Identity at Work

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U.S. antidiscrimination law may be perceived as an economy of identities: to receive protection from discrimination, one must prove that she is part of a recognized group, and that as such she deserves special treatment, to "jump the queue" in front of other wronged individuals and to have her interests favored. This Article explores recognition's role in regulating workplace conduct, as well as its hidden costs. It offers the concept of liminally recognized groups, i.e., groups still in the process of acquiring recognition, as a methodological lens through which to assess recognition's relationship to identities and the law. Liminally recognized groups' struggle to meet—and carry—the burden of recognition prompts the developments of alternative strategies for these groups to advance workplace justice.

The first Part provides a detailed typology of liminally recognized groups within U.S. antidiscrimination law, exploring in depth three such groups: asexuals, poor whites, and fat people. Their stories illuminate the specific type of work required for securing recognition and the challenges liminally recognized groups face in their meeting points with the law.

The second Part reconsiders recognition from a normative standpoint. It assesses, on the one hand, recognition's potential to legitimize marginalized identities, its effectiveness in converting the demands of social movements into law, and the importance of tailored, group-specific antidiscrimination protections in bridging the gap between vulnerable workers and workplace hegemonies. On the other hand, it highlights recognition's hidden costs, focusing on the inherent risk of "missing" vulnerable workers, the paradoxical nature of recognition, and the essentialist, regulatory grip of identity-based protections.

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The third Part presents two alternatives for promoting workplace justice. The first is non-identitarian readings of antidiscrimination laws: utilizing a textualist approach to the interpretation of major antidiscrimination laws (like Title VII and the ADA) to argue that they may be viewed not as protecting specific identities but rather prohibiting harmful ideologies (like racism, sexism, etc.) from motivating workplace decisions. The second is universal workplace protections: focusing on the potential of labor law and union power to provide a pioneering route for liminally recognized groups. Harnessing the power of social movements into workers' power could provide a path for workplace equity not contingent upon workers' identities.

INTRODUCTION

Identity has a key place in society as a primary channel through which we know ourselves and the other.[1] Identity also holds a core place within employment antidiscrimination law.[2] Antidiscrimination law is an economy of identities: to receive protection from discrimination, one must prove they are a part of a recognized group, and, *as such*, they deserve special treatment, or, in other words, to "jump the queue"[3] in front of other wronged individuals and have their interests favored.[4]

An example: a supervisor at a fast-food chain has three employees. She treats all three horribly, yelling at them, humiliating and bullying them, de facto creating a "hostile or abusive work environment" that "alter[s] the conditions of [their] employment."[5] Currently, the three may sue their employer for harassment under Title VII of the Civil Rights Act of 1964[6] only if this work environment is hostile because of their "race, color, religion, sex, or national origin,"[7] or if one of those traits is a motivating factor for the supervisor's behavior.[8] In other words, to gain legal protection they would need to show that they are "on the list." If two of the three are women, or

1. RICHARD JENKINS, SOCIAL IDENTITY 102 (3d ed. 2008); Andreas Wimmer, *The Making and Unmaking of Ethnic Boundaries: A Multilevel Process Theory*, 113 AM. J. SOC. 970, 975 (2008). For some, the ability to have our identity recognized by others is one of the first steps of gaining subjectivity, of becoming *someone*. *See generally* CHARLES TAYLOR, MULTICULTURALISM AND "THE POLITICS OF RECOGNITION": AN ESSAY (1992).

2. Hereinafter "antidiscrimination law."

3. MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES 226 (1997). While Kelman and Lester discuss benefits for children with learning disabilities, their overall argument regarding the connection between recognized identities and specific entitlements is relevant to this discussion as well.

4. The structure of employment discrimination law means usually this burden is laid upon the shoulders of the individual plaintiff. However, since the work of securing recognition is typically group based, as this Article shows, I have chosen to describe this process using a plural language.

5. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78, 81 (1998) (featuring similar facts, but involving a single employee).

6. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2018).

7. *Id*. § 2000e-2(a).

8. *Id*. § 2000e-2(m).

Black, or both, and the hostility is motivated by sex, or race, or both, it could lead to legal intervention. If the third worker cannot convince the court that he too is "on the list," the harassment he endures would probably be considered lawful.[9]

This economy of identities means that for decades, groups that sought legal protection took on the hard task of struggling for their identities to be recognized. I refer to this effort as "recognition work." The civil rights movement of the 1960s and 1970s fought to secure designated legal protections for Black people.[10] The feminist movement did the same for women. Similarly, recent years have borne witness to the LGBTQ community's struggle to gain legal recognition, culminating in the decriminalization of sodomy,[11] the recognition of same-sex marriages,[12] and, recently, *Bostock v. Clayton County*, in which the Supreme Court held that gay and transgender people are protected from discrimination under Title VII.[13] *Bostock* marked the end of a long period during which gay and transgender recognition under Title VII was liminal: debated in various courts that issued differing opinions and rulings.[14]

It is tempting to look at *Bostock* as proof that recognition work pays off. This Article will argue, however, that this moment calls for reflection regarding the way recognition shapes communities and individuals as well as the way its fruits—usually tailored antidiscrimination protections—curtail our political and legal imagination.

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9. There are non-identitarian ways to sue for workplace harassment, the most prominent being the tort of intentional infliction of emotional distress, discussed later in this Article. However, this tort is difficult to prove—one must show that the behavior was "outrageous" and caused its victim "severe" damage. *See* David C. Yamada, *The Phenomenon of Workplace Bullying and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 494–98 (1999).

10. I use the term *Black people* because while many cases have referred to the protected class as African Americans, there has been a longtime push by African-American scholars and writers to use the word "Black" in the context of race. This move is a "part of a generations-old struggle over how best to refer to those who trace their ancestry to Africa." John Eligon, *A Debate Over Identity and Race Asks, Are African-Americans 'Black' or 'black'?*, N.Y. TIMES (June 26, 2020), https://www.nytimes.com/2020/06/26/us/black-african-american-style-debate.html[https://perma.cc/N4X2-KKWU].

11. Lawrence v. Texas, 539 U.S. 558 (2003).

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

13. Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020). Notably, one of the driving forces behind the "economy of identities" that characterizes employment discrimination law is the identitarian hold of U.S. constitutional law, which in turn trickled down to employment discrimination law. *See* William N. Eskridge Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1032 (1988). I discuss the identitarian turn of U.S. constitutional law later in this Article. *See infra* note 221.

14. In the context of gender identity, see Jason Lee, Note, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination under Title VII Symposium*, 35 HARV. J.L. & GENDER 423 (2012). In the context of sexual orientation, see, e.g., Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018); Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017); Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698 (7th Cir. 2016).

This Article examines the site of *liminally recognized groups*,[15] i.e., groups in the process of gaining recognition, as a methodological lens through which to critically assess recognition's relationship to identities and the law. Following a definition and typology of liminally recognized groups in U.S. society and antidiscrimination law, this Article moves to closely examine the stories of three such groups: asexuals, poor whites, and fat people.[16]

Each of these groups occupies a different level of liminality with respect to the level of recognition it has acquired and the strategies deployed to achieve that recognition. Asexuals, for instance, have found their way into New York's Sexual Orientation Non-Discrimination Act, which bans discrimination on account of asexuality.[17] However, they are currently unrecognized in most antidiscrimination legislation,[18] and it remains unclear whether *Bostock* will extend to anti-asexuality discrimination.[19] Poor whites—often stigmatized as "white trash"—are not protected *as such* under any antidiscrimination laws. Accordingly, people suffering discrimination or harassment based on anti-poor white sentiment try to use recognized frameworks, including race discrimination, sex discrimination, and disability discrimination, to argue that they have been unlawfully discriminated against.[20] Finally, fat people have a long tradition of fighting against weight discrimination through Title VII and the Americans with Disabilities Act (ADA).[21] This rich legal history allows for a nuanced exploration into the possibilities and pitfalls of these attempts. Jointly, these groups' stories illuminate what liminality looks like on the ground. They also highlight the benefits and the costs of securing recognition.

Indeed, recognition has some important advantages. It can validate the experiences of devalued and marginalized individuals and communities. It has proven immensely effective in energizing individuals around a shared goal and in converting the demands of social movements into law. The products of recognition-based struggles—mainly targeted and specific

15. *Liminally recognized* is an adaptation of the commonly used adjective *liminal*, employed as a specific descriptive to refer to groups at the margins of social and legal recognition.

16. I use the term *fat* because it is the term accepted and preferred by fat activists. *See* Anna Kirkland, *Think of the Hippopotamus: Rights Consciousness in the Fat Acceptance Movement*, 42 L. & SOC'Y REV. 397, 398 n.1 (2008); *see also* Jenifer Lee, *A Big Fat Fight: The Case for Fat Activism,* THE CONVERSATION (June 22, 2012), https://theconversation.com/a-big-fat-fight-the-case-for-fat-activism-7743 [https://perma.cc/52NR-6NQA] ("The fat community has taken "fat" on, treating the word as a neutral descriptor in order to reclaim it and reduce its power as a negative. ").

17. *See* Sexual Orientation Non-Discrimination Act, ch. 2, § 3, 2002 N.Y. Laws 46 (codified at N.Y. EXEC. LAW § 292(27) (McKinney 2013)).

18. This includes proposed legislation as well, such as the Equality Act. *See* Equality Act, H.R. 5, 116th Cong. § 2(a)(3) (2019).

19. *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1747–48 (2020).

20. *See infra* Part I.B.2.b.

21. *See infra* Part I.B.3.b.

identity-based laws and doctrines—are important in centering vulnerable workers, who deserve unique, tailored protections to bridge the gap between them and workplace hegemonies.

But fighting for recognition also brings about a set of problems worthy of attention. The current regime of recognition is susceptible to the "paradox of political power," according to which groups must be simultaneously powerful enough to gain recognition and yet powerless enough to justify it. Recognition-based protections further propagate essentialism as targeted remedies for discrimination anchor and fixate the identities at the core of discriminatory regimes. To be granted protection as a woman, or as a person with a disability, one must perform their identity in a way that places them within the protected group. This, in turn, further reinforces the regulatory nature of group boundaries. As this Article argues, the specific type of identities favored under U.S. antidiscrimination law revolves around three specifically problematic characteristics: immutability, respectability, and attachment to injury. Members of liminally recognized groups are thus encouraged to perform their identities around these traits.

In light of recognition's costs, this Article explores two strategies available for liminally recognized groups to move beyond recognition. The first strategy uses a textual approach to the interpretation of major antidiscrimination laws, arguing they may be viewed not as protecting specific identities but rather as proscribing employers from making workplace decisions based on equality-hindering ideologies (racism, sexism, etc.). The second strategy focuses on the potential of labor law and union power to provide a pioneering route for liminally recognized groups via universal protections granted to all workers. Harnessing social movements' recognition work to bolster workers' power could provide a path for workplace equity and equality not contingent upon recognition. Moreover, such a path may strengthen broad, cross-cutting coalitions of workers of different identities—recognized and unrecognized.

This Article comprises three parts. Part I provides a definition and typology of liminally recognized groups and presents three such case studies. Part II reconsiders recognition from a normative standpoint, to assess its potential and promise for liminally recognized groups. It argues that despite the benefits of having one's identity recognized, the costs of recognition warrant serious consideration. Part III suggests two ways for liminally recognized groups to move beyond recognition: (1) utilizing antidiscrimination law as a tool with which to move beyond recognition or (2) exploring labor law's ability to achieve the goals of antidiscrimination law without resorting to identity and recognition.

Notably, as this Article demonstrates, the question of identity's place within law—and law's attachment to categories more generally—is an arduous one. While a comprehensive answer to this persisting dilemma is

outside the scope of this Article, the lens of liminally recognized groups offers a new way to revisit this question and highlights new considerations for individuals contemplating their relationship to both identity and the law. Rather than focusing on if and when the law should take categories into consideration, this Article examines the ways through which communities on the ground can navigate their positionality vis-à-vis the law and negotiate their own categorization. It offers the possibility for individuals and groups to strategically shift between particularity and universality. This in turn holds great potential, both to individuals and communities, but also to society as a whole. While law is bound by a strong commitment to stability and singularity, both of which often necessitate certain compromises and arbitrary decisions, individuals' utilization of law is not similarly confined. Given the unstable nature of categories, as well as the tension between their advantages and disadvantages, promoting solutions that allow for flexibility and broaden the range of tools available to vulnerable communities provides a novel path from which to tackle old questions.

