Marginal Whiteness

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INTRODUCTION

How are whites injured by minority-targeted racism? Prior to filing her Title VII interracial solidarity claim,[1] Betty Clayton thought she knew. For years, Clayton, a white cafeteria worker employed by the White Hall School District, was granted a nonresidency privilege that allowed her to enroll her daughter in one of the district's schools.[2] This was a special arrangement, as neither she nor her daughter lived within the district's boundaries.[3] This special arrangement abruptly came to an end when one of Clayton's black coworkers learned that she had been given the nonresidency privilege and asked the district for the same benefit.[4] The district refused the black worker's request and, to rebut any claim of racial favoritism, rescinded Clayton's right to the

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1. Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace on the basis of race, sex, and other statutorily identified characteristics. 42 U.S.C. § 2000e-2(a)(1) (2006). In this discussion, the term "interracial solidarity claims" refers to the judicially constructed causes of action under Title VII that allow white employees to bring claims based on discrimination directed at their racial and ethnic minority coworkers. Most of the Title VII claims in this area technically are called "interracial association" claims; however, as explained in more detail in the Parts that follow, the label is a misnomer given the slightly broader range of interests on which whites are allowed to sue when they complain about minority-targeted discrimination. For further discussion on the development of interracial solidarity or "interracial association" claims under Title VII, see *infra* Part II.

2. *See* Clayton v. White Hall Sch. Dist., 778 F.2d 457, 459–60 (8th Cir. 1985).

3. *Id.*

4. The black worker was a janitor, rather than a cafeteria worker. However, under the official residency rule neither he nor Clayton would have been eligible for the nonresidency benefit. *Id.*

privilege as well.[5] The district then reinstituted an old rule that provided that only "teachers" and certified "administrative" workers were entitled to the nonresidency benefit, thereby ensuring that both Clayton and her black co-worker were ineligible.[6] Clayton found herself the victim of what she believed was an obvious case of explicit racial bias.

Was Clayton a victim of race discrimination? Her claim may give some readers pause. Some might conclude that *she* was not subject to race discrimination, arguing instead that she was merely a secondary victim that fell prey to "friendly fire"—a white casualty incidentally injured by the district's attempt to discriminate against her black coworker. Others might share Clayton's view, arguing that she was a victim of discrimination. *But for* the district's desire to discriminate against her black coworker, the district would not have reinstated the stricter benefits rule and denied Clayton the residency privilege.[7] *But for* the district's discriminatory actions, Clayton would have been able to preserve her access to a valuable economic benefit: the ability to send her daughter to a White Hall school. And Clayton's supporters would note that there was ample evidence in her case to prove the district's racially discriminatory motivations, including: the district's prior discriminatory behavior; the timing of the district's decision to return to the old residency rule; and the absence of a reasonable nondiscriminatory justification for the old rule's reinstatement.

Clayton seemed to believe that the merits of her claim were self-evident;[8]

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5. *Id.*

6. *Id.* at 459.

7. *Id.* at 459–60. For an analysis of Clayton's efforts to replead her claim, see Noah D. Zatz, *Beyond the Zero Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 89 (2002).

8. Advocates of a plain reading approach to Title VII also might wonder why Clayton had such confidence in her claim. They rightly will note that Title VII, by its plain terms, only protects a person from workplace discrimination initiated because of her race. *See* 42 U.S.C. § 2000e-2(a)(1). Clayton did not allege that the district discriminated against her because she was white; therefore, they would argue, she had no claim. However, workplace discrimination scholars know that this rigid technical reading of Title VII has not held sway with courts. Instead, courts have allowed individuals to bring Title VII claims when the individual plaintiff's racial status technically did not cause the alleged discrimination. *See, e.g.*, Rodgers v. W.-S. Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993) (recognizing that racially harassing conduct on the part of an employer, even if not directed at the plaintiff, could be used to establish a Title VII racial harassment claim); Gray v. Greyhound Lines, E., 545 F.2d 169 (D.C. Cir. 1976) (recognizing black employees had standing to bring a Title VII race discrimination claim concerning discriminatory hiring practices that did not affect them directly but caused them psychological injury). In these cases, the plaintiff happened to be the same race as the actual target of the discrimination. *See, e.g.*, Schwapp v. Town of Avon, 118 F.3d 106, 111 (2d Cir. 1997) (recognizing that a "racial epithet need not be directed at a plaintiff in order to contribute to a hostile work environment"). However, courts determined that it was a small step to conclude that persons from other racial groups than the one being targeted also might have an interest in not being subject to a hostile, racially discriminatory environment. This broader interpretive approach to "hostile environment" doctrine became one of the bases for interracial solidarity doctrine. *See, e.g.*, *Clayton*, 778 F.2d at 459–60.

however, her confidence was misplaced, as her allegations raise thorny questions about how courts, antidiscrimination scholars, and indeed even laypersons see whites' relationship to minority-targeted discrimination in the workplace. Courts called upon to review these questions, particularly in Title VII cases, spend precious little time exploring how whites perceive minority-targeted discrimination to operate, or the range of ways in which minority-targeted discrimination perpetrated by certain whites can directly harm other whites' interests. A case in point: in *Clayton*, the court quickly concluded that whites can be injured by minority-targeted discrimination[9] but then tracked Clayton's claim into a little known area of Title VII precedent,[10] referred to here as interracial solidarity doctrine. As Clayton soon discovered, this analytic turn was less of a boon than it initially seemed, as interracial solidarity doctrine exerts an extraordinary regulatory power over white plaintiffs who attempt to use Title VII to challenge minority-targeted discrimination in the workplace. Rather than merely sorting out strong claims from weak ones, the doctrine functions as a kind of normative litmus test used to assess whether the *type* of harm white plaintiffs allege as a consequence of minority-targeted discrimination counts as compensable injury. As this Article shows, the doctrine plays this powerful gatekeeping function because it is informed by certain historically specific civil rights era propositions about whites and their relationship to race and race discrimination. The Article examines the costs the doctrine's strong normative commitments have imposed on Title VII plaintiffs and asks whether the enforcement of interracial solidarity doctrine has become an end in itself, regardless of whether it actually serves Title VII's larger policy goals.

Specifically, Title VII interracial solidarity doctrine currently only recognizes two kinds of harm whites can suffer from minority-targeted discrimination, and therefore only permits plaintiffs to plead these two kinds of injury. The first injury a plaintiff may claim is the frustration of his associational interests.[11] This injury is based on the civil rights era norm establishing that whites are entitled to the benefits of diversity, that is, the economic, cultural, and educational relationships they can form by associating with minorities.[12] The second injury a plaintiff can raise is the violation of a plaintiff's right to a "colorblind" or nondiscriminatory workplace. This injury is informed

9. *Clayton*, 778 F.2d at 460.

10. *Id.* at 459.

11. This is the class of interests most commonly recognized under interracial association doctrine. *See, e.g., id.* 459–60 (recognizing associational interests under interracial association doctrine); EEOC v. Bailey Co., 563 F.2d 439, 453–54 (6th Cir. 1977) (same).

12. *See, e.g.*, Stewart v. Hannon, 675 F.2d 846, 850 (7th Cir. 1982) (recognizing whites' standing to sue under Title VII for loss of benefits of interracial harmony); Int'l Woodworkers of Am. v. Chesapeake Bay, 659 F.2d 1259, 1271 (3d Cir. 1978) (recognizing whites' standing to sue for violation of interest in interracial association); Sidari v. Orleans County, 174 F.R.D. 275, 283–84 (W.D.N.Y. 1996) (recognizing whites' interest in associating with minorities as a basis for suit).

by the civil rights era norm that whites have an interest in striving for a colorblind society.[13] The "colorblindness" injury is based on the understanding that racial prejudice is a moral wrong because it compromises the struggle to make the United States a race-blind meritocracy. Scholars will recognize that both the diversity and colorblindness concepts of harm appear in areas of antidiscrimination law other than the interracial solidarity cases;[14] however, these concepts play a special role in Title VII interracial solidarity doctrine, as they are the *only* bases the doctrine recognizes as a source of harm.

The restrictive nature and regulatory power of interracial solidarity doctrine is clear when one reviews the disposition in the *Clayton* case, as Clayton's inability to articulate her interests under the existing framework left her without a remedy. The *Clayton* court began its analysis by noting that Clayton had not alleged the first kind of injury traditionally recognized in the interracial solidarity cases, as she was not suing because of lost associational opportunities.[15] Specifically, she did not allege that the discrimination had prevented her from forming a relationship with her minority coworker. The court next concluded that she had not alleged the alternate harm recognized under the doctrine, as she was not invoking a colorblindness-based injury. She did not allege that she was being psychologically injured by being forced to

13. As Part II shows, some courts also interpret interracial association doctrine to cover the right to a "nondiscriminatory" workplace. *See, e.g.*, *Stewart*, 675 F.2d at 849 (recognizing the right to a "colorblind workplace" as part of interracial association doctrine and collecting administrative cases); *Bailey Co.*, 563 F.2d at 453–54 (same); Badillo v. Cent. Steel & Wire Co., 495 F. Supp. 299, 305–06 (N.D. Ill. 1980) (interpreting interracial association doctrine to provide standing to sue based on right to a "colorblind workplace").

14. Some may recognize these interests as they are articulated in Fourteenth Amendment equal protection jurisprudence, as they represent the two kinds of interests whites have raised in cases challenging regimes designed to ensure that persons of color have equal access to educational opportunities. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (recognizing school administrators' interest in preserving a diverse student body and noting associational benefits conferred on white students as a result of affirmative action programs improving the educational access of minorities); *cf.* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (recognizing that white school children subject to a district-wide assignment plan based on race had standing to challenge the district's action depriving them of the benefits of a colorblind or race-neutral assignment process). Scholars have noted how Supreme Court equal protection jurisprudence shows the Court's particularly strong commitment to claims based on colorblindness. *See, e.g.*, Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007) (discussing the evolution of colorblindness discourse in Supreme Court doctrine). However, many legal scholars have characterized colorblindness discourse as one of the primary obstacles to achieving racial equality. *See, e.g.*, Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336–41 (1988) (describing how the rhetoric of colorblindness, formally associated with progressive antiracism movements, has been remobilized by conservatives in ways that tend to compromise the struggle for racial equality); 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).

15. *Clayton*, 778 F.2d at 459.

work in a racist or discriminatory environment.[16] Instead, the court explained, Clayton's claim appeared to be motivated by *bare* economic self-interest: she merely sought recovery of an employment benefit she lost because of the district's alleged discriminatory conduct.[17] These allegations, the court concluded, required that her interracial solidarity claim be dismissed, as she had failed to articulate any injury cognizable under current doctrine.[18]

For some, the dismissal of Clayton's case serves as a morality tale. Admittedly, she is not the most sympathetic antidiscrimination warrior: the self-sacrificing white person willing to risk his or her own personal standing to protect minorities from unfair treatment.[19] However, from a policy perspective, the demise of Clayton's claim should cause some unease. For Clayton did not lose her Title VII claim because she lacked proof of the district's discriminatory intent or because she failed to show concrete injury. Rather, her claim was dismissed because she failed to pass the normative litmus test at the heart of interracial solidarity doctrine.[20] The doctrine posits that whites may sue over minority-targeted racism *only* when their primary motive is to advance the social project of racial equality or promote diversity.[21] Yet we must begin to

16. *Id.*

17. Clayton was quite specific about the economic value of the benefit she had lost. In her claim she contended that the denial of the residency exemption posed an "economic hardship in the difficulty of obtaining a babysitter and the additional cost providing [sic] babysitting services for the child as a result of the hours [she] worked." *Id.* at 458.

18. The court in *Clayton* made it clear that the primary problem with her claim was its economic nature. Discussing both the associational and the "colorblind workplace" causes of action, the court explained that the "essence of these two doctrines is that a plaintiff employee finds racial or other discrimination in the workplace offensive or distasteful because it violates that employee's right to work in an atmosphere free of discrimination." *Id.* at 459. The court elaborated on this point, noting "it is an emotional or psychological injury to the plaintiff herself which is the gravamen of this cause of action." *Id.* The Court concluded that the nature of her injury invalidated her claim, as the interest she alleged in the case was not "an interest arguably within the zone of interests to be protected or regulated by the [civil rights laws]." *Id.* at 460.

19. For example, some scholars might find Clayton's passivity in the face of the earlier discrimination against her minority coworker to be disqualifying. *See, e.g.*, Zatz, *supra* note 7, at 92 (raising concerns about constructions of Title VII that reward passive bystanders to past discrimination instead of those who prevent or disrupt discrimination); *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, 561 (2007) (arguing that permitting bystanders to race discrimination to bring antidiscrimination claims generally favors the "powerful over the powerless").

20. Specifically, the court dismissed Clayton's claim because the injury she allegedly suffered did not fall within the "zone of interests" Congress intended to protect when it created Title VII. *Clayton*, 778 F.2d at 460. However, there is nothing in the court's opinion to explain how it construed the bounds of that "zone of interests." It appears that the court interpreted the scope of the "zone of interests" by reference to certain civil rights era norms used in antidiscrimination law to describe whites' interests. These norms posit that the only legally cognizable injuries that whites suffer from minority-targeted discrimination are second-order moral and ethical injuries (such as those inflicted when others wrongfully interfere with their interest in a colorblind workplace).

21. Courts show some variation in the doctrinal sources they rely on in recognizing the two

consider what is lost when courts interpreting Title VII limit whites to litigating over such a narrow class of injuries. Certainly, the civil rights era norms reflected in Title VII interracial solidarity doctrine are important; they reflect essential symbolic commitments regarding the moral investment whites ideally should have in ending racial inequality.[22] Yet one can embrace these civil rights era norms without believing that they should play a *filtering* function in Title VII cases and without believing they should wholly prevent white plaintiffs with alternate motivations for challenging minority-targeted discrimination from bringing Title VII actions. One wonders, why should these civil rights era norms be used to prohibit litigation by alternatively motivated whites when their claims in effect do the same Title VII enforcement work as those brought by whites motivated by civil rights era understandings? What the *Clayton* case reveals is that courts are interpreting interracial solidarity doctrine in an *overly rigid* fashion, prioritizing the doctrine's current normative commitments over the enforcement goals of the statute that gave rise to the doctrine's creation.

This Article attempts to shed more light on the Claytons of the world, arguing that there are ways whites are injured by minority-targeted discrimination in the workplace that are not cognizable under current interracial solidarity doctrine. The Article shows that, as long as Title VII interracial solidarity doctrine dominates the interpretation of whites' interests in the workplace, whites whose claims exceed traditional civil rights era understandings of whites' relationship to workplace discrimination will find themselves without a remedy. The Article points out the cost of the current restrictions on interracial solidarity actions, noting that they limit Title VII's enforcement by limiting the class of actionable cases to those where plaintiffs have morally palatable claims. Additionally, the Article posits that the doctrine and its common-sense equivalents stunt our ability to understand the nature of whites' relationship to whiteness, as well as the complex relationship whites have with minority-targeted discrimination.

Scholars who have previously written about interracial solidarity doctrine may view my claims with alarm, as they have raised concerns about empowering an ever-growing class of white plaintiffs to prosecute minority-targeted discrimination[23]—particularly when, like Clayton, they appear to be

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interests identified here by the term "interracial solidarity" doctrine. For example, the *Clayton* court recognized both interests; however, it interpreted "interracial association" doctrine in that case to cover only Clayton's interest in associating with minorities, what I describe here as a kind of diversity interest. *Id.* at 459–60. However, the court still found a way to recognize Clayton's right to sue for the invasion of her colorblindness interests (or her right to a nondiscriminatory workplace) by recognizing this claim under traditional Title VII "hostile environment" doctrine. *Id.* Other courts treat this interest in colorblindness as simply another interest cognizable under interracial association doctrine. For further discussion see *infra* Part II.

22. *See* Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996) (discussing law's role in reflecting certain normative understandings).

23. Lee, *supra* note 19, at 561 (raising concerns about white plaintiffs' claims based on

driven by self-interested concerns. Yet the prospect of assisting these self-serving plaintiffs seems far less troubling when one considers that the workplace discrimination these plaintiffs address might otherwise never be litigated, as the directly injured minority plaintiffs in these cases often possess too little information about their unfair treatment to bring a Title VII claim,[24] or they may believe the social costs incumbent to standing up for their interests are simply too high.[25] Indeed, in a historical era in which race discrimination is often carefully hidden from racial outgroup members, reporting by disaffected or low-status racial ingroup members—namely, whites—is destined to play a more important role in ferreting out workplace race discrimination. However, before these low-status whites can play an active role in eliminating workplace racial discrimination against minority targets, courts and scholars must recognize their potential value.

As a separate matter, antidiscrimination scholars' concerns about the motivations of less noble, self-interested white Title VII plaintiffs are evidence of a larger problem this Article intends to overcome. For I believe that the civil rights era norms associated with interracial solidarity doctrine often encourage moral judgment of white plaintiffs rather than a critical assessment of how their claims might teach us something about the operation of race and race discrimination. I argue that "self-interested" complainers like Clayton actually point to important ways in which minority-targeted discrimination by whites exacts concrete social and economic costs from certain white persons. More specifically, the *Clayton* case shows how high-status whites may attempt to cover their racially discriminatory actions by imposing colorblind rules that also victimize low-status white persons. Cases like *Clayton* demonstrate how high-status whites are willing to impose economic or dignitary costs on marginal or low-status whites when it is necessary to preserve resources for a

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minority-targeted discrimination when plaintiffs are mere passive bystanders); Zatz, *supra* note 7, at 92–93 (arguing that if courts extend Title VII standing to whites to prosecute minority-targeted discrimination they should not merely reward passive bystanders to past discrimination).

24. BARBARA TREPAGNIER, SILENT RACISM: HOW WELL-MEANING WHITE PEOPLE PERPETUATE THE RACIAL DIVIDE 66 (2006) (discussing the role social contacts play in gaining information about the workplace and the ways in which this factor contributes to institutional racism).

25. *See, e.g.*, Cheryl R. Kaiser & Carol T. Miller, *Derogating the Victim: The Interpersonal Consequences of Blaming Events on Discrimination*, 6 GROUP PROCESSES & INTERGROUP REL. 227, 228 (2003) (discussing prior research showing that women and African Americans were less likely to publicly claim that they had suffered discrimination in the presence of a racial or gender outgroup member). Kaiser and Miller's subsequent experiments showed that this seeming reluctance or fear about reporting was in part justified as outgroup members, specifically whites or male coworkers, judged persons who claimed race or gender discrimination more harshly than non-complaining persons. *Id.* These outgroup members continued to disfavor persons who complained about discrimination even when exposed to evidence showing that the complaints lodged had some basis—i.e. that the complainant was being forced to work for someone with discriminatory attitudes. *Id.* at 234.

group of high-status white persons.[26] Importantly, as long as courts hew to the limited understanding of whites' interests promoted by interracial solidarity doctrine, they miss out on these important connections. As long as scholars, and indeed even laypersons, hew to the same civil rights era understandings that inform the doctrine, they fail to recognize the potential role disaffected or low-status whites[27] can play in helping us uncover and understand the relationship between interracial and intraracial conflicts.

In summary, this Article reviews cases involving Title VII interracial solidarity claims to reveal the hold that civil rights era norms have on legal understandings about whites' relationship to minority-targeted discrimination. My goal is to reveal the burdens these norms impose on low-status or marginal whites as they attempt to plead their Title VII claims.[28] My hope is that the discussion of marginal whites' interests will help reveal their potential as allies in antidiscrimination struggles. However, this potential can only be fully realized if marginal whites' problems and challenges are better reflected in Title VII doctrine and explored in antidiscrimination scholarship. To this end,

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26. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217 (1971) (rejecting black petitioners' Fourteenth Amendment equal protection claim challenging a municipality's decision closing its public swimming pools after an integration order had been entered). Petitioners argued that the pools had been closed to avoid having to desegregate the pools, specifically, to allow admission to black as well as white community residents. *Id.* at 218–19. The municipality officials' decision arguably burdened working-class and poor whites in ways that wealthier whites were not, since wealthier whites continued to have access to pools at private clubs or owned their own swimming pools. *Id.* at 235 (Douglas, J., dissenting). However, working-class whites seemingly accepted the burden of these closures, joining in a coalition with higher-status whites to maintain the idea of "white privilege." This Article questions whether working-class whites would make the same cost-benefit calculations today or would instead be motivated to try to keep the pools open rather than tolerate their closure as part of the effort to defend white privilege.

27. Some may assume that the primary subgroup of low-status whites to which I am referring is working-class whites, as they are more likely to find that their economic interests dovetail with poor persons of color than wealthier whites. Class marginalization is an important kind of marginality that can cause whites to adopt a marginal whiteness framework for understanding workplace disputes; however, it is not the only form of difference that is relevant in these conflicts. A variety of other kinds of marginalization work similarly. For further discussion of the other identity factors that can qualify the experience of white privilege see *infra* text accompanying notes 66–71.

28. The civil rights era "norms" or premises referred to here are understandings based on unspoken assumptions that structure the public's views about whites' relationship to minority-targeted discrimination. These norms posit that all whites stand to gain illicit economic and social benefits from efforts to maintain white privilege. Consequently, whites must be actively trained to reject these illicit advantages. The civil rights era paradigm hypothesizes that the best way to achieve this end is by convincing whites to give up the benefits provided by white privilege in exchange for the higher or second-order moral and psychological benefits they will enjoy by working to achieve the goal of racial equality. These benefits are the benefits of diversity, achieved by associating with minorities, and the benefits of colorblindness, achieved by living in a race-neutral world. This paradigm, however, obscures the fact that many whites do *not* benefit economically and socially from white privilege and therefore may have a hostile relationship to some white privilege maintenance strategies, particularly when they compromise their economic and dignitary interests. These whites may want to complain about minority-targeted discrimination on grounds that simply cannot be articulated within the traditional civil rights era paradigm.

this Article also shows that the two kinds of injury courts currently recognize under interracial solidarity doctrine—the denial of the enjoyment of a colorblind workplace and the frustration of one's interest in diversity-based associational opportunities—are second-order concerns, and consequently fail to motivate substantial numbers of white persons.[29] Indeed, the doctrine's focus on second-order injuries seems even more puzzling when one considers that it almost entirely overlooks the more highly motivating first-order injuries marginal whites suffer because of minority-targeted discrimination, including basic economic and dignitary harms. A doctrine that attended to these first-order interests would be far more effective in causing whites to initiate interracial solidarity actions. Therefore, the Article uses "failed" Title VII interracial solidarity cases like *Clayton* to develop a more expansive and nuanced account of how whites are injured by minority-targeted discrimination in the workplace, providing an essential supplement to the existing concepts of harm in Title VII interracial solidarity doctrine.

This Article, however, is more than a descriptive account that catalogues overlooked or undervalued injuries present in interracial solidarity cases. It also uses these injuries to develop a theory of "marginal whiteness," a framework that allows courts and scholars to consider how white racial identity dynamics can be linked to interracial conflicts in the workplace.[30] The discussion begins by defining the class of "marginal whites"—individuals who, because they possess some nonracial, socially stigmatized identity characteristic, have more limited access to white privilege, and relatedly have a more attenuated relationship to white identity.[31] I argue that this attenuated relationship to whiteness often causes marginal whites to chafe at other whites' requests that

29. Specifically, the low number of interracial solidarity claims filed by whites suggests that, even if the moral concerns highlighted by the civil rights paradigm are valued by whites, these concerns have not convinced many whites to move beyond whatever competing, basic self-interest concerns they have. *Cf.* Elizabeth Denevi & Nicholas Pastan, *Helping Whites Develop Anti-Racist Identities: Overcoming Their Resistance to Fighting Racism*, 14 MULTI-CULTURAL EDUC. 70 (2006) (discussing failure of some whites to move beyond abstract concerns about race discrimination to personal action given their concerns about more basic self-interest based concerns). I argue that, to be truly effective, Title VII will have to provide these passive whites with a vision explaining why their individual self-interest concerns do not outweigh their interest in eradicating minority-targeted discrimination, and that their immediate economic and dignity interests may be far better served by disrupting workplace race discrimination.

30. 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 instead intended to function as an introduction to this framework and lay a foundation for future theorizing.

31. *See* Jennifer L. Eichstedt, *Problematic White Identities and a Search for Racial Justice*, 16 SOC. FORUM 445, 452 (2001) (discussing whites' experiences of certain kinds of subordination as generating a critical consciousness about white privilege). Eichstedt is focused on persons whose ambivalence eventually motivates them to become antiracist activists. My concern is with persons who experience ambivalence, but are passive about that ambivalence until they are confronted with circumstances that cause them to realize that their interests are not served by the construction of whiteness and white privilege in a given social context.

they bear burdens to support the maintenance of white privilege.[32] Put differently, marginal whites' ambivalence about whiteness becomes a critical frame that can allow low-status whites to see how higher-status whites' attempts to limit the options of minorities actually materially interfere with marginal whites' immediate economic and dignitary interests.[33] The Article posits that, if Title VII provided these marginal whites with a compelling account of their injuries, they would be more likely to bring Title VII claims.[34] The Article then considers how the marginal whiteness framework can help improve antidiscrimination scholars' analysis of intraracial and interracial conflicts more generally.

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32. This Article does not seek to establish a complete empirical basis for the claims made here about marginal whites and white intraracial conflicts in the workplace. Instead the marginal whiteness framework draws insight from scholars' work in anthropology and sociology about intragroup race discrimination. It shows how these scholars' insights about race are confirmed in Title VII cases where higher-status whites disregard low-status whites' interests as they attempt to discriminate against minorities. However, some scholars doing empirical work have begun inquiring about the ways in which higher-status whites may use discrimination targeted at certain subgroups of whites as a way of covering or masking discrimination directed at minorities. *See* Jill Bradley, Rejection and Deflection: The Case of the "Poor White Trash" Stereotype 3, 33–34, 46–47 (Apr. 2006) (unpublished Ph.D. dissertation, Tulane University) (*available at* http://proquest.umi.com/pqdlink?Ver=1&Exp=03-29-2015&FMT=7&DID=1390336521&RQT=309&attempt=1&cfc=1) (discussing study in which middle-class whites showed a greater willingness to discriminate against middle-class blacks after being given a chance to discriminate against working-class whites). The study's author suggests that the ability to deflect claims of discrimination by treating whites poorly psychologically freed middle-class whites to engage in minority-targeted discrimination. *Id.*

33. Some distinction must be made between marginal whites and marginal-white plaintiffs: the second group is merely a subset of the first. For I am not claiming that all marginal whites will become marginal-white plaintiffs who challenge minority-targeted discrimination in the workplace. Rather, some marginal whites undoubtedly will remain ambivalent about whiteness and mostly passive about minority-targeted discrimination. However, I am arguing that if Title VII provides marginal whites with a clear remedy for their injuries, they are much more likely to sue based on minority-targeted discrimination that also harms their interests. Also, my argument should not be read to suggest that *only* marginal whites are interested in bringing Title VII claims challenging minority-targeted discrimination. Rather, the traditional civil rights era paradigm, celebrating colorblindness or diversity-based associational interests, will encourage some whites to bring interracial solidarity claims. *See, e.g.*, Childress v. City of Richmond, 134 F.3d 1205 (4th Cir. 1998) (discussing white male police officers' Title VII interracial solidarity claim alleging association-based injuries because of their supervisor's discriminatory treatment of black and female coworkers). Instead, marginal whiteness is being offered as a supplementary account to explain the interests of whites that previously have not been well represented in the case law, as this group of plaintiffs has an important role to play in the enforcement of Title VII.

34. There are a variety of ways whites may experience outgroup discrimination as relevant to understanding ingroup conflicts. *See, e.g.*, Bradley, *supra* note 32 (arguing that whites may mask outgroup discrimination by engaging in discrimination against low-status members of their own ingroup). Alternatively, the presence of intraracial discrimination may make some whites more sensitive to the presence of outgroup racial discrimination. For example, prior experiences based on other kinds of marginalization and discrimination can shape whites' views about the prevalence of race discrimination. *See, e.g.*, Eichstedt, *supra* note 31, at 463 (discussing research showing that certain white individuals who were stigmatized or experienced oppression based on some non–race based characteristic used these negative experiences as they developed an antiracism stance).

Part I of this Article introduces the concept of marginal whiteness, drawing on insights from a variety of sources, but primarily from psychology, sociology, anthropology, and critical theory.[35] Part I.A describes the anxiety marginal whites feel about white identity and their access to white privilege. Part I.B provides courts and scholars with the tools to understand how this anxiety manifests in micro-level intraracial contests between whites in a given workplace. Specifically, this Section shows how minority-targeted discrimination in the workplace can herald and even trigger intraracial conflicts about the scope of whiteness and the proper recipients of white privilege. Part I.C explains why lower-status whites have become more likely to side with minorities in workplace disputes about white privilege when, historically, low-status whites have tolerated economic and dignitary slights caused by higher-status whites' privilege-maintenance strategies. Part I concludes with a brief discussion of the benefits this nuanced understanding of whiteness will bring to legal scholarship, as well as to courts interested in better understanding whites' Title VII claims.

Part II explores how marginal whites have fared in the past when bringing Title VII interracial solidarity actions. Part II.A reviews the origins and early history of the interracial association claim—the heart of interracial solidarity doctrine. Part II.B shows that doctrine has not yet fulfilled its promise to address whites' prejudice-related injuries because judges have forced marginal-white plaintiffs to articulate their injuries using the civil rights era concepts of injury already available under interracial solidarity doctrine. Specifically, this Part shows how the courts' reliance on civil rights era norms to evaluate white plaintiffs' allegations of harm has caused them to miss important Title VII enforcement opportunities. It also discusses cases showing how judicial reliance on the civil rights era norms has compromised the integrity of interracial solidarity doctrine. For example, as shown in *Clayton*, sometimes whites' claims of injury require a radical rethinking of how some whites' attempts to maintain white privilege adversely affect other whites' interests.

