claims of relative disadvantage. Under this model, whites' claims of relative disadvantage (based on partial access to white privilege) will always focus on whether the disadvantage they allege is relevant to the social problem being considered. So if one claims to be a "marginal white" because one claims a gay identity, this would be relevant to some discussions about privilege, but irrelevant to others, such as one's eligibility for preferences in a race based affirmative action programs intended to address black economic disadvantage. The marginal white may then argue that economically privileged blacks should not have the same access to this affirmative action program. Rather than avoiding this conversation, we would do better to point to any additional sources of social disadvantage black middle class persons suffer that we deem relevant to an assessment of how broadly the eligibility requirements for the program should be construed. This more nuanced debate promises to win more supporters for social programs than blanket pronouncements treating all whites as though they enjoy a static parcel of benefits called "white privilege." I recognize, however, that there is substantial risk that any framework that emphasizes the partial, fractured experience of white privilege, will cause whites to not take responsibility for the benefits they do derive from whiteness.[162] However, again, the best response to this problem is to emphasize that

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[161] Feldman, *Standing and Delivering*, supra note __ at 569(discussing whites potential better access to information about discrimination); Herbert M. Kritzer, Neil Vidmar, W. A. Bogart *To Confront or Not to Confront: Measuring Claiming Rates in Discrimination Grievances* 25 LAW & SOCIETY REV. 875-887 (1991) (discussing chronic problem of underreporting of workplace race discrimination)

[162] McDermott & Samson at 248 (arguing that the denial of white privilege is the foundation of colorblind racism) ; Much of the recent work on whiteness concerns how whites minimize, acknowledge, deny, embrace or feel guilty about their privileged status. See McDermott & Samson at 248. Critical White Studies scholars have also expressed concern about this problem. *See e.g.,* Charles A. Gallaher, *White Racial Formation* 9 in CRITICAL WHITE STUDIES (arguing whites claims about ethnic identity are thin and often are part of privilege avoidance strategies) Ruth Frankenberg, *White Women, Race Matters: The Social*

marginal whiteness requires whites, as a *starting point* to make an honest assessment of the access to privilege they do have, and to take responsibility for that privilege when fairness demands.

D. Marginal Whiteness as Impractical

Echoing Cass Sunstein, some critics will argue that the concept of marginal whiteness is likely to have an extremely narrow reach, given the forum in which this material is being presented. Most Americans do not read law reviews. Indeed, much to scholars' frustration, neither do most judges. And while I do not underestimate the formidable barriers there are preventing larger discussion of these ideas, there is more cause for optimism than might initially seem. This Article is part of a broader body of scholarship in sociology and political philosophy that calls on us to reexamine the nature of white identity. The Article is intended merely to start a discussion in legal scholarship about the "palpable" nature of whiteness and the potential for white marginality. Additionally it is intended to offer judges a way of thinking about discrimination, one that better responds to whites' current anxieties.

Richard Ford Thompson in his book *The Race Card* nicely summarizes the problem facing antidiscrimination scholars and advocates in this century. He explains,

> The [race] problem is the result of decent (but not saintly) people inadvertently doing harm because they don't know what else to do, or because doing something else is too much trouble. And the solution will be in changing the conditions and incentives that currently lead decent people to contribute, in their own small and often unintentional ways, to the problem.[163]

Ford calls on scholars and social commentators to develop new ways of talking about race that go beyond broad indictments of people's motives as "racist" and instead explains to whites why they should be more critical of and in some cases reject the structural advantages they enjoy as a consequence of white privilege. The concept of marginal whiteness I offer responds to the need for this kind of dialogue, as it provides a way for whites to reconstitute and reframe the cost benefit analysis they engage in when faced with facially race neutral systems or subtly racist social practices. My framework shifts marginal whites' attention to how the harms caused by racism only create value for certain white actors.[164] When low status whites are passive in the face of discriminatory conduct, it forces them to consider that in many cases, the dynamic of outgroup exclusion they are allowing to operate will in fact ultimately disadvantage them.

Construction of Whiteness 634 in CRITICAL WHITE STUDIES (warning whites against romantic engagements with their ethnic heritage to avoid responsibility for white privilege).

[163] FORD, THE RACE CARD at 342.

[164] Bonilla-Silva explains "although whites, because of their privileged position in the racial order form a social group . .. ,they are fractured along class, gender, sexual orientation and other forms of social cleavage. Hence they have multiple and often contradictory interests . . ." Bonilla-Silva, supra note __ at 10.

While not explored here, marginal whiteness potentially has broader applications. For example, marginal whiteness posits that the white person who fears that the value of his houses will go down when blacks move into his neighborhood should instead be focusing on white real estate agents' tendency to underprice properties in mixed race neighborhoods. Given the existence of housing discrimination legislation, a white person might find his interests better served by using screeners to determine if his house is being fairly marketed and threatening suit, instead of engaging in an illicit, informal campaign to discourage minority home buyers. Similarly, the theory of marginal whiteness posits that a white telemarketer who sees his wages fall when minorities are also hired for his position need not engage in a campaign of hostility against workers of color to protect the "status" of his job. Rather, if he knows he can sue an employer for race discrimination and restore the benefits to which he is entitled, he is likely to choose this more economically logical option. While there is ample historical evidence that low status whites have rejected the call to engage in more critical thinking about whiteness in the past, it is quite likely that many will make different calculations today. It is even more likely if Title VII and other antidiscrimination laws consider marginal whites concerns, and give them an incentive to make equality affirming decisions over discriminatory ones.

CONCLUSION

In summary, we know that "marginal" whites have long existed, as evidenced by scholarship documenting the marginalization and inclusion of certain ethnic groups as they fought to be recognized as white persons.[165] Additionally, the effects of class and gender disadvantage on the experience of white privilege are well known. Despite these facts, prior to this analysis legal scholars have not provided a comprehensive account of how the enjoyment of "contingent" or partial white privilege might shape an individual's reaction to race discrimination. Yet, the need for an analysis of this group of marginal whites' interests is acute, particularly as this group grows in size, awareness and visibility.[166] As sociologist Jennifer Eichsted explains, "deconstructing whiteness and white privilege would likely facilitate mobilization of whites to antiracism activism, [however] such a presentation is not easily developed given the contemporary language available for discussing race and identity."[167] The theory of marginal whiteness is offered as a way to facilitate this conversation and consider its potential effects on legal doctri

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[165] *See* DAVID R. ROEDIGGER, WORKING TOWARDS WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE (PERSEUS PRESS: 2005); ERIC L. GOLDSTEIN, THE PRICE OF WHITENESS: JEWS, RACE AND AMERICAN IDENTITY (NEW YORK: PRINCETON UNIVERSITY PRESS 2006); Richard Brookheiser, *Others and the WASP World They Aspired To* in CRITICAL WHITE STUDIES at 360; George A. Martinez: *The Legal Construction of Race: Mexican Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997).

[166] *See* sources cited supra note __. *But see*, Ariela J. Gross, "*The Caucasian Cloak*": *Mexican Americans and the Politics of Whiteness in the Twentieth-Century South,* 95 GEO. L. J. 337, 390 (2007) (describing Mexicans attempts to retain a specific Mexican racial or ethnic identity while staking claim to privileges afforded white citizens).

[167] Eichstedt, *Problematic White Identities* at 447

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