II. LIMINALLY RECOGNIZED GROUPS

A. Definition and Typology

The concept of liminally recognized groups defines groups at the margins of recognition—not fully recognized socially or legally. Most (but not all) such groups aspire to gain full legal recognition of their unique identities and are in the process of doing so. This type of liminality, along with the type of recognition groups often seek, is two-faceted. An epistemic facet concerns the basic knowledge that the group exists (which, in turn, comprises self-knowledge, societal knowledge, and legal knowledge).[22] A normative facet involves the recognition that the group is entitled to legal protection, either through statute or the courts.[23]

Accordingly, there are various possible modes of liminal recognition. For instance, some groups are recognized (epistemically) by courts that have determined they are not worthy of legal protection or do not fall under current antidiscrimination rules. The status of transgender and gay people under Title

22. While I discuss the meaning of each of these stages in the following pages, it might be worth taking a moment now to clarify some confusion regarding the epistemic facet of recognition. Consider the growing recognition of nonbinary identities in the last few years. This type of recognition is first and foremost epistemic. Many nonbinary people came to know themselves better with the growing knowledge of the possibility of identifying as nonbinary, and society—as a whole—learned that such a category exists. The next step in this epistemological progression might be legal (epistemic) recognition: signs that the legal system acknowledges the existence of this identity group.

23. As Aviam Soifer showed, sometimes a group is still not considered as "needing" legal protection even after Congress has dedicated an entire statute to providing them with exactly that. *See* Aviam Soifer, *Disabling the ADA: Essences, Better Angels, and Unprincipled Neutrality Claims*, 44 WM. & MARY L. REV. 1285, 1290 (2003).

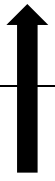
VII was in this state of liminality until the recent Supreme Court decision in *Bostock*.[24] Other groups are in the position where their very existence as a group is only liminally recognized, leaving the question of normative legal recognition outside the legal discussion.

Under the umbrella definition of liminal recognition, it might be helpful to think of full legal recognition as the top rung of a ladder: a culmination of the process that the societally wronged must go through to acquire group-based legal protections. I will present this ladder[25] below and elaborate upon it for the rest of Part I.

24. *Bostock*, 140 S. Ct. 1731.

25. My division of the process of gaining recognition into distinct stages, as well as my classification of various groups as occupying specific stages, is open for debate. I acknowledge the complexity and subtleties, as well as ongoing fluidity and evolution of these terms and groupings. This table was designed merely to offer a rough illustration of the process of gaining full legal recognition.

The Ladder of Recognition

	Level of Recognition	Examples
Full Recognition	Full normative recognition, i.e., special protected status	People with disabilities;[26] protected classes (e.g., women, Black people)[27]
	Legal epistemology of the group but no or unstable legal recognition	Fat people;[28] Arab Americans[29]
	Group consciousness and/or emerging social awareness	Asexuals;[30] nonbinary persons;[31] poor whites[32]
No Recognition	No group despite potential societal stigma/shared interests	Unattractive people;[33] "regarded as";[34] specific identity performances[35]

26. The Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 (2018). Currently, activists and the disabled community are split on whether to use "people-first" language (i.e. people with disabilities) or "disability-first" language (i.e. disabled people). While for many years people-first language was preferred, some proponents of the term "disabled people" argue it (1) fits better with the social model of disability, which sees disability as coalescing at the junction between people with impairments and society rather than as a trait one can "possess"; and (2) signals the central place disability holds in disabled people's identity. *See, e.g.*, SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 13 (1998); SIMI LINTON, MY BODY POLITIC: A MEMOIR 115–16 (2007). Following Samuel Bagenstos, I will alternate my use of both terms throughout the Article. *See* SAMUEL BAGENSTOS, DISABILITY RIGHTS LAW, CASES AND MATERIALS vi (3d ed. 2020). I thank Yaron Covo for his help with this point.

27. Title VII, 42 U.S.C. § 2000e-2(a) (2018); *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, (1973); Frontiero v. Richardson, 411 U.S. 677 (1973).

28. *See* Lucy Wang, Note, *Weight Discrimination: One Size Fits All Remedy?*, 117 YALE L.J. 1900, 1921–22 (2008).

29. *See* Sarah Khanghahi, *Thirty Years after* Al-Khazraji*: Revisiting Employment Discrimination under Section 1981*, 64 UCLA L. REV. 794, 809–13 (2017).

30. *See* Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 306 (2014).

31. *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 901 (2018) [hereinafter Clarke, *They, Them, and Theirs*].

32. *See* Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1502–03 (2010); *see also* Lihi Yona, *Whiteness at Work*, 24 MICH. J. RACE & L. 111, 127–31 (2018).

33. *See* DEBORAH L. RHODE, THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW 14–16 (2010); Elizabeth M. Adamitis, Notes and Comments, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 195–96 (2000).

34. *See* Craig Robert Senn, *Perception over Reality: Extending the ADA's Concept of "Regarded As" Protection under Federal Employment Discrimination Law*, 36 FLA. ST. U. L. REV. 827, 838 (2008). While there are some cases where people "regarded as" protected classes are recognized by courts (primarily in the context of the ADA), in the context of Title VII claims, courts do not usually extend similar recognition. *See infra* note 38.

35. *See* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 714–19 (2001).

At the base of this ladder are individuals not seen as part of any group and therefore not often considered for group-based protections. Think of unattractive people: research shows that people are significantly biased in favor of attractive people.[36] On average, less attractive people are "less likely to be hired and promoted" and earn lower salaries than their attractive counterparts.[37] And yet, unattractive people do not see themselves as part of a distinct social group (sometimes they might not see themselves as unattractive, despite being discriminated on that basis by others). To the best of my knowledge, there are no conventions or advocacy groups dedicated to their interests.

Another example we might think of is people "regarded as" protected classes. Think of a white person with a Hispanic name and might thus pass (at least for some people or in some places) as Latinx. People who might be mistaken as members of other classes do not consider themselves part of the "regarded as" identity group—there is no such group.[38]

We can also think of people facing discrimination based on various kinds of identity performances as minorities perform their identities in various ways, some more acceptable in an office setting than others. A perfect example is provided in Devon W. Carbado and Mitu Gulati's seminal piece *The Fifth Black Woman*.[39] The article describes Mary, a Black woman, who works as an attorney at an elite corporate firm. She, along with four other Black female attorneys, are up for promotion to partner at the firm. However, "[w]hile Mary wears her hair in dreadlocks, the other black women relax their hair. On Casual Fridays, Mary sometimes wears West African influenced attire. The other black women typically wear khaki trousers or blue jeans with white cotton blouses."[40] Eventually, the other four Black women win promotions, but Mary does not. Carbado and Gulati use this hypothetical to demonstrate their claim about identity performance and the various degrees of acceptability awarded to different types of performances.[41] Do "Marys" form a distinct social group located at the intersection of race, gender, and identity performance? While they may be subject to unique discrimination (and we may be able to recognize a Mary when we see one), there is no

36. Bias begins as early as infancy. Studies have found that infants "stare longer at attractive faces" and that "[p]arents and teachers give less attention to less attractive children." RHODE, *supra* note 33, at 26.

37. *Id.* at 27.

38. As Jessica Clarke has shown in the context of Title VII (as opposed to the ADA), the lack of a "regarded as" category means that discrimination claims coming from plaintiffs who were regarded as protected classes are often rejected by courts. *See* Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 132–41 (2017) [hereinafter Clarke, *Protected Class Gatekeeping*].

39. Carbado & Gulati, *supra* note 35.

40. *Id.* at 717.

41. *See also generally* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

distinct, recognized group of Black women who perform their identity the way Mary does.

Sometimes, a collection of individuals sharing interests or similar traits come to see themselves as part of a group with more or less clear boundaries. Other times, categories are imposed on individuals from the outside—for instance, by the medical community or as a result of shared societal stigma—leading individuals to self-identify according to such classifications.[42] Subsequently, group consciousness begins to form.[43] This emergence usually results in (and is the result of) communal work. Writing about the transgender movement, Susan Stryker wrote:

> [M]embers of minority groups often try to oppose or change discriminatory practices and prejudicial attitudes by banding together to offer one another mutual support, to voice their issues in public, to raise money to improve their collective lot in life, to form organizations that address their specific unmet needs, or to participate in electoral politics or lobby for the passage of protective legislation. Some members engage in more radical or militant kinds of activism aimed at overturning the social order or abolishing unjust institutions rather than reforming them, and others craft survival tools for living within conditions that can't at that moment be changed. . . . In short, a multidimensional activist movement for social change often begins to take shape.[44]

This process of group formation can be seen in other movements as well. Kenji Yoshino discussed it regarding the bisexual movement,[45] describing its formation following Stonewall.[46] Jessica Clarke recently documented this process regarding nonbinary identities,[47] highlighting the ways in which the past decade has witnessed a growing number of self-identified nonbinary persons, along with increased social awareness of the possibility and legitimacy of nonbinary gender identity and performance.[48]

This process of growing group consciousness and social awareness does not translate immediately and automatically to *legal* recognition, whether epistemic nor normative. Asexual, bisexual, and nonbinary identities are practically erased from many antidiscrimination laws and discussions.

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42. For many groups, self-ownership of group identity follows outside categorization, pathologizing, and bias. *See, e.g.*, MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 101 (1978).

43. On when and how that process occurs, see Wimmer, *supra* note 1.

44. SUSAN STRYKER, TRANSGENDER HISTORY: THE ROOTS OF TODAY'S REVOLUTION 9 (2d ed. 2017).

45. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 431–34 (1999).

46. Yoshino discussed the establishment of the National Bisexual Liberation group during the early 1970s: the formation of various organizations and political action groups, news articles, conferences, etc. *Id.*

47. Clarke, *supra* note 31, at 896–900.

48. *Id.*

When societal knowledge of a group becomes more widespread, its existence manages to coalesce within legal and judicial consciousness. Often, however, even when courts acknowledge a group's existence, the group still does not enjoy full legal recognition (i.e., legal protection). As mentioned, while courts have been aware of the existence of transgender people for several decades now, federal courts were until recently split on whether this group is entitled to protection from discrimination under Title VII.[49] Similarly, while the existence and social borders of Mexican Americans as a group have never been questioned, whether they suffer from discrimination and bias and are therefore entitled to a higher level of judicial scrutiny was for years up for debate.[50] Similarly, Arab Americans, who are "white" according to racial data collection, may be stigmatized and subject to hostile work environments. Nevertheless, courts often deem them not part of a protected class and therefore not entitled to protection from discriminatory harassment.[51]

Finally, once a group's struggle for recognition bears fruit, it may reach the status of a fully recognized group under the law. Various factors determine which groups are more likely to do so, or, as Laurence H. Tribe put it, be "deemed appropriate losers in the ongoing struggle for political acceptance and ascendancy."[52] Perhaps the most famous of such factors appears in footnote four of *Carolene Products*, in which Justice Stone mentioned "discrete and insular" minorities as deserving higher levels of scrutiny and protection by the Court.[53] Elizabeth Emens offered a model of criteria that contribute to a group "winning" legal protection from discrimination, including an identity that is hard to alter and/or "characterized by a visible trait or distinct behavior"; an identity "associated with a salient social group" and "a widely known social movement"; existing bias against the group; and a history of explicit/implicit legal burdens.[54]

Regardless of which set of criteria is used to justify normative legal recognition of a group that wishes to be recognized, what is clear is that this status is usually the result of intense social struggles. Social movements fight, often for decades, to reach the peak of the ladder and be recognized for group-based protections from discriminatory practices and laws, or to be entitled to special accommodations in the public sphere. Black people, women, and

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49. Lee, *supra* note 14, at 426–27.

50. Yifat Bitton, *The Limits of Equality and the Virtues of Discrimination*, 2006 MICH. ST. L. REV. 593 (2006).

51. *See, e.g.*, Chaib v. GEO Grp., Inc., 92 F. Supp. 3d 829, 836–37 (S.D. Ind. 2015), *aff'd on other grounds*, 819 F.3d 337 (7th Cir. 2016); Yousif v. Landers McClarty Olathe KS, LLC, No. 12-2788-CM, 2013 WL 5819703, at *3 (D. Kan. Oct. 29, 2013).

52. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1073 (1979).

53. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

54. Emens, *supra* note 30, at 377.

disabled people are groups that have been recognized, either statutorily or judicially, as protected classes or groups that warrant higher levels of scrutiny. Under Title VII, having the status of a protected class means not only an easier route for proving discrimination claims[55] but also, as Jessica Clarke has shown, a greater chance that your claim will be seriously considered.[56]

The examples offered here are not exhaustive. Moreover, the classifications I have suggested may be contested. The positions of various groups on the ladder are in constant flux, and movement along the ladder is not always linear. Groups that once enjoyed full legal recognition may be stripped of it, and groups that were once deemed highly visible and rigid lose relevance with changing power dynamics and patterns of discrimination.[57]

However, what the above discussion demonstrates is the process groups must undergo to reach full societal and legal recognition and the variety of groups and positionalities currently in a state of liminal recognition. Part I.B will focus on three case studies of such groups, chosen for their ability to portray varying types of identities and liminalities. It will demonstrate each group's fight for group-based recognition and its current vulnerability and liminality under antidiscrimination law.