35. Although the theory of marginal whiteness offered here is my own creation, it was influenced by the work of other scholars. *See generally* MATT WRAY, NOT QUITE WHITE: WHITE TRASH AND THE BOUNDARIES OF WHITENESS (2006) (using a sociological account to discus the need for a broader theory of whiteness that incorporates insights about how gender and class shape racial identity and experiences); Ruth Frankenberg, *The Mirage of an Unmarked Whiteness*, *in* THE MAKING AND UNMAKING OF WHITENESS 72 (Birgit Brander Rasmussen et al. eds., 2001) (discussing the need in critical whiteness studies more generally to further deconstruct existing scholarly concepts of whiteness); Ladelle McWhorter, *Where Do White People Come From?: A Foucaultian Critique of Whiteness Studies*, 31 PHIL. & SOC. CRITICISM 533 (2005) (using insights from critical theory to critique contemporary representations of whiteness and white privilege); Joel Olson, *Whiteness and the Participation-Inclusion Dilemma*, 30 POL. THEORY 384 (2002) (offering insights from political theory to explain whites' increasing devaluation of white privilege); France Winddance Twine & Charles Gallagher, *The Future of Whiteness: A Map of the 'Third Wave,'* 31 ETHNIC & RACIAL STUD. 4 (2007) (discussing influence of post-structuralist theory on studies of whiteness).

However, courts in interracial solidarity cases sometimes avoid these hard conceptual questions by either summarily dismissing cases under existing doctrine or by forcing claims that fail to meet the existing civil-rights-influenced standards into the current doctrinal framework. Part II.C addresses concerns about encouraging courts to elaborate and expand on the grounds for interracial solidarity claims, including concerns about departing from the civil rights era paradigm that informs interracial solidarity doctrine.

Part III shifts from doctrinal concerns to explore marginal whiteness's broader possibilities, particularly the degree to which the framework provides a more motivating vision of antidiscrimination law to whites who have thus far disengaged from antidiscrimination efforts. Specifically, Part III.A reports on recent data from sociological and psychological studies about post–civil rights era whites—whites that entered adulthood roughly two decades after the civil rights movement.[36] This data shows that this cohort of whites has not fully assimilated the civil rights generation's antiracism commitment and, instead, tends to view its antidiscrimination obligations in a more limited, episodic manner.[37] Because of a combination of demographic and social shifts, and related attitudinal changes, post–civil rights era whites have not been strongly motivated by the second-order, moral concepts of injury in interracial solidarity doctrine. This shift, I argue, is one of the reasons we see relatively few interracial solidarity claims from persons in this generation.

Part III.B then explores potential opportunities available for motivating post–civil rights era whites, as studies suggest that these younger whites have a weaker, more ambivalent relationship to white identity than prior generations. Relatedly, these studies suggest that younger whites are increasingly likely to question the importance of or even devalue white privilege.[38] Consequently,

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36. Throughout this Article, I often refer to "post–civil rights era whites." Again, this term refers to white persons who came of adulthood roughly two decades after the civil rights movement. The term collectively refers to at least three generations—colloquially called Gen Xers, Gen Yers, and millenials. My analysis should be limited to the perceptions of these groups of whites because I rely on psychological research performed after the late 1990s describing recent significant changes in whites' attitudes. Consequently, most test subjects in these studies were born in the late 1970s or subsequent years. *See, e.g.*, Lisa B. Spanierman & Mary J. Heppner, *Psychosocial Costs of Racism to Whites Scale (PCRW): Construction and Initial Validation*, 51 J. COUNSELING PSYCHOL. 249, 252 (2004) (discussing study of 361 self-identified white participants taken from undergraduate classes at a midsized Midwestern university); Janet K. Swim & Deborah L. Miller, *White Guilt: Its Antecedents and Consequences for Attitudes Toward Affirmative Action*, 25 PERS. SOC. PSYCHOL. BULL. 500, 503 (1999) (discussing study of 102 white undergraduate students from the University of Pennsylvania). However, the framework may also have appeal for whites from earlier generations who did not deeply embrace the goals of the civil rights movement.

37. *See* sources cited *infra* Part III.

38. *See, e.g.*, Olson, *supra* note 35, at 391 (discussing contemporary whites' increasing devaluation of white privilege); *see also* Charles A. Gallagher, *White Racial Formation: Into the 21st Century*, *in* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR, *supra* note 38, at 10 ("It becomes difficult for working class white students to think about white privilege when they are accumulating college debt, forced to live with their parents, working twenty-five hours a week

many younger whites will find that the marginal whiteness framework's basic principles resonate with them quite strongly. While this cohort of whites is not as willing to challenge racism in pursuit of colorblindness concerns or to gain the benefits of diversity, they are more likely to challenge racism that requires them to assist other whites in maintaining certain advantages. Part III.C revisits this issue, showing how the marginal whiteness framework permits whites to critically evaluate white privilege and allows whites to acknowledge the ways in which efforts to preserve white privilege can work at cross purposes with their individual interests. In short, the marginal whiteness framework is likely to appeal to post–civil rights era whites because it allows whites to raise questions about inequities or different levels of access to racial privilege in white communities. These inquiries might cause them to see their interests as more aligned with subordinated minority workers in disputes over workplace race discrimination.[39]

Part IV anticipates concerns about the social and intellectual transmission of the marginal whiteness framework, addressing questions about its descriptive accuracy, theoretical ambitions, and its potential to disrupt or undermine contemporary antidiscrimination mobilization efforts directed at whites. Part IV explains that, rather than wholly replacing civil-rights-era-influenced normative and descriptive accounts of whites' interests, the concept of marginal whiteness provides an essential supplement to existing accounts of harm. Part IV also more specifically considers the ways in which marginal whiteness can function as a useful analytical tool in understanding contemporary "white racial formation" projects, including the overtures being made to and the identity politics struggles associated with multiracial whites, white Latinos, and Middle Eastern whites.[40] It explores marginal whiteness's

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on top of their studies, and are concerned that Starbucks or the Gap may be their future employer.").

39. Sociologist Eduardo Bonilla-Silva points out that these inequities between whites may help build common ground between whites and minorities. As he explains,

> the wages of whiteness are not equally distributed. Poor and working-class whites receive a better deal than their minority brethren, but their material share of the benefits of whiteness is low, as they remain too close to the economic abyss. Hence white workers have a powerful reason to exhibit more solidarity toward minorities than whites in other classes.

EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 145 (2d ed. 2006) (citations omitted).

40. Sarah Gualtieri, *Becoming "White": Race, Religion and the Foundations of Syrian/Lebanese Ethnicity in the United States*, 20 J. AM. ETHNIC HIST. 29 (2001) (discussing prior categorization of Arab-Americans as white and current attempts to "dissociate" from this classification given their need for the protection of antidiscrimination laws); Jonathan W. Warren & France Winddance Twine, *White Americans, the New Minority?: Non-Blacks and the Ever-Expanding Boundaries of Whiteness*, 28 J. BLACK STUD. 200 (1997) (discussing legal and institutional measures allowing multiracial persons and Latinos to identify themselves as white in many cases, and discussing intermarriage rates as evidence of the expansion of the category of whiteness to include Asians and Latinos).

potential explanatory power for understanding questions of ethnic and class fractures within the category of whiteness, while acknowledging the need for additional study on these questions. Part IV concludes by highlighting the ways in which the marginal whiteness framework breaks substantially from early Critical White Studies' accounts of white interests, demonstrating its promise as a better analytic tool for analyzing post–civil rights era whites' struggles regarding racial identity than existing models of their interests.

I
DEFINING MARGINAL WHITENESS

Part I explores the treatment of whiteness in legal scholars' work, focusing on antidiscrimination scholarship and, in particular, workplace discrimination scholars' treatment of racial identity issues. The discussion notes that, aside from legal historians, the majority of legal scholars working on antidiscrimination issues have declined to explore the contingent, context-specific nature of whiteness in their work or the relationship intraracial struggles between whites over whiteness have for our understanding of interracial conflicts. In particular, workplace discrimination scholars have declined to explore how the contingent nature of whiteness might inform our understanding of interracial workplace conflicts, as well as whites' willingness to assist in prosecuting minority-targeted discrimination. After demonstrating the need for more research on these issues, this Part introduces the concept of marginal whiteness, and explains its relationship to recent research on racial identity in psychology and sociology. Part I concludes by offering some initial thoughts about how the marginal whiteness framework could enrich understandings of racial identity formation underpinning workplace discrimination law and antidiscrimination scholarship.

A. Legal Scholarship and the Study of the White Racial Subject

For decades, legal scholars have called our attention to ways the concept of whiteness informs the law both implicitly and explicitly. Legal historians, in particular, have offered detailed analyses charting intraracial and interracial contests over the definition of whiteness.[41] These analyses examined how the definition of whiteness has been litigated in various areas of the law, including immigration law and property law (such as the interpretation of slave codes),

41. As historian Matthew Jacobson has noted,

> races are invented categories—designations coined for the sake of grouping and separating peoples along lines of presumed difference—Caucasians are made and not born. White privilege in various forms has been a constant in American political culture since colonial times, but whiteness itself has been subject to all kinds of contests and has gone through a series of historical vicissitudes.

MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE 4 (1998).

and in U.S. census policy.[42] However, other legal scholars discussing the deployment of whiteness in contemporary social conflicts have moved in a different direction, instead embracing what I refer to as an "invisibility thesis." These scholars' work has concentrated on how various laws complicate fair adjudication of racial disputes because they effectively encode or protect a default "white" normative perspective, making whites' interests seem invisible or natural. Critical White Studies (CWS) and Critical Race Theory (CRT) scholars have focused most of their attention on this invisibility thesis, using it in contexts as varied as discussions of Title VII workplace race discrimination issues and analyses of Fourteenth Amendment race discrimination challenges.[43] In their work on employment discrimination, CRT and CWS scholars, in particular, have endeavored to show how the law allows social actors using a default white normative perspective to insulate their employment decisions from critical evaluation.[44]

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42. *See, e.g.*, ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA (2008) (discussing racial determination trials in America during the antebellum period); IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (2006) (discussing courts' racial status determinations in nineteenth- and twentieth-century immigration cases); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998) (examining court analyses regarding racial status in nineteenth-century cases concerning slave codes); Ian Haney López, *Race on the 2010 Census: Hispanics & the Shrinking White Majority*, 134 DAEDALUS 42 (2005) (discussing changing designations for Latinos in American census forms and effect on the construction of white identity). Labor and immigration historians also have been instrumental in developing our understanding of the evolving nature of whiteness and the political implications of changes during a given historical period. *See, e.g.*, JACOBSON, *supra* note 41 (immigration historian charting the political dynamics in the nineteenth and twentieth centuries that led to the absorption of various European ethnics into the category of whiteness including Celts, Slavs, Hebrews, and Mediterraneans); DAVID R. ROEDIGER, WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE (2005) (labor historian discussing the historical process by which Southern and Eastern Europeans became socially recognized as white in the United States); *see also* BRUCE BAUM, THE RISE AND FALL OF THE CAUCASIAN RACE: A POLITICAL HISTORY OF RACIAL IDENTITY (2006) (political scientist exploring political pressure exerted on evolving scientific definitions of race and how these dynamics affected the definition of Caucasian in the United States).

43. *See, e.g.*, Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2013 (1995) [hereinafter Flagg, *Fashioning a Title VII Remedy*] (arguing against interpretations of Title VII that fail to problematize default cultural norms of the workplace that privilege whites); Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993) (arguing that Fourteenth Amendment analysis based on the colorblindness principle is inadequate social policy if the ultimate goal is substantive racial justice).

44. *See, e.g.*, Flagg, *Fashioning a Title VII Remedy*, *supra* note 43, at 2013 (introducing the concept of the transparency phenomenon—the understanding that whites see themselves as non-raced). As Flagg explains,

> the transparency phenomenon . . . affects whites' decisionmaking; behaviors and characteristics associated with whites take on the same aura of race neutrality. Thus, white people frequently interpret norms adopted by a dominantly white culture as racially neutral, and so fail to recognize the ways in which those norms may be in fact covertly race-specific.

Id. (citations omitted). Flagg's observations, which were based on sociological discussions of

To instrumentalize this invisibility thesis in their work, CRT and CWS scholars have concentrated on describing the experiences and perspectives of those whites occupying the perceived core of whiteness,[45] as opposed to individuals located at the margins of this category.[46] That is, to the extent that

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whiteness from the 1980s, proved to be an incredibly powerful intervention for antidiscrimination scholars. Over the last fifteen years, Flagg's "transparency thesis" has appeared in a wide variety of work and played a key role in many scholars' analyses of whiteness as a social phenomenon. *See, e.g.*, Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1169 (2008) (discussing Flagg's "transparency phenomenon" in the context of university admissions); Kevin Noble Maillard & Janis L. McDonald, *The Anatomy of Grey: A Theory of Interracial Convergence*, 26 LAW & INEQ. 305, 323 (2008) (discussing implications of Flagg's transparency phenomenon in the context of transracial adoption); Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245, 245 (2005) (discussing transparency phenomenon's role in legal scholarship on whiteness and race discrimination). However, Flagg's work has remained a particularly important source of insight for scholars working on employment discrimination issues. *See, e.g.*, E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 462 (1998) (discussing implications of transparency phenomenon for disparate treatment doctrine); Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 665 (2005) (discussing implications of transparency phenomenon for Title VII disparate impact analysis).

45. Examples are too common to provide any useful overview here. For representative works, see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1759 (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" accrues to relatively few white persons, she does not explore this insight further 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*, *in* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR, *supra* note 38, at 291, 293–94 (recognizing potential variations in the experience of whiteness but listing forty-six ways in which white privilege benefits all whites regardless of class and gender position).

More recently, some CRT scholars have raised questions about whether CRT should begin to examine questions concerned with different whites' varying levels of access to white privilege. *See, e.g.*, LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2002) (exploring political possibilities with coalitions of whites who enjoy less access to white privilege); Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1296–97 (2002) (recognizing possibilities of a "differentiated whiteness" model that explores whites' varying levels of access to white privilege). Other CRT scholars have recognized the potential productive nature of such discussions but raise concerns that the benefits of whiteness may still prove too strong to allow whites to develop an appropriately nuanced perspective on white privilege. *See* Cheryl I. Harris, *Mining in Hard Ground*, 116 HARV. L. REV. 2487 (2003) (reviewing LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2002)) (raising concerns about Torres and Guinier's idea of multiracial coalitions based on "political race" because the strategy fails to give sufficient weight to the social and material benefits all whites enjoy as a consequence of white privilege).

46. Some CRT scholars have explored issues affecting ethnic groups that could be described as marginal whites. However, these scholars have not attempted to articulate a larger theory about the dynamics of intraracial conflict and its relationship to minority-targeted discrimination. *See, e.g.*, JOHN TEHRANIAN, WHITEWASHED: AMERICA'S INVISIBLE MIDDLE EASTERN MINORITY (2009) (noting that Middle Easterners historically have been categorized as white but are subject to discrimination similar to other persons of color).

these discussions have focused on a "normative" white perspective, they have elaborated on a core white identity, presumptively untouched by ethnic specificity, class disadvantage, gender, or religious difference. Certainly, some productive scholarship has been produced using this invisibility thesis, as it has raised questions about the ways workplace antidiscrimination law and workplace dynamics force ethnic minorities to defend their deviation from the "default" cultural norms in the workplace.[47] However, the production of scholarship that stresses how employers use default assumptions associated with white identity has left CRT and CWS vulnerable to the claim that they are complicit in the very dynamic they are attempting to challenge: the instantiation of a naturalized, unmarked, homogenized, privileged white identity.[48]

CWS scholars perhaps have utilized the invisibility thesis the most in their work, stepping beyond the analysis of legal regimes that naturalize "white perspectives" to discuss whites' allegedly shared experience of social interactions. These scholars have suggested that whites experience whiteness as a fully sutured experience, arguing that part of the benefit of whiteness and white privilege is enjoying a feeling of racelessness[49] or invisibility.[50] More

47. *See, e.g.*, Flagg, *Fashioning a Title VII Remedy*, *supra* note 43, at 2013 (discussing the burden the transparency phenomenon imposes on black workers); *cf.* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (discussing how minority workers' attempts to comply with workplace professionalism norms are interpreted disadvantageously as race-based behavior instead of being understood against a default white norm).

48. Legal scholars' work discussing the notion of a default "white" perspective could continue to be a source of insight for scholars using a marginal whiteness framework, or another approach that recognizes the contingent nature of white identity. However, in order to modify this work for use with the marginal whiteness framework, scholars would have to acknowledge that the default white identity that operates in a particular workplace is actually the product of a specific negotiation between workers in that workplace as to how to define whiteness or what white identity means.

49. *See, e.g.*, Flagg, *Fashioning a Title VII Remedy*, *supra* note 43, at 2013. Flagg's insights match with some whites' descriptions of how they experience whiteness, as some do claim that they see themselves as racially unmarked subjects. *See* Amanda E. Lewis, *"What Group?" Studying Whites and Whiteness in the Era of "Color-Blindness,"* 22 SOC. THEORY 623, 635–36 (2004) (noting that many whites lack a self-conscious understanding of themselves as racial actors); Monica McDermott & Frank L. Samson, *White Racial and Ethnic Identity in the United States*, 31 ANN. REV. SOC. 245, 248 (2005) ("College and high school students are often unable to articulate what it means to be white, instead describing it as nothing or a vacuum.") (citations omitted). I have some skepticism about this view, as it is most likely held by persons socialized in relatively homogenous communities in terms of culture and class, and who consequently have not as much opportunity to compare their particular social and cultural practices (as well as political views) against other distinct groups of whites. However, even for this group, maintenance of an "unmarked" white identity requires studied inattention, for evidence of cleavages in the construction of whiteness are readily available in popular culture and media. For example, the Kennedy and Bush families are both celebrated American "white" families, but they do not perform whiteness in the same ways. Yet each family is regarded as representing an uncomplicated, privileged form of white identity with its prominence linked to specific identity features that are prioritized by particular constituencies of whites.

50. Some sociologists' research continues to support the view that whiteness is experienced as transparent and invisible by many white persons. *See, e.g.*, BONILLA-SILVA, *supra* note 39, at

recently, however, CWS scholars in fields other than law, including sociology, political philosophy, and critical theory, have called on scholars to reconsider whether this invisibility thesis actually holds true in social life. Instead, they contend that whiteness is increasingly experienced as a palpable, contextually situated experience for persons who claim white identities.[51] These scholars have called for additional theorizing about whiteness that recognizes its palpable nature. They argue that the experiences of whites with more complex, situated relationships to whiteness have much to teach us about white racial identity.[52] This Article responds to this call for scholarship that explores the palpable, situated, or context-specific nature of whiteness. It is the first analysis in legal scholarship that explores how whites' palpable experiences of whiteness affect their relationships with other whites in the workplace, their experiences of discrimination, and their attendant responses to the norms of antidiscrimination law. More specifically, this Article explores how whites' palpable experiences of whiteness and their anxieties about whiteness's contours affect their relationships with other whites who may be more invested in whiteness's social dominance, and the conflicts that result when whites find themselves on the margins of this racial category.

B. Understanding the Marginal-White Subject: Charting a New Direction

Section A described the need for more complex, situated accounts of whiteness in legal antidiscrimination scholarship; Section B provides an overview of my efforts in this regard, laying out the basics of the marginal whiteness framework. The analysis offered is a "social constructionist" approach to the study of white racial identity, one informed by sociologists

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103–29 (describing whites' tendencies to see race as something that shapes minorities' experiences but not their own). However, other studies support the more nuanced proposition that the understanding of whiteness is determined by context. *See infra* notes 52–53. The best way to align these two observations is to recognize that whites may use a homogenized version of whiteness when primed to think about cross-racial conflicts, but may articulate more nuanced understandings of what counts as white and elaborate on whiteness's specificity when they are in all white communities or communities where the definition of whiteness is being contested.

51. The notion of "white invisibility" seems increasingly less compelling to many whiteness studies scholars. *See, e.g.*, John Hartigan, Jr., *Establishing the Fact of Whiteness*, 99 AM. ANTHROPOLOGIST 495, 498 (1997). These scholars note that it would be difficult for whites to maintain the view that whiteness is invisible as they perceive their numbers to be shrinking and find the cultural landscape to be increasingly shaped by minority changes that make them aware of their own distinct cultural interests. As Ruth Frankenberg explains, "the current 'conditions and practice of whiteness' render 'the notion that whiteness might be invisible . . . bizarre in the extreme.'" McDermott & Samson, *supra* note 49, at 249 (quoting Frankenberg, *supra* note 35, at 76).

52. Sociologists Monica McDermott and Frank L. Samson explain that few scholars have attempted to "specify[] concrete ways in which . . . experiences of whiteness differ" so as to materially affect whites' life chances and social standing. McDermott & Samson, *supra* note 49, at 256.

Michael Omi and Howard Winant's concept of "racial formation."[53] However, my analysis examines racial formation contests at a more granular level than typical discussions of racial formation, concentrating on the construction of race in individual workplaces, rather than national or macro-level racial formation contests. More specifically, I focus on what I call the "technologies of whiteness" that are employed in a given workplace—the context-specific administrative policies, cultural practices, social understandings, and representational strategies that collectives of whites, as well as institutions, employ to identify, include, or exclude persons from the social category of whites and relatedly the benefits of white privilege.[54] To provide additional dimension to the discussion, my approach also contains a component that explores the individual psychology of white workers, namely the desires and

53. *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S (1st ed. 1986). Omi and Winant explain that "racial formation" as a concept "emphasizes the social[ly constructed] nature of race, the absence of any essential racial characteristics, the historical flexibility of racial meanings and categories," and, key for our purposes, "the conflictual character of race at both the 'micro-' and 'macro-social' levels . . . ." *Id.* at 4. Along with other social theorists, they have connected the ways in which a given racial formation or racial project in a particular historical moment or context is tied to, and typically relies on, constructs that specifically inform racism as it is manifest in a given period. *See also* David Gilborn, *Student Roles and Perspectives in Antiracist Education: A Crisis of White Ethnicity?*, 22 BRIT. EDUC. RES. J. 165, 170 (1996) (noting that social theorists like Omi and Winant "highlight ways in which ideas about class, race, culture, gender and sexuality are continually made and remade, often in contradictory and ambivalent processes, so that racism becomes a much more complex and dynamic issue than is usually assumed") (citations omitted). Omi and Winant's work on white racial formation and white racial projects has focused on developments within broader national or regional political debates and social movements. *See* Howard Winant, *White Racial Projects*, *in* THE MAKING AND UNMAKING OF WHITENESS, *supra* note 35, at 98, 102–07 (discussing new abolitionist, neoconservative, and liberal racial projects).

54. The term "technologies of whiteness" is loosely based on ideas introduced by Michel Foucault in his writings on genealogy and the constitution of the subject, specifically, the ways in which individuals are constituted as subjects by the discursive categories utilized by other social actors and institutions, and participate in the continued mobilization and interpretation of these discursive categories. *See* McWhorter, *supra* note 35, at 537–38 (discussing Foucault's work on genealogy and its relevance to whiteness studies). McWhorter explains that,

> [i]f Foucault had wanted to understand the formation of white subjectivity, he would have done a genealogy of whiteness. He would have looked for a point in the historical archive before whiteness made its appearance as a subject position, and he would have tried "to identify the accidents, the minute deviations—or conversely, the complete reversals—the errors, the false appraisals, and the faulty calculations that gave birth to" white subjectivity, realizing that any such genealogical account of what has claimed the status of the ahistorical, the natural, or the norm "has value as a critique."

Id. at 537 (quoting Michel Foucault, *Nietzsche, Genealogy, History*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE 139, 146 (Donald F. Bouchard ed., 1977)). This genealogy can be used to evaluate the current constitution of race and whiteness as a subject position. *Id.* I similarly argue that race (and particularly whiteness) is constituted, mobilized, and continually reworked by social actors as they discuss who fits into a racial category and what membership in that group means. Whiteness is remade as individual actors explore the possibilities presented by claiming a subject position associated with this particular racial group. Charting this evolving process will provide insight into the ways in which whiteness, and race more generally, is currently deployed in workplace discrimination disputes as well as larger social conflicts.

anxieties of persons that socially claim white identities.[55] Both disciplinary frameworks, the sociological and psychological, prove essential in crafting a comprehensive, nuanced framework for understanding whites' experiences of white racial identity, intraracial workplace conflicts, and the connections these intraracial conflicts have to interracial workplace discrimination.

The concept of "marginal whiteness," as defined here, refers to whites who only enjoy white privilege in contingent, context-specific ways. For these whites, although the basic social privilege of being recognized as white is typically not questioned, their access in a given context to the material and dignitary benefits associated with whiteness is not always assured.[56] Consequently, because of their relatively insecure access to white privilege, marginal whites share special insights and face different incentives when higher-status whites subtly, and not so subtly, invite them to engage in minority-targeted racism.

To better understand the special perspective of marginal whites, one needs an understanding of the racial identity pressures that shape their perspectives. There are two factors that determine whether one can lay claim to the benefits of a racial identity: voluntary racial identification and involuntary racial ascription. Therefore, whiteness should be understood as having two dimensions: it is a personal identity that an individual voluntarily claims and simultaneously an involuntary experience of subjection, in which one is drafted into a given racial category based on the perceptions of others. Because of the

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55. Some scholars have criticized CWS scholars' work that is based on the concept of "racial formation" because the scholarship produced tends to encourage a macro-level analysis of problems and fails to pay sufficient attention to the micro-level disputes about racial categories as they are defined in particular social locations. *See, e.g.*, John Hartigan Jr., *Locating White Detroit*, *in* DISPLACING WHITENESS: ESSAYS IN SOCIAL AND CULTURAL CRITICISM 180, 182 (Ruth Frankenberg ed., 1997) (noting that a focus on racial formation tends to lead scholars to use a national focus in their work although the theory is concerned with how the meaning of race is defined and contested through "collective action *and* personal practice") (emphasis added); McWhorter, *supra* note 35, at 534 (discussing the limitations of scholarship that solely relies on racial formation theories and does not include attention to micro-level disputes).

56. Indeed, there may be more questions about who qualifies to receive the benefits of whiteness in a particular space in contemporary circumstances, as large numbers of multiracial people have now decided to identify as white. *See* Twine & Gallagher, *supra* note 35, at 14 (noting that half of multiracial Asian and light-skinned Latino offspring who identified one parent as white in the 2000 National Health Interview Survey designated their primary identity as white in follow-up interviews). These persons may find that in certain circumstances their claims to whiteness are challenged. *See, e.g.*, Warren & Twine, *supra* note 40, at 202 (discussing Twine's surprise at discovering that her Syrian and Italian background was cited by an interviewee as disqualifying her from the category of whiteness in his view). Persons without clearly identifiable ethnic characteristics may still encounter this difficulty, as persons more clearly phenotypically identified as white may find that their claims to whiteness are challenged because they display certain class-based markers. *Cf.* Jane W. Gibson, *The Social Construction of Whiteness in Shellcracker Haven, Florida*, 55 HUMAN ORG. 379, 384 (1996) (noting that poor whites are socially constructed as racially different, and despite their "identification with privileged white society," find their bond to whiteness is "seldom and only opportunistically reciprocated").

involuntary dimension of racial ascription, some whites view the process with anxiety, as one is forced to "wait and see" whether the community of whites in a particular social context will recognize one as white and grant one access to certain advantages.[57] This second dimension of whiteness, the ascription process, can be particularly anxiety provoking for low-status whites, as they typically have much less control over the rules of racial determination used in any given location. There are, of course, some limits on the fluidity of racial ascription rules as they are the product of a combination of factors, including widely held and longstanding social understandings about race, such as social views regarding the interpretive meaning of certain phenotypical characteristics. However, ascription rules are also locally determined based on cultural, historical, or contemporary coalition-specific understandings of race generated in a particular workplace or institutional context.[58]

Therefore, although a person may claim a "white" identity, she is merely a putative white person and therefore may not be socially recognized as white in all contexts.[59] The unstable nature of putative whites' whiteness claims is more easily seen in the case of multiracial whites or whites with phenotypic characteristics that may suggest they are of mixed or prominent ethnic ancestry.[60] What is less often acknowledged is that putative whites with phenotypic characteristics that technically mark them as white may still exhibit features, engage in behaviors, or be otherwise marked in some way that signals to other whites that they are marginal or low-status white persons. Circumstances of scarce resources—or political, cultural, or social conflicts—may trigger higher-status whites to use these features to effectively redraw the

57. Joane Nagel, *Constructing Ethnicity: Creating and Recreating Ethnic Identity and Culture*, 41 SOC. PROBS. 158, 161 (1994). Nagel describes this process similarly, explaining that racial and ethnic identity is formed through individual voluntary identification and involuntary social ascription, as well as the formal and informal ethnic and racial identities that are deployed in different social locations. *Id.* at 154; *see also* 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 voluntary and ascriptive components of racial and ethnic identity).

58. Gibson, *supra* note 56, at 379–89 (discussing regionally specific forces that shape the understandings of poor whites in Shellcracker, Florida). *See* Hartigan, *supra* note 55, at 182 (discussing regionally specific understandings that construct various subgroups of poor whites' understanding of white racial identity in urban Detroit).

59. Lewis, *supra* note 49, at 624 ("Self-identification processes are linked with but are not equivalent to external ascriptions of racial categorization.") (citations omitted). Indeed, a person may not claim to be white at all, but still experience privilege because her morphology causes her to be regarded as white. *Id.* at 628.