B. Groups in Liminal Recognition

The following Section details three groups that are in a state of liminal recognition: asexuals, poor whites, and fat people. As mentioned, these groups were chosen for their portrayal of a range of liminal levels of recognition, a variety of axes of oppression (race, sex, disability, etc.), as well as a range of tactics utilized as part of their recognition work. Other liminally recognized groups not discussed here possess different characteristics and face their own unique challenges. However, these case studies nevertheless offer lessons and insights that are relevant to other groups in liminal recognition and to the nature of acquiring recognition in general.

55. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), the Supreme Court offered a simpler route to proving discrimination for plaintiffs who are members of "protected classes." Plaintiffs who are members of protected classes can show that they applied to—and were rejected from—a job they were qualified for and that the position remained open after they were rejected. When a plaintiff manages to meet all these requirements, the burden of proof then shifts to the employer to provide a legitimate, nondiscriminatory reason for its decision. The plaintiff can then rebut this reason. *Id.*

56. *See generally* Clarke, *Protected Class Gatekeeping*, *supra* note 38.

57. *See, e.g.*, KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA (1998); *see also* Wimmer, *supra* note 1.

1. Asexuals

a. The Rise of Social Recognition

Asexuality is a newly emerging identity for people who do not experience sexual attraction.[58] The concept of asexuality developed first as an external classification and later reemerged as a group of self-identifying asexuals (or "aces") who sought to reclaim the category and promote its societal acceptance and legitimacy.[59]

One of the earliest mentions of asexuality as a sexual orientation was in 1980. Psychologist Michael D. Storms posited asexuality as the fourth sexual orientation, after homosexuality, heterosexuality, and bisexuality.[60] By doing so, Storms challenged the Kinsey scale's problematic assumption about sexual desire, according to which lower levels of heterosexual attraction inherently mean a higher degree of homosexual attraction.[61] During that same year, a definition of asexuality appeared in the third edition of the American Psychiatric Association's *Diagnostic and Statistical Manual* (DSM-III) as "inhibited sexual desire," marking lack of sexual desire as a pathology that warranted correction.[62] This definition changed in subsequent volumes.[63] Various empirical studies found that a persistent 1 percent of the population identified as never feeling "sexually attracted to anyone at all."[64]

Medicine's initial stigmatization of asexuality was joined by other forms of societal bias. A 2012 study that surveyed some 250 heterosexual subjects found bias against sexual minorities, particularly toward asexuals, who were viewed most negatively.[65] Asexuals were dehumanized more than other sexual minorities, and subjects reported a greater inclination to discriminate against them in hiring and renting decisions compared to other sexual

58. ANTHONY F. BOGAERT, UNDERSTANDING ASEXUALITY 5 (2012) (defined as "[a] complete lack of sexual attraction and/or sexual interest").

59. Emens, *supra* note 30, at 314–15.

60. *Id.* at 308.

61. *Id.* The Kinsey scale, developed by Alfred Kinsey, placed all individuals as either heterosexuals, homosexuals, or bisexuals on a scale from zero to six, with zero signaling exclusively heterosexual and six signaling exclusively homosexual. The scale did mention an additional grade, marked as "X," which indicated "[n]o socio-sexual contacts or reactions." *See* ALFRED C. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE 638–41, 656 (1948).

62. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM) 278–79 (3d ed. 1980).

63. The revised DSM-III, published in 1987, labeled asexuality as "hypoactive sexual desire disorder," a category that remained (with some variations) in the DSM until 2013. *See* Emens, *supra* note 30, at 310.

64. Anthony F. Bogaert, *Asexuality: Prevalence and Associated Factors in a National Probability Sample*, 41 J. SEX RES. 279, 281 (2004).

65. Cara C. MacInnis & Hodson Gordon, *Intergroup Bias toward "Group X": Evidence of Prejudice, Dehumanization, Avoidance, and Discrimination against Asexuals*, 15(6) GROUP PROCESSES & INTERGROUP REL. 725 (2012).

minorities.[66] Studies that focused on self-identified asexual subjects corroborated these findings: the subjects reported high levels of felt stigma and bias. Asexuals further reported reactions ranging from anger to disbelief to pathologization and even exposure to the danger of "corrective rape."[67]

Beginning in the early 2000s, concurrent with the formation of asexuality as a stigmatized category, asexuality began to emerge as an identity group mostly via online communities, primarily Asexuality Visibility and Education Network (AVEN) founded in 2001 by David Jay.[68] In such spaces, asexuals discuss their identity; provide asexuals, allies, and researchers with information about the community; and organize workshops, local meetings, and visibility projects, including participation in various pride marches.[69] Asexuals[70] have a distinct pride flag representing their sexual identity.[71]

Jay described the process through which the asexual community has been moving over the last two decades: "The movement has made incredible progress from a place where most of our culture considered us a mystery, oddity, or even threat, to a place where we are widely acknowledged as an important part of the spectrum of queer identity."[72] Part of this process concerns efforts to communicate that asexuality is not a choice.[73] As Emens

66. *Id.* at 732.

67. *See* State v. Dutton, 450 N.W.2d 189, 191–92 (Minn. Ct. App. 1990) (involving a complainant who testified that her pastor had sex with her repeatedly, assuring her that sex is a gift from God, following her stated desire to be asexual); Nancy Leong, *Negative Identity*, 88 S. CAL. L. REV. 1357, 1382 (2014). Two other studies, from 2016 and 2020, reaffirmed high levels of stigmatization and marginalization reported by asexuals. *See* Kristina Gupta, *"And Now I'm Just Different, but There's Nothing Actually Wrong with Me": Asexual Marginalization and Resistance*, 64 J. HOMOSEXUALITY 991 (2016); Esther D. Rothblum, Evan A. Krueger, Krystal R. Kittle & Ilan H. Meyer, *Asexual and Non-asexual Respondents from a U.S. Population-Based Study of Sexual Minorities*, 49 ARCHIVES SEXUAL BEHAV. 757 (2020).

68. The network, which started with 134 members in 2002 and rapidly grew to more than 100,000 members by 2019, was created with two distinct goals: "creating public acceptance and discussion of asexuality and facilitating the growth of an asexual community." *About AVEN*, ASEXUAL VISIBILITY & EDUC. NETWORK, https://www.asexuality.org/?q=about.html (last visited Jan. 27, 2021) [https://perma.cc/9ZF6-MHD4]. For the number of current registered members in AVEN, see Nosheen Iqbal, *No Lust at First Sight: Why Thousands Are Now Identifying as 'Demisexual*,*'* THE GUARDIAN (Sept. 7, 2019), www.theguardian.com/society/2019/sep/07/no-lust-at-first-sight-day-i-finally-realised-i-was-a-demisexual [https://perma.cc/UGW6-XKDD].

69. Notably, many studies of asexuals have relied on the AVEN community for access to research subjects.

70. While I use the term asexuals here, it is important to note that not all asexuals identify with the flag or with the asexuality movement. Given that this Section discusses the movement, when using the term asexuals I refer only to those who see themselves as part of the movement. This applies to the following case studies as well.

71. The flag comprises four horizontal stripes in the colors purple, white, gray, and black.

72. Jasmin Liao, *David Jay and the Rise of Asexual Visibility*, LOVE TO ALL PROJECT (July 2, 2020), www.lovetoallproject.com/interviews/david [https://perma.cc/59M4-TDUU].

73. Emens, *supra* note 30, at 318.

explained, the idea that asexuals do not choose to avoid sex is central to the asexual movement.[74]

Changing the narrative around asexuality, pushing for recognition and social awareness, and finding a place on the "spectrum of queer identity" require work. Such work includes political engagement, protests, advocacy, the dissemination of information about asexual identity, a push for media and scholarly attention, and collaborative efforts among activists on the local, national, and international levels.[75] The hard labor the asexual community has invested in recognition work is showing signs of success, at least when it comes to visibility (societal epistemic recognition).[76]

However, while the asexual community has managed to climb the first step of the ladder of recognition to form group consciousness and initial social awareness, they still have a long way to go to gain recognition in the normative sense. Moreover, despite their growing visibility, asexuals' place within the law is mostly absent.

b. Asexual Liminality under Antidiscrimination Laws

When it comes to legal recognition (both epistemic and normative), asexuality is almost completely erased. In fact, asexuals remain absent even in the few instances in which they are present. One of the earliest mentions of asexuality in judicial language is in *Corne v. Bausch & Lomb, Inc.*, a 1975 sexual harassment case.[77] The court, concluding that sexual harassment does not amount to sex discrimination, reasoned as follows:

> It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act . . . . [A]n outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another.

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74. As one pamphlet of AVEN explains, "Asexuality is not a choice, but rather a sexual orientation." *Id*.

75. Joseph de Lappe, *Asexual Activism*, *in* THE WILEY BLACKWELL ENCYCLOPEDIA OF GENDER AND SEXUALITY STUDIES 1–2 (2016).

76. In recent years, asexuals have been featured in news segments, talk shows, and documentaries. *See, e.g.*, Julie Sondra Decker, *How to Tell If You Are Asexual*, TIME (June 18, 2014), https://time.com/2889469/asexual-orientation/ [https://perma.cc/6VLV-VWUE]; Charlotte Dingle, *"I'm an Asexual Woman, and This Is What It's Like Not to Feel Sexual Attraction*," COSMOPOLITAN (Mar. 8, 2018), https://www.cosmopolitan.com/uk/reports/a9088917/womankind-asexual-woman-sexual-attraction/ [https://perma.cc/PJ4E-XH94]. Most notable, perhaps, are two self-identified asexual characters who have recently appeared in the popular television shows *BoJack Horseman* and *Sex Education*. *See* Julie Kliegman, *A Quiet Revolution on 'BoJack Horseman*,*'* THE RINGER (Aug. 12, 2016), https://www.theringer.com/2016/8/12/16046836/bojack-horseman-asexual-representation-netflix-3c9d6c80d49d [https://perma.cc/38SA-HY4Z]; Sam Moore, *Sex Education is the First Show to Get This Important Aspect of Queerness Right*, DIGITAL SPY (Jan. 22, 2020), https://www.digitalspy.com/tv/ustv/a30612262/sex-education-asexual-queer-florence-lgbtq/ [https://perma.cc/3K2A-E3GN].

77. Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977).

> The only sure way an employer could avoid such charges would be to have employees who were asexual.[78]

Asexuality functions in this paragraph as a hypothetical: part of an ad-absurdum argument rather than a category reflecting actual people's lived experiences. Asexual individuals are mentioned as a punchline, not as actual people.

A similar argument can also be found in *Oncale v. Sundowner Offshore Services, Inc.*, where the Supreme Court recognized same-sex harassment as actionable under Title VII.[79] Writing the opinion of the Court, Justice Scalia explained that "[t]he prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment."[80] As Elisabeth Emens argued, paradoxically, this explicit mention by Scalia perfectly exemplifies the way in which asexuals "are written out of law."[81] As in *Bausch*, the point Justice Scalia made in *Oncale* rested on the truism that sexuality is desirable in the workplace and is regulated only to protect people from specific unwanted sexual practices. Accommodating the workplace to asexual workers (who might prefer workplaces that are nonsexual) is again a possibility mentioned only as an absurdity that is self-evidently a step too far.

A notable exception to asexuals' lack of visibility in antidiscrimination law is New York's Sexual Orientation Non-Discrimination Act (SONDA). Enacted in 2002, it explicitly mentions asexuality as a protected sexual orientation along with heterosexuality, homosexuality, and bisexuality, either actual or perceived.[82] It is the first and only state law to prohibit discrimination against asexuals.[83]

As Emens found, while SONDA is a major step toward legal recognition and protection, the inclusion of asexuals in it was almost accidental. The category of asexuals was included only to "broaden the perceived scope of the bill beyond gays."[84] In other words, asexuals were included not because

78. *Id.* at 163–64.

79. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998).

80. *Id*. at 81.

81. Emens, *supra* note 30, at 359. Similar rhetorical language may be found in other cases as well. *See, e.g*., Vinson v. Taylor, 760 F.2d 1330, 1331 (D.C. Cir. 1985); Munford v. James T. Barnes & Co., 441 F. Supp. 459, 461 (E.D. Mich. 1977); Goddard v. Artisan Earthworks, LLC, No. CIV. 09-2336-EFM, 2010 WL 3909834, at *5 (D. Kan. Oct. 1, 2010); and recently Brauer v. MXD Grp., Inc., No. 3:17-CV-2131 (VLB), 2019 WL 4192181, at *10 (D. Conn. Sept. 4, 2019), *appeal withdrawn,* No. 19-3006, 2019 WL 7167535 (2d Cir. Dec. 12, 2019)

82. Sexual Orientation Non-Discrimination Act, ch. 2, § 3, 2002 N.Y. Laws 46 (codified at N.Y. EXEC. LAW § 292(27) (McKinney 2013)).

83. Emens, *supra* note 30, at 362. Several localities in New York mention asexuality in their antidiscrimination laws, including Albany, Rochester, and Binghamton; this is also true of Madison, Wisconsin, Hyattsville, Maryland, and San Antonio, Texas. For a full list, see *id.* at 362–63 n.351.

84. *Id.* at 363.

of a conscious decision to recognize and protect asexuality but rather to depict the law as one that protects "everyone."[85] While it might be seen as an advancement, this development was the result of asexuals being so far under the radar during the enactment of SONDA that they were not yet sufficiently recognized to even be considered a contentious group.

And, in fact, asexuals are not mentioned in any other state or federal antidiscrimination law. Asexual activists pleaded for the inclusion of asexuals in the proposed Employment Non-Discrimination Act (ENDA),[86] but they remained out of the versions introduced to Congress.[87] Likewise, the proposed Equality Act that replaced the ENDA and was introduced to Congress in 2019 stated its purpose to protect "[l]esbian, gay, bisexual, transgender, and queer (referred to as 'LGBTQ') people" from discrimination.[88]

It remains unclear whether asexuals will be protected under *Bostock*. The majority in *Bostock* made clear that "Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them."[89] However, Justice Gorsuch's textual analysis could leave asexuals unprotected. The logic behind the *Bostock* decision is that when an employer fires a lesbian woman because she is attracted to women but not a straight man similarly attracted to women, a similar trait (attraction to women) is treated differently based on the employee's sex. Thus, the argument goes, this is sex discrimination. However, if an employer fires a worker for being asexual, the same contrast cannot be drawn.[90]

Asexuals provide a vivid example of the amount of work newly emerging identity groups invest in climbing the ladder of recognition—work that is social, political, and legal. It involves the creation of a community, activism focused on awareness and visibility, and pleas for inclusion and protection from legislators. While the asexual community is slowly climbing this ladder and gradually enjoying wider socio-epistemic recognition, this group has a long way to go and its members still reside at the margins of recognition.

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85. *Id.* at 364.

86. AVEN submitted a memo urging legislators to include asexuals as part of the list of protected sexual minorities. *See id.* at 361 n.347.

87. H.R. 1755 and S. 815, introduced in 2013, define *sexual orientation* as including "homosexuality, heterosexuality, or bisexuality." Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. § 3(a)(9) (2013); Discrimination Act of 2013, S. 815, 113th Cong. § 3(a)(10) (2013).

88. Equality Act, H.R. 5, 116th Cong. § 2(a)(3) (2019).

89. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1747–48 (2020).

90. Ann C. McGinley, Nicole Buonocore Porter, Danielle Weatherby, Ryan H. Nelson, Pamela Wilkins & Catherine Jean Archibald, *Feminist Perspectives on* Bostock v. Clayton County, 53(1) CONN. L. REV. 1, 10 (2020); Pulkit Goyal, Bostock*: A Blanket that Cannot Be Stretched Far Enough*, JURIST (June 19, 2020), https://www.jurist.org/commentary/2020/06/pulkit-goyal-bostock/ [https://perma.cc/X9XD-Y68N].

2. Poor Whites

a. The Rise of an Identity Category

In recent years, there has been a growing interest in the status and condition of poor, rural whites. In 2016, J.D. Vance's *Hillbilly Elegy* became a *New York Times* bestseller.[91] One year later, Nancy Isenberg's seminal book *White Trash: The 400-Year Untold History of Class in America* was published, providing a broad historical account of this unique social group.[92] These books join a rich, albeit quite marginal, body of literature dedicated to the demarcation of poor, often rural whites as a distinct social group with shared geographical origins, social traits, and patterns of oppression and bias.[93] The discussion surrounding poor whites intensified following the 2016 elections as many commentators explained the results as stemming from poor whites' growing resentment of the Democratic party.[94]

The history of the othering and marginalization of poor whites is essential to an understanding of their social distinctness, which cannot be analyzed solely through a class paradigm. Individuals referred to as "white trash" or "hillbillies" were historically seen by high-status whites as a clear and identifiable social group that threatened the "contamination" of the white race. Nineteenth-century scientists described their "yellowish," tallow-colored skin that purportedly derived from them being "clay eater[s]" and from interracial sex leaving traces of "negro blood."[95] People deemed "white trash" have been perceived as "filthy," "lazy,"[96] and morally and evolutionarily inferior.[97] Some of the negative stereotypes of poor whites revolve around the perception that this social group is politically and morally "backward"—one with racist and homophobic tendencies.[98]

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91. J. D. VANCE, HILLBILLY ELEGY: A MEMOIR OF A FAMILY AND CULTURE IN CRISIS (Reprint ed. 2018). The book was later developed into a movie, which came out on Netflix in 2020.

92. NANCY ISENBERG, WHITE TRASH: THE 400-YEAR UNTOLD HISTORY OF CLASS IN AMERICA (2016).

93. *See* MATT WRAY, NOT QUITE WHITE: WHITE TRASH AND THE BOUNDARIES OF WHITENESS (2006); Lisa R. Pruitt, *Missing the Mark: Welfare Reform and Rural Poverty*, 10 J. GENDER RACE & JUST. 439 (2006); Lisa R. Pruitt, *Gender, Geography & Rural Justice*, 23 BERKELEY J. GENDER L. & JUST. 338 (2008); Rich, *supra* note 32.

94. *See* ASAD HAIDER, MISTAKEN IDENTITY: RACE AND CLASS IN THE AGE OF TRUMP (2018); ARLIE RUSSELL HOCHSCHILD & SUZANNE TOREN, STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT (Unabridged ed. 2017); JONATHAN M. METZL, DYING OF WHITENESS: HOW THE POLITICS OF RACIAL RESENTMENT IS KILLING AMERICA'S HEARTLAND (2019). For a critique of this argument see Ta-Nehisi Coates, *The First White President,* THE ATLANTIC (Oct. 2017), https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909/ [https://perma.cc/4N2F-KYWT].

95. *See* ISENBERG, *supra* note 92, at 151; WRAY, *supra* note 93, at 39–40, 77.

96. *See* WRAY, *supra* note 93, at 21–22, 65.

97. *See id.* at 16, 18.

98. *See* Lisa R. Pruitt, *Welfare Queens and White Trash*, 25 S. CAL. INTERDISC. L.J. 289, 294 n.37 (2016); Lisa R. Pruitt, *The Geography of the Class Culture Wars*, 34 SEATTLE U. L. REV. 767, 768–69

But this is a stigmatizing stereotype. Poor and working-class whites and, specifically, self-identified "hillbillies" and "rednecks" have been involved in organized radical political actions throughout American history. Groups such as the Young Patriots Organization and Rising Up Angry were involved in anti-racist, anti-capitalist struggles, often jointly with other movements such as the Black Panthers and Puerto Rican activists.[99] Today, organizations like Redneck Revolt operate under an "anti-racist, anti-fascist"[100] platform to promote "working class liberation from the oppressive systems which dominate our lives."[101]

Despite this long tradition of political organizing and scholarly interest, the status of poor whites is not usually discussed through the prism of recognition, and their place in U.S. antidiscrimination law has been liminal at best. This has been the case notwithstanding that one stereotype of poor whites is that they lack qualities generally sought after in the workplace. Isenberg showed how "white trash" whites were socially understood as those "who lack the civic markers of *stability*, *productivity*, *economic value*, *and human worth*."[102] This means that the stigma regarding poor whites potentially puts them at risk of being discriminated against in the labor market.

One important exception to the dearth of discussion about poor whites in the context of antidiscrimination law is Camille Gear Rich's 2010 article on marginal whiteness.[103] Rich discussed the category of "low-status" or "marginal" whites: those who have only "limited access to white privilege."[104] She argued that high-status whites often impose costs—both economic and dignitary—on low-status whites in an attempt to preserve their resources and privileges or to disguise discrimination against Black people as racially neutral.[105] However, she added, these dynamics have generally not translated to the legal language of current antidiscrimination doctrine.

(2011). See also Leah Donnella, *Why Is It Still OK to 'Trash' Poor White People?* NPR CODE SWITCH, (Aug. 1, 2018), https://www.npr.org/sections/codeswitch/2018/08/01/605084163/why-its-still-ok-to-trash-poor-white-people [https://perma.cc/GKE7-5SGE] ("When poor (or formerly poor) white folks do get portrayed in the media and pop culture, they're often reduced to a series of offensive stereotypes: that they're angry, lazy, dirty, overweight, sunburned, stupid, racist, alcoholic, abusive, jobless, tacky, diseased, violent, backwards, Bible-thumping and uneducated."); John Moran, *"Queer Rednecks": Padgett Powell's Manly South*, 22 S. CULTURE 95, 96–97 (2016). ("[R]ural white southerners are represented as simultaneously perverse and homophobic.")

99. AMY SONNIE, JAMES TRACY & ROXANNE DUNBAR-ORTIZ, HILLBILLY NATIONALISTS, URBAN RACE REBELS, AND BLACK POWER: COMMUNITY ORGANIZING IN RADICAL TIMES (2011).

100. REDNECK REVOLT, https://www.redneckrevolt.org/ [https://perma.cc/QK4A-6PT8] (last visited Jan. 27, 2021).

101. *About,* REDNECK REVOLT, https://www.redneckrevolt.org/about [https://perma.cc/X376-MS8X] (last visited Jan. 27, 2021).

102. ISENBERG, *supra* note 92, at 315 (emphasis added).

103. Rich, *supra* note 32.

104. *Id*. at 1504–05.

105. *Id*. at 1503–05.

b. Poor Whites' Liminality under Antidiscrimination Laws

No laws address discrimination against poor whites as such. Most cases in which courts discuss discrimination against or harassment of poor whites (involving epithets like "white trash," "hillbilly," or "redneck") revolve around claims of reverse racism: white employees who complain about non-white colleagues, supervisors, or employers using such terms.[106] This is not surprising. In reverse racism cases, what courts recognize is not the specific identity group of poor whites but rather the larger, already recognized group of "whites." Accordingly, when an employee complains about being called "white trash," for instance, courts put more analytical emphasis on "white" than on "trash." Evidence of specific references to the plaintiffs belonging to a subset of white people generally adds no additional weight to courts' analyses of the discriminatory acts. When it does, courts usually explain that such a subgroup is not recognized as a protected class under Title VII.

For instance, in *Higginbotham v. Ohio Department of Mental Health*, a white plaintiff of Appalachian background argued that she was a victim of reverse racism due to her identity as a white Appalachian. She said that after her Black supervisors "learned of her cultural heritage," they made derogatory comments about her background (calling her a "white Appalachian hillbilly") and gave her "unwarranted negative job performance evaluations."[107] The court dismissed her race discrimination claim, noting that "Appalachian ancestry has not been recognized as a protected status under any federal law to date" and the court "decline[d] to extend such recognition here."[108]

When poor white plaintiffs have brought claims against white employers, they have been even less successful.[109] Workers seeking compensation in such cases have tried various strategies to fit their harm into accepted legal frameworks.

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106. *See, e.g.*, Fuelling v. New Vision Med. Labs. LLC., 284 F. App'x 247 (6th Cir. 2008); Braid v. MJ Peterson Corp., 208 F.3d 202 (2d Cir. 2000); Lamb v. Lowe's Cos., Inc., No. 5:17-cv-00028-RJC-DSC, 2018 WL 1185508 (W.D.N.C. Mar. 7, 2018); Charest v. Sunny-Aakash, LLC., No. 8:16-CV-2048-T-30JSS, 2017 WL 4169701 (M.D. Fla. Sept. 20, 2017); Hood v. Nat'l R.R. Passenger Corp., 72 F. Supp. 3d 888 (N.D. Ill. 2014) (dealing with the term "hillbilly"); Atkins v. Denso Mfg. Tenn., Inc., No. 3:09-CV-520, 2011 WL 5023392 (E.D. Tenn. Oct. 20, 2011); Scarbrough v. Gray Line Tours, No. 02-CV-203S, 2004 WL 941729 (W.D.N.Y. Mar. 21, 2004); Julian v. Safelite Glass Corp., 994 F. Supp. 1169 (W.D. Mo. 1998); Schiraldi v. AMPCO Sys. Parking, 9 F. Supp. 2d 213 (W.D.N.Y. 1998); McCoy v. Johnson Controls World Servs., Inc., 878 F. Supp. 229 (S.D. Ga. 1995).

107. Higginbotham v. Ohio Dep't of Mental Health, 412 F. Supp. 2d 806, 808–10 (S.D. Ohio 2005).

108. *Id*. at 813. The court referenced *Bronson v. Board of Education of Cincinnati,* 550 F. Supp. 941 (S.D. Ohio 1982), where it was similarly determined that "Appalachians do not have a common national origin other than that which they share with the general population of this country." *Id*. at 946.