60. *See, e.g.*, France Winddance Twine, *Brown Skinned White Girls: Class, Culture and the Construction of White Identity in Suburban Communities*, 3 GENDER, PLACE & CULTURE 205 (1996) (interviewing suburban mixed-race girls of African descent who successfully claimed white identities during adolescence in middle-class, suburban communities despite bearing phenotypical characteristics that marked them as persons of mixed descent). This experience of being raced as white or non-raced ended for many of the young women at puberty as social pressures forced them to recognize their status as mixed race persons or persons of African heritage. *Id.* at 216–18.

lines of whiteness in a particular context and deny marginal whites access to resources (or white privilege).[61] These low-status or marginal whites may find that they are, for all practical purposes, being treated like minorities, as they are subject to defamatory statements and denial of privileges available to other white workers.[62] Consequently, people who exhibit low-status identity markers, but self-identify as white may find that their anxiety levels are increased when they are exposed to new or unfamiliar communities of whites, as they fear potential rejection or unfair treatment by other whites who do not regard them to be true white persons.[63]

Although anxieties about racial misrecognition trouble all persons invested in maintaining their racial identities, individuals seeking to claim whiteness often suffer from particularly acute anxieties, because being socially recognized can confer a raft of social and material benefits.[64] Stated alternatively, these putative whites know that misrecognition is not merely a source of irritation, embarrassment, or inconvenience, as might be experienced by a minority not properly identified with her chosen racial group. Rather, misrecognition may impose significant material costs for self-identified whites, costs that can affect their life chances.[65]

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61. Nagel, *supra* note 57, at 158–59 (discussing how ethnic and racial boundaries are porous and often shift in response to status competition over resources). Nagel notes that these status conflicts are particularly likely to arise in the workplace. *Id.* Citing David Roediger's work on the white working class in the 1930s and 1940s, Nagel notes how the Irish worked to expand the category of whiteness to include their ethnic group as well, as a way of distancing their labor from the labor of African Americans. *Id.*

62. *See, e.g.*, Sidari v. Orleans County, 174 F.R.D. 275, 278 (W.D.N.Y. 1996) (discussing Italian American correction officer's national-origin- and religion-based discrimination claim based on allegations that white officers called him a "nigger turned inside out" and otherwise harassed him in the workplace). *See* LaRocca v. Precision Motorcars, Inc., 45 F. Supp. 2d 762, 770–71 (D. Neb. 1999) (discussing Italian American plaintiff's Title VII national-origin discrimination claim alleging his Italian heritage and darker skin caused co-workers to racially harass him, call him "spic" and wetback, and make ethnic jokes in front of him).

63. *Cf.* Winant, *White Racial Projects*, *supra* note 53, at 97 (arguing that much of white racism and identity struggles can be understood as a struggle against anxiety regarding the instability of whiteness).

64. Other scholars have addressed the question of race-based anxiety, particularly in the context of group status conflicts that control access to resources. *See, e.g.*, Lawrence D. Bobo, *Prejudice as Group Position: Microfoundations of a Sociological Approach to Racism and Race Relations*, 55 J. SOC. ISSUES 445, 447, 449 (1999) (summarizing Herbert Blumer's theory of group position); Rich, *supra* note 57, at 1187–90 (applying Blumer and Bobo's insights to workplace discrimination conflicts). While most group position scholars have concentrated on the anxiety associated with ensuring the status of one's own racial group, in this analysis I argue that group status-based anxiety extends to group membership concerns. Specifically, a person may perceive herself to be a member of a particular racial group but fear not being recognized as a member of that group by others, or fear exclusion from the enjoyment of certain group-controlled benefits. These anxieties are most readily apparent when one examines the experiences of multiracial whites and working-class whites.

65. *See* Swim & Miller, *supra* note 36, at 500 (noting that whites do not need to "spend as much psychological effort or economic resources recovering from others' prejudice and protecting themselves from possible encounters with prejudice").

To better understand the anxiety putative whites suffer attendant to the racial ascription process, one must understand that putative whites (persons who voluntarily claim a white identity) often also possess other socially stigmatized or "low-status" identity features. These features effectively modify or disrupt their ability to fully experience white privilege.[66] The most common identity markers that play a role in this process are gender, class, ethnicity, sexual orientation, and religious background. For example, white women find that the experience of white privilege for them is always complicated by gender.[67] Similarly, white gay persons have discussed how the experience of whiteness for them is qualified by homosexuality.[68] There is ample research demonstrating that for poor and working-class whites, relative class position shapes their experiences of whiteness and white privilege.[69] Similarly, ethnic white males are aware that national origin can complicate their ability to claim the advantages of white privilege.[70] These low-status identity features work in

66. *See* Eichstedt, *supra* note 31, at 450 ("[T]he 'benefits' of being white are not evenly distributed and . . . this uneven distribution of white privilege leads to different phenomenological relationships to the 'fact of whiteness.'") (citation omitted).

67. *See* Twine & Gallagher, *supra* note 35, at 6 (discussing feminist scholars' work that shows how "whiteness and gender shape racialized identities") (citations omitted); *cf.* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 874 (1990) (criticizing theories that purport to "isolate gender as a basis for oppression . . . [as] reinforc[ing] other forms of oppression") (footnote omitted).

68. McDermott & Samson, *supra* note 49, at 249 ("Poor, gay, or 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.") (citations omitted); *see also* Alan Bérubé, *How Gay Stays White and What Kind of White It Stays*, *in* THE MAKING AND UNMAKING OF WHITENESS, *supra* note 35, at 234 (discussing experiences in which the author began to notice the degree to which gay identity 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, 621–22 (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.").

69. *See* Michelle Fine et al., *(In)Secure Times: Constructing White Working-Class Masculinities in the Late 20th Century*, 11 GENDER & SOC'Y 52, 52–68 (1997) (discussing how class affects the experience of whiteness for poor and working class whites); Gibson, *supra* note 56, at 381–87 (discussing same). Indeed, class seems to be the most widely recognized basis on which intraracial disputes over the construction of whiteness are fought. For a further examination of how class historically has played a role in constructing differences between "normal" and marginal white persons, see generally WRAY, *supra* note 35. For further discussion of the discursive methods used to racialize poor whites as "other," see Annalee Newitz & Matthew Wray, *What Is "White Trash"? Stereotypes and Economic Conditions of Poor Whites in the United States*, *in* WHITENESS: A CRITICAL READER 168, 169 (Mike Hill ed., 1997) (discussing discourse about "white trash" and the ways in which class and race tend to bleed into one another).

70. This insight is better illustrated by case law than existing scholarship, as the data on white ethnic identification is mixed. As the cases cited in this discussion show, whites sometimes will use ethnic differences between their members as a reason to distinguish between whites when resources are scarce. *See, e.g.*, Holtz v. Rockefeller & Co., 258 F.3d 62, 72, 84 (2d Cir. 2001) (discussing English-German women's EEOC charge alleging Title VII national origin discrimination based on Irish supervisor's preferential treatment of Irish women); *see also* cases cited *supra* note 62 and *infra* notes 88 & 89. Other data suggests that white ethnic identification

this fashion because some whites use these distinctions to judge the "belongingness" or relative status of other white persons. This is not to say that white women or gay men, for example, routinely find themselves entirely cast out of the category of whiteness in a particular workplace. However, what they do discover is successive layers of ingroup privilege constructed among whites that make them feel as though they are "marginal" white persons.[71]

Sociologists and anthropologists have long acknowledged this relationship between race and other aspects of social identity,[72] noting the important role these connections play in understanding the operation of race discrimination and the ability to access racial privilege. Matt Wray, a sociologist working in whiteness studies, more recently issued a call for a theory that better maps the interrelation of multiple aspects of social identity and their complementary roles in achieving racial subordination. Wray notes that "[i]t is now common parlance in whiteness studies to speak about the racialization of sex and class, the gendering of race, or the sexualization of race and class . . . ."[73] He continues,

> [T]his 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 better see them as four deeply related subprocesses of a single, larger process of social differentiation?[74]

Some may have reservations about collapsing these different identity features into a single framework to create a "unifying theory of social difference and inequality,"[75] arguing that the discrimination triggered by each feature has its own distinct properties worthy of separate analysis. However,

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may be less significant than other marginal whiteness factors, although this may be because whites (like other racial groups) invoke ethnic identification on a situational basis. *See* Nagel, *supra* note 57, at 156 (recognizing whites make different ethnic and racial identification decisions based on social contexts). In particular, Nagel notes that whites may highlight particular European ancestry, Native American ancestry, whiteness, or Americanness, depending on which identity is more relevant in a given social context. *Id.* at 155.

71. This multi-vectored approach to race has also been associated with the "Third Wave" of whiteness studies, as described in sociological theory. Persons who are members of multiple subordinated groups experience whiteness through the prism created by multiple vectors of disadvantage. *See* Twine & Gallagher, *supra* note 35, at 6 (explaining that new sociological models see "whiteness as a multiplicity of identities that are historically grounded, class specific, politically manipulated and gendered social locations").

72. As Ruth Frankenberg observes, "whiteness as a site of privilege is not absolute but rather crosscut 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." *Id.* at 7 (quoting Frankenberg, *supra* note 35, at 76).

73. *See* WRAY, *supra* note 35, at 5.

74. *Id.*

75. *Id.* at 6 (urging the adoption of a unifying, totalizing model of social differentiation). Scholars' concerns about this kind of unifying model are reviewed in more detail in Part IV.

Wray is correct that the antidiscrimination literature would benefit from the development of a theoretical framework for analyzing racial conflict that more fully integrates insights about potential multiple bases of marginality—one that focuses less on the discrete experiences of individual subgroups marked by multiple vectors of difference, and instead considers how race, class, sex, gender, religion, ethnicity, and sexual orientation are essentially key factors used in a single process that creates privileged ingroups and subjects others to outgroup subordination.[76] The marginal whiteness framework is offered as one approach that helps synthesize the effects of these multiple sources of subordination, while still focusing on the primary question of how outgroup differentiation (or discrimination) operates in a particular space. Marginal whiteness is based on the proposition that high-status whites devote their attention to defining a privileged ingroup of "white" members and incidentally cast other persons (minorities and other low-status whites) outside of that privileged ingroup as circumstances require. It is also based on the proposition that many marginal whites are aware of this process of ingroup status construction and outgroup subordination and are preoccupied with where they fall in this process of distinction.

To further instrumentalize this account it is useful to think about marginal whiteness in the following manner: when most whites imagine the experience of whiteness, their reference point is the most privileged version of whiteness—a white, non-ethnic, middle-class, heterosexual male.[77] For example, when white women believe they are being denied the full experience of social equality or of white privilege, they do not look to the experiences of minority

76. The marginal whiteness framework 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 discrete vectors of difference combine to create unique forms of disadvantage for persons belonging to multiple socially subordinated identity categories. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing unique forms of discrimination experienced by black women). Rather than privileging subgroup specificity, marginal whiteness suggests that these discrete vectors of difference can be treated as historically grounded rhetorical strategies used to create and distance outgroups, thereby ensuring the maintenance of privilege for a core group of white males.

77. This observation is not to suggest that white, non-ethnic, middle-class, heterosexual males never experience social stigma or disadvantage. Rather, one obvious additional basis for subordination is religion, which is included in the list of modifiers offered in my initial points outlining the propositions that inform the marginal whiteness model. Also, white males may be subject to stigma based on their perceived failure to comply with normative standards for the default identity they hold. For example, males may be sanctioned because of their failure to "properly" perform traditional masculinity, etc. However, again, this merely further proves the point that the paradigmatic American subject with full rights is always imagined as a white, non-ethnic, middle-class, heterosexual male. It need not matter that this ideal person often does not exist in a particular workplace, as the ideal subject functions in part as a fantasy. One's proximity to or one's imagined embodiment of the ideal standard allows a white worker to use the ideal as a basis for subordinating others.

males or gay, white males.[78] Rather, they look to the experiences of white, non-ethnic, middle-class, straight men. When white, gay men assert that they do not enjoy the full measure of white privilege, they do not compare their circumstances against those of straight Asians, Latinos, African Americans, or white women. Rather, they also look to the experiences of white, non-ethnic, heterosexual, middle-class men.[79] The essential truth of this claim becomes clear when whites make complaints about affirmative action on the ground that they do not really enjoy white privilege.[80] The comparison on which they base their complaints is that they do not enjoy all of the social and political benefits enjoyed by white, non-ethnic, middle-class, heterosexual males. By making these arguments, whites reveal that they are assessing their experiences of whiteness with reference to a paradigmatic privileged white subject, the reference point against which all other experiences of whiteness are compared.[81]

Having recognized that multiple identity factors can compromise the experience of whiteness, one can see why many whites' experiences of whiteness are characterized by a feeling of anxiety and incompleteness. In spite of the assumption naturalized by interracial solidarity doctrine (namely, that all whites have equal access to white privilege), many whites are aware that they only have partial access to this privilege and are thus plagued by anxiety. Too often discussions of racism, rather than attending to marginal whites' concerns about different levels of privilege between whites, tend to increase marginal whites' anxiety. For example, marginal whites chafe when they are described as oppressors in these conversations, as they believe that they have never

78. This default assumption is well grounded in American legal history. White, Anglo, middle-class, heterosexual 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 minorities, typically in circumstances where they allege that their employers are overzealously enforcing formal and informal affirmative action measures. *See, e.g.*, Ricci v. Destefano, 129 S. Ct. 2658 (2009) (discussing white firefighters' challenge to employer's decision to disregard results of promotion exam that appeared to unnecessarily disadvantage minority candidates).

79. *Cf.* Wendy Brown, *Wounded Attachments*, 21 POL. THEORY 390, 394 (1993) (noting that social justice advocates focused on equality should consider the degree to which they have limited calls to change by simply calling for the extension of the same parcel of rights enjoyed by white, non-ethnic, middle-class, heterosexual males to all persons regardless of race, gender, or sexual orientation). Brown argues that, by adopting this approach, advocates have given up the opportunity to imagine alternative social arrangements. *Id.* at 408.

80. 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.

81. Twine & Gallagher, *supra* note 35, at 6 (noting that "Third Wave Whiteness" studies call 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.

intentionally played this role or consciously made use of social benefits that are the result of the oppression of minorities.[82] Also, many balk at being asked to bear the costs of social justice programs to improve the standing of minorities, as marginal whites often do not perceive themselves as enjoying the benefits of white privilege that put minorities at a relative disadvantage.[83]

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 when marginal whites think about race or whiteness, they tend to focus on their perceived *lack* of access to privilege. Their constant focus on their lack of privilege shapes marginal whites' reactions to discussions about whites' comparative social advantages.

My observations about marginal whites' anxieties about whiteness may seem novel. However, these anxieties are already being harnessed in political debates. For marginal whites' frustration about their lack of access to privilege can be channeled in two ways: it can be directed at higher-status whites, who enjoy greater access to privilege, or at minorities, who draw attention to current inequalities. The New Right has enjoyed great success by convincing many marginal whites to redirect their anxiety about their marginal status away from high-status whites and to focus their attention on minorities' claims for advancement, suggesting these advances inevitably must come at the cost of lower-status whites.[84] Counterarguments that highlight higher-status whites' role in marginal whites' frustration have been less prominent in political debates. Yet, occasionally, marginal whites find themselves in the situation exemplified in *Clayton*, circumstances in which they see higher-status whites consciously sacrifice the interests of lower-status whites when necessary to exclude minorities from receiving certain privileges. These experiences tend to alienate marginal whites even further from whiteness, and can lead to the development of a critical consciousness.

82. *See* Debbie Storrs, Book Review, 31 CONTEMP. SOC. 570, 571 (2002) (reviewing THE MAKING AND UNMAKING OF WHITENESS, *supra* note 35). Storrs's review quotes an email from a white student complaining, "[w]e have all the advantages in life in this country, but once again, this isn't our fault. We didn't ask to be born white males." *Id.*; *see also* Gilborne, *supra* note 53, at 170 (arguing that white resistance to traditional antiracism education that highlights white privilege is "more than simple 'white defensiveness'"). Gilborne further explains that whites' complaints about their own relative disadvantage should not be dismissed as a mere "attempt to retain privilege by masquerading as an oppressed group." *Id.* (citation omitted).

83. Olson, *supra* note 35, at 392.

84. Sean Brayton, *MTV's Jackass: Transgression, Abjection and the Economy of White Masculinity*, 16 J. GENDER STUD. 57 (2007).

C. Marginal Whites and the Technology of Whiteness: Charting Workplace Intraracial Disputes

The second component of the marginal whiteness framework focuses more on sociological questions, rather than on the individual psychology of white workers. It is based on the understanding that there are multiple social forces at work continuously shaping racial identity in any given context. Therefore, one must be aware of the "technologies of whiteness" at play in a given institutional location: the legal and social definitions of race being mobilized by different institutional actors as well as the informal, social definitions of whiteness generated by collectives of whites in a given context. By "technologies of whiteness," I am referring to the regional, cultural, and context-specific practices whites use to actively construct the category of whiteness in a workplace (or other institutional locations). These practices include differentiating among whites and subordinating lower-status whites' interests to conserve scarce resources for a smaller, select group of whites when necessary. These social practices typically make use of understandings of whiteness circulated in national political debates or local politics but can be idiosyncratic in some ways based on understandings generated by the workers in a given employment context.

For example a group of putative whites whose members previously recognized one another as white may begin to distinguish among themselves when presented with a significant cultural or social event that makes their respective differences salient. So, for example, all of the employees in a given workplace may socially recognize each other as white, but when their employer decides to give Saint Patrick's Day off but not Cinco de Mayo, Mexican whites may feel slighted and ethnically marked in a way that diminishes their claim to whiteness.[85] Groups of whites may also begin to distinguish between one another when they are presented with a scarce-resources problem that does not allow them to confer advantages on every "white" worker. A workplace in which all employees are recognized as white may begin to notice cleavages between Irish and Syrian workers when an Irish supervisor appears to solely grant Irish workers valuable overtime assignments. The marginal whiteness

85. Indeed, cultural events or cultural symbols can trigger these fractures within whiteness. *See, e.g.*, McWilliams v. W. Penn. Hosp., 717 F. Supp. 351, 353 (W.D. Pa. 1989) (discussing Irish plaintiff's Title VII national origin discrimination claim based on discriminatory comments by other whites allegedly triggered by St. Patrick's Day holiday); Pinsker v. Joint Dist. No. 28J of Adams & Arapahoe Counties, 735 F.2d 388, 389 (10th Cir. 1984) (discussing Jewish plaintiff's Title VII religious discrimination claim arguing failure to give automatic leave for Jewish holidays compared to leave granted for Christian holidays constituted discrimination); Goldschmidt v. N.Y. State Affordable Hous. Corp., 380 F. Supp. 2d 303, 311 (S.D.N.Y. 2005) (discussing Orthodox-Jewish plaintiff's hostile environment claim based on other employees' disrespectful statements regarding Judaism and supervisor's complaints regarding his absences to observe Jewish holidays).

framework posits that lower-status whites are aware of these cleavages, and in some instances recognize mobilization of intragroup distinctions within whiteness as attempts to eject them from the category of privileged persons.[86]

The same kind of intraracial fractures occur in response to rules with less ethnic or cultural register. For example, all of the workers in a telemarketing firm may socially recognize one another as white, until their employer institutes a rule discouraging the hiring of thickly accented persons. After the rule is instituted, Russian immigrants, Latinos, Southerners, and many other ethnically marked subgroups of whites may suddenly feel their difference sufficiently highlighted so as to eject them from the category of whiteness in that workplace.[87] They may feel the effects of this exclusion even more significantly if they fear the loss of their jobs because of the change in policy. The above examples focus on changes in workplace rules that highlight distinctions in whiteness based on ethnicity, immigration history, and region, but rule changes can also implicate gender, class, or religion. These changes function as trumps that trigger the anxieties of white workers and mark them as marginal or low-status white workers, particularly when they have economic significance.

Importantly, the presence of minority workers in the same workplace where these changes are in effect further complicates the equation. That is, a rule change instituted to affect minorities may end up focusing on features that are shared by a subgroup of whites who then feel "marginal" because of the decision. Alternatively, more bald efforts at minority-targeted discrimination may trigger complaints and (as in *Clayton*) an employer may attempt to find some race-neutral rule to mask its prior discrimination. However, the employer or supervisor is likely to select a rule that does not affect the highest-status white workers in a given workplace, and instead choose an approach that will

86. *See, e.g.*, Holtz v. Rockefeller & Co., 258 F.3d 62, 72, 84 (2d Cir. 2001) (discussing English-German women's EEOC charge alleging Title VII national origin discrimination based on Irish supervisor's preferential treatment of Irish women in their twenties in offering hiring and training opportunities). In rejecting her claim, the court noted that she merely complained that "her supervisor and several co-workers formed 'a little clique of Irish people and they would talk about being Irish a lot,' and that she was 'out of the loop.'" *Id.* at 84.

87. *See, e.g.*, Valtchev v. City of New York, No. 06 Civ. 7157, slip op. at *10 (S.D.N.Y. Aug. 31, 2009) (dismissing on summary judgment Bulgarian immigrant plaintiff's national-origin discrimination claim based on other whites' conduct involving alleged accent discrimination); *cf.* Batyreva v. N.Y. City Dept. of Educ., No. 07 Civ. 4544, 2008 WL 4344583, at *1 (S.D.N.Y. Sept. 18, 2008) (permitting Russian immigrant to bring Title VII claim of national-origin-based and accent-based discrimination regarding supervisors' treatment of the only two Russian immigrant teachers at her school). Even more interesting, sometimes these "marginal" whites believe their discrimination allegations concern race, but the court concludes that they are white and therefore their claims should be classified as Title VII national-origin discrimination claims. *See, e.g.*, Abdulrahim v. Glick, 612 F. Supp. 256, 264 (N.D. Ind. 1985) (holding that Palestinian-heritage Syrian's "failure to hire" claim could not be characterized as a Title VII race discrimination claim because his dispute was against other white employees). The court, however, allowed the plaintiff to bring a Title VII national-origin discrimination claim and a § 1981 color discrimination claim. *Id.* at 256 (citing Carrillo v. Ill. Bell Tel. Co., 538 F. Supp. 793 (N.D. Ill. 1982).

fall disproportionately on lower-status or marginal-white workers.

When viewed in this light, one recognizes that minority-targeted discrimination can function to unite a group of culturally, socially, and economically differently positioned whites, or it can draw attention to cleavages between them. For example, the *Clayton* case revealed class to be an important cleavage point between the whites in the White Hall School District, a result that might have proved revelatory to Clayton. However, whites will make discriminatory distinctions between one another for a range of reasons. Consequently, courts should be aware that intraracial discrimination among whites can follow minority-targeted discrimination (i.e. be used to mask prior minority-targeted discrimination), precede, or accompany it (i.e. when the white worker displays markers that effectively cause him or her to be categorized as a non-white or low-status white person).

D. Marginal Whites' Reactions to Discrimination: The Role of Rational Cost-Benefit Calculations

What do these insights about intraracial conflict and white anxiety teach us about white reactions to minority-targeted discrimination in the workplace? They suggest that contemporary marginal whites face special incentives when confronted with racism. The conventional account under Title VII, which is based on civil rights era norms, posits that whites will be offended by minority-targeted discrimination because it threatens their ability to enjoy a colorblind workplace and to form valuable relationships with minorities. While these are social goods that many whites might enjoy, marginal whites (in particular post–civil rights era whites) likely view them as secondary considerations. Low-status whites, in particular, often feel like they are not economically and socially positioned in a manner that allows them to focus on these concerns, as opposed to their first-order economic or dignitary interests. Moreover, many whites are preoccupied with their inability to fully access white privilege and are therefore resentful of race conversations that seem to treat them as though they enjoy unqualified privileged status. Because interracial solidarity doctrine fails to recognize these whites' frustration, we have seen relatively few whites take up its invitation to file claims seeking the benefits of colorblindness or diversity. Instead, these whites require an antidiscrimination framework (as well as Title VII claims) that acknowledges their feelings of economic and social vulnerability.

The marginal whiteness framework can improve our understanding of these whites' perspectives, as it takes account of economic and socially vulnerable whites' difficulties when faced with discriminatory conduct. It suggests that when marginal whites are faced with overtures to engage in or tolerate racism, they experience these moments as offering illicit temptation to

cast their lot with a discriminatory system that only occasionally and intermittently benefits their social and economic interests.[88] They must choose to assist with the maintenance of discriminatory arrangements (with the hope that these arrangements will deliver personal benefits to them), or align themselves with outsiders and disrupt discrimination (based on the concern that discriminatory arrangements ultimately work to their disadvantage). Some whites will accept the invitation to discriminate; others will adopt an antidiscrimination perspective that challenges white privilege.[89] 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 is based on pragmatic considerations. Unlike civil-rights-era-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 categorize, not only for 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 assume whites will be motivated primarily 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 Intra-Group Esteem Payments

The marginal whiteness model's claims regarding whites' cost-benefit approach to invitations to discriminate is properly characterized as a "rational actor" account of discrimination, one related to the "intra-group esteem" model offered by Richard McAdams.[90] McAdams explains that, historically, whites

88. *See* BONILLA-SILVA, *supra* note 39, at 133 (noting that working class whites find that white privilege may make them relatively better off in some circumstances than many of their minority comparators, but they also recognize that they do not have access to the full parcel of benefits associated with white privilege).

89. The above reference to "overtures" to discriminate refers to explicit overtures as well as the arguably more common, subtle invitations to discriminate, which often are articulated in race-neutral terms. While subtle invitations occur quite frequently, a review of Title VII cases indicates that explicit overtures also continue to cause problems. *See, e.g.*, Bermudez v. TRC Holdings, Inc., 138 F.3d 1176 (7th Cir. 1998) (discussing explicit overtures made to white employee to discriminate based on race).

90. Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status*

maintained their socially dominant position by providing incentives for other whites to engage in "outgroup" discrimination, even when this discrimination was not economically profitable.[91] Whites used an incentive structure based on the exchange of "intra-group" esteem or "status" benefits, which motivated whites to take less attractive economic bargains to insure that certain benefits and resources were only available to whites.[92] 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 complying with these maintenance norms.[93] McAdams extends his analysis to cover the period shortly after the civil rights movement, and notes that the entire intra-group esteem system depended on whites continuing to value these esteem credits highly.[94]

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.[95] Specifically, Title VII has complicated whites' ability to exchange intra-group esteem (and similarly, to preserve workplace benefits for whites) for at least four reasons: it

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Production and Race Discrimination, 108 HARV. L. REV. 1003, 1029 n.95, 1030 (1995). McAdams states, "Groups use intra-group status rewards as a non-material means of gaining material sacrifice from members . . . ." *Id.* at 1007.

91. *Id.* at 1042–48.

92. McAdams explains that "[a]bsent the desire for intra-group status, selfish individuals would not make the material sacrifices that discrimination requires." *Id.* at 1007–08.

93. The paradigmatic example of this phenomenon is one in which a white person accepts a lower bid on her house from a white buyer, instead of accepting a higher bid from a black buyer. The white buyer who does so takes this action in expectation that she will receive intra-group esteem or "status" payments from other whites. *See id.* at 1007.

94. *See id.* at 1056–58. McAdams believes that race-based status concerns have endured, but he also recognizes that the language and rationales offered to support them have likely changed because of the strength of contemporary antidiscrimination norms. *See id.* at 1069, 1078 n.302.

95. The 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's analysis and sociological discussions of race, however, is more porous than it might seem. Sociologist Lawrence Bobo, relying on the work of Herbert Blumer, posits that racism is produced by, and engenders, group status conflicts over resources. Bobo, *supra* note 64, at 456–57. McAdams uses Bobo's insights to supplement the traditional rational actor model used to describe discrimination. *See* McAdams, *supra* note 90, at 1044 n.160, 1056 & n.214. He explains how individuals factor in irrational status benefits derived from racial identity into their cost-benefit calculations when making decisions. *See id.* In the present discussion, McAdams's granular analysis of the group status calculations individual whites make 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.

has (1) muddied or blurred norms about white preferences; (2) complicated communication between potential discriminators; (3) created sanction risks; and (4) therefore prevented the consistent delivery of reciprocal benefits between whites. These complications have undercut the effectiveness of the intra-group esteem system, which has reinforced whites' beliefs that they cannot expect consistent payoffs from white privilege. Each of these complicating factors is dealt with more specifically in the discussion that follows.

Most American workers currently in the workforce have been socialized in an era of Title VII enforcement and, consequently, have at some level adopted civil rights norms. This commitment to civil rights era understandings may be largely passive in nature, with whites not being required to do much to prove their commitment to these ideals in normal social interaction. However, even whites with a relatively superficial commitment to these understandings present challenges to consciously discriminatory whites when they attempt to exchange intra-group esteem or communicate discriminatory intentions.[96] For, at present, most whites believe that those who engage in explicit, dominative racism are deviant, and even psychologically flawed.[97] Therefore, although whites may tolerate the occasional racist joke or seemingly discriminatory comment, they are far more disturbed when someone explicitly states that they intend to discriminate against or disadvantage a minority person because of racial prejudice.

Because antidiscrimination norms have fundamentally shaped whites' impressions about explicit racial prejudice, discriminators typically do not want to be seen as overtly racist. They instead try to use coded, race-neutral language and rules to achieve their goals. This shift in communication strategy causes two problems. First, these coded terms are often alienating to marginal whites, as they may feel implicated by the disfavored, race-neutral category. For example, when a white admissions officer attempts to keep blacks out of Harvard University by using a term like "persons from a culture of poverty" to describe undesirables, a marginal white is likely to feel implicated by the negative thrust of this coded reference.[98] Over time, the use of these coded

96. Discriminating whites also face challenges in dealing with "race traitors," whites who proactively seek to disrupt white privilege. *See* RACE TRAITOR (Noel Ignatiev & John Garvey eds., 1996). The discriminating white may fear that "progressive" or "race traitor" whites 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 that 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 the critical mass of whites necessary for an intra-group esteem system to function.

97. Laura Smith et al., *The Territory Ahead for Multiracial Competence: The "Spinning" of Racism*, 39 PROF'L PSYCHOL.: RES. & PRAC. 337 (2008).

98. Carole Marks, *The Urban Underclass*, 17 ANN. REV. SOC. 445, 460–61 (1991) (describing ideological work performed by the terms "culture of poverty" and "urban poor," and their role as coded racial signifiers).

references will likely lead to resentment between the admissions officer, attempting to signal discriminatory intent, and the marginal white person—a dynamic which compromises their ability to work collectively to uphold white privilege. Similarly, when the coded markers for discrimination highlight other identity-salient features, such as class, region, culture, and religion, the discriminator encourages her white coworker to consider other nonracial aspects of the coworker's identity, making the importance of whiteness and white privilege seem less significant. For example, the discriminating admission officer's reference to the "urban poor" applicant may prime his coworker to think class is an important part of the discriminator's calculations. This draws attention to the coworker's class standing as a source of potential vulnerability.[99]

Whites' inability to communicate explicitly about intra-group esteem also makes a white worker unsure whether other whites will reward him 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 rewarded properly. In most workplaces, a discriminator 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' intra-group esteem against the very real threat of sanctions.

Finally, because of their ambivalent relationship to whiteness,[100] many whites focus 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. Consequently, they comparatively 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 whites. Indeed, for many of these whites, overtures to discriminate may be perceived as a kind of racial

99. The references used here (for example, "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 suggests that there may be a well-established lexicon of coded references that whites use to signal to each other regarding their biased attitudes but also allow them to avoid making explicitly racist comments. However, because many whites want to avoid appearing explicitly racist, as a term becomes more established as a discriminatory reference pertaining to a particular minority group, it becomes less useful as a coded form of communication. Consequently, discriminating whites must periodically find new proxies to describe unwanted groups, further compromising their ability to communicate with one another.

100. Charles Jaret & Donald C. Reitzes, *The Importance of Racial-Ethnic Identity and Social Setting for Blacks, Whites, and Multiracials*, 42 SOC. PERSP. 711, 711 (1999) (noting that contemporary studies on whiteness "have uncovered a mix of pride, denial, and ambivalence in the way people incorporate a sense of being white into their self-concepts"); *see also* Twine & Gallagher, *supra* note 35, at 7 (noting that "white privilege can be at the same time a taken-for-granted entitlement, a desired social status, a perceived source of victimization and a tenuous situational identity").

harassment. Whites may feel they are being asked to perform a kind of illicit "racial labor" when they receive requests to preserve preferences for whites, partly because they know this racially biased system does not confer benefits consistently and could even get them fired. Post–civil rights era whites are therefore 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.

Additionally, demographic and social changes, in particular the rising number of multiracial persons, have increased the risk that the individual being courted to participate in the exchange of intra-group esteem is a marginal white—and therefore has previously experienced discrimination that prevented him from accessing social or economic benefits available to other white persons. For example, a multiracial white person may have experienced exclusion based on the use of coded criteria that happened to also apply to him. Alternatively, he may have experienced exclusion because his morphology caused 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 a prior experience in which he was denied the full privileges of a white identity.[101] 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.[102] 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.[103]

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101. This proposition requires further discussion. 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 may be denied when he visits his employer's Scarsdale neighborhood and meets the employer's friends. Because the intra-group esteem system depends on meeting participants' expectations and providing consistent payoffs, these inconsistent results pose a problem.

102. A biracial Asian interviewee in the Miville Study, presumably with racially ambiguous phenotypic characteristics, recounts a time when he submitted an application for a job but was not called for an interview. Marie L. Miville et al., *Chameleon Changes: An Exploration of Racial Identity Themes of Multiracial People*, 52 J. COUNSELING PSYCH. 507, 509 (2005). When he stopped by his potential employer's office, the hiring administrator immediately offered him the job. *Id.* He quickly deduced that he had not been called for an interview because of his Asian-sounding name. *Id.* He recalled that he said to her,

> "I've 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 in [sic] twice before now. So, obviously to me if you're looking for a person hired [sic] 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 that 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.

Id.

103. Some would even argue that these marginal whites are *more prone* to embrace antidiscrimination work than other persons. Jennifer Eichstedt contends that "differential experiences of and relationships to whiteness strongly impacts . . . who is more likely to become

Students of history may ask, what has changed? They know that marginal whites' interests have always been subordinated to serve the interests of higher-status white persons, and historically marginal whites have been willing to bear these burdens.[104] However, because of changes in social conditions, marginal whites may be less inclined to do so now, as this intra-group esteem system cannot provide them with consistent benefits for their sacrifices. For example, in the era of Jim Crow, discriminating whites received daily compensation for the work they did to maintain white privilege, as blacks were required to continually and publicly demonstrate their social subordination.[105] Now that these clear markers of social dominance are gone, the immediate value of whiteness for whites is less evident. Although post–civil rights era whites still enjoy numerous social advantages because of whiteness, they are less likely to notice the benefits they receive and *more likely to undervalue them.*[106] Consequently, when asked to perform labor to maintain white privilege in the short term, 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.

[an] antiracism activist[]," 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, *supra* note 31, at 450; *see also* BONILLA-SILVA, *supra* note 39, at 146 (noting that racial progressives often use their own experiences of discrimination as a frame to understand the discrimination experiences of others).

104. *See generally* DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS 133–40 (1st ed. 1991). Most historical accounts tend to emphasize the benefits that whites enjoyed at the expense of blacks during periods when white privilege played a more dominant role in American social relations, but there is also evidence showing that some whites were forced to make costly sacrifices during this period to maintain the privileged status of whiteness. *See, e.g.*, GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS 26 (1998) (acknowledging the burden lower-income whites endured in the pre–civil rights era by selling their homes for lower amounts to avoid having minorities move into white neighborhoods); DAVID R. ROEDIGER, TOWARD THE ABOLITION OF WHITENESS 29 (1994) (noting that white union workers engaged in lengthy "hate strikes," in response to integration measures or the promotion of black workers, resulting in significant lost wages).

105. RICHARD THOMPSON FORD, THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE 78–79 (2008) (discussing the benefits of "ritual sadism" that poor whites enjoyed under Jim Crow as they routinely watched blacks perform rites of social subordination in public settings).

106. Troy Duster, *The "Morphing" Properties of Whiteness*, *in* THE MAKING AND UNMAKING OF WHITENESS, *supra* note 35, at 113, 114 (discussing some of the current benefits of whiteness as securing easier access to loans, benefiting from regular service at restaurants, and enjoying the ability to drive without fear of being stopped on suspicion of criminal activity). Many authors working in Critical White Studies explore these and other benefits in more detail. However, these scholars also recognize that contemporary whites are likely to regard the benefits associated with white privilege as something to which they are automatically entitled, rather than special privileges for which they should be grateful. *See, e.g.*, McIntosh, *supra* note 45; *see also* Olson, *supra* note 35, at 392 (discussing contemporary whites' tendency to undervalue white privilege). This sense of passive entitlement, I argue, affects many contemporary whites' willingness to assist in maintaining white privilege.

2. Distinctions from a Behavioral Economics Account

McAdams would likely challenge my use of his intra-group esteem model on at least one critical point. He would contest the claim that experiences with class disadvantage will make marginal whites feel ambivalent about white identity and thereby increase their skepticism about overtures to engage in racism. Instead, McAdams posits that poor or lower-status whites have been the ones *most likely* to discriminate because they have no other means of producing status.[107] Rather than being frustrated by their marginal-white status, he would predict that these whites are more likely to emphasize their claims to whiteness and white privilege.

My response to this challenge is that McAdams' assumptions about working-class whites' willingness to discriminate are based on a group of whites that were not 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. This attitudinal shift has pushed many whites in the direction forecast by the marginal whiteness framework. Admittedly, however, the data on this point is unclear. There is research to support both McAdams's view and my own.[108] Consequently, rather than trying to categorically decide whether poor and working-class whites are more likely to be biased or more likely to adopt a marginal whiteness orientation, it would be more fruitful to acknowledge that whites' responses to overtures to discriminate will depend, in part, on the social context in which they arise. The same working-class white person may adopt a critical marginal whiteness perspective in one interaction and switch to a biased, even regressive, perspective in another circumstance.

I must emphasize that the marginal whiteness framework is not being offered to describe all or even most contemporary whites' behavior in all circumstances.[109] The framework simply is offered to explain the interests of a

107. McAdams argues that "[w]hites 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 their last remaining mechanisms of status production." McAdams, *supra* note 90, at 1055 (footnote omitted). Indeed, this view has functioned as a common-sense assumption about white working-class persons' attitudes. *See* BONILLA-SILVA, *supra* note 39, at 133 (noting problem and critiquing assumptions about working-class whites' attitudes). The prevalence of this view has lead Bonilla-Silva and other scholars to conduct research that rebuts the claim that working-class whites are more likely than middle-class or wealthy whites to hold discriminatory attitudes. *See, e.g., id.*

108. *See* BONILLA-SILVA, *supra* note 39, at 132, 144 (acknowledging the "common sense view" that working-class whites are more racist than higher-status whites, but noting that 1997 and 1998 surveys indicate that young working-class women were the *most* likely to have "racially progressive attitudes").

109. Again, many whites, particularly those that became adults during the civil rights movement, will find that their attitudes are better described by existing civil rights–influenced models of whites' interests.

growing class of persons who, although they do not fully conform to civil rights era norms, may still in certain circumstances generate the critical insights necessary to bring interracial solidarity claims.[110] The reasons for this shift in consciousness is explored in more detail in Part III. Part II considers how these marginal whites have fared in prior antidiscrimination cases, and describes the special role their claims can play in the elimination of workplace discrimination.

II
UNORTHODOX PLAINTIFFS: MARGINAL WHITES IN ANTIDISCRIMINATION CASES

Sometimes legal scholars must be anthropologists as well. As we review cases, we discover unorthodox plaintiffs: claimants whose claims do not seem to comport with the norms and values of the doctrine they rely on to advance their interests. The stories these unorthodox plaintiffs tell and the relief they seek require scholars, as well as judges, to think more deeply and critically about legal doctrine, to assess whether current legal constructs give adequate relief to plaintiffs in need, and to inquire whether these doctrinal constructs properly express the norms and values of the statutory provisions that gave rise to their creation. This kind of inquiry is particularly important for antidiscrimination scholars, such as those working on Title VII, as workplace discrimination cases provide an especially rich field to consider the competing equities at stake in creating antidiscrimination protections. Courts act from a desire to give proper expression to Title VII's goals, but they also must remain mindful that legislators likely cannot anticipate nor rapidly respond to many modern permutations in contemporary discrimination or the evolving motivations and perspectives of plaintiffs using Title VII to redress their injuries.[111]

Part II provides an anthropological reading of several Title VII interracial solidarity cases, to show that in many prior cases the civil rights norms naturalized by the interracial solidarity doctrine ill fit plaintiffs' expressed motivations. Because of the strong hold these norms have on interracial solidarity doctrine, plaintiffs lost highly valuable cases, Title VII missed important enforcement opportunities, and courts were forced to elaborate on a logically indefensible kind of injury. Part II then shows how the marginal whiteness framework more accurately reflects certain white Title VII plaintiffs'

110. *See* McAdams, *supra* note 90, at 1049.

111. This analysis utilizes a modified anthropological approach, as it does not rely on first-person participant interviews. In place of interviews, the analysis examines litigants' interests as reflected by the claims they initially articulate when they petition for relief, the pressures exerted on those claims by the norms that inform the statutes (or doctrine) they use to frame their claims, and the resulting messages the legal system communicates to litigants as a result of this process. For a discussion of the ways in which legal scholars have attempted to use anthropological methods to enrich their scholarship, see Annelise Riles, *Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity*, 1994 U. ILL. L. REV. 597 (1994).

interests and more forthrightly maps out the competing equities and hidden policy questions that must be resolved in cases in which whites sue over minority-targeted racism. Part II reveals that once these "lost" interracial solidarity cases are recontexualized under the marginal whiteness framework, they provide judges with a greater understanding of the role marginal whites can play in Title VII enforcement, as well as in America's larger antidiscrimination project.

A. The Early History of Interracial Solidarity Claims

Title VII interracial solidarity cases provide a unique opportunity to investigate judges' perceptions regarding whites' potential interest in third-party discrimination directed against minorities. Because the interracial solidarity claim is a judicially constructed cause of action, it has a potentially expansive reach. However, despite judges' relative interpretive freedom in this area of doctrine, they have interpreted the doctrine to cover a very narrow field of interest, focusing on claims that are reflective of certain civil rights era norms.

The civil rights era norms' strong influence on interracial solidarity doctrine is unsurprising, as the seminal decision that led to the doctrine's creation was issued in 1972, on the heels of the civil rights movement. *Trafficante v. Metropolitan Life Insurance Company*[112] involved a Title VIII housing discrimination claim. In *Trafficante*, the Supreme Court recognized a new cause of action under Title VIII,[113] allowing a white tenant to join a black tenant in a housing discrimination suit against a landlord for rejecting qualified blacks' applications for housing.[114] Two arguments threatened dismissal of the white plaintiff's claims. First, it was argued that the white tenant should not be permitted to sue based on the alleged housing discrimination directed at the minority housing applicants because the tenant could not establish that he had Article III standing to litigate this claim—he could not show that the alleged minority-targeted discrimination had directly injured him. The next challenge presented statutory construction issues. The allegation was that the white

112. 409 U.S. 205, 209 (1972). Indeed, the status of interracial solidarity claims under Title VII is still in question. At present, the Circuits are divided. The Fourth, Fifth, Seventh, and Tenth Circuits have determined that Title VII does not permit interracial solidarity claims. *See, e.g.*, Pinsker v. Joint Dist. No. 28J of Adams & Arapahoe Counties, 735 F.2d 388 (10th Cir. 1984); EEOC v. St. Anne's Hosp., 664 F.2d 128 (7th Cir. 1981); EEOC v. Miss. Coll., 626 F.2d 477, 483 (5th Cir. 1980); Childress v. City of Richmond, 907 F. Supp. 934 (E.D. Va. 1995), *aff'd in part, rev'd in part*, 134 F.3d 1205 (4th Cir. 1998). Only the Sixth, Eighth, and Ninth Circuits have permitted these claims to go forward. *See, e.g.*, Clayton v. White Hall Sch. Dist., 778 F.2d 457, 459–60 (8th Cir. 1985); EEOC v. Bailey Co., 563 F.2d 439, 453–54 (6th Cir. 1977); Trafficante v. Metro. Life Ins. Co., 446 F.2d 1158, 1161–62 (9th Cir. 1971), *rev'd*, 409 U.S. 205 (1972). Therefore, there are only a small number of claims available for analysis. This Article explains, however, that the courts' exclusive reliance on certain civil rights norms to interpret the scope of interracial solidarity claims has likely stunted the growth of this class of claims.

113. *Id.*

114. *Id.*

tenant's claim violated certain prudential limitations governing the interpretation of Title VIII standing, as the plaintiff's claim did not fall within the "zone of interests" or concern the class of persons Congress intended to protect when it drafted Title VIII.[115] Stated more simply, Title VIII only allows "aggrieved persons," as defined by the statute, to sue for housing discrimination, and white bystanders to minority-targeted discrimination it was argued were not the kind of "aggrieved persons" Congress contemplated when it drafted Title VIII.[116]

The *Trafficante* Court rejected both challenges. First, it held 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 lose "important benefits from interracial associations."[117] This same interest, the Court concluded, satisfied the "prudential limitations" inquiry required by principles of statutory construction.[118] The Court explained that the plaintiff's interest in interracial association fell within the zone of interests Congress contemplated when it drafted Title VIII, as evidenced by the legislative history and the terms of art used in the statute.[119] These factors, the Court explained, as well as the statute's structure, counseled that Congress intended "aggrieved persons" to have a broad meaning and include whites injured by minority-targeted discrimination.[120] Antidiscrimination scholars have mostly praised this ruling,[121] which now serves as the basis for the interracial solidarity doctrine. However, the Supreme Court's decision actually compromised the future of interracial solidarity doctrine in its moment of creation because it declined to define what it meant when it referred to the plaintiff's interest in "interracial association," leaving the defining of the pleading and proof requirements to the lower courts.[122]

The *Trafficante* Court's failure to define the right of "interracial association" under Title VIII allowed many courts to treat interracial solidarity doctrine as a quirk in the case law and refuse to recognize claims based on the doctrine as presenting a viable basis for a Title VII workplace claim.[123] Instead,

115. *Id.* at 208–09. These arguments were treated only briefly once the case was presented for Supreme Court review. For more detailed exploration of these standing issues, see Trafficante v. Metro. Life Ins. Co., 446 F.2d 1158, 1161–62 (9th Cir. 1971), *rev'd*, 409 U.S. 205 (1972).

116. *Trafficante*, 409 U.S. at 208–09.

117. *Id.* at 210.

118. *Id.* at 210–12.

119. *Id.* at 210–11.

120. *Id.* at 209–11.

121. *See, e.g.*, Joseph C. Feldman, *Standing and Delivering on Title VII's Promises: White Employees' Ability to Sue Employers for Discrimination Against Nonwhites*, 25 N.Y.U. REV. L. & SOC. CHANGE 569 (1999) (recognizing the value of the doctrine and calling for its expansion); Zatz, *supra* note 8 (applauding the creation of the doctrine and offering guidelines for its expansion). *But see* Lee, *supra* note 19 (outlining the doctrine's potential distortion effects).

122. *Trafficante*, 409 U.S. at 209–11.

123. *See, e.g.*, Childress v. City of Richmond, 907 F. Supp. 934, 938 (E.D. Va. 1995), *aff'd*

they have restricted interracial solidarity doctrine to the small set of Title VIII cases where white plaintiffs brought suit to insure the integration of a building or housing complex.[124] When plaintiffs attempted to raise interracial solidarity claims under Title VII, courts quickly disposed of their claims, arguing that plaintiffs 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's and Title VII's statutory provisions, legislative history, and enforcement structure, holding that those considerations counseled that white secondary victims of minority-targeted discrimination were not covered under Title VII.

Courts that *did* allow plaintiffs to bring interracial solidarity claims picked up on the civil rights norms that the plaintiffs espoused in the *Trafficante* case. The paradigmatic plaintiff became the selfless white who sued because of discrimination directed at third parties, a person who suffered no concrete 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 one suffers when one is not employed in a colorblind workplace.

For example, some courts adopted an interpretation of "interracial association" based on the *Trafficante* plaintiffs' allegations in their initial complaint.[125] These courts read the interest in interracial association as the lost "personal, professional or business contacts" the white plaintiff may have formed in the absence of discrimination.[126] On its face, this interpretation seems to make room for claims of economic injury. However, in practice, it only provides for a very narrow class of economic injuries. To show "economic harm," the white plaintiff needs to allege that he was deprived of potential (or

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in part, rev'd in part, 134 F.3d 1205 (4th Cir. 1998).

124. *Trafficante*, 409 U.S. at 209.

125. *Id.* at 208–09; *see, e.g.*, Sidari v. Orleans County, 174 F.R.D. 275, 284–85 (W.D.N.Y. 1996). A careful read of the *Sidari* court's opinion shows that it cites the Supreme Court's *Trafficante* decision as authority, but it is relying on the Court's recitation of the allegations in plaintiffs' complaint (rather than the actual holding in the case) to outline the potential bases for injury under interracial association doctrine. *Id.* at 284.

126. Waters v. Heublein, Inc., 547 F.2d 466, 469 (9th Cir. 1976). A prime example of this analysis is provided in *EEOC v. Bailey Co.*, 563 F.2d 439, 453–54 (6th Cir. 1977). The court explained:

> [T]he purposes and effects of Title VII in the employment field are identical to the purposes and effects of Title VIII in the housing field. . . . The provision for such opportunities and the ending of discrimination declared unlawful by Titles 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 associations is as real at work as it is at home because "interpersonal contacts" occur in both places.

Id. (citation omitted).

expected) business opportunities he would have derived from interacting with minorities. By its plain terms, the doctrine does not allow for any other economic claims to be filed. Because of this construction, white plaintiffs typically did not discuss economic injury, instead using this cause of action to allege they suffered social and psychological harms by working in a racially discriminatory environment.

Some courts also specifically read the right to "interracial association" to mean that whites may sue when they are deprived of the "benefits of interracial harmony,"[127] another term that emphasizes an atmospheric interest, the deprivation of which causes moral and psychological injury. A third definition of harm, offered by the Equal Employment Opportunity Commission, is even more diffuse and difficult to define.[128] The agency interpreted *Trafficante* to give whites a broad right to a non-discriminatory workplace, the violation of which causes injury.[129] The broad, amorphous nature of this kind of harm concerned many courts, and consequently it was not adopted widely.[130]

Courts that refused to recognize interracial solidarity claims should not be judged too harshly, as they had valid concerns about allowing whites to sue based on their expectancy interests regarding interactions with minorities. Chief among these concerns is the difficulty in quantifying or determining the scope of this expectancy interest. How does an employer figure out how much interference with a white employee's interracial solidarity interests can be tolerated before this conduct violates 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 offered by the Supreme Court about whites' projected interest in interacting with minorities. This construction comes very close to commodifying diversity—rendering interracial association into a guaranteed monetizable interest possessed by all white employees.

Courts that recognized interracial solidarity claims also should not be judged too harshly, for there is value in providing whites with an incentive 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

127. Waters v. Heublein, 547 F.2d at 469 ("The possibilities of advantageous personal, professional or business contacts are certainly as great at work as at home. The benefits of interracial harmony are as great in either locale."); *see also* Nat'l Org. for Women v. Sperry Rand Corp., 457 F. Supp. 1338, 1345 (D. Conn. 1978).

128. *Sperry*, 457 F. Supp. at 1345.

129. *Bailey Co.*, 563 F.2d at 454 (recognizing that the EEOC interprets Title VII to "confer upon every employee the right to a working environment free from unlawful employment discrimination," which permits whites to sue based on discrimination directed at blacks). The court declined to establish limits on the scope of this right. *Id.*

130. *See Bailey Co.*, 563 F.2d 439.

can cause, and to provide those who experience these harms with a clear remedy. These courts should be faulted, however, for their narrow, restricted focus on the two kinds of injuries they identified based on the civil rights norms. As the next Section shows, over the years, judges saw numerous compelling cases that appeared to deserve a remedy, yet were not adequately covered by existing doctrine. Instead of acknowledging this pool of problem cases and discussing the need for a more expansive doctrine, some courts chose to mask their efforts to recognize novel injuries.[131] Indeed, when one reviews the interracial solidarity cases, it is clear that many plaintiffs were not suing primarily to vindicate the interest in interracial association protected under the doctrine's plain terms. Instead, they sued over the harms relevant to marginal whites: economic and dignitary injuries 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. In using the marginal whiteness framework to analyze these types of cases, several things become clear. For one, the associational account distorts plaintiffs' claims when they fall into these categories. In the most severe cases, it causes otherwise strong claims to be dismissed. In others, it allows questionable claims to proceed. Second, the associational account allows judges to sidestep critical questions these cases present, questions that should be addressed for courts to better understand the role Congress intended whites to play in the enforcement of antidiscrimination protections under Title VII. Third, the associational account's distortion of these plaintiffs' claims discourages many potential future claimants from initiating actions, as their interests are not accurately reflected in the doctrine. Finally, the associational account leaves courts that would like to recognize interracial solidarity claims in the uncomfortable position of attempting to build doctrine on an unstable and conceptually indefensible concept of injury. This Part explores each of these problems.

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 her position are being allocated according to facially colorblind procedures intended to disadvantage minorities. Her claim is that these invidious policies compromise her interests in a manner *identical* to the way they injure minority employees. Whites are more likely to suffer these injuries from minority-targeted discrimination than

131. Zatz, *supra* note 7, at 89–90.

many others kinds of harm, because Title VII requires that workplace allocation rules be facially race neutral; employers therefore feel compelled to adopt facially race-neutral policies to cover minority-targeted discrimination.

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 its residency exemption program was only used by white employees or, at the very least, by as few black employees as possible.[132] Consequently, the district reinstated its old rule making only "certified administrative personnel" eligible for the exemption.[133] The evidence Clayton would have offered to prove discriminatory animus would have mirrored that presented by a black employee to establish a disparate treatment claim. Specifically, she would have offered circumstantial evidence showing that when a black employee requested the residency exemption, which had been awarded on request to a white employee, the district denied the request *and*, without justification, reinstituted a more restrictive, facially race-neutral rule that prevented Clayton from accessing the benefit as well.[134]

Clayton's loss is particularly disturbing when one reviews the case history, as it reveals that Clayton doggedly tried to present her claim in a more accurate fashion, by emphasizing her economic interests, only to be told that she had not stated a cognizable claim.[135] Indeed, during its initial review of the case, the court informed Clayton that she categorically *could not* have suffered any racially motivated 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

132. Clayton's claim was premised on the fact that the district had not enforced its policy restricting use of the residency exemption until a black employee requested the exemption and the district needed to invoke the policy to prevent him from using the benefit. Clayton v. White Hall Sch. Dist., 778 F.2d 457, 459 (8th Cir. 1985).

133. *Id.*

134. *Id.*

135. *Id.*

the black employee.[136]

Clayton is also disturbing because the Fifth Circuit took the exact opposite position eight years earlier in *Equal Employment Opportunity Commission v. T.I.M.E.-D.C. Freight*;[137] however the court in *Clayton* never acknowledged this alternate result. In *T.I.M.E.-D.C. Freight*, two white truck drivers alleged they were subjected to a facially neutral, but discriminatory, non-transfer policy their employer had designed to prevent blacks from gaining access to preferred line driver jobs.[138] In a subsequent dispute, the court recognized that the white drivers had suffered the same economic injury under the policy as the black drivers, and granted them the same relief.[139] The Fifth Circuit in *T.I.M.E.-D.C. Freight* specifically noted that some might be concerned that a few of the drivers suing over the implementation of a racially discriminatory policy were white, even though the employer's facially race-neutral policy targeted African American drivers.[140] It determined, however, that the Title VII interracial solidarity doctrine covered the white truckers' claims.[141] The court noted that conceptually the white truckers "claim [rested on the] deprivation of the same employment opportunity denied to the black claimants," a clear economic interest; it also cited the men's right to "work in an environment unaffected by racial discrimination"[142] as a basis for its ruling. This latter language more closely tracks 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 or whether it was an independent source of injury.

In short, *T.I.M.E.-D.C. Freight* provided the *Clayton* court with a template for understanding the basis for Clayton's claim of injury: she was a white plaintiff injured by a facially race neutral policy designed to disadvantage a minority employee. Yet the *Clayton* court failed to acknowledge the guidance that the Fifth Circuit's analysis could have offered. Arguably, the *Clayton* court should be forgiven for not noticing this aspect of the *T.I.M.E.-D.C. Freight* decision, as the relevant holding is buried in a footnote and articulated in less than clear terms.

The most disturbing aspect of the *Clayton* decision is its long-term effect, as no economic injury claims have been filed since, despite ample evidence that the harm Clayton warned of is an important labor market phenomenon. Economists have shown that employers tend to decrease wages for certain jobs

136. Clayton v. White Hall Sch. Dist., 875 F.2d 676, 678 (8th Cir. 1989) (summarizing district court decision); *Clayton*, 778 F.2d at 460 (noting economic "fringe benefit" Clayton sued on was not within the zone of interests protected by the statute).

137. 659 F.2d 690 (5th Cir. 1981) (per curiam).

138. *Id.* at 691–92.

139. *Id.* at 692 n.2.

140. *Id.*

141. *Id.*

142. *Id.*

when they appear to be dominated by minorities, and whites who are employed in these positions experience the same drop in wage levels.[143] Some will argue that there may be other labor market explanations for a drop in wages when a position becomes dominated by minorities. Consequently, proof of discriminatory motivations is key. Yet it seems clear that when an employee can show that a drop in the wages paid for her position is associated with an attempt to discriminate against minority workers hired in the same job category, these salary changes are the kind of interventions that should serve as the basis for a Title VII action.

In summary, the economic injury cases present a unique opportunity for courts to expand the enforcement reach of Title VII if they are willing to allow a white employee to stand in the shoes of a minority employee when the same discriminatory employment policy injures both workers. Whites would be able to bring economic injury cases when they have been denied compensation, benefits, or other privileges because of discriminatory animus: because their occupation is now actually or is perceived to be dominated by minorities and is therefore subject to disfavor. 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 change in policy.

Some may not be convinced that the unique opportunity presented by the economic injury cases 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 may worry that every time an employer changes a race-neutral policy so that it confers benefits solely on white employees, he will have to brace himself for a lawsuit. However, this fear is unwarranted. These economic injury plaintiffs would be subject to the same rigorous evidentiary standards for establishing discriminatory intent as other claimants under Title VII's disparate treatment analysis.[144] This standard results in the risk of liability being low when an

143. *See, e.g.*, DONALD TOMASKOVIC-DEVEY, GENDER AND RACIAL INEQUALITY AT WORK: THE SOURCE AND CONSEQUENCES OF JOB SEGREGATION 3–4 (1993) (noting that employers tend to devalue jobs associated with or dominated by minority workers and wages tend to fall); Julie A. Kmec, *Minority Job Concentration and Wages*, 50 SOC. PROBS. 38 (2003) (same). Kmec's research revealed similarly skilled jobs dominated by black and Latino workers paid 17 to 20 percent less than jobs dominated by whites. Her research also showed that the race of one's coworker was more predictive of an employee's relative wage level than her own race. *Id.* at 54–56 (stating "lower wages in minority-dominated jobs extend to *all* workers, not just to subordinate group workers") (emphasis in original).

144. Some may question whether marginal whites should be granted standing to bring disparate impact claims as well as claims based on disparate treatment. Because the scenarios anticipated in this Section of the discussion involve positions that are *about* to become minority dominated or are in the process of becoming minority dominated, the facts will not lend

employer can demonstrate that its decision was actually motivated by a valid economic or administrative justification.[145] If the concern is that employers will be afraid of litigation, even if the risk is not real or substantial in nature, this is not a negative development. Rather, if the potential for claims leads employers to internalize concerns about imposing costs on minorities and other low-status workers this would be a positive result. Stated more simply, the regime could cause employers to self-police and spend more time thinking about whether proposed race-neutral policies are systematically disadvantaging minorities, and this development 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 disparate treatment doctrine has always been interpreted in a manner that sanctions actors who possess specific intent to subordinate or disadvantage minorities in the workplace. Consequently, under existing doctrine, Title VII would not exempt discriminating employers from sanctions merely because they found a way to include whites as well as minorities in a disadvantaged category.[146] 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 sufficient to remove his actions from Title VII's reach.