109. Notably, such cases are rare. Yona, *supra* note 32, at 143. A Westlaw search I conducted on April 10, 2017, for "white trash" or "hillbilly" and "Title VII" found that only approximately 5.6 percent discussed white plaintiffs suing their white employer for referring to them as "white trash." As I have written elsewhere, "This is not a reflection of societal reality, but rather of the narrow range of cases that find a place within Title VII courts." *Id.*

One strategy was to explain anti-"white trash" sentiment as sex discrimination. In *Sacco v. Legg Mason*, a female employee who worked as a portfolio assistant in a New York investment company claimed she was subjected to sexual discrimination, retaliation, and sex-based hostile work environment.[110] Her retaliation claims focused on, among other things, a comment made by a coworker who referred to her as "white trash."[111] The court ruled that comments about the plaintiff being "trash," while inappropriate, are not an "adverse employment action" (that is, the employee had not sustained actionable harm). The ruling spared the court from having to address whether such a comment is "because of sex."[112] In *Schofield v. Maverik Country Store*, the plaintiff similarly claimed a "white trash" comment directed at her by her employer was part of the sex-based hostile work environment.[113] Dismissing her claim, the court stressed that this comment was not "facially sex-based."[114]

The case of *Scruggs v. Garst Seed* clearly exemplifies the problem with arguing for discrimination against poor whites via a gender lens.[115] The plaintiff, Danya Scruggs, worked as a researcher at a research facility in Indiana. She sued, raising hostile work environment and retaliation claims, on the basis of repeated demeaning comments from her supervisor, Curtis Beazer. Specifically, Scruggs testified that Beazer told her she was "too dumb to catch on," not "smart enough," and "made for the back seat of a car." She also said that Beazer described her to other employees as "the person in charge of 'cookies with sprinkles'" and told her "she looked like a 'UPS driver,' a 'dyke,' and a 'redneck.'"[116] Reviewing these facts, the Seventh Circuit upheld the district court's dismissal of the case, holding that the gender-based conduct was not sufficiently severe or pervasive.[117] While acknowledging that Beazer made some "occasional inappropriate comments,"[118] only a few of them pertained to gender. Instead, the court ruled that "most of Beazer's comments related to Scruggs's work habits or alleged lack of sophistication, which were the kinds of comments he made to both male and female employees."[119]

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110. Sacco v. Legg Mason Inv. Counsel & Tr. Co., N.A., 660 F. Supp. 2d 302 (D. Conn. 2009).

111. *Id.* at 311.

112. *Id*. at 316.

113. Schofield v. Maverik Country Store*,* 26 F. Supp. 3d 1147, 1151 (D. Utah 2014).

114. *Id.* at 1159–60. Regardless, the court ruled, even if the comments were sex-based, the actions described in the lawsuit were not sufficiently severe and pervasive to establish a hostile work environment claim under Title VII. *Id.*

115. *See* Scruggs v. Garst Seed, 587 F.3d 832 (2009).

116. *Id*. at 836.

117. *Id.* at 841. The court stressed that Beazer did not "threaten to touch her," nor did he make comments "suggesting that he was interested in her sexually." *Id*.

118. *Id.*

119. *Id.*

The ruling in *Scruggs* can be analyzed as a moment of intersectional failure:[120] the court did not recognize the specific bias directed at women of poor and/or rural backgrounds, bias that is directly linked to the stereotype of "lack of sophistication." Analyzing the comments solely through a gender paradigm prevented the court from acknowledging the intersectional bias to which the plaintiff had been subjected. Thus, that both men and women experienced comments about their "lack of sophistication" led the court to exclude such comments from consideration and conclude that the gender-based comments were not sufficiently severe.[121]

Another strategy plaintiffs have used to confront hostility toward them as poor whites is employing the prisms of *disability* and *race* discrimination. In *Magness v. Harford County*, the plaintiff—who identified as having a low IQ, a learning disability, cognitive impairments, and an "auditory processing disorder"—argued that he was subjected to disability discrimination and harassment while working as a manual laborer in Harford County.[122] Specifically, Magness said that several of his supervisors repeatedly called him a "re****," "dumb farmer," a "dumb redneck," and "stupid."[123] Given the rich medical diagnosis of the plaintiff's various disorders and medical conditions, the court accepted without any discussion the merit of his claim for disability discrimination and the case survived the defendant's motion to dismiss.[124] Notably, the anti-poor-white sentiment in this case was not recognized as such, and the court did not develop any analysis of stereotypes of the social group the plaintiff was associated with (as is clear from insults such as "dumb farmer" and "dumb redneck").

In *Keel v. Wal-Mart Stores, Inc.*, the plaintiff—"a white male who suffers from dyslexia and illiteracy"— was employed in various roles at Wal-

120. The term "intersectional failure" was coined by Kimberlé Crenshaw to highlight instances where individuals who encompass more than one axis of identity are often erased from public awareness and are denied adequate treatment by courts, state policies, etc. *See generally* Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally about Women, Race, and Social Control Symposium: Overpoliced and Underprotected: Women, Race, and Criminalization: I. Establishing the Framework*, 59 UCLA LAW REV. 1418 (2011) (For a direct use of the phrase see, for instance, page 1450.); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

121. *Scruggs*, 587 F.3d at 841. Notably, in *Huff v. Southwest Virginia Regional Jail Authority*, No. Civ.A 1:08cv00041, 2009 WL 3326889 (W.D. Va. Oct. 13, 2009), the court did recognize a reference to a female employee as a "hillbilly" as part of a sex-based hostile work environment. The plaintiff, a nurse at a prison facility, complained about a doctor at the facility who referred to her as "stupid," "incompetent," and a "hillbilly." While the court stressed that the comments themselves "were not directly related to gender," it did acknowledge that they were directed only at female nurses and were thus because of sex. The case was nevertheless dismissed, as the court ruled that Huff failed to show that the comments were sufficiently "severe and pervasive." *Id*. at *7.

122. Magness v. Harford Cty., No. CV ELH-16-2970, 2018 WL 1505792 (D. Md. Mar. 27, 2018).

123. *Id.* at *4.

124. *See id.* at *9–14. Some parts of the plaintiff's complaint were nevertheless dismissed, mainly for technical and procedural reasons not related to the legal merit of his suit. *Id.*

Mart.[125] A few months after he was hired, Keel wrote a letter complaining about his supervisor, stating that "[s]he regularly swears at me calling me 'a fat lazy [m]otherf [sic].' . . . On my last shift (last night), she shouted that I was 'f***ing lazy WHITE TRASH.['][126] Soon after, Keel was fired and filed a lawsuit against Wal-Mart, arguing he suffered a discriminatory and hostile work environment due to both his race and his disability. Both arguments were dismissed by the Texas District Court. Regarding the race-based argument, the court simply stated that "[t]here is no evidence in the record indicating that Keel was subject to adverse employment action because of his race."[127] Regarding his disability argument, the court recognized Keel as a person with a disability, describing it as innate and resulting from "complications that occurred at birth," despite the court's own admission that "there is very little evidence in the record describing the extent or cause of Keel's disability."[128] The court nevertheless ruled for the defendant, stating that it had presented nondiscriminatory reasons for its various employment practices. Examining the derogatory comments directed at Keel, the court merely wrote that "there is no evidence indicating that Keel interpreted this comment to implicate his disability." Here, as in *Scruggs*, the failure to recognize the intersection of disability with anti-poor-white sentiment prevented the court from recognizing the merit of Keel's claim.

Like the plaintiff in *Keel*, some poor white plaintiffs have made allegations of *race*-based discrimination or harassment against white employers, mostly without success. In *Hoffman v. Winco Holdings, Inc.*, a white employee argued she was subjected to a race-based hostile work environment because her coworkers referred to her as "white trash" and harassed her.[129] The court dismissed her claim, noting that several of those coworkers were themselves Caucasian and that "there is no evidence that plaintiff's white coworkers were motivated by racial animus."[130] Likewise, in *Hood v. National Railroad Passenger Corp.*, the court stated that the term "hillbilly" does "not necessarily target a race or national origin" and dismissed a harassment claim from a white Amtrak employee.[131]

125. Keel v. Wal-Mart Stores, Inc., No. 1:11–CV–248, 2012 WL 3263575, at *1 (E.D. Tex. July 17, 2012), *aff'd*, 544 F. App'x 468 (5th Cir. 2013).

126. *Id*. (emphasis in original).

127. *Id*. at *8.

128. *Id*. at *1 & n.3.

129. Hoffman v. Winco Holdings, Inc., No. CIV. 07–602–HA, 2008 WL 5255902, at *1 (D. Or. Dec. 16, 2008).

130. *Id.* at *4.

131. Hood v. Nat'l R.R Passenger Corp., 72 F. Supp. 3d 888, 895 (N.D. Ill. 2014).

One exception to this judicial trend of nonrecognition is the case of *Barber v. A&J Hometown Oil, Inc.*[132] The plaintiff, a white woman, complained that she was subjected to a hostile work environment due to her race and her ancestry, citing how her employer referred to her as "white trash" and said "Heil Hitler" to her to mock her German background, while simultaneously chastising her for associating with Arab Americans.[133] The court clarified that each of these comments on its own would probably not be sufficient to sustain a hostile work environment claim but recognized that their combination was sufficient for the case to survive a motion to dismiss.[134]

Despite such occasional victories, poor whites discriminated against or harassed at work—especially by other whites—are barely recognized under antidiscrimination law. Plaintiffs challenge this legal reality using varying and creative strategies. However, to be fully recognized as deserving of recognition and protection, they will have to engage in extensive recognition work.

3. Fat People

Up to this point, this Article has covered two distinct liminally recognized groups at the bottom of the ladder of recognition. Asexuals are beginning to form a movement to gain societal and legal recognition and are fighting for inclusion in antidiscrimination laws, but there are currently no attempts by asexuals to be recognized by U.S. courts. In contrast, while poor whites generally do not focus on recognition as a goal, individuals who are subjected to workplace bias or discrimination regularly seek ways to secure judicial recognition and redress.

This third case study, which focuses on the fat rights movement, provides an opportunity to appreciate a group situated higher on the ladder yet still excluded from full legal recognition.

a. The Rise of the Social Movement

The fat acceptance movement, inspired by other civil rights struggles during the 1960s, began to coalesce in that same decade.[135] Around five-hundred people staged a "fat-in" in Central Park in 1967, eating ice cream and burning diet books, purposefully mirroring the renowned sit-ins staged by Black and anti-war activists.[136] Two years later, the first national

132. Barber v. A&J Hometown Oil, Inc., No. 11-CV-3350 (CS), 2012 WL 13049677 (S.D.N.Y. June 28, 2012).

133. *Id.* at *5.

134. *Id.* at *7.

135. AMELIA GRETA MORRIS, THE POLITICS OF WEIGHT: FEMINIST DICHOTOMIES OF POWER IN DIETING 147 (1st ed. 2019).

136. *Curves Have Their Day in Park; 500 at a 'Fat-in' Call for Obesity*, N.Y. TIMES, June 5, 1967, at 54.

organization for the advancement of fat people was founded. Bill Fabrey, seeking justice for his wife, who was subjected to workplace discrimination because of her weight, formed the National Association to Advance Fat Acceptance (NAAFA).[137] In 1972, the radical feminist group Fat Underground formed around Marxist feminist ideas and analyses of fat oppression.[138] The group released the "Fat Liberation Manifesto," calling for fat people of the world to unite.[139] Fat Underground spoke against what it saw as a fat "genocide": attempts by the medical profession and the diet industry to erase and eliminate fat people.[140] While such radical efforts remained marginal within the larger fat rights movement, NAAFA is to this day the leading organization advocating for the rights of fat people.[141]

Notably, after the rise of the fat acceptance movement, a countermovement developed: the anti-obesity movement. Anti-obesity advocates argue that discrimination against fat people is justified and socially desirable because it shames people into a healthy lifestyle.[142] As Lauren Jones showed, fat activists' response to the countermovement was to turn to science to show that fat bodies can be healthy. This approach culminated in the Health at Every Size movement.[143]

Despite this consolidation of the fat rights movement, bias and discrimination against fat people have only increased in recent years. Anna Kirkland described negative social attention to obesity in the mid-1990s as "fat panic."[144] Amid a growing wave of media attention, obesity was labeled a serious social problem associated with a cultural decline toward self-gratification, the rise of consumerism and corporate greed, and even rising bankruptcy rates.[145]

Weight-based discrimination is currently one of the most prominent forms of discrimination in the United States.[146] A long series of studies show that weight bias leads to stigmatization, bullying, prejudice, and

137. Back then, it was called the National Association to Aid Fat Americans. *See* Dan Fletcher, *The Fat-Acceptance Movement*, TIME (July 31, 2009), http://content.time.com/time/nation/article/0,8599,1913858,00.html [https://perma.cc/4APJ-HRCV]. Fabrey consciously chose initials that resemble *NAACP*. *See* Abigail C. Saguy & Anna Ward, *Coming Out as Fat: Rethinking Stigma*, 74 SOC. PSYCH. Q. 53 (2011).