Some may be concerned that the economic injury cases might create perverse incentives: anytime white employees are frustrated with an employer's decision, they will look to see if it was motivated by discriminatory intent. However, it would be a *good* thing if white workers grew accustomed to asking

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themselves well to a disparate impact analysis. However, if the facts of a case could support a disparate impact analysis, some would argue that Title VII's overall purpose would be served if marginal whites were eligible to bring these claims as well.

145. This assertion is based on the basic doctrinal structure articulated in *McDonnell Douglas*, allowing an employer to rebut an employee's proof establishing a prima facie case of discrimination with evidence that its decision rested on a legitimate non-discriminatory business reason. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). An employee may alternatively try to claim that discrimination played a partial if not singularly determinative role in her employment decision, using the "motivating factor" analysis as outlined in *Desert Palace*. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 99–100 (2003). Some controversy currently exists over the impact *Desert Palace* may have on the structure of the *McDonnell Douglas* analysis. *See generally* Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887 (2004).

146. If they fail to locate sufficient evidence of discriminatory animus to bring a disparate treatment claim, marginal-white plaintiffs may in certain circumstances turn to Title VII disparate impact doctrine, a separate area of Title VII law that addresses employer policies that are not specifically motivated by discriminatory animus, but in effect impose unjustifiably heavier burdens on minority employees. Disparate impact claims are arguably even harder to establish than disparate treatment claims, as they require plaintiffs to meet a rather tough evidentiary standard and involve more complicated evidentiary questions involving statistical proof.

these questions, rather than maintaining their current tendency to blame minority workers for the downturn in wages and benefits that occurs when minorities increase their share of positions in a given occupation.

Critics may also argue that the economic injury framework is actually an attempt to turn Title VII into a vehicle for addressing class-based discrimination. They may argue that this framework incentivizes white working-class employees to try to convert scenarios that are about class-based discrimination into Title VII race discrimination claims. 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 that race-based discriminatory intent motivated a particular policy. In contrast, if a policy is solely motivated by a bare desire to compromise the interests of poor workers, it may be morally troubling, but it would not be actionable under Title VII. Numerous scholars have recognized the ways in which race- and class-based subordination are intimately connected in American society;[147] consequently, it does not seem surprising that, in many instances, employers or coworkers may articulate race-based subordination strategies in class-based terms or class-based subordination strategies in racial terms. Courts will have to sort through these difficulties by looking for evidence of race-based animus behind seemingly class-based initiatives.

Last, critics may 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 claims about wage and benefit cuts for a particular position will compare the treatment they receive against that afforded other employees in the company in positions held primarily by whites. Many scholars have written about the conceptual difficulties involved in comparing seemingly equal positions in a company, as well as in challenging employers' decisions about how to best set wages and allocate benefits in light of their particular economic circumstances.[148] Claims structured in this way may thus be difficult to adjudicate. However, this comparable-worth approach is an *optional* evidentiary strategy plaintiffs may decide to pursue in economic injury cases. As in traditional disparate treatment cases involving minority plaintiffs, white plaintiffs bringing economic injury cases may decide to prove disparate treatment in less complicated and less controversial ways. They may present evidence regarding how their position has been compensated historically and point to dramatic changes that occur when minorities are hired. Alternatively, they may show how wages for the same position in other companies in the relevant industry have held steady

147. *See, e.g.*, sources cited *supra* note 69.

148. *See, e.g.*, Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1763–70 (1986) (noting that comparable worth cases inevitably rest on subjective value judgments and questioning whether these comparisons can fairly integrate employer's real world trade offs and calculations regarding how to attract labor to less attractive jobs).

when the position continued to be dominated by white workers.[149]

2. Marginal Whiteness and Linkages Between Discriminations

"Linkage cases"[150] are also compromised by the "associational interest" model currently used in interracial solidarity cases. In these cases, a marginal-white worker 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 other form of disparate treatment suffered by minority workers in the workplace, such as the failure to recruit, hire, or promote minorities, or the existence of a hostile environment.[151] In the supplementary claim, the plaintiff alleges that the employer's racially discriminatory practice has decreased the interracial solidarity plaintiff's opportunities for interaction with minorities.[152] The linkage cases are perhaps the doctrine's most troubling, as courts have allowed these claims to go forward in cases where the plaintiff's allegations regarding the associational barriers are at best questionable.

For example, in *EEOC v. Mississippi College*, a white female adjunct professor sued Mississippi College for sex discrimination based on its failure to

149. For a discussion of the ways in which a minority employee can use Title VII to challenge discriminatory wage and benefit structures when the pool of workers for his job has increasingly become minority dominated, or is dominated by a particular racial or ethnic group, see generally Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303 (2004).

150. EEOC v. Mississippi College, 626 F.2d 477, 483 (5th Cir. 1980).

151. Interracial solidarity cases based on the idea that minority-targeted discrimination creates a "hostile environment" for nontargets raise distinct concerns, but these issues are not the primary focus of this discussion. Certainly, there is psychological research to support the recognition of such claims. *See* K. S. Douglas Low et al., *The Experiences of Bystanders of Workplace Ethnic Harassment*, 37 J. APPLIED SOC. PSYCHOL. 2261 (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 whites to bring a claim alleging that 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 comments should analytically be treated as directed at the complaining white employee.

152. *See* Golleher v. Aerospace Dist. Lodge 837, 122 F. Supp. 2d 1053 (E.D. Mo. 2000) (allowing sex discrimination plaintiff to proceed to trial on interracial association claim despite thin allegations of harm because her allegations could be construed to allege injury from lost associational opportunities stemming from a racially hostile workplace environment). Even cases where the sole allegation rests on interracial association doctrine feature plaintiffs with tenuous claims regarding lost associational opportunities. *See, e.g.*, Stewart v. Hannon, 675 F.2d 846, 849–50 (7th Cir. 1982) (allowing plaintiff to proceed with interracial solidarity claim based on allegations of lost associational opportunities).

hire her full-time when a position at the school opened.[153] 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 for the position, consequently depriving her of her associational interest in interacting with minorities.[154] The plaintiff's claim of interracial association seemed weak, as she did not complain about the failure to interview minorities until *after* she was denied the position. Additionally, it was unlikely that the college's decision merely to interview minority applicants for the professorship would have increased the plaintiff's opportunities for interracial association. Even if the college had hired a minority candidate, the addition of one minority professor would not have greatly increased her opportunities for interracial association. The court, however, did not press the plaintiff for specifics concerning her lost associational opportunities and allowed the case to proceed to trial.[155]

The court's decision in *Mississippi College* seems incomprehensible until one uses a marginal whiteness framework, which helps to explain both the plaintiff's motivations and the court's treatment of her allegations. The plaintiff sued based on feelings of marginality—the college had maneuvered to ensure that only white men would hold full-time professorships.[156] Once the plaintiff compared her situation to the full parcel of benefits she perceived white male professors to enjoy, she brought suit to broadly challenge the college's discriminatory practices, believing that the college's race discrimination was probative of the college's general hostility towards all outgroup members (those who were not white men). Recognizing that the race-based Title VII violation the plaintiff alleged was part of a campaign of outgroup discrimination, the court allowed her to plead facts showing the presence of sex and race discrimination in the college's hiring process. In effect, the interracial solidarity claim served as a vehicle that allowed the plaintiff to present all of her evidence regarding the dynamics of outgroup differentiation and discrimination in her workplace.

Mississippi College also exemplifies why the linkage cases can sometimes be disturbing. In these cases a plaintiff's interracial association claim is often criticized as merely a strategic choice to supplement the evidence for a primary discrimination claim, rather than to 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 to victory on one's primary Title VII claim.[157] Others complain that the interracial solidarity claim acts as

153. *Mississippi College*, 626 F.2d at 477.

154. *Id.* at 480 n.2.

155. *See id.* at 483.

156. *See id.* at 479 (discussing Mississippi College's hiring policies).

157. *See, e.g.*, Sidari v. Orleans County, 174 F.R.D. 275, 284 (W.D.N.Y. 1996) (expressing concern that the plaintiff was attempting to prove his primary Title VII claim based on religion

insurance, adding an alternative basis for damages should the plaintiff's primary Title VII claim fail. Finally, the claim bothers some because of its symbolic result: the doctrine seemingly transforms a deeply self-interested plaintiff into a hero out to vindicate the civil rights of minorities.

Linkage cases also pose more practical concerns. 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 the minorities most injured by the discrimination.[158] Even those sympathetic to the cause of linkage plaintiffs may worry that these plaintiffs cannot present facts adequate to assess the effects of the disparate or discriminatory treatment directed at minority workers. Thus, the court may award damages to the interracial solidarity plaintiff without fully understanding the extent of the harm inflicted on minorities that were the actual targets of the employer's racially discriminatory actions.

Although these criticisms are troubling, the counterargument for allowing Title VII linkage cases is compelling. From an enforcement perspective, these plaintiffs' companion claims are often quite similar to those that would be brought by the primary victims of the employer's racially biased treatment. Regardless of the plaintiff's primary motivations, a successful interracial solidarity claim secures the guarantees of Title VII equality in the workplace for other employees in the years that follow. Such suits allow the court to address conduct that violates Title VII that would otherwise go undiscovered. Therefore, while an interracial solidarity claim may not sufficiently present evidence regarding the full scope of the employer's racially discriminatory actions, arguably it is better to present some proof to support the plaintiff's race discrimination allegations, rather than forego the opportunity to subject the race discrimination issues to litigation. Certainly, reasonable people can disagree about the propriety of permitting plaintiffs to bring linkage cases, and no one should underestimate the difficulties involved in resolving the policy issues at stake in them. What the marginal whiteness framework offers is a way for courts and legal scholars to engage honestly with the arguments on both sides of the linkage debate by stripping away the currently dominant (but irrelevant) arguments in these cases, arguments that focus on plaintiffs' claims about "association."

The marginal whiteness framework also improves our ability to rigorously analyze the linkage cases. The framework allows us to see that plaintiffs will often see discriminations as linked to a general campaign of discriminatory differentiation from whiteness, making them feel both attuned to and threatened by the disparate treatment of other minority groups. That is, plaintiffs may see

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and national origin by proving race discrimination against someone else).

158. *See, e.g.*, Lee, *supra* note 19, at 561 (arguing that extending standing to white plaintiffs does not empower minority plaintiffs, reestablishes whiteness as the objective frame for establishing whether harm has occurred, and generally favors the "powerful over the powerless").

these various forms of discrimination as efforts to draw boundaries favoring an ingroup and progressively disfavoring outgroups, as one's relative relationship to a white male center becomes more attenuated.[159] While controversial, some scholars, like Clark Freshman, have argued that Title VII should recognize these kind of connections between discriminations.[160] Recent empirical work by Ian Ayres provides some support for this kind of analysis, showing that in some interactions white males did tend to discriminate against white females and racial outgroups by expressing ingroup preferences as opposed to dislike specifically targeted at certain outgroups.[161]

The case for recognizing linkages claims under the marginal whiteness framework is supported further by the events in some interracial solidarity cases, particularly those in *Sidari v. County of Orleans*.[162] Sidari was an Italian-American Catholic male who worked in a predominately white Protestant male squadron at the Orleans County jail.[163] His coworkers made it clear he that was not regarded as a true white person.[164] They labeled him a "Dago," and told him that an Italian was a "nigger turned inside out."[165] Additionally, the officers humiliated black prisoners in his presence, referring to the inmates as "niggers" and "DANS."[166] When Sidari brought suit alleging Title VII national origin and religious discrimination, he thought it natural to include an interracial solidarity claim alleging that the treatment of black prisoners was

159. Evidence suggests the plaintiff-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 J. APPLIED SOC. PSYCHOL. 1540 (2005). The authors explain that

> 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.

Id. at 1541 (citation omitted) (emphasis in original).

160. Clark Freshman, *Whatever 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 STAN. L. REV. 241 (1990).

161. Ian Ayres has done fieldwork studying white male car salesmen's behavior that illustrates this concept of general outgroup discrimination, and layers or levels of biased treatment for different outgroup constituencies. *See* IAN AYRES, PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 61–73 (2001).

162. 174 F.R.D. 275, 278 (W.D.N.Y. 1996).

163. *Id.*

164. *Id.*

165. *Id.*

166. Sidari v. Orleans County, 2000 WL 33407343, *4 (W.D.N.Y. 2000) ("DANS" is an acronym that stands for "dum-ass nigger.").

relevant to his experience at the jail.[167] 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 in sorting out the competing equities in the linkage cases. The court rejected Sidari's interracial solidarity claim because it concluded that Sidari had no valid interest in "associating" with the black prisoners because he was supposed to be guarding, not fraternizing, with them.[168] One could resuscitate Sidari's claim regarding the treatment of the black prisoners within the civil rights era framework currently used in the interracial solidarity cases by arguing the court imposed too restrictive a definition of Sidari's associational interests. Yet this reframing does not get to the heart of the case, as Sidari likely believed that the discrimination directed at the black prisoners was linked to the discrimination he faced as an Italian.[169] Sidari was not primarily concerned about his ability to interact with the black prisoners; rather, he was concerned about his own treatment. The marginal whiteness framework better explains the harm Sidari suffered because it suggests that he experienced his coworkers' acts of minority-targeted discrimination as an orchestrated way of cordoning him off from whiteness. The facts in *Sidari* make one reevaluate whether the charges of "bootstrapping" raised in linkage cases against marginal whites are fair or appropriate given the seemingly apparent relationship between the different forms of discrimination raised in that case.

In summary, the linkage cases rightly seem controversial, but it is important to remember that they have been among the *most successful* claims under current interracial solidarity doctrine. In cases ranging from hostile work environment discrimination to discriminatory hiring, white plaintiffs have been permitted to bring claims that discuss evidence of minority-targeted discrimination by arguing that these claims and associated facts are relevant to their claims of interracial association.[170] Opponents of this kind of linkage evidence should be deeply concerned because, as a practical matter, evidence of "linked" discrimination is already being presented in many of the cases involving interracial solidarity claims. Additionally, supporters of an evidentiary rule allowing linkages between discriminations should also be

167. 174 F.R.D. at 278.

168. *Id.* at 284.

169. *Id.* at 283–84. The court recognized this essential point in Sidari's subsequent appeal of its decision, deciding this was one of the limited circumstances where linkages between different forms of discrimination should be recognized. *Sidari*, 2000 WL 33407343 at *4.

170. This linkage phenomenon can even be seen in cases that do not concern interracial solidarity claims. *See, e.g.*, EEOC v. St. Anne's Hosp., 664 F.2d 128, 129–30 (7th Cir. 1981) (discussing retaliation claim brought by a Jewish hospital worker alleging she was subject to anti-Semitic and racist comments after she hired the first black worker at the hospital where she was employed).

concerned because the current doctrine does not give adequate notice of the propriety of such claims, nor does it articulate clear standards for plaintiffs to use in structuring their cases.

Once the linkage cases are stripped of their superficial analysis regarding "interracial association," it is clear that that they present key questions about the validity of proxy-based suits concerning employment discrimination. Should courts allow white plaintiffs to stand in as proxies, 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 to the plaintiff's primary discrimination claim? Is the risk of evidentiary bootstrapping too great to permit such companion claims, or is this bundling appropriate in light of empirical evidence that ingroup preferences motivate discriminators rather than specific and discrete animus against particular racial and gender outgroups? At present, courts avoid these questions by offering varied interpretations of what frustrated associational interests mean. However, the failure to squarely address these issues leads to inconsistent and unprincipled adjudication of 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 the marginal whiteness framework helps to explain. In these cases, whites are asked to do work that assists with "the technologies of whiteness," the strategies whites use to ensure that certain benefits and privileges are only extended to themselves. In some of the cases, white employees are asked to perform functions to facilitate the exclusion or disadvantage of minority employees. These strategies include requests from one white person to another to not refer minorities for jobs, exclude them from meetings, or otherwise marginalize minorities in the workforce. They can also involve more passive interactions, such as forcing an employee to regularly listen to racist jokes and comments. Even circumstances where whites are required to "stand mute" in the presence of explicit discriminatory conduct should be interpreted as requiring some labor, as evidenced by the complaints of employees subject to these situations.[171]

Bermudez v. TRC Holdings, Inc.[172] gives some insight into the experiences of workers in a "racial labor" scenario. In *Bermudez*, plaintiff Schlichting, a white female employed at a temporary worker referral agency brought suit alleging that her co-workers asked her to violate Title VII and

171. *See, e.g.*, Childress v. City of Richmond, 907 F. Supp. 934, 938–40 (E.D. Va. 1995), *aff'd in part, rev'd in part*, 134 F.3d 1205 (4th Cir. 1998) (discussing white male plaintiffs' interracial solidarity claim alleging that their supervisor required them to listen to racist jokes and comments about minority and female co-workers). The biased supervisor did not actually ask the workers to also engage in discrimination, but the workers concluded that his behavior compromised the collegial atmosphere in the workplace. *Id.* at 938.

172. 138 F.3d 1176 (7th Cir. 1998).

engaged in a pattern of discriminatory behavior in her presence.[173] Specifically, Schlichting alleged that she was told to search through a pile of resumes for a "white sounding name" to send out for an interview, and to ask an employer whether he was willing to fill a position with a black person.[174] Schlichting refused to comply, but noticed that those workers who did appear to comply received benefits for their adherence to the discriminatory norms of her workplace.[175] The court unfortunately concluded that interracial solidarity doctrine did not provide relief in her case.[176]

Bermudez is significant because it highlights the conceptual weakness of the interracial solidarity doctrine, even when interpreted by a court fairly supportive of interracial solidarity claims. The Seventh Circuit had indicated that Title VII interracial association claims could be brought in its jurisdiction;[177] however, it had rejected Schlichting's claim because she failed to plead facts showing that she lost associational opportunities.[178] The court noted that, during the period Schlichting identified in her complaint, she continued to refer black applicants to jobs despite her co-workers' attitudes.[179] Also, no evidence was offered to show that she was deterred from interacting with her black coworker. Rather, Schlichting's claim was simply that other employees' discriminatory attitudes had caused her "discomfort" at work.[180] This discomfort, the court ruled, was an insufficient basis for an interracial solidarity claim.[181]

Schlichting found herself in a relatively bizarre situation. Because she resisted her co-workers' requests for her to discriminate, and presumably continued to interact 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, established a regime where 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 resisting calls to discriminate proves that they were not actually 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 in part because she was not the direct addressee of

173. *See id.* at 1179–80.
174. *Id.* at 1180.
175. *Id.*
176. *Id.* at 1181.
177. *Id.* at 1180 (citing Stewart v. Hannon, 675 F.2d 846, 850 (7th Cir. 1982)).
178. *Id.*
179. *See id.* at 1180.
180. *See id.*
181. *Id.* at 1181.

the discriminatory comments or attitudes.[182] Yet some of the comments the plaintiff complained of were quite direct, such as the requests to engage in racial labor by ensuring that white applicants received preferences in assignments. These comments were directed at her personally.[183] The court, however, failed to acknowledge this in its analysis of her allegations.[184] It explained,

> 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 Schlichting a victim of [] discrimination. . . . Although the comments of which Schlichting complains reflect actionable discrimination against applicants for employment, a reasonable person in Schlichting's position would have found them "merely offensive", *because they posed no threat to her personally*. The directly injured persons, rather than bystanders appalled to learn that discrimination is ongoing, are the proper plaintiffs in situations of this kind.[185]

A district court in the Eighth Circuit issued a contrary ruling two years later, without even noting the split among the courts on this question.[186]

The value of the "racial labor" construct is that it allows us to simplify the Title VII analysis in Schlichting's case, as it allows us to recognize the overtures to discriminate as a kind of discriminatory harassment Schlichting was subjected to on account of her race. As explained in Part I, most whites have adopted the understanding that explicit racial discrimination is wrong; consequently, they are likely to view direct overtures to 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 both the actual overtures to discriminate, as well as the "discrimination in the air," create a hostile environment for a white plaintiff. Stated alternatively, the racial labor construct allows courts to analyze cases like *Bermudez* as classic disparate treatment cases. The framework clarifies that the white plaintiff in this kind of case has been targeted to perform certain labor to maintain white privilege *because of his or her race*. This classic disparate treatment approach is far superior to the currently strained cause of action based on Title VII's protection of whites' "associational interests."

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182. *See id.* at 1180.

183. *See id.*

184. *See id.* at 1180–81.

185. *Id.* (emphasis added).

186. *See* Golleher v. Aerospace Dist. Lodge 837, I.A.M.A.W., 122 F. Supp. 2d 1053, 1064 (E.D. Mo. 2000) (allowing a white plaintiff to avoid summary judgment on an interracial solidarity claim based on testimony that workplace verbal discrimination against blacks "deeply offended" her and caused her to "suffer[] emotional distress").

Noah Zatz, the only other scholar to conduct an in-depth analysis of the interracial solidarity cases, has suggested the cases that I refer to as "racial labor" cases should actually be thought of as "race performance" cases. He argues that judges could use Title VII disparate treatment doctrine to adjudicate these as cases where whites discriminate against other whites for their failure to "perform" or comply with stereotypical expectations of how to fulfill one's role as a white person.[187] Zatz's analysis raises some challenging doctrinal questions.[188] However, even if Title VII doctrine permits his reading,[189] 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.

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.[190] Sometimes individuals rely on grooming or clothing choices, such as the African American woman's dreadlocks or the Indian woman's sari. Sometimes individuals use particular speaking styles or accents to establish their claim to a given identity—for example, a Latino

187. *See* Zatz, *supra* note 7, at 63.

188. The continuing strength of his doctrinal analysis, to the degree it is premised on the prohibition of gender-based stereotyping in *Price Waterhouse v. Hopkins*, is open to question in light of more recent grooming code cases decided at the circuit level that allow employers to enforce grooming codes that require compliance with sex-based stereotypes regarding physical appearance. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that a plaintiff could bring a Title VII sex-discrimination claim based upon sex stereotyping); *cf.* Jespersen v. Harrah's Operating Co., 444 F.3d 1106, 1111 (9th Cir. 2006) (rejecting plaintiff's sex stereotyping challenge to enforcement of employer grooming code that imposed arguably stereotypical standards of femininity on female employees). The court concluded that the policy was not discriminatory because it did not impose "unequal burdens" on female and male employees. *Id.* at 1109–11; s*ee also* Bjornson v. Dave Smith Motors/Frontier Leasing & Sales, No. CV 04-0285-N-MHW, 2007 WL 2705585, at *10 (D. Idaho Sep. 12, 2007) (finding employer's disciplinary action against employee for failure to wear hosiery and nail polish did not violate Title VII because there was no proof of "unequal burden" imposed on female as compared to male employees).

189. Some scholars analyze the grooming code cases as a separate line of doctrine from the sex stereotyping cases, arguing that the grooming cases merely permit different grooming standards for different genders as long as each gender bears "equal burdens" in achieving compliance. Julie A. Seaman, *The Peahen's Tale, or Dressing Our Parts at Work*, 14 DUKE J. GENDER L. & POL'Y 423, 426–27 (2007) (discussing prevalence of view). However, this analysis fails to consider the degree to which *Jesperson* also stands for the proposition that an employer may enforce stereotypical understandings regarding the appearance of each gender and sanction employees for their failure to comply with that standard. *Jespersen*, 444 F.3d at 1115 (Pregerson, J., dissenting). If an employer created different charm and etiquette standards for male and female employees, standards that imposed equal burdens on each sex, but was based on stereotypical gender norms, would this raise Title VII concerns post-*Jesperson*? Would Ann Hopkins' employer today be in a better position if it had strict grooming codes and standards for its male and female employees, and it merely sanctioned Hopkins for her failure to conform to those standards?

190. Rich, *supra* note 57, at 1139 n.12 (identifying scholars using race-performance theories).

person's active use of Spanglish. In contrast, sometimes an individual may engage in behavior or make expressive choices that she personally does not notice and therefore is not aware convey a race-based expressive meaning. The classic example is a black person who is not aware she speaks "Black English." This kind of passive race performance can also serve as a basis for sanction, as it still triggers negative associations in persons biased against a given racial or ethnic group.

In my earlier work, I have argued that Title VII has much to learn from identity performance theory,[191] as it helps explain why Title VII's antidiscrimination norms counsel against allowing employers unlimited discretion to prohibit many racially and ethnically marked performative behaviors. More specifically, I argued that employers should be required to show that the employee's behavior (or expressive choice) interferes with his job performance before being permitted to prohibit these kinds of performances.[192] Although I generally believe that identity performance theory provides assistance in resolving many Title VII disputes, I have been careful to limit my analysis to cases where a worker's race or ethnic performance is either culturally based or involves a feature accidentally acquired as a consequence of racial or ethnic segregation.[193] My work also supports the use of performativity theory to justify granting workers protection to express race-related political views, so long as the employee's behavior does not violate the antidiscrimination rights of others.[194] However, in my view, the theory of race performance that courts use should not acknowledge so-called performative behavior that violates the Title VII rights of another employee. These acts should instead be treated as illicit activity.[195] The reasons for this are clear.

When an employer sanctions individuals for "race performance" 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 grooming or stylistic choices suspect.[196] It is quite different, however, for an antidiscrimination regime to *punish* an employee for activity that may merely express hostile

191. *Id.* at 1176–86 (discussing the role performance theory can play in helping us understand workplace race discrimination disputes).

192. *Id.* at 1164 (discussing active race- and ethnicity-based performance); *id.* at 1166, 1259 (discussing necessary limits on protection afforded to active or passive race performance behaviors).

193. *Id.* at 1161–63 (discussing justifications for affording antidiscrimination protections when an employee engages in passive race- or ethnicity-based performance). These cases typically involve employees who have passively acquired ethnically marked speaking styles.

194. *Id.* at 1176–86 (laying out theory of race performance).

195. *Id.* at 1258–59 (noting that 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." *Id.* at 1259.

196. *Id.* at 1163.

views about race relations, or to provide protection for only those employees whose political views support Title VII's continued enforcement. To be clear, if Title VII protects only "non-discriminatory" forms of white "race performance" and allows employers to sanction employees for allegedly discriminatory versions of whiteness, it arguably subsidizes the performance of one kind of white identity over another.[197] The troubling nature of this proposition quickly grows clear when one thinks about its implications for other racial groups. Race-performance regimes are only viable to the extent that they avoid these questions about how antidiscrimination norms may be expressed by particular racial communities.[198]

Also, treating discriminatory behavior as a stereotypical version of white identity, one 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 a particular identity group.[199] Yet it is clear that Title VII may prohibit actions

197. One could argue that the antidiscrimination regime I proposed in my early work is actually hostile to discriminatory speech, because it refuses to treat any discriminatory conduct as a protected kind of race-performance practice. However, the antidiscrimination regime I outlined in *Performing Racial and Ethnic Identity* is actually far more agnostic than this claim makes it appear. *See* Rich, *supra* note 57. The regime I have outlined focuses solely on employee's *conduct*, and allows an employer to sanction or prohibit a specific practice when that practice has actually injured or threatens to injure another worker. Speech can become conduct when it is deployed in a particular fashion (i.e. harassment), for example if it is intended to drive another worker from continuing her employment at a particular workplace. Instead, broad protection of nondiscriminatory performances of whiteness and a crackdown on discriminatory performances invite the courts into a quagmire of determinations about when a form of white identity performance counts as discrimination. For example, how should a court regard a black employee's Title VII hostile environment claim based on a white employee's display of a Klu Klux Klan tattoo, or a white employee alleging that he is threatened by a black employee's tattoo of Lewis Farrakhan? Are these "stereotypical" performances of white and black identity that Title VII should prohibit? I would argue that the more important consideration for a hostile environment analysis would be the way that these tattoos are used: either to intimidate workers, or as passive expressions of a political viewpoint. Title VII should be concerned with the former, not the latter.

198. Some would disagree, arguing that antidiscrimination law should facilitate the dissolution of whiteness or attempt to facilitate whites' efforts to forge a progressive account of white identity. *See, e.g.*, David Wellman, Book Review, 30 CONTEMP. SOC. 339, 339–40 (2001) (reviewing WHITE REIGN: DEPLOYING WHITENESS IN AMERICA (Joe L. Kincheloe et al. eds., 1998)) (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.* Lawrence J. Oliver, *The Current Dialogue on Whiteness Studies*, 25 CALLALOO 1272, 1274–76 (2002) (describing the New Abolitionists call for the eradication of whiteness as a necessary condition for eliminating racial inequality); *see also* Olson, *supra* note 35, at 386 (arguing that dissolution is required).

199. A person may feel he is "expressing" his belief in white supremacy by refusing to refer blacks to a particular employer. Prohibiting this action presents no problems from a First Amendment perspective. Aside from its material effect in shifting resources, it has no significant expressive dimension. In contrast, a Southern white's decision to wear a cowboy hat to express a

that attempt to hold resources hostage for the benefit of certain groups without offending anyone's First Amendment sensibilities.

Zatz is correct that Title VII needs a way to prohibit the commonplace overtures to engage in discriminatory conduct made between rank-and-file employees;[200] this problem remains an important but relatively overlooked component for creating a truly non-discriminatory work environment. When we allow employees to bring suit when they are subject to these overtures in "racial labor" cases, we ensure that Title VII can protect an individual (whatever her racial or ethnic membership) whenever a higher-status member of her racial group attempts to force her to do work to maintain the privilege or status of that group. For example, the racial labor framework allows us to understand that when 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 is asking the Latino employee to engage in a kind of racial labor, with the promise that she will be granted a certain kind of racial esteem. (She is not asking the employee to "perform" a stereotyped version of white identity.) The racial labor construct illuminates other conflicts within Title VII as well: Title VII should be concerned with racial labor demands concerning other groups (for example, when a Chinese worker asks another Chinese worker to do labor to assist in maintaining a given workplace as a racially or ethnically homogenous environment).

In summary, the racial labor cases are only visible when one embraces a marginal whiteness framework, as they are based on one of the fundamental propositions that inform this approach to understanding intraracial conflicts. The framework recognizes that many whites suffer anxiety when they experience rank-and-file overtures to discriminate and will report the harasser, not because of their strong commitment to a larger project of racial justice, but primarily to protect their own economic and dignitary interests. These whites feel that the attendant risks associated with compliance with racial labor demands—in the form of workplace sanctions or condemnation from other employees—are simply too high to perform such labor. The framework posits that whites are effectively harassed by these requests that they engage in white-privilege maintenance strategies, whether they experience them as "dignitary assaults" or as dangerous and threatening requests to perform uncompensated "racial labor."

C. Courts, Interracial Association, and Civil Rights Norms

Given the limitations civil rights era norms have imposed on the development of interracial solidarity doctrine, one wonders why these norms have continued to play such a dominant role in Title VII cases. One explanation

white identity has a significant expressive component, but no immediate material repercussions.

200. Zatz, *supra* note 7, at 63.

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 these rules send; they do not expect enforcement or prosecution under these standards to actually address wrongful conduct or provide individual victims with remediation.[201] Supporters of this "expressive" approach to law might argue that it is important to preserve interracial solidarity doctrine in its current form, as it functions as a tool of the noble "civil rights soldier," the person truly committed to advancing racial justice. It does not matter if this tool is not used very often. Also, they might argue that the doctrine's normative project should be pursued even if it means that the doctrine causes courts to miss certain opportunities to address Title VII violations. They would argue that, 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 cause of action that clearly reflects the value attached to interracial relationships.

Sunstein articulates some doubt about whether expressive laws are truly effective, particularly because there are many barriers that prevent easy communication of the substance of judicial opinions to laypersons.[202] He notes that, even when judges' and legislators' expressive statements reach their intended public targets, they have been so filtered that one cannot be sure the original message's integrity is maintained.[203] Without further empirical study to assess the strength of this argument, it is difficult to assess its weight. However, even if substantial filtering occurs, because courts and legislators primarily rely on media interest and media packaging to spread relevant information, there are ample contemporary examples demonstrating that some messages, in their simplest form, make it into the public consciousness. Whether one considers the reverse discrimination claims of the *Ricci* defendants[204] or the equal pay disputes that motivated the passage of the Lilly Ledbetter Fair Pay Act, the basic normative claims made by legal actors in employment discrimination cases often find their way into public discourse even if the niceties of the decisions or Title VII itself are not part of public conversation.[205]

201. Sunstein, *supra* note 22, at 2024.

202. *Id.* at 2024–25.

203. *Id.* at 2050.

204. Ricci v. DeStefano, 129 S. Ct. 2658 (2009), opened a public conversation about when it is appropriate for an employer to take affirmative steps to avoid the anticipated racially discriminatory effects of a promotion test, and how much protection antidiscrimination law should provide to employers who engage in prophylatic measures that arguably affect the established expectations of employees. Again, although the decision has technical repercussions for the understanding of Title VII disparate impact claims, the basic normative questions that informed the resolution of the dispute were both well reported and vigorously debated by American media outlets.

205. The Lilly Ledbetter Fair Pay Act of 2009, Pub L. No. 111-2, 123 Stat. 5, amended Title VII to ensure that the statute of limitations for equal pay claims would run from the date of

Assuming, however, there are institutional mechanisms in place that allow widespread, quality transmissions of judicial pronouncements, much can be gained if courts also recognize injuries under the marginal whiteness framework. Recognizing these new kinds of injuries would send other important antiracism messages that have thus far gone unexplored. The main message that would be sent is that strategies to maintain white privilege can economically injure whites and minorities in precisely the same ways. Additionally, it would send a message to whites that strategies to maintain privilege can directly compromise one's ability to experience dignity at work. Arguably by expanding on the statements that interracial solidarity doctrine currently sends, we risk losing our primary message about the importance of civil rights norms. If this concern prevents the interracial solidarity claims I have described from being recognized, complementary causes of action that allow marginal whites to sue should be considered, rather than further committing to a regime that threatens to silence these plaintiffs entirely.

In summary, although the civil rights era norms that inform interracial solidarity doctrine still serve an important function, this Part shows that exclusively focusing on these norms has had a number of costs. First, these norms have stunted interracial solidarity doctrine's growth by forcing courts to elaborate on a logically indefensible concept of injury. Second, courts' focus on these historically-specific norms has prevented them from recognizing a broader range of whites' prejudice-related injuries. The cases analyzed in this Part are intended to give courts the confidence necessary to recognize some of the additional interests at stake in interracial solidarity cases: when marginal whites bring claims that appear on their face to be designed primarily to address their individual dignitary concerns or to pursue economic self-interest, courts should not be dismissive or skeptical. Instead, they should consider the larger question: whether the effect the suit has on the workplace ultimately inures to the benefit of vulnerable minority employees. If courts are able to develop some comfort with this approach, they may reinvigorate interracial solidarity doctrine, opening the door to a new era of antiracism litigation.

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the last paycheck, rather than when the discriminatory pay arrangements were set by the employer—the rule the Supreme Court established in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). Although the statute of limitations concerns were not a part of public discussion, the basic normative commitment behind the statute, affirming the commitment to equal pay for women and a fair opportunity to litigate their claims, did become a part of public conversation. *See, e.g.*, Posting of Valerie Jarrett to The White House Blog, http://www.whitehouse.gov/blog/2010/07/20/conversationcontinues-equal-pay-and-workplace-flexibility (July 20, 2010, 11:33 EST).

III
CONTEMPORARY WHITES' ATTITUDES AND MARGINAL WHITENESS

Part III shifts our attention to the future, focusing on changes in younger whites' attitudes that promise to make marginal whiteness a productive framework for thinking about race, particularly for whites who are unmotivated by the interracial solidarity doctrine's account of whites' interests. This Part begins by reviewing social science data showing the emergence of a new class of whites referred to here as "post–civil rights era" whites—a generation whose attitudes about race and discrimination differ substantially from whites whose views were shaped by the civil rights conflicts of the 1960s. I argue that because interracial solidarity doctrine is based on civil rights era norms, certain aspects of its logic about whites' interest have failed to strongly resonate with many whites socialized subsequent to the civil rights initiatives of the 1960s. This Part then shows how certain features of the marginal whiteness framework, in particular its context-specific understanding of whiteness and white privilege, are likely to appeal to post–civil rights era whites, given their more ambivalent relationship to white identity and their concerns about the relative levels of privilege among white persons. This Part then shows that Title VII, properly construed to recognize marginal whites' injuries, has the potential to further weaken the attraction of whiteness for this post–civil rights era generation. Part III concludes with a discussion of the framework's long-term potential, including whether it can encourage those whites unmotivated by current interracial solidarity doctrine to take a greater interest in policing workplace discrimination.

A. Post–Civil Rights Era Whites' Beliefs About Racism

Recent studies in social psychology show that many post–civil rights era whites suffer from what I call "racial fatigue,"[206] an attitude that causes them to adopt a passive attitude toward racial discrimination and to disengage from discussions about antiracism efforts.[207] These post–civil rights era whites still share *some* of the same attitudes as the civil rights generation. For example, they strongly reject dominative or Jim-Crow-style discrimination. Also, they would characterize explicitly racist treatment of minorities as one of the worst social evils,[208] and they would not make explicit claims about white superiority

206. Camille Gear Rich, *Decline to State: Diversity Talk and the American Law Student*, 18 S. CAL. REV. L. & SOC. JUST. 539, 563–65 (2009) (defining the concept of racial fatigue and discussing challenges of engaging racially fatigued students in discussions about race).

207. Spanierman & Heppner, *supra* note 36, at 250–51.

208. 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 A. Tuch & Jack K. Martin eds., 1997).

or engage in overtly racist actions.[209] Additionally, post–civil rights era whites recognize the importance of diversity and the need to maintain non-discriminatory work environments. However, post–civil rights era whites differ from the immediately preceding generation of whites because the idea of actively combating race discrimination does not really interest them, despite their adoption of civil rights era norms. Stated simply, post–civil rights era whites are not highly motivated to take any personally risky action to facilitate diversity initiatives or ensure that minorities are guaranteed a non-discriminatory workplace. As a consequence, they pose special challenges for those committed to antidiscrimination efforts.

Numerous scholars have explored why many post–civil rights era whites have disengaged from discussions of race and from antidiscrimination struggles. They note that many of these whites are disengaged because they believe that the worst aspects of the race discrimination problem in the United States have been solved, and the remaining problems are not easily controlled.[210] Past civil rights era whites may concede that the continuing discrimination minorities face is a problem, but they also believe that this issue has little connection to well-meaning (or non-discriminatory) whites' lives.[211] Some also have deep anxieties about being seen as racist, and consequently avoid people of color and conversations about race.[212] All of these attitudes lead whites to take a less active role in antidiscrimination work.

Ironically, despite post–civil rights era whites' belief that race discrimination does not actually affect them, sociologists and social psychologists have found that many of these whites are confronted with race discrimination on a regular basis. The discriminatory comments they hear, however, tend to be made in primarily white circles. Specifically, studies have shown that many whites routinely are exposed to colleagues, friends, and loved ones that make racist comments, but they are typically passive when exposed to racist behavior.[213] Numerous reasons have been offered to explain whites'

209. *See generally* RACIAL ATTITUDES IN THE 1990S: CONTINUITY AND CHANGE, *supra* note 208 (noting that most whites report holding racially progressive egalitarian values and identify racism as a social harm). This attitude shift should not be read to mean that these whites are incapable of engaging in discrimination, only that many whites currently believe that inequality is a natural consequence of market vicissitudes or minorities' disadvantaging cultural practices. Whites generally tend to use race-neutral rationales to explain away allegations of bias. Bobo, *supra* note 208, at 21–22 (describing the 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 208, at 45, 47–49 (describing the rise of symbolic racism); John B. McConahay, *Modern Racism, Ambivalence and the Modern Racism Scale*, *in* PREJUDICE, DISCRIMINATION AND RACISM 91 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (describing the rise of modern racism).

210. *See, e.g.*, Smith et al., *supra* note 97, at 342.

211. *Id.*

212. *See* Matthew P. Winslow, *Reactions to the Imputation of Prejudice*, 26 BASIC & APPLIED SOC. PSYCHOL. 289, 296 (2004).

213. Smith et al., *supra* note 97, at 342–43 (noting that many whites treat other whites'

passivity;[214] however, the data consistently shows that large numbers of young whites are unmotivated, disinterested, and even distressed by the idea of confronting others who act in a racially discriminatory fashion.[215] Antidiscrimination scholars have concluded that one of the primary challenges for advocates working on antidiscrimination issues in the next century is to make well-meaning whites aware of the ways in which their passivity actually facilitates race discrimination.[216]

To some degree, post–civil rights era whites' passivity about racially discriminatory comments should be expected, as many whites have been socialized in a fashion that suggests their primary obligation springs in cross-racial interactions—that is, that they must prevent minorities from being exposed to explicit racist treatment. To the extent this account of whites' obligations assumes that one is only required to respond to explicit discriminatory comments made to minorities, it tends to diminish the importance of the racism whites are exposed to in private interactions between whites in all-white environments. Also, to the extent this account of whites' obligations assumes that racially discriminatory conduct will involve dominative, Jim-Crow-style racism, it is even less helpful, as most whites have been socialized not to act in an explicitly racist manner in interracial disputes. Consequently, whites find they have few opportunities to challenge explicit racism.

Importantly, young whites also have not responded well to contemporary antidiscrimination scholars' call for them to begin to analyze more subtle exclusionary behaviors and patterns that are indicative of racial bias.[217] With

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racist comments and jokes as just "a matter of opinion").

214. TREPAGNIER, *supra* note 24, at 47–62 (describing reasons for well-meaning whites' passivity towards racism); Claire M. Renzetti, *All Things to All People or Nothing to Some: Justice, Diversity, and Democracy in Sociological Societies*, 54 SOC. PROBLEMS 161 (2007); Smith et al., *supra* note 97, at 338 (discussing various strategies whites employ to excuse racist behavior that occurs in their presence, including minimization among other strategies). Denial is one of the most important strategies used. *Id.* at 342 (noting the tendency of white test subjects to not connect themselves, or racist whites whom they know, to racism's existence).

215. *See* BONILLA-SILVA, *supra* note 39, at 43–47. Indeed, many whites, fearing discomfort or mischaracterization, will avoid people of color, discussions of race, and, most importantly, will avoid confronting friends and associates when they engage in discrimination. *See* TREPAGNIER, *supra* note 24, at 62; Smith et al., *supra* note 97, at 337, 342 (noting whites' tendency to dismiss associates' racism as "a matter of opinion").

216. *See, e.g.*, TREPAGNIER, *supra* note 24, at 49 (explaining that passive whites' failure to react to discrimination may be read by discriminating whites as acceptance or encouragement and that once a pattern of passivity is set the passive actor is less likely to react to discrimination in the future). Indeed, some scholars have even noted that displays of discriminatory behavior by one white subject tend to increase the discriminatory behavior of others. *See, e.g.*, Fletcher A. Blanchard et al., *Condemning and Condoning Racism: A Social Context Approach to Interracial Settings*, 79 J. OF APPLIED PSYCHOL. 993 (1994).

217. As long as whites concentrate on Jim-Crow-style explicit racism, they can avoid the more difficult questions raised in allegations of subtle racial bias expressed in cross-racial interactions. *See* Madonna G. Constantine & Derald Wing Sue, *Perceptions of Racial Microaggressions Among Black Supervisees in Cross-Racial Dyads*, 54 J. COUNSELING PSYCHOL.

the rise of social sanctions for "political correctness," many whites are also hesitant to adopt other suggestions from contemporary antidiscrimination literature, such as making whites in their circle aware of the racially discriminatory implications of seemingly neutral statements. The reasons for younger whites' reluctance to take on these new antidiscrimination obligations seem clear; there are high social costs associated with mistakenly labeling some arrangement or someone's behavior as racist.[218] Also, whites may be wary of what I call the "mirror effect," a dynamic in which learning about problematic behavior requires one to reevaluate one's own seemingly innocent conduct for traces of bias. Finally, the benefits promised for engaging in these interventions are low, as it is harder to confront persons engaged in subtle discriminatory conduct, and these confrontations do not bring the same easy psychological benefits derived from joining with other whites to condemn persons who are unabashedly, explicitly racist in interracial interactions. Also, antidiscrimination scholars' increasing focus on more subtle discrimination may be premature, given the evidence that some whites continue to make plainly racist comments in the safety of all or primarily white environments.

Taken together, these general observations about post–civil rights era whites provide several insights that are key for understanding the importance of the marginal whiteness framework. First, the research suggests that whites are exposed to a great deal of information about their white coworkers' discriminatory attitudes, evidence that would be highly relevant in assessing the discriminatory intent of decisionmakers charged with wrongful conduct in a Title VII suit. This research also suggests that many whites suffer from a kind of learned passivity, an attitude that makes it highly unlikely that they would risk the social cost associated with filing a Title VII interracial solidarity action in the absence of some clear, concrete, and personal benefit. Given the current injuries recognized under interracial solidarity doctrine—interference with one's diversity interests or one's interest in a colorblind work environment—it is highly unlikely that post–civil rights era whites would overcome their reluctance to sanction racist behavior and file an interracial solidarity action.

142, 148 (2007) (discussing reluctance of whites to label ambiguous events as discriminatory); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1098–99 (2008) (same); Derald Wing Sue et al., *Racial Microaggressions in Everyday Life*, 62 AM. PSYCHOLOGIST 271, 275, 277–79 (2007) (describing different interpretations of whites and minorities when interpreting arguably antagonistic cross-racial interactions).

218. JOE R. FEAGIN ET AL., WHITE RACISM: THE BASICS 240–42 (2d ed. 2001) (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 and subtle situations); Janet K. Swim et al., *The Role of Intent and Harm in Judgments of Prejudice and Discrimination*, 84 J. OF PERSONALITY & SOC. PSYCHOL. 944, 945 (2003) (noting tendency for caution in labeling a person racist because the label is difficult to disconfirm).

B. Post–Civil Rights Era Whites and White Privilege

Unfortunately, the racial fatigue post–civil rights era whites display in general conversations about race also extends to conversations about white privilege. Even worse, psychologists have noted that many whites exhibit anxiety during "white privilege" discussions.[219] These discussions require whites to assess the unfair cultural and structural advantages whites enjoy as a consequence of wealth distribution established during *de jure* segregation and continuing social arrangements that benefit white persons.[220] Social psychologists explain that some whites are disturbed by these conversations because of "identity threat":[221] they fear that by acknowledging the role of white privilege in their success, they must confront questions about their own deservingness. Inquiries of this kind put whites at risk of self-invalidation, making them question whether they have actually earned or are entitled to the accolades and benefits that they have secured.[222]

Also, whites may be reluctant to talk about white privilege because rational self-interest sometimes makes whites invested in preserving and capitalizing on facially race-neutral social systems that benefit their group. Some would prefer to avoid finding out about the discriminatory underpinnings of these arrangements, to ensure they feel no moral conflict. Others find it difficult to even feel guilty about these arrangements, as they personally have played no role in establishing current discriminatory social arrangements or the *de jure* segregation that has given many whites their current economic standing.[223] Even whites who are more willing to give up certain advantages associated with white privilege worry about the perpetual scrutiny that race-neutral arrangements must undergo for evidence of bias. They express concern

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219. *See* Nyla R. Branscombe, Michael T. Schmitt & Kristen Schiffhauer, *Racial Attitudes in Response to Thoughts of White Privilege*, 37 EUR. J. OF SOC. PSYCHOL. 203, 211–12 (2006). Of course, some whites still react constructively to discussions of white privilege. *Id.* at 212. This observation is consistent with propositions that Branscombe and Schmitt advanced in their earlier work on white privilege. *See* Adam A. Powell, Nyla R. Branscombe & Michael T. Schmitt, *Inequality as Ingroup Privilege or Outgroup Disadvantage: The Impact of Group Focus on Collective Guilt and Interracial Attitudes*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 508 (2005). They believed that honest interrogation of white privilege and exploration of collective guilt about whites' misdeeds would make whites more racially progressive and encourage them to hold anti-racist attitudes. *Id.*

220. *See generally* THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY (2004) (describing the role whites' accumulated wealth plays in maintaining racial inequality); Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & L. 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* FORD, *supra* note 105, at 31–32.

221. Branscombe, Schmitt & Schiffhauer, *supra* note 219, at 204.

222. *Id.* at 204–05; Swim & Miller, *supra* note 36, at 514.

223. *See* BONILLA-SILVA, *supra* note 39, at 31–39; Olson, *supra* note 35, at 391.

that there is no clear stopping point for the dismantling of white privilege.[224]

Psychologists' findings about whites' reactions to discussions of white privilege are concerning—and there may be more cause for alarm. Recent studies have shown that white privilege discussions can even have a deleterious effect on some whites, increasing their attachment to whiteness and their anxieties about white privilege.[225] Studies show that certain whites are actually made *more racist* by discussions of white privilege.[226] The increase in racism in this constituency of white persons is due in large part to anxieties described above as identity threat issues.[227] However, researchers discovered that the whites most adversely affected by discussions about white privilege were whites that were already strongly attached to a white identity.[228]

These insights about certain whites' reactions to discussions of white privilege suggest that some changes are required in how we talk about whiteness and discrimination. The question is, how does one engage with whites in discussions about race without triggering a strong, defensive commitment to white identity? Importantly, because of the way the doctrine constructs whites' interests, interracial solidarity doctrine does little to address whites' anxieties about losing advantages associated with white privilege.[229] Rather the doctrine assumes that whites who bring interracial solidarity cases must be enlightened public attorneys general; they must be working for the greater good by seeking to vindicate diversity and colorblindness interests. However, the decision to abandon white privilege in favor of these larger public concerns requires a leap of faith that many whites find difficult to

224. *See* BONILLA-SILVA, *supra* note 39, at 31–39.

225. Those whites primed to think about the specific ways that they benefit from their whiteness demonstrate the highest levels of modern racism. Branscombe, Schmitt & Schiffhauer, *supra* note 219, at 213.

226. *See* BONILLA-SILVA, *supra* note 39, at 31–39.

227. *See* Branscombe, Schmitt & Schiffhauer, *supra* note 219, at 204.

228. *See id.* at 211–12.

229. Additionally, the moral and psychological account of white injury used in current interracial solidarity doctrine does not resonate with many post–civil rights era whites, because conversations about discrimination have fundamentally changed. Now that whites are being asked to consider whether facially race-neutral and ambiguous personal interactions facilitate bias, civil rights accounts that concern racism's ability to inflict moral harm seem far less convincing. Whites are unlikely to believe that merely witnessing or failing to respond to another party's unconscious or unintentional racially-biased behavior causes them to suffer moral or psychological injury. Also, the civil rights era account of whites' relationship to discrimination seems even more of an ill fit in discussions of "white privilege." As explained above, many whites feel little risk of moral and psychological injury from using race-neutral advantages that *someone else's* discrimination may have created for them. They may think it is morally wrong to ask them to abandon the social capital their ancestors accumulated merely because these resources were amassed in an era tainted by racism. Finally, even if reliance on these advantages makes them culpable at some level, whites may believe that the small advantage they enjoy seems justified, given the existence of social justice programs that benefit minorities' interests. Certainly persons holding these views are oversimplifying matters, but these views must be addressed by contemporary attempts to explain the wrongfulness of more subtle discriminatory conduct and social arrangements.

make.[230] Moreover, requiring whites to make this shift to bring interracial solidarity claims is unnecessary. As the facts of the interracial solidarity cases show, in many cases whites have suffered other more tangible economic and dignitary injuries because of other whites' minority-targeted discrimination. However, the doctrine provides no clear relief to whites who believe that they have been victimized by other whites' efforts to discriminate, and therefore fails to speak to this group of white workers.

The larger project of finding productive ways to talk to whites about white privilege is actually easier than it seems, for psychologists have shown that many whites do not identify whiteness as their primary social identity. Instead, these whites tend to select more idiosyncratic or context-specific distinguishing factors to identify themselves unless they are primed to think about situations in racial terms.[231] Indeed, psychologists have noted that whites tend to *increase* their attachment to whiteness in circumstances that highlight race-based group conflicts over resources.[232] I argue that marginal whites are also primed to think about whiteness when it appears that a privileged ingroup of whites is being formed in a particular space, in a way that emphasizes a marginal white's membership in a disfavored category. For some the disquiet triggered by marginalization scenarios may affect them at a more liminal level, without being consciously understood as related to race, but it may become clearer as they compare their treatment to other minority workers in the workforce.

The central insight here is, when scholars talk about white privilege in the abstract, without discussing the host of competing identity variables that complicate white privilege, they risk increasing the salience of whiteness for less race-identified whites in a context that gives whites an incentive to cling to a white identity. The marginal whiteness framework avoids this problem by encouraging whites to maintain a context-specific definition of whiteness in privilege discussions, one that encourages them to think critically about whether contemporary "privilege" arrangements actually serve their individual interests.

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230. The authors of *White Racism* recognize the problems posed by white privilege discussions and the argument that whites should give up material advantages for the abstract moral interests protected by interracial solidarity doctrine. *See* FEAGIN ET AL., *supra* note 218, at 220–36. Questioning the viability of this strategy, they ask, "[w]ill 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?" *Id.* at 220.

231. Jaret & Reitzes, *supra* note 100, at 732 ("[W]hites seem to build a self-image that is very individualistic, colored not mainly by race/ethnicity, class, or age but instead mainly by highly personalized qualities and idiosyncrasies that are appreciated by them and their reference groups."). These identities can range from more widely recognized regional affiliations, political associations, or cultural affinities to seemingly inconsequential or quotidian interest-based preferences, such as commitments to particular leisure activities or sports teams.

232. *Id.* at 731 ("[W]hen people are in more diverse settings, especially if there is tension or conflict present, they are likely to make self-other comparisons and contrasts that elevate feelings about the importance of their racial-ethnic identity.").

Additionally, the marginal whiteness framework taps into a thus-far untapped resource in the privilege literature: the understanding that there is unrest among whites about the nature of white privilege. Sociologists have noted that, particularly in discussions of affirmative action, many young whites take the position that white privilege is not as much of a boon as it is represented to be. This tendency to diminish the significance of white privilege is greater for whites that were not socialized in an era of *de jure* segregation, when the benefits of white privilege were explicit and obvious. When post–civil rights era whites think about the advantages of whiteness, they perceive white privilege to be much *less* of a benefit than it has been historically. As political theorist Joel Olson explains, after the civil rights movement "the possibility of aristocrati[c standing] that white privilege offered disappeared . . . ."[233] To many whites it now appears that "social advancement [is] subject to the competitive rules of the market rather than inhering partially in racial privilege."[234]

Olson, however, notes that whites are generally aware that being white provides them with certain "statistical advantages," and potentially with cultural capital; yet they do not perceive how these advantages assist them on a day-to-day basis. He explains:

> It means almost nothing to a particular 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.[235]

Olson notes that, "because [the benefits of whiteness] are probabilities, 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 told that whiteness used to be much] more."[236]

The marginal whiteness framework recognizes that marginal or low-status whites are aware of the "probabilities" that make up white privilege, but they are also aware that they do not seem to end up on the winning side of these probabilities in many circumstances. Marginal whites also recognize that many higher-status whites seem to systematically enjoy the gains associated with "white" privilege. Importantly, as long as conversations about racial privilege fail to acknowledge the uneven distribution of racial privilege among whites and treat whites as a stable group, we risk increasing all whites' attachments to whiteness and white privilege. In contrast, conversations that acknowledge marginal whites' different experiences of privilege will encourage marginal whites to recognize that they often do labor to assist in white privilege

233. *See* Olson, *supra* note 35, at 391.
234. *Id.*
235. *Id.* at 392.
236. *Id.*

(including defending institutional arrangements that ostensibly benefit all white persons), but enjoy comparatively fewer benefits than higher-status white persons. This critical consciousness may make marginal whites more willing to question and challenge existing institutional and social arrangements, and to form coalitions with minorities when they discover these arrangements also compromise their interests.

The insights produced by the marginal whiteness framework also lead to a rather striking realization. Many antidiscrimination scholars have expressed concerns about whites' refusal to acknowledge their attachment to whiteness. They have argued that whites' repeated invocation of their vulnerability to others kinds of discrimination in white privilege discussions should be treated as an attempt to avoid taking responsibility for white privilege.[237] Yet the marginal whiteness framework reveals the irony of these complaints: scholars are complaining about changes in white identity that are actually evidence that *whites' investment in the protection of white privilege may be declining.*[238] That is, when marginal whites complain that white privilege does not advantage them, this may be a necessary initial step in recognizing that they should also fight against white privilege. Thus far, however, complaining whites have been treated as though they are in denial about the benefits they enjoy from contemporary social arrangements. Antidiscrimination scholars should reevaluate these complaints as they may signal that there is a breakdown in the coalition of "whites" necessary to maintain white privilege.

In summary, this Section raises the concern that contemporary discussions of white privilege may unwittingly fuel and even ignite hostility in marginal whites who might otherwise be allies in disrupting the effects of white privilege. Again, traditional discussions of white privilege have attempted to focus on aspects of white privilege that *all* whites enjoy, regardless of the other socially relevant features of a white person's identity that might limit her access to important aspects of white privilege. Scholars often grow frustrated when whites mention other aspects of their identities in white privilege discussions and interpret these comments as attempts to flee from social responsibility.[239] Consequently, whites are discouraged from seeing these alternate, nonracial features as important, and are told to focus on their identities as whites instead. Even worse, contemporary privilege discussions have a disturbing tendency to painfully articulate each and every possible benefit one gains from whiteness—from the trivial to the consequential, further increasing whites' anxiety about

237. *See, e.g.*, Ruth Frankenberg, *White Women, Race Matters: The Social Construction of Whiteness*, *in* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR, *supra* note 38, at 632, 634 (warning against engagements with "'white ethnic' heritage that . . . evade race privilege in the present"); Gallagher, *supra* note 38, at 9 (arguing that whites' claims about ethnic-based subordination are part of privilege avoidance strategies).

238. *See* Brayton, *supra* note 83.

239. *See, e.g.*, sources cited *infra* note 245.

the losses they will suffer with the end of white privilege.[240] Little attention is paid in these discussions to how disadvantaged or low-status whites are materially and economically harmed when they respond to calls based on white privilege. Instead, what is offered in return for giving up the material and cultural capital of whiteness is the promise of amorphous, long-term psychological and moral benefits, prizes that seem less salient to many white persons.[241]

My decision in this Section to outline the perils associated with certain kinds of discussions of white privilege is not meant to dissuade people from having conversations about the links between race and social advantage.[242] Rather, these observations are being offered to spur more nuanced conversations about the linkages between race and social standing. I believe that discussions of white privilege must continue if there is any hope of dismantling the structural and cultural arrangements that disadvantage minorities. My claim simply is that conversations about white privilege have more potential to recruit supporters and discourage critics if they proceed in a more nuanced fashion that acknowledges other sources of social identity that should complicate whites' attachment to whiteness as a racial identity. However, these conversations must occur in a context in which whites are still required to consider how race may have unfairly advantaged them in certain arenas. The marginal whiteness framework offers students and scholars more opportunities for these more nuanced conversations.

C. Placing the Civil Rights Model in Context

Thus far I have offered a relatively strong critique of the civil rights era model of whites' interests used in interracial solidarity cases. Most of this criticism stems from the model's tendency to oversimplify whites' experiences. The civil rights era model posits that whites know that they concretely and meaningfully benefit from white privilege and, in the absence of a strong

240. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, *in* RACE, CLASS, AND GENDER IN THE UNITED STATES 188, 189–90 (Paula S. Rothenberg ed., 6th ed. 2004) (listing benefits of whiteness, including lower risk of police surveillance and discrimination in social interactions, as well as consumer shopping choices more in line with whites' interests and expectations). McIntosh even considers the fact that whites (as compared to persons of color) have easy access to skin colored toned band-aids as an example of white privilege. *See* McIntosh, *supra* note 45, 291, 294.