138. MORRIS, *supra* note 135, at 146–47.

139. *Id.* at 146.

140. *Id.* at 149; Lauren E. Jones, Note, *The Framing of Fat: Narratives of Health and Disability in Fat Discrimination Litigation*, 87 N.Y.U. L. REV. 1996, 2006–07 (2012).

141. Fletcher, *supra* note 137. NAAFA organizes annual conventions and local and national events and activities designated to advocate for fat acceptance and rights.

142. Jones, *supra* note 140, at 2009.

143. *Id.* at 2008.

144. ANNA KIRKLAND, FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD ix (2008).

145. Kirkland, *supra* note 16, at 398.

146. Molly Henry, Note, *Do I Look Fat—Perceiving Obesity as a Disability under the Americans with Disabilities Act*, 68 OHIO ST. L.J. 1761, 1762 (2007).

discrimination. A 2008 study examining reports of discrimination found weight discrimination to be one of the most common forms reported.[147] A 2007 study found that 43 percent of fat workers reported experiencing bias from their supervisors, and above 50 percent reported harassment from colleagues.[148] The study also found that fat workers earn less income, receive fewer raises, and are seen as having less potential for managerial positions.[149] Additionally, 17 percent of study participants reported having been fired or pressured to resign due to their weight.[150]

The fat rights movement has used various legal strategies to protect fat people from discrimination, including filing numerous lawsuits. This decades-long battle has resulted in some limited victories which provide a useful vantage point for understanding both the gains and perils of moving up the ladder of recognition.

b. Fat People's Liminality under Antidiscrimination Laws

While there is no federal law directly targeting anti-fat discrimination, the State of Michigan and several localities have enacted laws designated to prevent it.[151] Given the scarcity of such laws, many fat people who have experienced workplace discrimination have, like poor whites, sought to fit their harm into existing federal frameworks.

One of the first laws through which weight discrimination was contested was Title VII, in the context of sex-based fat discrimination. A major line of cases involved flight attendants challenging airline-imposed weight requirements.[152] Over the years, flight attendants employed by various airlines were routinely weighed, and those whose weight exceeded a certain limit were dismissed. In *Laffey v. Northwest Airlines, Inc.*, a class of female cabin attendants sued Northwest Airlines to challenge its maximum weight requirements. [153] Given that the policies were directed only at women, it was argued as a sex discrimination case. The district court ordered Northwest Airlines to stop weighing female flight attendants and to refrain from punishing them for gaining weight. The airline appealed this ruling and,

147. Phillippa C. Diedrichs & Rebecca Puhl, *Weight Bias: Prejudice and Discrimination Toward Overweight and Obese People*, *in* THE CAMBRIDGE HANDBOOK OF THE PSYCHOLOGY OF PREJUDICE 392, 393 (Chris G. Sibley & Fiona Kate Barlow eds., 2016). As Diedrichs and Puhl indicated, reports of weight discrimination have increased from 7 percent in 1996 to 12 percent in 2004, a 66 percent increase.

148. Teri Morris, *Civil Rights/Employment Law*, 32 W. NEW ENG. L. REV. 173, 175 (2010).

149. *Id.* at 176.

150. *Id*.

151. These include Washington, D.C. and Santa Cruz, California. Yofi Tirosh, *The Right to Be Fat*, YALE J. HEALTH POL'Y L. & ETHICS 264, 332 (2012).

152. Women were allowed to work as flight attendants, or "air hostesses," beginning in the 1930s. A *New York Times* article from 1936 described air hostesses as ideally being "petite" and weighing around 100–118 pounds. *See Air Hostess Finds Life Adventures*, N.Y. TIMES, Apr. 12, 1936, at 86–87.

153. Laffey v. Nw. Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976).

simultaneously, expanded its maximum weight policies to apply to both men and women. As a result of this change, the appellate court ruled, "As long as the company henceforth extends equal treatment in this regard to all pursers and stewardesses in its employ . . . we cannot say that [the company's] desire for trimness in those representing it in public is discriminatory or unreasonable."[154]

Following *Laffey* and other similar cases,[155] airlines slowly began relaxing some of their weight requirements.[156] However, weight requirements exist in most airlines to this day, enforced "equally," regardless of gender. Male attendants' attempts to challenge weight discrimination were mostly unsuccessful.[157]

Given that Title VII requires a claimant to tie their claim of weight discrimination to another class, such as race or sex, many fat people sought redress by framing discrimination against them as being based on disability. The ADA defines disability as having "a physical or mental impairment that substantially limits one or more major life activities of such individual," having "a record of such an impairment," or, alternatively, "being regarded as having such an impairment."[158] Courts generally choose to interpret this definition narrowly, distinguishing recognized disabilities from physical properties or characteristics.[159] This distinction complicates attempts to fit obesity and weight discrimination into the law. Obesity may be considered a disability or a perceived disability, but that determination is usually made on a case-by-case basis and thus "requires a complicated analysis of the individual's particular condition[,] . . . creating a web of confusing and sometimes contradictory jurisprudence."[160]

In an early case discussing weight discrimination as disability discrimination, the court concluded that being fat does not amount to having a disability because weight is "not an immutable condition such as blindness or lameness."[161] The court added that the plaintiff's weight "seemed to vary

154. *Id*. at 457.

155. *See, e.g.*, Underwood v. Trans World Airways, 710 F. Supp 78 (S.D.N.Y. 1989) (holding that an airline guideline concerning a flight attendant's weight as it relates to the attendant's appearance in uniform was a "minor dispute").

156. *See* Sharlene A. McEvoy, *Fat Chance: Employment Discrimination against the Overweight*, 43 LAB. L.J. 3, 8 (1992).

157. *See, e.g.*, Tudyman v. United Airlines, 608 F. Supp. 739, 741 (C.D. Cal. 1984) (involving a male flight attendant heavier than the weight limit). The plaintiff argued that he was discriminated against on account of being regarded as having a disability. The court dismissed his suit, accepting United's defense that Tudyman was fired only for not meeting its weight requirements. *Id.*

158. ADA, 42 U.S.C. § 12102 (2018). Some of the cases discussed in this section were brought under the Rehabilitation Act of 1972, 29 U.S.C. § 701 *et seq*. (RA), which preceded the ADA.

159. Henry, *supra* note 146, at 1767.

160. *Id.* at 1763–64. *See also* Jennifer Bennett Shinall, *Distaste or Disability: Evaluating the Legal Framework for Protecting Obese Workers*, 37 BERKELEY J. EMP. & LAB. L. 101, 108 (2016).

161. Greene v. Union Pac. R.R. Co., 548 F. Supp. 3, 5 (W.D. Wash. 1981).

according to the motivation that he had for controlling [it],"[162] implying that the plaintiff was responsible for his condition and perhaps even for the discrimination itself.

In *Andrews v. Ohio*, a group of law enforcement officers sued the state of Ohio, claiming they were discriminated against due to their weight as they did not meet the specific weight requirements set for their particular jobs.[163] The Sixth Circuit dismissed their claim, ruling that "weight or muscle tone that are within 'normal' range and are not the result of a physiological disorder" are not impairments.[164] The court did, however, argue that in some instances "morbid" obesity may be considered a disability.[165]

In *Krein v. Marian Manor Nursing Home,* plaintiff Mary Krein claimed that she was discharged from her job due to her obesity.[166] The court ruled that while obesity can be considered a disability, the plaintiff could not demonstrate that her weight had been a limiting characteristic amounting to one.[167] The court relied on the testimony of Krein herself, who said she did not consider her weight a disability and could not think of any specific problems associated with it.[168] The *Krein* ruling highlights the paradoxical nature of weight-based claims argued through a disability framework. Employees must argue they have some sort of limiting characteristic or feature while simultaneously showing that they can perform the job in question to prevent the employer from raising a valid occupational qualifications defense.[169]

Some people recognized as obese indeed found a home within the ADA, either through the recognition of obesity as a disability or through its characterization as a perceived disability. *Cook v. Rhode Island* was the first case in which obesity was recognized as a disability in a federal court.[170] Plaintiff Bonnie Cook worked at a mental health facility and reapplied for the same position following a break in her employment.[171] The Department of Health refused to rehire her on the basis that Cook's weight prevented her from fulfilling certain job-related functions such as evacuating patients during emergencies.[172] Cook presented medical testimony that she was morbidly obese and that her obesity was a "physiological disorder involving

162. *Id*.

163. Andrews v. Ohio, 104 F.3d 803 (6th Cir. 1997).

164. *Id.* at 808.

165. *Id.* at 809–10.

166. Krein v. Marian Manor Nursing Home, 415 N.W.2d 793, 794 (N.D. 1987).

167. *Id*. at 796.

168. *Id*.

169. For a discussion of this tension, see Henry, *supra* note 146, at 1773. *See also* Michael Ashley Stein, *Foreword: Disability and Identity*, 44 WM. & MARY L. REV. 907, 909 (2002).

170. Cook v. R.I., Dep't of Mental Health, Retardation, & Hosps., 10 F.3d 17, 28 (lst Cir. 1993).

171. *Id*. at 20–21.

172. *Id*. at 21.

a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system."[173] The court refrained from determining whether obesity is a disability but ruled that Cook was perceived by her employers and the state as having an impairment, which satisfied the Act's definition of "disability."[174] As Molly Henry stated, this legal victory was mitigated by the court's heavy reliance on the medicalization of obesity.[175]

In *Gaddis v. Oregon*, the Ninth Circuit took this argument a step further, ruling that "morbid obesity" *is* indeed a disability.[176] However, given the complicated and contradictory relationship of fat people with questions of health and disability, that ruling may not be a victory. For activists invested in severing the Gordian knot of weight and health and for the Health at Every Size movement,[177] such legal "victories" prove problematic.

Recent years have marked the narrowing of protections for obese people claiming disability discrimination. In a 2006 case, the Sixth Circuit ruled that these questions should be determined on a case-by-case basis, stressing that the ADA covers only physical characteristics resulting from a physiological disorder.[178] In 2019, the Seventh Circuit, following judgments by the Second, Sixth, and Eighth Circuits, likewise ruled that obesity not caused by "an underlying physiological disorder or condition" is not an actual or perceived impairment under the ADA.[179]

For non-obese fat people, the level of legal recognition is even lower. While many are still subjected to bias, they cannot use the avenue of disability discrimination to seek redress. A 2015 attempt to challenge weight restrictions by twenty-one waitresses at the Borgata Casino & Spa failed.[180] The court left plaintiffs only the narrow route of proving the restrictions were a manifestation of a disability or sex-related discrimination, relevant only to "[c]ertain plaintiffs, whose lack of compliance resulted from documented medical conditions or post-pregnancy conditions."[181]

Unlike asexuals or poor whites, fat people have an enduring organized social movement and enjoy higher levels of societal visibility. Fat persons subjected to weight-based discrimination have been challenging the legal system for years, carving paths for legal recognition within the framework of

173. *Id*. at 23.

174. *Id*. at 28.

175. Henry, *supra* note 146, at 1783.

176. Gaddis v. Oregon, 21 F. App'x 642, 643 (9th Cir. 2001) ("Appellant . . . suffers from morbid obesity, a disability under the American [sic] with Disabilities Act of 1990 . . . .")

177. *See* Jones, *supra* note 140.

178. EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436, 442 (6th Cir. 2006).

179. Richardson v. Chi. Transit Auth., 926 F.3d 881 (7th Cir. 2019).

180. Schiavo v. Marina Dist. Dev. Co., LLC, 123 A.3d 272 (N.J. Super. Ct. App. Div. 2015). Importantly, the hotel did not regard them merely as waitresses but rather as "entertainers who serve complimentary beverages . . . similar to performance artists." *Id.* at 280.

181. *Id*. at 279.

existing federal legislation, and securing laws in several localities. Their liminality somewhat resembles the position of gay and trans people before *Bostock*: a cohesive group with a designated national legal organization and various routes through which to argue for legal recognition. However, their limited ascendance toward legal recognition exposes the contradictory nature of recognition: it splits the movement between those who push against the stigmatization of fat people as unhealthy and those who advocate for their inclusion within the category of people with actual or perceived disability. For the latter group, some additional inner contradictions arise between the need to prove plaintiffs' impairment and their ability to perform their jobs.

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The case studies presented here offer three unique examples of groups in a liminal state of recognition and their various meeting points with the law. While they differ in what constitutes them as groups, in their goals, and in the level of recognition they are afforded via laws and courts, the three display several similar patterns.