241. Discussions of whites' concrete benefits from "white privilege" tend to dominate the psychological literature as well. *See, e.g.*, Spanierman & Heppner, *supra* note 36, at 249 (noting that "white privilege" provides 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 has cognitive, behavioral, and affective costs for whites, such as guilt, shame, apathy, and anxiety. *Id.*

242. Duster, *supra* note 106, at 114–15 (explaining that a discussion of the context-specific description of whiteness that is attendant to the shifting definitional nature of whiteness need not prevent a discussion of its role in structural oppression).

antidiscrimination commitment, would be inclined to defend that privilege. The existing civil rights era model for whiteness also assumes that whites can only be persuaded to abandon the benefits of white privilege by being told about the higher-order psychological and moral harms they experience when they allow prejudice to unfairly subordinate others.[243] It assumes that second-order benefits like diversity and the moral commitment to race neutrality will motivate whites to name and dismantle systems that privilege their racial group. This way of talking erases socially and economically vulnerable whites and unnecessarily problematizes the more concrete, self-interested reasons they have for disrupting white privilege.

Having made these observations, I should note that the civil rights era account of whites' prejudice-related injuries is not wholly wrong. Rather, the moral and psychological harm bystanders to discrimination suffer has been empirically documented.[244] Whites do stand to gain something when explicit racial bias is removed from the workplace and when workers feel free to enjoy the benefits of diversity. What this discussion demonstrates is that there are many other reasons that marginal whites have to challenge and disrupt white privilege. What this discussion demonstrates is that marginal whites' recognition of the inequitable operation of white privilege within communities of whites, and their ambivalence about white identity, now allows them to fight white privilege when they believe it disadvantages them. Because many whites feel they are saddled with responsibility for privileges they do not enjoy, it is highly unlikely that they will engage in self-sacrifice and subsidize these privileges for other whites' gain. The next Section more specifically considers the appeal the framework promises to have for marginal-white persons.

D. The Antidiscrimination Benefits of Marginal Whiteness

Some may view the marginal whiteness framework as an effort to build on undervalued arguments made during the civil rights era, as opposed to a wholly new approach to building cross-racial antidiscrimination coalitions. They rightly note that certain civil rights era activists tried to motivate whites to join cross-racial antidiscrimination movements during the 1960s by drawing attention to the economic and dignitary costs minority-targeted discrimination imposed on white persons.[245] Yet these arguments over time have not received

243. Some of the moral and psychological harms seem particularly unappealing to actors primarily focused on economic and short-term considerations. *See, e.g.*, Spanierman & Heppner, *supra* note 36, at 249–62 (describing discrimination's costs to whites' mental health, noting it makes a white lose his authentic self, develop a distorted sense of history, and experience spiritual depletion).

244. Low & Schneider, *supra* note 151, at 2261–97.

245. *See generally* CYNTHIA STOKES BROWN, REFUSING RACISM: WHITE ALLIES AND THE STRUGGLE FOR CIVIL RIGHTS (2002) (describing whites' efforts during the civil rights era to create outreach organizations for whites that explained how whites were disadvantaged by structural racism); *see* GUINIER & TORRES, *supra* note 45, at 275–82 (discussing political race as a

as much attention as the diversity and colorblindness justifications for whites to take part in antidiscrimination efforts. My work compliments that of scholars that have continued to write about the structural effects of minority-targeted racism on white communities, but updates this line of conversation by providing an identity construction analysis that explains why post–civil rights era whites are more likely to take note of these structural disadvantages than whites in other age groups. This next Section explores some of the insights the marginal whiteness framework allows whites to produce, once they adopt a critical perspective on white identity.

The first advantage of the marginal whiteness framework is that it encourages whites to think about whiteness as a shifting coalition that can leave them outside of the circle of privilege in particular contexts. Consequently, it increases whites' skepticism and discomfort with white privilege, even when they find themselves within the circle of privilege in a given context. In contrast, current discussions of white privilege push whites to imagine themselves as members of a stable racial group, not one where certain members are periodically forced outside of whiteness's margins. These kinds of conversations, which emphasize rigid racial boundaries, tend to unnecessarily increase whites' and minorities' perceptions of conflict, even in circumstances where their economic and dignitary interests are actually *aligned.* An example makes this point more clear. A working-class white employee using a marginal whiteness framework is more likely to speak up if she has evidence that wages for her job category have been cut because the position has become minority-dominated. She is more apt to recognize that she shares the same disadvantages suffered by minority employees. The same employee is less likely to speak up if she has been consistently told that she is a beneficiary of white privilege, and her complaints about her relative disadvantage as compared to more privileged whites are merely an excuse to avoid confronting her own privileged status.

Second, the marginal whiteness framework gives whites an incentive to examine the repercussions of race-neutral arrangements with an eye toward uncovering their potential discriminatory effects. Current white privilege discussions may cause whites to automatically assume that the unraveling of these systems will cause them to lose white privilege. The marginal whiteness framework instead encourages these whites to consider whether the system being challenged also disadvantages them because of their ethnicity, class, religion, or some other consideration. For example, assume that a marginal white learns that the police department's test for promoting officers to detective

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way for cross racial coalitions to identify systems of oppression, namely by taking cues from social arrangements that tend to disadvantage particular minority groups); *see also Treason to Whiteness Is Loyalty to Humanity: An Interview with Noel Ignatiev of* Race Traitor *Magazine, in* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR, *supra* note 38, at 607, 608–12 (urging whites to abandon whiteness in favor of a new identity that allows them to see common cause with people of color in overcoming structural disadvantages caused by racism).

tends to disadvantage blacks. Instead of automatically assuming that he will be disadvantaged if the exam is eliminated, he might consider whether ethnic or poor whites also do badly on the test and would benefit from its elimination.

Third, the marginal whiteness framework tends to make whites more suspicious when they are asked to perform racial labor because it urges them to recognize the possibility of linkages between discriminations. While the presence of one type of bias in the workplace (for example, sexism) may not automatically mean that others (for example, racism) exist, the marginal white is encouraged to recognize that his primary concern should be how ingroup preferences are being constructed by higher-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 asked to passively accept or assist with the expression of 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. Scholars have noted that many whites regard white identity with a mixture of shame, pride, and ambivalence.[246] Some legal scholars have complained that whites tend to flee from whiteness when race discrimination is discussed, typically highlighting some other aspect of their identity.[247] However, thanks to the work of social psychologists, we now know that this is a typical reaction to identity threat, and not a moral failing.[248] We should be less invested in preventing this kind of flight, given the empirical evidence showing that forcing whites to accept a simple, unqualified white identity in these conversations may do more harm than good.[249] 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 with regard to a particular workplace practice, problem, or rule—either enjoying unfair advantages or being disadvantaged, depending on the context—I predict they will likely be less defensive and more amenable to recognizing and giving up unfair advantages in circumstances where they are conferred with certain benefits.[250]

246. *See, e.g.*, Swim & Miller, *supra* note 36, at 500–01 (discussing an ambivalent relationship to whiteness). They report on studies showing that whites often "feel guilt by their association with the White race." *Id.* at 501. Indeed, they often experience the "discomfort of guilt, shame and sometimes anger at the recognition of their advantage because of being White . . . ." *Id.* (citation omitted).

247. *See, e.g.*, Jaret & Reitzes, *supra* note 100, at 732.

248. *See* Branscombe, Schmitt & Schiffhauer, *supra* note 219, at 204.

249. *See supra* notes 221–228 and accompanying discussion.

250. Eichstedt, *supra* note 31, at 463 (discussing the experiences of discrimination endured by gay whites, Jews, and white female interview subjects and interviewees' observations that their outsider status allowed them to both understand oppression while simultaneously taking responsibility for the white privilege they did enjoy).

E. Accepting the Invitation: Will Low-Status Whites Adopt a Marginal Whiteness Framework?

What might encourage white workers to adopt the marginal whiteness framework? One way to encourage a greater critical perspective on whiteness (and a relatedly critical engagement with issues of racial equality) is to introduce more whites to descriptions of whiteness that require them to critically evaluate their experiences. For many whites are unaware that it is their attachment to whiteness and their frustration about access to white privilege that causes them to experience their lives as shaped by yearning and lack. Preoccupied with discussions emphasizing the social relevance of white privilege, these whites become fundamentally insecure, always questioning whether they truly have access to white privilege, whether certain subgroups of whites have greater access to privilege, and whether they are being unfairly penalized by affirmative action when they do not truly enjoy all of the benefits associated with whiteness. When whiteness is characterized in this way, many whites find space to critically examine their past experiences and consider how anxieties about whiteness have encouraged them to mobilize in the past to protect whiteness, rather than rationally assess whether proposed changes in institutional regimes might actually inure to their benefit. They may conclude that their prior actions to defend the institutional interests of "white" persons makes little sense in light of the inconsistent benefits they receive from defending the interests associated with whiteness as a social category.

Additionally, rather than providing an isolated experience of critical insight, persons who take the marginal whiteness framework seriously may find it hard to simply return to their previous ways of experiencing white racial subjectivity.[251] Ladelle McWhorter urges scholars to recognize 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 conscious agents of racism.[252] Whites in "all-white" contexts may become more aware of the fractures within their racial group and the potential connections between these divisions and "innocent" or incidental discriminatory comments about racial outgroup members made by whites in these single-race settings. For in mixed-race contexts, these seemingly minor divisions may become more rather than less socially significant if and when higher-status whites determine that it is necessary to sacrifice some whites' interests to preserve advantages for higher-status whites.

Skeptics may argue that it is unlikely an account of race like marginal whiteness will jump from legal scholarship into the cultural consciousness of

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251. *See* McWhorter, *supra* note 35, at 533–56.

252. *See id.* at 544. McWhorter explains that Whiteness Studies scholars working in critical theory "hope their work will bring white people up short, make it difficult for them to continue to function unthinkingly within a white supremacist social system, and make it possible for them to imagine and create different ways of living." *Id.*

rank-and-file workers in an easy fashion. While there certainly is no clear and direct route between the two domains, previous accounts of white privilege, which are more threatening to whites, have managed to exert significant cultural influence outside of legal academia. Additionally, much of the socialization necessary to adopt a marginal whiteness framework has already occurred. Education about privilege is the legacy of multiple movements to politicize persons that are members of disempowered social groups. 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, whites must be challenged to think about how these identity components shape their experiences of whiteness and allow for the development of a critical perspective.[253]

Finally, whites may be attracted to the marginal whiteness framework because it responds to America's changing demography. The number of multiracial persons in the United States who identify as mixed-race has risen significantly.[254] At the same time, there has been a willingness by some white communities to accept mixed-race persons as white.[255] Additionally, Latinos and Middle Easterners encounter institutional and social pressures that encourage them in some contexts to identify as white persons. Together these changes have created a situation in which many persons socially recognized in

253. *See* Jaret & Reitzes, *supra* note 100, at 732 (arguing that the reason whites may suggest that other aspects of identity such as race, class, and gender are not important to them is because they have not experienced exclusion on that basis). In the absence of discrimination, Jaret and Reitzes observe, whites are likely to prize more idiosyncratic identities uncorrelated with an established antidiscrimination project. *Id.* They note, however, that this weak identification dynamic may change when individual whites experience discrimination based on politically significant identity features, such as class or gender. *Id.*

254. It is difficult to precisely quantify the increase in the number of Americans who identify as multiracial persons over time because of limitations in data collection efforts. However, the 2000 census is often identified as the high-water mark for counting mixed-race persons, as it allowed people, for the first time, to check off multiple boxes when identifying by race to signify their mixed-race heritage. In the 2000 Census, almost seven million people, or 2.4% of the U.S. population, identified as mixed race. Miville et al., *supra* note 102, at 507; *see* Kerry Ann Rockquemore & David L. Brunsma, *Socially Embedded Identities: Theories, Typologies, and Processes of Racial Identity Among Black/White Biracials*, 43 SOCIOLOGICAL Q. 335, 338 (2002) (reporting the same statistics). Some believe these high numbers are indicative of a trend towards identification as multiracial among the young. *See id.* at 350 (noting 2% of persons age 50 and over self-identified as black and multiracial on the Census, as compared to 8% of persons aged 17 and younger who self-identified as black and multiracial).

255. This increased openness to recognizing multiracial persons as white has been described both anecdotally in small-scale studies as well as larger studies tracking the evolving politics of racial identification. *See* Miville et al., *supra* note 102, at 511 (describing certain multiracials' ability to shift between racial identities as the "chameleon experience"); Rockquemore & Brunsma, *supra* note 254, at 338 (discussing protean multiracials that shift between identifying black, white, or multiracial depending on their social context); *see also* Warren & Twine, *supra* note 40 (discussing legal and institutional measures allowing multiracials and Latinos to identify themselves as white in many cases and discussing intermarriage rates as evidence of the expansion of the category of whiteness to include Asians and Latinos).

some spaces as being white are treated as minorities in others. This split consciousness may cause these contingently recognized whites to have a distant relationship with whiteness, similar to that predicted by the marginal whiteness model. Taken together, the demographic and social changes described above present antidiscrimination scholars and courts with a critical challenge: will we construct a doctrine that responds to these whites' potential to develop more of a critical stance on whiteness and white privilege, or will we allow this potential to go unmined? As studies show more whites growing disengaged from discussions about race, there will be more pressure to find novel ways to encourage whites to rejoin antidiscrimination efforts.[256]

IV
CRITIQUES AND CONCERNS

Part IV addresses anticipated concerns about the marginal whiteness framework, including critics' potential reservations about its doctrinal implications, descriptive accuracy, and analytic and conceptual ambitions. The discussion then turns to the framework's repercussions for existing cross-racial mobilization efforts, particularly those motivated by Critical White Studies scholarship based on discussions of white privilege. More specifically, this Part explores the progressive potential of the marginal whiteness framework, arguing that when used in a responsible and rigorous fashion, it allows us to build stronger ground for progressive cross-racial coalitions. Exploring these possibilities in detail, I explain that marginal whiteness may be *more* effective with certain whites than existing models of white privilege because it attends to the changing demographic profile of whites themselves (including the more limited experience of white privilege available to Latinos, Middle Easterners, and white multiracials). Additionally, this Part shows that the framework responds to the challenges presented by "racially fatigued" whites described in Part III, who have become increasingly alienated by discussions of white privilege.

A. Marginal Whiteness: Implications for Title VII Doctrine

Judges convinced by the basic tenets of the marginal whiteness framework may still be looking for additional direction. They may agree that Title VII interracial solidarity doctrine provides an underinclusive account of the ways in which minority-targeted discrimination injures whites, and that the marginal whiteness framework shows that there are other justifications for creating causes of action for whites to challenge other whites' discriminatory actions. However, some judges may still be unsure about whether marginal whiteness can take us beyond critique to a point where actual productive changes in Title

256. Lisa B. Spanierman & Patrick Ian Armstrong, *Psychosocial Costs of Racism to Whites: Exploring Patterns Through Cluster Analysis*, 53 J. COUNSELING PSYCHOL. 434, 434–41 (2006); Spanierman & Heppner, *supra* note 36.

VII doctrine can be suggested. Additionally, they may have some process-based reservations, as it is unclear whether judges or Congress should be responsible for making the changes in Title VII necessary to accommodate marginal whites' interests.

Process-based questions or concerns about limiting the judiciary's role in statutory interpretation are central to the dilemmas present in current interracial solidarity doctrine, for the limited interpretations of Title VII preventing marginal whites from properly asserting their interests are solely the product of judicial action. *Courts* have provided the account of whiteness that informs interracial solidarity cases, and *courts* have insisted on the centrality of civil rights era norms. These observations, however, are not intended as an indictment of the courts that took these actions. Rather, courts often perform this kind of gap-filling function when the plain text of a statute is unclear. Sometimes they feel compelled to do so because legislative history cannot resolve an interpretive question, Congress may not have explicitly considered a given issue, or legislators could not arrive at a clear consensus as to a statutory provision's meaning. However, even if one is inclined to believe Congress rather than courts ideally should create claims for marginal whites, there are reasons to believe that the legislative changes required might be a long time in coming. The small number of marginal-white litigants in the past makes the likelihood of mobilizing Congress to make statutory changes to address the needs of this constituency relatively small, and there is no way of knowing how many claims would ultimately be brought if legislative changes were made. Mindful of these challenges, courts may have created interracial solidarity doctrine in an effort to ensure Title VII remained responsive to changing social conditions.

The above-mentioned discussion allows skeptics to better understand why courts found it necessary to create interracial solidarity doctrine; however, it also provides reassurance to judges that prior interracial solidarity decisions do not create an insurmountable bar to introducing new doctrine to address marginal whites' interests. Judges interested in revisiting these questions about whites' injuries in Title VII cases should feel more confident knowing that there is no "plain text" basis for arguing that Title VII limits whites to allegations concerning a desire for colorblindness or diversity-based associational injuries. Similarly, the statute's legislative history does not contain anything requiring the existing limited framework for understanding whiteness and whites' interests. Therefore, courts in jurisdictions where interracial solidarity claims have been allowed can use the marginal whiteness framework to extend the class of injuries recognized as interracial solidarity claims. They may authorize claims in the racial labor or economic injury cases precisely because the plaintiff's claims are based on the core discriminatory practices Title VII was designed to punish. This would be a positive result, as the prosecution of these kinds of claims allows otherwise undetected intentional discrimination to be reached, and therefore addresses the primary harms that

motivated Title VII's passage.[257]

Jurisdictions that have not yet recognized interracial solidarity cases may choose to wait for clearer indication from Congress before creating new causes of action. However, there are some options available to courts that decide to proceed more conservatively until there is congressional action on this set of issues. For example, another option available to courts interested in addressing the needs of marginal-white plaintiffs is to consider whether existing hostile environment doctrine or disparate treatment doctrine more generally provides a basis for recognizing these workers' claims. This approach is based on the proposition that it was a mistake to place marginal-white plaintiffs into a special category in Title VII doctrine and, instead, efforts should be made to articulate their claims under existing causes of action. This approach would work well for classes of cases such as the racial labor cases, in which a white plaintiff, because of his race, is asked to do special labor to support white privilege. There is no particular reason to make a special category for these cases if they can be litigated using existing causes of action. Importantly, the existing civil rights era framework for analyzing whites' interests has caused courts to think too narrowly about such cases and caused them to miss productive analogies between marginal whites' allegations and existing Title VII claims. The economic injury cases also could be litigated under existing disparate treatment doctrine when the plaintiff can show that a facially race-neutral policy has been instituted to hide minority-targeted discrimination. In these circumstances, a worker like Clayton could make the argument that she was subject to the new discriminatory rule "because of her race," because the employer needed to sanction some whites in order to mask minority-targeted discrimination. In short, existing disparate treatment doctrine could prove extremely useful in making marginal whites visible in jurisdictions where courts are loath to create new causes of action. Arguably, these attempts to modify existing causes of action run the risk of providing only partial relief to marginal white plaintiffs, but these cases may end up building the ground for activism necessary to spur congressional changes.[258]

B. Marginal Whiteness: Descriptive Accuracy Concerns and Empirical Issues

Some workplace discrimination scholars may conclude that there is sufficient legal ground for creating judicially constructed remedies for

257. *See* Feldman, *supra* note 121, at 560 (discussing whites' potentially better access to information about discrimination); Herbert M. Kritzer et al., *To Confront or Not to Confront: Measuring Claiming Rates in Discrimination Grievances*, 25 LAW & SOC'Y REV. 875, 875–87 (1991) (discussing the chronic problem of underreporting of workplace race discrimination).

258. Courts may find it more difficult to interpret existing Title VII causes of action in ways that allow plaintiffs to present claims concerning linkages between discriminations. For discussion of why these claims are significant to marginal white plaintiffs, see *supra* text accompanying notes 158–170.

marginal-white plaintiffs, but be loath to act without clearer evidence about the number of marginal whites as a group. These scholars may find the descriptive account of whiteness I have offered somewhat compelling, but argue that it is dangerous to supplement the existing framework for understanding whites' interests without empirical evidence regarding the long-term effects this constituency will have on workplace disputes. Proponents of this view also may argue that one must be able to quantify the number of marginal whites likely to bring antidiscrimination claims before determining whether Title VII should accommodate their views.

In response to these concerns, I would argue that fairness demands that marginal whites be provided with remedies, even in the absence of evidence quantifying the number of cases that may be brought by this group. The general trends I have identified in the "failed" Title VII "interracial solidarity" cases are well documented and supported by writers in critical theory, in the sociological literature on whiteness studies, and in anthropological studies documenting whites' views.[259] These studies establish that intragroup conflicts about whiteness can both mask and aggravate cross-racial conflicts in workplace antidiscrimination disputes.[260] Additionally, their work shows that whites' experiences of intragroup marginalization often precede critical consciousness about the operation of whiteness, because personal experiences of social subordination are often key to recognizing the social harms caused by the operation of whiteness in a given context.[261] These scholars' work explains why we should expect marginal whites to be motivated to address workplace race discrimination that directly affects their interests.

Additionally, scholars concerned about how to measure the number of marginal whites[262] should keep in mind that my project here is limited, as my Article does not attempt to establish that all whites or even most whites utilize the marginal whiteness framework. Rather, my aim is to show that whites who do adopt this viewpoint do not see their interests represented under contemporary Title VII doctrine. My essential claim is that, because these marginal whites' claims would disrupt and negatively sanction racially

259. *See supra* text accompanying notes 34–35.

260. *See, e.g.*, Bradley, *supra* note 32, at 46–47 (documenting findings from study showing middle-class whites showed a greater propensity to discriminate against middle-class blacks after being given a chance to discriminate against working-class whites).

261. *See* Eichstedt, *supra* note 31, at 452 (discussing whites' experiences of certain kinds of subordination as generating a critical consciousness about white privilege).

262. KIRBY MOSS, THE COLOR OF CLASS: POOR WHITES AND THE PARADOX OF PRIVILEGE 73–76 (2003) (discussing poor whites' reaction to a middle-class black researcher's attempts to interview them about the construction of white privilege). One could argue that the black researcher's class created a kind of identity threat to poor whites that prevented opportunities for conversations. *Id.* These dynamics continue to present challenges for whites who might otherwise develop a marginal whiteness perspective. Gibson, *supra* note 56, at 388 (noting racism of poor whites in Shellcracker as an impediment to their understanding of their similar economic position to poor and marginalized blacks and Latinos).

discriminatory practices—key Title VII goals—there is no logical basis for denying marginal whites relief for their injuries. In short, regardless of the ultimate size of this group, I argue that Title VII, for both practical and moral reasons, should assist whites who are aware of the complex relationships between intragroup discrimination among whites and outgroup racial bias when they stand ready to disrupt these discriminatory dynamics. Courts may justify these remedies by arguing that these whites perform a whistleblowing function, or because these remedies are compelled by an understanding of the myriad economic and dignitary harms minority-targeted discrimination inflicts on persons in the workplace.[263] No matter the justification, remedial actions should not be foregone simply because we cannot yet determine how many workers' lives would be improved by this intervention.

Additionally, scholars who would caution against action in the absence of more extensive empirical data must acknowledge that their claims present an intractable "chicken-and-egg" problem for scholars like myself, who primarily concentrate on questions of antidiscrimination theory. That is, scholars focused on empirical methods understandably believe that the scope of a phenomenon must be measured if one is to precisely understand how to respond to that phenomenon.[264] In contrast, scholars focused on theory understandably believe that the theory should be elaborated in the first instance, and then subject to testing by those with the skills required to perform this kind of analysis. This Article takes what I believe is the first necessary step to outline a theory that should be subject to empirical measurement. I outline how and why marginal whites experience intraracial conflict in the workplace, a phenomenon ignored in existing Title VII "interracial solidarity" doctrine. My goal is to offer employment discrimination scholars a portrait of a white subject thus far largely overlooked by Title VII, but with great potential to advance the statute's antidiscrimination goals. Like many empiricists, I also have questioned why there is not more hard data addressing the potential relationship between high-

263. Several concepts discussed in the psychological literature may prove helpful in measuring these dynamics, including the "black sheep effect" and "reflection and deflection theory" (RAD), as described by Jill Bradley. Bradley, *supra* note 32, at 3 (describing RAD as a pattern in which middle-class whites derogate lower-status whites in a self-deception effort that facilitates their ability to discriminate against middle-class blacks); *see also* Saera Khan & Alan J. Lambert, *Ingroup Favoritism Versus Black Sheep Effects in Observations of Informal Conversations*, 20 BASIC & APPLIED SOC. PSYCHOL. 263, 263 (1998) (describing the "black sheep effect" as the tendency to judge ingroup targets more negatively than outgroup targets when the targets' features are unambiguously negative).

264. Paul R. Croll, *Modeling Determinants of White Racial Identity: Results from a New National Survey*, 86 SOC. FORCES 613, 617 (2007) (noting that "[a]n underlying assumption of much of the research on white racial identities (especially in the work on identity scales in psychology) is that whites' awareness of their racial identity is part of a progression of enlightenment as well as a move toward stronger views of social justice and activism"). This enlightenment path is similar to the model that celebrates diversity and colorblindness in that it does not stress the more personal, self-interested reasons marginal whites might have for wanting to challenge minority-targeted discrimination.

status whites' actions, their treatment of low-status whites, and potential linkages to cross-group racial discrimination. I suspect that the traditional civil rights era paradigm critiqued in this discussion also has fundamentally shaped the view of scholars performing empirical work on whites' attitudes,[265] discouraging the development of studies necessary to document the experiences of marginal whites.[266] My hope is that this project, along with the work of other scholars, will encourage more empirical research on questions of intraracial conflict and outgroup prejudice.

Last, while the identity construction effects of antidiscrimination law should not be overstated, I believe that marginal whites' litigation efforts may have a socializing effect, convincing marginal whites to conceptualize their interests in the workplace—and in society more generally—in a way more conducive to racial equality efforts. As Part III showed, we are witnessing the growth of a new class of whites less inclined to be motivated by the moral civil rights era account currently used in interracial solidarity doctrine, and more inclined to adopt understandings regarding the contingent, context-specific enjoyment of white privilege that I have described in Part III.[267] I suspect that, if courts create doctrine more accommodative of marginal whites' interests, the financial incentives are such that we will see more Title VII "interracial solidarity" claims articulated in the idioms offered by the marginal whiteness framework.

C. Marginal Whiteness: Concerns About Analytic Ambitions

Antidiscrimination scholars that focus more on theoretical questions will be less concerned about identifying appropriate empirical measures for assessing marginal whiteness as a social phenomenon. These scholars, instead, will raise questions about the marginal whiteness framework's larger analytic

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265. More specifically, the paucity of empirical data stems from the fact that the two models of white identity used in the social psychology literature are based on the same civil rights era norms that have limited the development of Title VII doctrine. The models are primarily concerned with charting whites' path to the acknowledgment of white privilege and the creation of a positive, integrated white identity that disavows white privilege, racism, and the naturalization of ideas about white social superiority. The first model is the white identity development model (WID) created by Rita Hardiman in 1982. The second is the six-stage white racial identity development model (WRID) developed by Janet Helms in 1984. For a discussion of these models, see Rita Hardiman, *Reflections on White Identity Development Theory*, *in* NEW PERSPECTIVES ON RACIAL IDENTITY DEVELOPMENT: A THEORETICAL AND PRACTICAL ANTHOLOGY 108, 124–25 (Charmaine L. Wijeyesinghe & Bailey W. Jackson III eds., 2001), and Croll, *supra* note 264, at 617. The WID has had the most impact on empirical research, as it was converted into the White Racial Attitudes Identity Scale (WRAID), a measurement tool that has been widely used in the psychological studies on whiteness. Hardiman, *supra* note 265.

266. Hardiman, *supra* note 265, at 124–25 (discussing a need for future research on white identity to explore the variations in the experiences of whiteness, including the effects of ethnicity and culture and their relationship to positive white identities less shaped by a dominance or privilege framework).

267. *See supra* Part III, and text accompanying notes 168–173.

implications. They may argue that marginal whiteness is dangerous because it is carnivorous, as it appears to unnecessarily attempt to consume every other model of bias and discrimination, digesting them into side notes used to explore questions of relative levels of white privilege. In particular, these scholars may be concerned that we will lose out on key insights in existing legal scholarship detailing the precise ways in which particular social identities have formed the basis for discrete kinds of social subordination. The central concern for this group is that marginal whiteness threatens to distract from studies of gender, class, ethnicity, and sexual orientation in ways that should concern antidiscrimination scholars that focus on forms of social disadvantage other than race.

For example, critics of marginal whiteness may point to specific insights developed about sexist practices by feminist legal theorists, showing how women were marginalized by being associated with the domestic sphere, being characterized as the more delicate, fairer sex, and by "benevolent" judgments that disqualified them from certain opportunities. In contrast, scholars working on sexual orientation issues will note that marginalization of gays has involved very different discursive claims about disease, moral decay, and pathology, which are used to deprive gays of civic and professional opportunities.[268] These two examples, critics may argue, illustrate that many kinds of discrimination are simply not motivated by race, and it is important to separately chart the discursive moves made to subordinate persons based on nonracial identity features. Proponents of this view may note that Title VII, as currently interpreted, properly respects each kind of discrimination's individual history and contemporary features because it requires each litigant to precisely identify and prove the kind of animus at issue in her case. By following this approach the statute avoids the problems potentially created by marginal whiteness claims, which could allow persons to make amorphous, overly reductionist complaints about outgroup discrimination.