In all three cases, self-identification as a group or an identity usually came *after* outside societal or medical bias and classification. For groups that have begun their movement toward (legal) recognition, climbing the ladder has brought similar consequences: turning to biology and science, often to prove some form of immutability, framing members' identity as something they were born with rather than something they can control or change, and framing identity as a source of both pride and suffering. Asexuals insist that they do not *choose* to avoid sex; poor whites sometimes sought to medicalize illiteracy, detaching it from questions of unequal access to education and tying it to biological pathologies; and, fat people's recognition has been mainly contingent on the ability to prove their weight results from a biological impairment.

Finally, the stories of all three groups demonstrate that recognition requires work. It involves building large social movements and communities; coordinating orchestrated efforts of advocacy and activism; organizing political campaigns, marches, and demonstrations; and regularly challenging legislators and courts. This work does not always pay off. The fat movement has been fighting for decades, but fat people remain mostly outside current antidiscrimination laws. Asexuals are still excluded from all proposed LGBTQ antidiscrimination legislation, and poor whites' various legal strategies have mostly been unsuccessful. These groups' failures also expose, as the following Part will show, the gap between current employment antidiscrimination law and its goal of protecting vulnerable groups from workplace bias and discrimination.

Liminally recognized groups are therefore faced with the dilemma of whether to continue climbing the ladder of recognition or to seek protections not grounded in identity: protections one can claim not as a member of a

recognized group but on other non-identitarian grounds. No doubt, forming an identity group and fighting as a group to have an identity recognized has numerous advantages for individuals: a sense they are not alone or a language with which to understand themselves and narrate their experiences. But recognition also comes with costs. Some of them were briefly illustrated via the case studies above. The following Part will delve more deeply into the normative debate around recognition, highlighting it through the lens of liminally recognized groups.

II. RECONSIDERING RECOGNITION

The debate about recognition and the place identities hold within law has occupied legal thinkers for decades. This Article does not purport to solve this enduring dilemma. Part II.A provides a taxonomy of the debate's main arguments, incorporating insights offered by liminally recognized groups. This Part thus provides a fresh take on this ongoing controversy, highlighting the various ways in which the current discourse around recognition has at times assumed a correlation between the existence of an identity group and its legal recognition. Further, it examines this debate from a strategic standpoint, exploring the arguments for and against investment in recognition work for groups still at its margins.

A. The Case for Recognition

1. Recognition Is Validating

Perhaps one of the major reasons that forming an identity and climbing the ladder of recognition is appealing is identity's potential to validate the experiences and traits of stigmatized, marginal individuals. When the law recognizes you as worthy of protection, it usually comes with a general societal label of value and legitimization. This facet of recognition was perhaps most evident in the struggle for gay and lesbians to marry. For many advocates, earning the right to same-sex marriage signaled their recognition as equal citizens.[182] The Supreme Court in both *Windsor* and *Obergefell* accepted this argument, tying together legal recognition with the removal of stigma from gays and lesbians and their children.[183]

For groups at the beginning of their struggle for recognition, such as asexuals, the validating aspect of recognition carries further importance.

182. Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1344 (2011); KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY 60 (2015). As Franke stressed, a struggle to accord gays and lesbians the material benefits that come with marriage could have been promoted independently from a right to marriage equality. *See id.* at 51–52.

183. Obergefell v. Hodges, 576 U.S. 644 (2015) (citing United States v. Windsor, 570 U.S. 744 (2013)).

Legal recognition can save them the trouble of having to explain their identity to people. Instead, it can be framed using an already familiar rubric; in the case of asexuals, that of "sexual minority." Legal recognition can also generate publicity for a marginal identity group, which might help "crystallize the identity in the public imagination."[184]

The longing for recognition as a longing for validation is also evident in the fat acceptance movement. Interviewing fat activists, Anna Kirkland showed how even fat people's meager legal recognition has had a validating effect, de facto legitimizing their existence. One activist recalled discovering the Michigan state law banning weight discrimination:

> Some time after I was working in Michigan I looked to see, you know, is it really in the statement? There it is, how cool! . . . [So you've used the Michigan law for leverage in some of your own advocacy for armless chairs?] Yeah. But not in a way I wouldn't wanna say, "Hey, there's a law." It's more in it's that legitimacy and not, "That's [Ashley] the advocate. Always bringing up weird stuff." You know? It's like, "No, it's not me. Look at, there's a whole law that addresses it."[185]

2. Recognition Is Effective

Stating one's claims as claims for recognition is often a useful and effective tool. Simply put, it works. This effectiveness is usually threefold: (a) effectiveness in community formation; (b) effectiveness in advancing community interests; and (c) effectiveness in combating counterarguments and resistance.

First, the ability to center one's demands in a clear, defined category is a useful organizing tool.[186] It helps people who might be part of the cause to recognize themselves as part of it, and it encourages a deep commitment to the struggle to advance the group's interest.

Furthermore, it is effective in its engagement with the legal system. The U.S. legal system, in particular its antidiscrimination regime following the civil rights movement of the 1960s, is generally receptive to the concepts of identity and recognition.[187] Accordingly, fighting to achieve group recognition and protected class status means framing your narrative in a language the legal system already understands and marching along routes that other groups have walked before you.

As the three case studies show, groups climbing the ladder of recognition have generally sought to model their claims on those made by already recognized groups. Asexuals have tried analogizing their case to that of other

184. Emens, *supra* note 30, at 370.

185. Kirkland, *supra* note 16, at 415.

186. Yoshino, *supra* note 45, at 409–10.

187. Richard Ford, *Beyond "Difference": A Reluctant Critique of Legal Identity Politics*, *in* LEFT LEGALISM/LEFT CRITIQUE 38, 55 (Wendy Brown & Janet E. Halley eds., 2002).

sexual minorities, and fat people have intentionally drawn analogies to the civil rights struggles and narrated their claims using disability language, as have poor whites. This is not a new phenomenon. Historically, women have compared themselves to Black people, and gays, lesbians, and trans activists have used analogies to both Black people and women.[188]

The power embedded in such analogical arguments is that if they are persuasive and one group successfully equates its traits with a recognized group, the liberal state may be compelled to respond with equal recognition. The argument becomes one of Aristotelian equality, central to liberal democracies. Kimberlé Crenshaw acknowledged the power of such arguments in *Race, Reform, and Retrenchment.* She argued that one of the advantages offered by the legal structure of civil rights is its pretense of neutrality: the claim that civil rights are applied similarly in similar situations.[189] It allowed the civil rights movement to turn the state's "institutional logic" against itself and force the legal system to uphold its rhetorical promises.[190] Working outside the established ideology of the legal system, she wrote, is likely to be ineffective.[191]

Another good example of the effectiveness of recognition is found in the history of the gay rights movements. In the post-Stonewall era, many radical activists in the gay liberation movement did not focus on "gay rights" but rather argued for the disappearance of categories like homosexual/heterosexual altogether through the "abolition of constraining categories."[192] However, this radical movement lost its power to a new kind of gay movement: one that sought to promote an "ethnic" version of gay identity and pushed for recognition, similar to the process the fat movement underwent. Steven Epstein wrote:

> This "ethnic" self-characterization by gays and lesbians has a clear political utility, for it has permitted a form of group organization that is particularly suited to the American experience, with its history of civil-rights struggles and ethnic-based, interest group competition . . . by appealing to civil rights, gays as a group have been able to claim a legitimacy that homosexuals as individuals are often denied.[193]

Indeed, this type of recognition work, which the gay movement immersed itself in the years that followed, paid off.[194] Gay people organized

188. Janet E. Halley, *"Like Race" Arguments*, *in* WHAT'S LEFT OF THEORY? 52 (2002).

189. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

190. *Id.* at 1366.

191. *Id*. at 1367.

192. Steven Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Constructionism*, 93 SOCIALIST REV. 9, 18 (1987).

193. *Id.* at 20.

194. Katherine Franke traced the specific origins of the struggle for recognition characterizing the gay community in the wake of *Bowers v. Hardwick*, 478 U.S. 186 (1986), the 1986 Supreme Court

around gay identity as a distinct identity group, and it proved useful in that it resonated with the legal system, especially with the Supreme Court. Following their recognition work in the 1970s, 1980s, and 1990s, the gay movement began seeing the fruits of its labor, which culminated in a line of Supreme Court decisions recognizing gay rights like outlawing the sodomy ban,[195] upholding same-sex marriage,[196] and, most recently, banning anti-gay and anti-trans workplace discrimination.[197]

The example of the gay struggle for recognition helps illuminate the third aspect of recognition's effectiveness: its usefulness in combating counterarguments and backlash. As Janet Halley explained, gay activists had another reason for turning away from universalizing narratives (that subvert the construction of gayness as a unique trait) and toward identitarian arguments focused on the recognition of gay people as a minority group. Many feared that universal arguments are exposed to the dangerous counterargument that being gay is a choice. Under this framework, anti-gay activists could justify discrimination against gay people because it prevents the "spread" of homosexuality—an undesired and preventable lifestyle.[198] This argument echoes those made by the anti-obesity movement discussed earlier, which characterizes discrimination against the obese as a way to incentivize "healthy" lifestyles. In the case of both the gay and fat movements, the reaction to such arguments was to promote recognition of difference, situating fat and gay people as inherently and innately different from the rest of society—as people who were "born this way."[199]

3. Recognition Yields Tailored Protections

A major argument for recognition-based strategies is that they generally yield workplace protections and accommodations that are uniquely tailored to marginalized groups rather than general, universal rules applying to everyone. The products of the civil rights movements were laws designed to prohibit both the discrimination against and the disenfranchisement of Black

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decision to uphold the constitutionality of Georgia's anti-sodomy laws. *See* Katherine Franke, *Dignifying Rights: A Comment on Jeremy Waldon's Dignity, Rights, and Responsibilities Third Annual Edward J. Shoen Leading Scholars Symposium: Jeremy Waldron*, 43 ARIZ. ST. L.J. 1177, 1189–90 (2011). I discuss the problems rooted in this respectability turn later in this Article. *See infra* Part II.B.3.b.

195. Lawrence v. Texas, 539 U.S. 558, 559 (2003).

196. United States v. Windsor, 570 U.S. 744 (2013); Obergefell v. Hodges, 576 U.S. 644 (2015).

197. Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020).

198. Halley, *supra* note 188, at 53.

199. Recall how important it is for asexuals to characterize asexuality as an orientation rather than a choice. *See* Emens, *supra* note 30. Notably, as Halley also reminded us, the characterization of gay people as a distinct "ethnic" minority is not unsusceptible to counterarguments or backlash. Such pro-gay arguments can similarly be co-opted, "representing homosexuals as pathological deviants who should be cured, killed, aborted, or at least hidden from view." Halley, *supra* note 188, at 53.

people. The feminist struggle led to a series of laws and judicial doctrines pertaining to women.[200]

Specific identity-based protections have three main advantages for groups seeking legal justice. First, universal protections (granted to all workers) have an assimilatory potential.[201] Proponents of recognition-based protections worry that universal rights might bring us back to the gender-blind, color-blind liberal order, under which workers of minority groups are incentivized to cover their unique traits and assimilate into the white, male, heterosexual workplace.[202] Such assimilatory incentives devalue the lived experiences of minority workers. Further, the work embedded in assimilatory behavior consumes time and effort and is often accompanied by other psychological costs.[203] Targeted protections against discrimination and harassment, on the other hand, are developed around the lived experienced of minorities, thus bridging the gap between them and workplace hegemonies.

Second, for some groups, bridging this gap requires more than just ignoring their unique traits (i.e., not treating them with bias or stigmatization). In some cases, what groups are seeking is accommodation. In such instances, any solution that is not tailored around the specific type of accommodation they need would not be sufficient. Fighting for recognition, then, is fighting to characterize their demands for accommodation as deserving.[204]

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200. The normative justification for such tailored protections echoes the concept of corrective justice, according to which it is justifiable to tailor specific protections meant to amend wrongful harm that was and is suffered by specific groups. The first articulation of this principle goes back to Aristotle. *See* Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1991). Another famous articulation of this principle is Robert Nozick's "rectification of injustice." *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 152–53 (Reprint ed. 2013).

201. Jessica A. Clarke, *Beyond Equality—Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1245 (2011) [hereinafter Clarke, *Beyond Equality*].

202. *See generally* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (Reprint ed. 2007); Carbado & Gulati, *supra* note 41.

203. Carbado & Gulati, *supra* note 41, at 1278, 1291–92*; see also* Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 49 (2017).