While certainly understandable, concerns about marginal whiteness's insensitivity to the individual idiosyncrasies of different kinds of bias fail to acknowledge the costs of these independent models of social discrimination, as well as the benefits of more integrative approaches. Numerous scholars have warned about the dangers of discrete independent models of difference, arguing that they have held us back from critical insights about the relationships

268. For a discussion of this problem in feminist scholarship, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 257, 592 (Richard Delgado & Jean Stefancic eds., 1995) (noting that because much of feminist discourse is "in the pursuit of the essential feminine, Woman leached of all color and irrelevant social circumstance, issues of race are bracketed as belonging to a separate and distinct discourse"). For example, readers of accounts of sexism and the cult of domesticity that dominated the eighteenth and nineteenth centuries will realize that the precise features of sexism identified in these accounts are actually specific to the experiences of middle-class white women. They do not account for the experiences of Latino, Black, and Asian women who in many cases were forced to labor extensively outside of the home.

between discriminations and that they tend to reinstantiate a white norm as the backdrop for understanding other subordinated social identities.[269] For example, the above descriptions of sexism and homophobia both have been roundly criticized for reinstantiating whiteness as the default racial norm while they simultaneously focus on exploring another kind of difference. Angela Harris's incisive critique of the limitations of feminist legal scholarship warned of these dangers more than a decade ago,[270] and more recently, Darren Hutchinson has discussed the effects of default assumptions about whiteness in theoretical work explaining the political and legal interests of gay Americans.[271]

Recognizing the dangers of non-integrative approaches, the marginal whiteness framework avoids this problem by insisting on an analysis that takes into account how multiple vectors of social subordination shape the experience of racial identity. Yet this model does not focus attention on the unique individual experience of disempowerment each individual suffers as a consequence of his or her intersectional location in a grid of social difference. Instead the analysis keeps the focus on the ways in which marginal whites and racial minorities are distanced from the core site of privilege in a given context.[272]

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269. France Twine and Charles Gallagher identify a range of scholars that have adopted this understanding in their work, including Ruth Frankenberg, Anoop Nayak, and David Roediger, among others. *See* Twine & Gallagher, *supra* note 35, at 7, 12–14. I would include additional scholars in this group, at least one of whom has been characterized as part of the second wave in their analysis. These scholars include Matthew Frye Jacobson, Matthew Wray, Eric Klinenberg, Ladelle McWhorter, and John Hartigan, Jr.

270. Specifically, Harris points out that accounts of gender that stress the oppressive channeling of women into the domestic sphere render invisible the experiences of women of color and position white women as the true victims of sexism. Harris, *supra* note 268, at 591–92. Harris further notes, "feminist essentialists find that in removing issues of race they have actually only managed to remove Black women—meaning that white women now stand as the epitome of Woman." *Id.* at 592.

271. Hutchinson, *supra* note 68, at 583–84. Hutchinson notes that discussions about discrimination against gays foreground the issues facing white gay men, disguising a truly raced problem as a universal one. *Id.* at 620–24.

272. Scholars wedded to discrimination frameworks that analyze each basis for social subordination separately must consider what is lost when they insist that there are distinct phenomenological experiences of otherness experienced by different socially subordinated groups. Discrimination targets themselves often have difficulty sorting out which precise form of discrimination they are experiencing when they are being targeted, particularly when they are members of several different subordinated groups. For example, one wonders, how does a mixed-race lesbian tell what kind of discrimination she has been subject to when her white male supervisor wrongfully declines to promote her? Is the discrimination based on her gender, her race, or her sexual orientation? Should her judgment be based 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 his tendency to reinstantiate white male homosexuality as the paradigmatic and preferred version of gay identity? If the supervisor is of mixed race, does this take her race out of the running as well, or could he be reacting to the example of racial admixture reflected by her physical traits? The mixed-race lesbian is on a fool's errand if she tries to sort out which discrete kind of discrimination has caused her injury, as the attempt to chase down the precise nature of this bias does not ultimately help her negotiate the workplace. Instead, her best strategy is to look

Also, I expect that marginal whiteness will complement other nuanced models of discrimination, based on class, sex, or other forms of difference, provided that these models acknowledge the simultaneous working of multiple forms of subordination. To be clear, to the extent that scholars are worried that marginal whiteness is being offered to supplant or devalue discrimination frameworks concerning identity variables other than race, their concerns are unwarranted. Nothing offered in this analysis requires that an examination of race (or marginal whiteness for that matter) trumps all other frameworks for understanding discrimination. Scholars may still find it useful to engage in analyses that instead privilege concerns other than race, such as sexual orientation, sex, class, and other identity variables when they believe these variables provide the primary basis for ingroup or outgroup dynamics in a given workplace. Indeed, these alternative frameworks may prove more useful than marginal whiteness when the workplace does not contain a significant number of whites and whiteness is therefore a less socially salient category.[273] The marginal whiteness framework simply assumes that, as an initial matter, one should always be attuned to the range of identity variables given significance in a particular employment setting in establishing privileged ingroup members and marginal outgroup members. The framework encourages scholars to more actively consider how identity variables such as gender, sexual orientation, ethnicity, and class can enrich their understanding of both intraracial and cross-racial conflicts.

Additionally, rather than marginalizing scholarship focused on ethnicity, class, sex, sexual orientation or other bases of social subordination, the marginal whiteness framework offers new possibilities for earlier scholarship in these areas that has been criticized for its failure to adequately attend to questions of race. The marginal whiteness framework would recontextualize this work, showing how this research actually documents contests about the construction of whiteness and white privilege in relation to specific subordinated subgroups in white communities. There is much to be done in understanding how high-status whites interpret the contours of whiteness in ways that create burdens on lower-status white persons. These earlier analyses, to the extent they limited themselves to questions about homophobia, sexism,

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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, first among white men and then among whites more broadly. What marginal whiteness brings to this analysis is it reminds the mixed-race worker, as well as other white employees, that we should focus less on thinking about discrimination as the specific condition of the single targeted worker, but instead on how higher-status whites manipulate the boundaries of whiteness in a particular workplace to ensure that they maintain systematic advantages.

273. At different work sites (or even at different times on the same work site), a given facet of one's identity, such as race, gender, and sexuality, may become more or less significant depending on the particular social conflict being played out.

and other issues in white communities, can assist us in developing an understanding of intragroup conflicts among whites and the terms on which white privilege historically has been extended.[274]

D. Marginal Whiteness and Metatheories of Discrimination

Some may suggest that rather than being overly ambitious, the marginal whiteness framework is not ambitious enough. These scholars may argue that instead of marginal whiteness, a metatheory should be adopted that treats all forms of social subordination as *equally* germane to one's experience of social subordination. The marginal whiteness framework is flawed, they might argue, because it privileges, without justification, one aspect of social identity—race—in its analysis of the multiple dynamics of social subordination. It diminishes the status of other equally important identity variables that serve as a basis for stigma.[275] At bottom, these scholars are worried about an analytic framework that too rigidly locks in a hierarchical structure of relative privilege and advantages race, arguing that the framework is both counterproductive and destined to be historically inaccurate as social conditions change.[276]

My response to these concerns is necessarily limited, as marginal whiteness is not being offered as a global theory to explain the role of multiple forms of privilege for all persons in all settings. Certainly the framework has the potential for broader applications; however, at this juncture it is primarily being offered to explain how a particular constituency of whites understands workplace intraracial conflicts, and how whites that adopt this framework are better positioned to recognize connections between minority-targeted discrimination and intraracial conflict.

However, concerns about the need for a larger metatheory of discrimination deserve a more pointed answer. In my view, an analysis focused on race (or marginal whiteness) as a starting point for analyzing social privilege more generally can be a useful tool in understanding contemporary American society. In America, questions about race (and in particular questions about

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274. As Gerald Torres explains, "the imposition of gender norms was one way that institutions of white supremacy were maintained." Gerald Torres & Katie Pace, *Understanding Patriarchy as an Expression of Whiteness: Insights from the Chicana Movement*, 18 WASH. U. J.L. & POL'Y 129, 134 (2005) (footnote omitted).

275. *See, e.g.*, Karen D. Pyke & Denise L. Johnson, *Asian American Women and Racialized Femininities: "Doing" Gender Across Cultural Worlds*, *in* GENDER THROUGH THE PRISM OF DIFFERENCE 263, 263 (Maxine Baca Zinn et al. eds., 3d ed. 2005) (arguing that "[w]ork is still needed that integrates systems of oppression in a social constructionist framework without granting primacy to any one form of inequality or ignoring larger structures of domination").

276. Mike Hill, *Introduction: Vipers in Shangri-la, Whiteness, Writing, and Other Ordinary Terrors*, *in* WHITENESS: A CRITICAL READER 1, 5 (Mike Hill ed., 1997). Marginality exceeds its twin (the center) and is therefore accountable neither from the perspective of the margins or the centers, *in any static sense of those terms*. To think otherwise is to engage in a sort of secondary narcissism that keeps (an oppressive) center—if inadvertently and with good intentions—in place.

how to identify whites) served as the basic qualifying questions by which decisions regarding citizenship were made.[277] Questions regarding racial identification continue to demand scholarly and administrative attention, demonstrating the peculiar way in which race matters for a great many Americans, even as they ostensibly believe in a colorblind ideal.[278] 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.[279] A more generic metatheory approach to understanding privilege, which did not privilege race, could minimize the importance of the role current racial formation dynamics play in social subordination. It would, by necessity, be less focused on the rhetorical strategies and representational approaches used to widen and contract the category of whiteness based on political considerations.[280] Given the importance of these considerations, an individual's decision to use marginal whiteness as one of several metatheories for understanding larger questions of social privilege would be a logical approach in light of America's prior political patterns and Americans' current preoccupations.

However, while I would encourage scholars to explore marginal whiteness as an approach for understanding social conflicts outside of the workplace, scholars should not forget that factual specificity is key to a successful application of the framework. Marginal whiteness is based on the idea that a context-specific understanding of whiteness is always necessary for an accurate grasp of intraracial and cross-racial dynamics. Consequently, in an analysis of workplace disputes, a marginal whiteness inquiry must begin with how whiteness is defined in that particular workplace, recognizing that it will be defined by reference to other variables (e.g., ethnicity or class) to suit the needs of the most privileged whites in that environment. This specificity requirement becomes more complicated as one attempts to use the framework to describe racial dynamics in a larger arena, such as in regional or national debates, as more work is required to establish precisely what definition of whiteness is being mobilized in a particular context and whether it is being challenged by any other definitions.

Also, some feminist theorists may argue that masculinity, rather than whiteness, is a more stable referent to use if one seeks to develop a metatheory of social privilege. In my view, *neither* identity feature provides a more stable basis from which to make claims about marginal status and social privilege.

277. *See, e.g.*, Gross, *supra* note 42; López, *supra* note 42.

278. *See, e.g.*, MELISSA NOBELS, SHADES OF CITIZENSHIP: RACE AND THE CENSUS IN MODERN POLITICS (2000) (discussing the role of the Census in shaping and reflecting changing discursive understandings about the role of race and the composition of racial groups in American society); Rich, *supra* note 206, at 576 (discussing same with regard to self-designation choices made by individuals in admissions applications).

279. Rich, *supra* note 206.

280. Twine & Gallagher, *supra* note 35.

Conducting a "marginality" analysis based on male privilege may be particularly complicated in contemporary political debates as there are currently multiple versions of "privileged" masculinity in American society, each enjoying relatively more or less privilege depending on the social context in which it is invoked.[281] Although many persons still recognize a kind of upper-class, white masculinity as the core of masculine privilege—marking the rational, fully empowered citizen subject[282]—other versions such as working-class, white masculinity, and ethnic or race-based masculinity currently compete for the center.[283] Of course, these same concerns can be raised about a metatheory based on whiteness. Consequently, rather than attempting to craft a metatheory of discrimination, I believe that discrimination scholars are better served by identifying the specific construction of whiteness or masculinity that is being mobilized as natural, ideal, or dominant in a particular context and the ways in which outgroup discrimination are affected by that construction. In short, while a marginal masculinity analysis, similar to a marginal whiteness framework, could produce interesting insights about conflicts in the workplace, it is important to remember that just as marginal whiteness is always focused on the specific racial project or construction of whiteness in a given space, a marginal masculinity approach would also have to analyze the potentially competing versions of masculinity in a given social context and their effect on understandings regarding outgroup discrimination.[284]

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281. For a general discussion of some of the contemporary social, political, and cultural pressures on masculinity, see Peter Jackson, *The Cultural Politics of Masculinity: Towards a Social Geography*, 16 TRANS. INST. BRIT. GEOGRAPHERS 199 (1991) and Lynne Segal, *Changing Men: Masculinities in Context*, 22 THEORY AND SOC'Y 625 (1993).

282. *See, e.g.*, Pyke & Johnson, *supra* note 275, at 264 ("Hegemonic (also known as ascendant) masculinity is organized around the symbolic equation of masculinity and power. It is an ideal type that is glorified and associated with white men at the highest levels of society, although few actually possess the associated traits.").

283. Historically, white masculinity was seen as paradigmatic or unmarked. However, as questions are raised about masculinity's nature, this privileged position for white masculinity is under increased social and political pressure. *See* Brayton, *supra* note 83, at 58 (describing "[w]hite masculinity in North America [a]s a historically unstable category, beset with continual anxiety") (citation omitted). Some might argue that, in certain ways, some versions of black or Latino performances of masculinity are closer to the traditional paradigmatic representation of masculinity. Others would note that the view that there was ever a single paradigmatic unchanging representation of white masculinity is a fiction, and that there have always been cultural skirmishes and contests regarding the proper construction of white masculinity, although they were less visible and perhaps of more limited material and economic significance in earlier periods of American history.

284. In addition to competing considerations threatening to change the core of masculinity, the definition and value of the construct itself is being challenged. *See* HARVEY C. MANSFIELD, MANLINESS (2006) (discussing current cultural pressures on masculinity raising questions about its significance); Ronald F. Levant, *The New Psychology of Men*, 27 PROF'L PSYCHOL.: RES. & PRAC., 259–65 (1996) (noting that, since the 1980s, scholars 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 Man – The Downsized Male*, ECONOMIST, Dec. 22, 2001

E. Marginal Whiteness and Politics

The last constituency likely to raise concerns about the marginal whiteness framework is the community of activists working on antiracism projects. These activists will be less concerned about subtle refinements that need to be made in the theoretical framework provided here, and more concerned about the political effects of the marginal whiteness framework on the ground. They will ask, how should we expect marginal whiteness to affect attempts at political mobilization? Will it encourage cross-racial coalitions or, instead, undercut the decade-old critique of white privilege legal scholars in Critical White Studies initiated, a discourse that mobilized many white Americans for the first time to take an interest in the problem of race discrimination?

Political activists' anxieties about marginal whiteness are understandable. Previous calls to whites emphasizing class, ethnicity, gender, and other identity variables that compromise access to white privilege have in many instances made some whites more critical of race-based social justice initiatives, in particular affirmative action. Scholars like Sumi Cho also have noted that, although individual whites may not benefit from existing institutional arrangements, family ties may connect them to whites who do benefit, and therefore they resist changes that would inure to their personal self-interest.[285] I have addressed these particular concerns elsewhere, as they relate to affirmative action debates, noting that more rather than less dialogue about relative levels of privilege is required to advance debates about race-based social justice initiatives.[286] Here, my broader claim, one amply supported by the social science literature, is that whites who have experienced social subordination in one domain are far more likely to be interested in cross-racial coalitions and, more specifically, in disrupting social arrangements that are not actually in their interests.[287] That individual members of these disempowered groups sometimes develop views that protect the status quo is not surprising. However, on average, recognition of the bases for one's own experiences of

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(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). Certainly, the questioning of a particular identity feature does not stop it from functioning as a source of privilege. Mike Donaldson, *What Is Hegemonic Masculinity?*, 22 THEORY & SOC'Y 643 (1993).

278. Denevi & Pastan, *supra* note 29, at 70–73; Eichstedt, *supra* note 31, at 447.

286. *See* Rich, *supra* note 206, at 570. In *Decline to State*, I argue that affirmative action supporters gain little by avoiding conversations about relative levels of white privilege. *Id.* at 582–83. Often these discussions are avoided by persons concerned about ensuring that protections remain in place for middle-class blacks or other minorities with class privilege. However, in order to adequately defend these policies, one needs to have a substantive discussion distinguishing between class-based privilege and race-based privilege. *Id.* at 569–70. This kind of open discussion, I argue, has more potential to win supporters for social programs like affirmative action than less nuanced ones that treat all whites as though they enjoy a static parcel of benefits called white privilege.

287. Denevi & Pastan, *supra* note 29, at 71–72; Eichstedt, *supra* note 31, at 447.

subordination serves as a template for understanding the experiences and shared areas of concern one has with other subordinated groups.

Whiteness studies scholars Matthew Wray and Fay Newitz rightly note that "[w]hen people are kept guessing about what kinds of social forces oppress them, they are less able to defend themselves . . . ."[288] Consequently, marginal whiteness offers a way to dialogue with whites about the ways in which calls to whiteness often distract them from noticing forms of social disadvantage that more immediately affect their lives. These experiences, which allow low-status whites to recognize the concrete ways in which whiteness disadvantages them, and may help them develop a critical perspective on whiteness and white privilege. Moreover, once they become aware that calls to whiteness invariably privilege one or more subgroups of whites' interests at the expense of others, whites will learn to more skeptically evaluate claims about how existing institutional structures benefit whites, and may even come to resent whiteness overtures. In this sense the marginal whiteness framework dovetails with Lani Guinier and Gerald Torres's project of "political race," encouraging whites to recognize their "common experiences of marginalization [with persons of color as] those experiences often function as a diagnostic device to identify and interrogate systemwide structures of power and inequality."[289] My analysis differs from Guinier and Torres's, however, in several respects, the most significant being that their analysis primarily concentrates on building broad-based cross-racial coalitions to transform American democratic politics and institutional structures that cause social inequality.[290] In contrast, my theory specifically focuses on micro-conflicts that occur in the workplace, based on the understanding that whites are more likely to possess a critical perspective on whiteness and white privilege when white privilege threatens their immediate economic and dignitary interests. I suggest that vivid and even repeated experiences of this nature may be required before many whites develop the critical perspective that informs Guinier and Torres's work.

Political activists may still question whether marginal whiteness provides a more effective way to encourage whites to engage in anti-racist politics than the existing civil rights norms that stress whites' accountability for white privilege and the need to name conditions of privilege in their own lives. They may worry that some whites will be attracted to marginal whiteness for the wrong reasons: namely, because they would prefer to remain focused on their own lack of privilege, rather than honestly interrogate whether they are relatively more privileged than other low-status whites or minorities in a given context. They may worry that some whites who embrace marginal whiteness do not do so because they are interested in finding common cause with other

288. Newitz & Wray, *supra* note 69, at 169.
289. GUINIER & TORRES, *supra* note 45, at 14.
290. *Id.* at 11–16.

subordinated groups,[291] but rather, to ensure that they are not unfairly disadvantaged vis-à-vis minorities because of their relative lack of white privilege. In this sense, one could argue that the existing white privilege framework does a far better job of mobilizing whites, as it avoids questions of relative privilege, and focuses their attention instead on their moral or ethical duty to fight racism.

Certainly white privilege scholarship has motivated large numbers of whites to engage in cross-racial coalitions and antidiscrimination struggles. However, given the recent studies in social psychology demonstrating the limited inroads and the counterproductive effects traditional white privilege claims are making with post–civil rights whites, it is time to consider additional vehicles that might be used to encourage white political engagement.[292] The contemporary challenge for political activists is to find ways to reignite the interest of racially fatigued whites in antidiscrimination work. The marginal whiteness framework suggests that highlighting the economic and dignitary costs of whiteness may prove more effective with racially fatigued whites than other models that stress the core aspects of the experience of white privilege.

Additionally, political activists may discover that there is much to be gained by exploring the experiences of whiteness at the margins. Scholarship that speaks more generally about white privilege without attention to the contingent access some whites are granted threatens to alienate the numerous white ethnics currently being offered partial access to white privilege. These groups include multiracial persons, white Latinos, and Middle Easterners,[293] many of whom have a very attenuated and ambivalent relationship to whiteness and white privilege.[294] Put differently, the marginal whiteness framework is responsive to evidence that this is a critically important period of racial formation, an era in which there are multiple racial groups attempting to redefine the contours of whiteness as a social category. The model takes account of the fact that during this renegotiation period there will be many who

291. *Cf.* CHARLES J. SYKES, A NATION OF VICTIMS 3–15 (1992) (arguing that all Americans seem to believe that no matter how much privilege they actually have, all of them deserve to be pitied or treated as victims in some circumstances).

292. Some scholars have found that when whites are primed to think about the specific ways in which whiteness has benefited them, they demonstrate the highest levels of modern racism. *See, e.g.*, Branscombe, Schmitt & Schiffhauer, *supra* note 219, at 213 (noting that discussions of whites' privileged status or unfair advantages triggered feelings of identity threat that caused some whites to question the deservingness or competence of less-favored groups). *See also*, Swim & Miller, *supra* note 36, 503 (1999) (discussing certain whites' defensive reactions to discussions of white privilege).

293. John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817 (2007).

294. *See, e.g.*, Gualtieri, supra note 40 (noting the recent movement among Arab Americans to "dissociate" from their classification as white, partially in an effort to be protected under antidiscrimination laws and partially in recognition of their status as marginalized figures or outsiders in white American society).

are socially recognized as white in certain circumstances, while not in others, and that this inconsistent experience of whiteness may cultivate for some a critical perspective on whiteness and white privilege.

Last, irresponsible uses of the marginal whiteness framework cannot stand as a reason not to explore the substantial promise the model brings in building political coalitions. One safeguard against inappropriate uses of marginal whiteness is to clarify that the first step in using the framework is to honestly acknowledge the scope of one's privilege. Whites that use the framework to think more critically about their experiences should recognize that they must be precise about their claims of relative disadvantage, recognizing that they are context-specific and that their relative level of privilege may change depending on the question being considered. Again, the marginal whiteness framework requires that whites' claims of relative disadvantage (based on partial access to white privilege) focus on *whether the disadvantage they allege is relevant to the social problem being considered.* Therefore, 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. For example, such a claim would not be relevant to a person's eligibility for preferences in affirmative action programs intended to address black economic disadvantage. It may, however be relevant if an affirmative action program is attempting to take into account poor academic performance because of discriminatory and marginalizing dynamics in secondary schools. Even with this clear statement of my intentions, I recognize that there is a substantial risk that any framework that emphasizes the partial, fractured experience of white privilege will cause some whites not to take responsibility for the benefits they derive from whiteness.[295] The best response to this problem is to emphasize that 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 so demands.

F. Future Directions

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 review articles. Indeed, to the frustration of legal scholars, neither do most judges. My hope is that at a minimum this Article will trigger conversations about the "palpable" nature of

295. *See* McDermott & Samson, *supra* note 49, 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 id.* Critical White Studies scholars have also expressed concern about this problem. *See, e.g.*, Frankenberg, *supra* note 237, at 634 (warning whites against romantic engagements with their ethnic heritage to avoid responsibility for white privilege); Gallagher, *supra* note 38, at 9 (arguing whites' claims about ethnic identity are thin and often are part of privilege avoidance strategies).

whiteness and the potential for white marginality in legal scholarship. Additionally, this Article is intended to offer judges a way of thinking about discrimination that better responds to whites' current anxieties. Although I do not underestimate the formidable barriers that prevent larger discussions of these ideas, I still believe that there is much cause for optimism. For this Article is part of a broader body of scholarship that includes work in sociology, critical theory, and political philosophy that calls for a reexamination of the nature of white identity.

The challenge for antidiscrimination scholars is to find ways to discuss whiteness that are more attentive to changing demographics among whites and, relatedly, are responsive to changing attitudes whites hold about white identity and their responsibility to assist in antidiscrimination efforts. Richard Thompson Ford astutely summarizes the essential challenge 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.[296]

Ford correctly notes that part of the current challenge in dismantling racially biased arrangements stems from whites acting in an unreflective manner in some circumstances and, in others, clinging to benefits they believe stem from white privilege. He notes that there is a need to assist whites in reconstituting and reframing the cost-benefit analysis they engage in when faced with facially race-neutral systems or subtly racist practices. The marginal whiteness framework accomplishes this end by making marginal whites more attentive to how the structures they may be clinging to actually create far greater value for high-status whites and may not actually inure to their benefit in the short or long term.[297] It invites them to at least recognize the need to temporarily defect from whiteness, and creates incentives for whites to make a habit of defecting from whiteness until they can no longer uncritically view calls to protect whites' interests.

If more whites adopt this framework for understanding intraracial and cross-racial workplace dynamics, the results could potentially be quite significant. Traditional disputes between whites and racial minorities competing for low-wage jobs will markedly change. For example, the theory of marginal whiteness posits that when a white telemarketer sees his wages fall

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296. FORD, *supra* note 105, at 342.

297. 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 39, at 10.

when minorities are also hired for his position, he will not engage in a campaign of hostility against workers of color to protect the "status" of his job. Rather, if he is aware of evidence of discriminatory animus that motivated the change, he can sue his employer directly for race discrimination and regain the benefits to which he is entitled. The marginal whiteness framework posits that the white worker is likely to choose this more economically logical option than the less economically effective policy of creating a hostile environment for minority workers.

Additionally, constructive use of the marginal whiteness framework need not be limited to the workplace. Properly interpreted and applied, the marginal whiteness framework could be used to analyze cross-racial dynamics outside of the workplace setting. For example, the marginal whiteness framework could change white property owners' calculations regarding housing discrimination, particularly if courts interpret statutes to give weight to marginal whites' injuries. For example, marginal whiteness posits that the white property owner who fears that the value of his house will go down when blacks move into his neighborhood would instead consider whether he is being subject to white real estate agents' discriminatory tendency to under price properties in mixed-race neighborhoods. He may realize that his economic interests are far better served by threatening suit against discriminating realtors if he finds his house is not fairly valued when placed on the market, rather than engaging in an illicit, informal campaign to discourage minority homebuyers from purchasing homes in his neighborhood.

The framework also has implications for discussions of affirmative action, where conversations thus far have been muddled, in part because of a reluctance to substantively engage with low-status whites' claims about their partial access to white privilege and consequent anxieties about affirmative action. Marginal whiteness provides a framework for talking about limited or partial access to white privilege, and responsible ways to sort through and discuss the operation of admissions regimes that give applicants advantages for a wide array of social disadvantages. Extended exploration of the multiple potential applications of the marginal whiteness framework is beyond the scope of this Article, but I have attempted to provide sufficient ground for other antidiscrimination scholars to consider the role marginal whites might play in disrupting discrimination in contexts other than the workplace.

In summary, my hope is that the basic outline and theoretical principles I have offered here will create ground for additional theorizing about how antidiscrimination law might harness the potential created by a growing constituency of marginal whites in the United States, finding ways to turn racially ambivalent whites into marginal-white plaintiffs. However, my call for additional study and theorizing on the issue comes with an awareness of the substantial historical evidence showing that lower-status whites have rejected

the call to engage in more critical thinking about whiteness in the past.[298] However, given the cultural, social, and economic changes over the past several decades, as well as the economic and social incentives we can create through Title VII and other antidiscrimination laws, there is now more cause to believe that marginal whites will act as whistleblowers in circumstances where discrimination materially affects their dignitary and economic welfare. Over time, with changes in the legal system's understanding of whiteness and an increased willingness to recognize low-status whites' interests, we can create more compelling incentives for whites to choose equality-affirming decisions over racially discriminatory ones.

CONCLUSION

We know that marginal whites have long existed, as evidenced by scholarship that documents the inclusion and exclusion of certain ethnic groups as they fought to be recognized as white persons.[299] Additionally, the effects of class and gender disadvantage on the experience of persons attempting to claim 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 in a given social context. Additionally, we have failed to chart the ways in which intraracial discrimination against marginal whites often heralds, masks, and is conjoined with acts of minority-targeted bias.[300] Yet, as this Article explains, the need for an analysis of marginal whites' interests is acute, particularly as this group grows in size, awareness, and visibility. Sociologist Jennifer Eichsted has argued in favor of analyses like the one offered here, explaining that "deconstructing whiteness and white privilege would likely facilitate mobilization of whites to antiracism activism."[301] However, she notes that "such a presentation is not easily developed given the

298. *See, e.g.*, ROEDIGER, THE WAGES OF WHITENESS, *supra* note 104, at 168–70 (discussing labor's call during the 1860s for Irish and black solidarity to improve working conditions). Ultimately, however, the socialization of the Irish as white resulted in the failure of efforts at solidarity. *See* ROEDIGER, TOWARD THE ABOLITION OF WHITENESS, *supra* note 104, at 29 (discussing 100,000 lost days of labor whites endured during hate strikes in the 1940s when they protested the promotion of small numbers of black workers). Despite the clear economic cost of these acts of opposition for white workers, the desire to defend positions for whites as a group motivated behavior that went against individual whites' economic self-interest.

299. *See, e.g.*, ERIC L. GOLDSTEIN, THE PRICE OF WHITENESS: JEWS, RACE AND AMERICAN IDENTITY (2006); ROEDIGER, *supra* note 42; Richard Brookhiser, *Others, and the WASP World They Aspired to*, *in* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR, *supra* note 38, at 360; George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997).

300. Gibson, *supra* note 56, at 379–89 (noting the geographically specific class-based ways in which whiteness is constructed for poor whites and the construction's relationship to minority racism).

301. Eichstedt, *supra* note 31, at 447.

contemporary language available for discussing race and identity."[302] The theory of marginal whiteness provided in this discussion is offered as a way to facilitate this conversation. By developing the analytic tools and causes of action necessary to address marginal-white interests, we can usher in an era of renewed Title VII antidiscrimination enforcement. However, before marginal whites can truly function as useful allies in antidiscrimination efforts, we will also need to have more challenging social dialogues about whiteness, discussions that attend both to whiteness's obdurate role in social and structural subordination, as well as its contingent context-specific manifestations. This open communication is essential for marginal whites to play their potential role in discrimination disputes. This Article provides a starting point by encouraging marginal whites to recognize the costs whiteness imposes on their daily lives, rather than cling to its inconsistent promise of benefits.

302. *Id.*