204. For instance, some theorists might argue that special accommodation for deaf employees are more legitimate than a parallel demand for accommodation by an employee who enjoys playing chess and thus needs special vacation days to attend chess tournaments. Others, however, stress the potential and plausibility of a universal standard of accommodation offered to *all workers*. *See* Guy Davidov & Guy Mundlak, *Accommodating All? (Or: 'Ask Not What You Can Do for the Labour Market; Ask What the Labour Market Can Do for You')*, *in* REASONABLE ACCOMMODATION IN THE MODERN WORKPLACE 191–208 (2016); SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 53–54 (2009); Rachel Arnow-Richman, *Incenting Flexibility: The Relationship between Public Law and Voluntary Action in Enhancing Work/Life Balance Symposium: Redefining Work: Implications of the Four-Day Work Week—Rational Choice, Flexibility, and Accommodation in the Workplace*, 42 CONN. L. REV. 1081, 1108 (2010). I will touch upon such a suggestion later in this Article. Currently, what is relevant for my discussion here is the possibility that securing recognition offers to liminally recognized groups: the achievement of tailored protections designed around their unique harm and specific needs.

Jessica Clarke developed another argument for tailored protections. She argued that universalizing workplace protections and accommodations—essentially detaching them from specific identities—would ultimately dilute the level of protection and allocation afforded, as rights must be narrower and more abstract to apply in more contexts.[205] Allocating these "benefits" to all workers regardless of identity, risks trivializing the serious harm of discrimination and diminishing the level of possible accommodations granted to those who need them most. In her words, "Expanding a civil rights remedy may result in lesser protections in the new context, with those limitations drifting back into the core doctrine."[206]

This argument that workplace protections are somehow a zero-sum game is worth examination. We may alternatively posit that abandoning targeted protections might *broaden* the level of protection awarded to all workers.[207] In a different article, Clarke herself developed this line of thought. Arguing against the practice of "protected class gatekeeping"—the judicial practice of dismissing discrimination claims by plaintiffs not a part of protected classes[208]—Clarke argued that opening avenues for plaintiffs not from protected classes would benefit those in protected classes as well. She listed several such advantages for protected minorities. For instance, allowing more powerful workers to sue for discrimination would redistribute the burden of promoting more equitable workplaces so it would not fall solely on vulnerable workers. Doing so would diminish the employers' added risk of hiring protected classes. When only protected classes are allowed to bring discrimination claims, employers have an incentive to not hire minority employees. Further, opening a path for all workers to sue for discrimination would diminish the backlash vulnerable workers are exposed to when protections are tailored specifically to them.[209]

In an earlier article, where I focused mainly on poor whites, I detailed several additional arguments why allowing poor whites to sue against workplace discrimination is consistent with the interests of recognized racial minorities. Specifically, I showed how gatekeeping Title VII only to recognized racial minorities (Black and brown plaintiffs) grants white employers immunity from lawsuits in instances where their targets are poor whites (as mentioned, poor whites are mainly suing *non*-white employers via reverse racism claims).[210] This, in turn, redirects claims of racism towards racial minorities.[211] In addition, I showed how demarcating Title VII only

205. Clarke, *Beyond Equality*, *supra* note 201, at 1247.

206. *Id.* at 1249.

207. *See infra* note 309.

208. Clarke, *Protected Class Gatekeeping*, *supra* note 38, at 103.

209. *See id.* at 159.

210. Yona, *supra* note 32, at 143.

211. *Id.* at 145.

around recognized racial minorities leaves inner power struggles within whiteness outside the courtroom, thus reinforcing the category of whiteness as neutral and raceless.[212] Finally, I argued that lawsuits by poor whites against white employers could bring to the forefront the intricate ways in which poor whites are pushed to perform their identity along white supremacist ideals. Such lawsuits could challenge the norms of whiteness within the workplace, to the benefit of non-white workers as well.[213]

Moreover, examination of the dilution argument from the perspective of liminally recognized groups turns on its head some of its basic assumptions. Liminally recognized groups demonstrate how particular measures designed to protect the most vulnerable workers can nevertheless miss some even more vulnerable. In that sense, detaching protections from recognized identities would not only afford additional protection to majority groups and powerful workers but might also pave a path for groups not yet able to reach the top of the ladder of recognition. Sometimes, these identity groups are comprised of less powerful workers.[214]

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It is clear though that recognition comes with benefits: establishing a shared sense of identity and pushing the law to recognize it can have a validating effect on marginalized individuals. In addition, joining forces with others who share similar traits is effective in energizing communities toward collective action and identification. Further, arguing for recognition uses a language the legal system is receptive to and allows members of marginalized communities to follow paths carved out for them by recognized groups. It can also provide a discursive shield against backlash and delegitimization.

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212. *Id.* at 146.

213. *Id.* at 147.

214. See, for example, Naomi Schoenbaum's argument regarding the use of the gender nonconformity doctrine (as first developed in *Price Waterhouse*) in the context of transgender plaintiffs (pre-*Bostock*). Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105(2) MINN. L. REV. 831 (2020). Schoenbaum argued against this use, claiming it harms both the cause of transgender rights and the level of protection afforded to cisgender women: "Treating transgender persons as gender nonconformers also undermines protection for gender nonconformity. Under the doctrine, claims brough by cisgender persons like Hopkins appear weak next to transgender claims. Cisgender plaintiffs are seen as less gender nonconforming." *Id.* at 836–37. Schoenbaum's argument is the flip side of Clarke's: both accept the alleged zero-sum game of workplace protections, and both argue that broadening the scope of populations deserving of protection will lower the amount of protection afforded. However, the juxtaposition of the two arguments highlights the problem. The dilution argument makes sense when one thinks about vulnerable groups losing protection for strong and powerful groups. But, as Schoenbaum's argument illustrates, sometimes it is the other way around: in the pre-*Bostock* era, transgender people were a liminally recognized group fighting to be afforded protection from sex-based discrimination. Even if we accept the zero-sum assumption according to which affording protection to transgender people would somehow lower the level of protection afforded to cisgender women, we may still ask ourselves: is that really that bad? Thinking from the position of liminally recognized groups exposes how sometimes, protected classes do not represent the most vulnerable members of the workforce. Accordingly, broadening the scope of workplace protections to include their harm does not distance us from the egalitarian aspirations of antidiscrimination laws as Clarke worried it would; it advances them.

Finally, once a group manages to climb the ladder of recognition, this usually entails tailored protections and/or accommodations designed specifically around this community's vulnerability.

However, along with these gains, recognition imposes several notable costs, which will be the focus of Part II.B.

B. The Case Against Recognition

1. Recognition Is Inherently Limited

The first key argument against recognition-based systems is the inevitability of liminality. The reality of yet-to-be-discovered minority groups is inherent in a process that requires an immense amount of recognition work by individuals seeking protection from workplace harm. There will always be new liminal groups on the fringes of recognition; there will always be groups that have yet to recognize themselves as such.[215] The goal of antidiscrimination law is to promote equality in the workplace, yet a system built around recognition will always leave that goal unfulfilled.

Recall the example of Mary from Carbado and Gulati's *The Fifth Black Woman*: a Black woman who performs her identity in a way that makes her less palatable to white partners at her elite corporate firm than other Black women. For Mary to argue that the denial of her promotion was discriminatory, she must embark on a strenuous journey to highlight her positionality as a distinct identity that was discriminated against in the promotion process. Otherwise, within the identity regime of antidiscrimination law, she is bound to be misrecognized and her claims will likely be ignored. This problem intensifies in cases of intersectional identities, where misrecognition often labels both the employee and the employer as belonging to the same group. Examining same-race discrimination claims, Enrique Schaerer found that many claims for same-race discrimination between racial minorities do not receive proper judicial treatment due to lack of nuance regarding identity categorization.[216]

Also recall the flight attendants' cases discussed in the context of weight discrimination. Some airline guidelines challenged in these cases include (or used to include) a wide variety of physical requirements. Flight attendants in some instances are required to have good teeth and "a clear complexion" without any evident scars, pimples, or severe blemishes.[217] It is worth

215. As Naomi Schoenbaum wrote, "[W]ronged employees do not always exercise voice. Complaining requires 'legal consciousness'—framing one's experience as a legal wrong, and formulating a response." Naomi Schoenbaum, *Towards a Law of Coworkers*, 68 ALA. L. REV. 605, 620 (2016).

216. Enrique Schaerer, *Intragroup Discrimination in the Workplace: The Case for Race Plus*, 45 HARV. C.R.-C.L. L. REV. 57, 59 (2010).

217. Soo Kim, *Unusual Flight Attendant Requirements: The Good, the Bad and the Beautiful*, THE TELEGRAPH (Mar. 31, 2016), https://www.telegraph.co.uk/travel/news/unusual-flight-attendant-

pondering such possible requirements. Some might find them irrelevant to the job and perhaps even as conferring unwanted costs upon potential employees.

Under a paradigm of recognition, these guidelines may be criticized in two different ways. First, we can argue that each requirement in these airline guidelines discriminates against a not-yet-recognized identity group. We might say that people with "bad teeth" and people with unclear skin form specific identity groups[218] and that these guidelines discriminate against them. This option sounds both unrealistic and undesirable: both because of the immense work it would take to secure recognition of each of these groups and because it is hard to see people choosing to define themselves as belonging to an identity group solely due to the shape and condition of their teeth or skin. Second, we may say that attributes such as clear skin and "good teeth" are a proxy for identities (either recognized or that should be recognized). Accordingly, we can argue that having "good teeth," for instance, usually costs money, so listing it as a job requirement would disqualify candidates from less-privileged backgrounds. Then, we may attach these attributes to already recognized identities or fight for different identities to be recognized through the link between such proxies and identity-based bias.[219] But sometimes attributes are neither proxies for, nor markers of distinct identities. Indeed, as Janet Halley wrote, sometimes the costs of a specific job requirement go "to places where no current subordination theory can find them."[220]

This is an innate problem of recognition: antidiscrimination law is inherently non-visionary. It is always one step behind. A group must declare itself as such, fight to gain the necessary political power, and only then achieve justice. Given the ever-shifting axis of stigma and power and the endless possible intersections of identities, the prospect of misrecognition cannot be avoided.

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requirements-the-good-the-bad-the-beautiful/ [https://perma.cc/UE28-69DQ]. Notably, there were some successful challenges to appearance requirements for flight attendants in which arguments made by airlines that appearance was a "bona fide occupational qualification" were denied. *See, e.g.*, Wilson v. Sw. Airlines Co., 880 F.2d 807 (5th Cir. 1989).

218. Richard Ford made a similar move regarding the proliferation of identities as a mechanism to "score points" in public policy debates. *See* RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE 140 (2009).

219. For instance, think of the specific stereotype of poor whites having "bad teeth." *See* ISENBERG, *supra* note 92, at 269. Another example is the link between various bans on hairstyles in the workplace and specific racial identities. *See* D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355 (2008).

220. JANET E. HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 287 (2006).

2. Recognition Is Characterized by a Paradox of Political Power

The last argument centered on the recognition work required of stigmatized individuals for their claims to be seriously considered. This argument highlights how the process of climbing the ladder and doing this work is characterized by an inherent paradox.

As previously mentioned, the general principle for recognizing minority groups as worthy of unique protection was laid out in *Carolene Products*.[221] In footnote four—the most famous footnote in constitutional law[222]—Justice Stone detailed the basis for applying heightened scrutiny when analyzing legislation adversely affecting minority groups. Such heightened scrutiny, Stone said, should be afforded to "discrete and insular minorities" deemed distinctly vulnerable to majoritarian repression.

Bruce Ackerman offered a strong critique of the underlying assumption in *Carolene Products* that "discrete and insular minorities" are uniquely vulnerable and thus warrant heightened levels of judicial review.[223] Ackerman stressed the relative advantages discrete and insular minorities enjoy in the political process, as opposed to "anonymous and diffused" minorities. When a minority is discrete and insular, the chances are that individual members of that group will be more loyal to it, are more likely to exercise their voice against stigma and inequalities, and can more easily organize around their joint cause. In contrast, "anonymous and diffused" minorities face a harder time organizing. Given that such minorities are (often) more able to assimilate, their members are usually less loyal to the group, diminishing its political and social power.[224] The "discrete and insular" paradigm is thus tailored to the "pariah model" of minorities: minorities who enjoy representation and political power but are considered outcasts so they cannot advance their goals successfully through the political process. However, Ackerman pointed out, anonymous and diffused minorities often do not even have a seat at the negotiation table.[225]

Following Ackerman, Kenji Yoshino further highlighted the problem of *Carolene Products,* coining it "the paradox of political power." According to this paradox, "A group must have an immense amount of political power before it will be deemed politically powerless by the Court." As Yoshino recognized, there are instances where a group is so devoid of political power that courts do not even recognize its existence.[226]

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221. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

222. Kenji Yoshino, *The Gay Tipping Point Symposium: Sexuality & Gender Law: Assessing the Field, Envisioning the Future*, 57 UCLA L. REV. 1537, 1538 (2010).

223. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723 (1984).

224. *See id.* at 730–31.

225. *Id.* at 723–34.

226. Kenji Yoshino, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2012 UTAH L. REV. 527, 541 (2012).

While the controversy around *Carolene Products* is situated mainly in the realm of constitutional law, the paradox both Ackerman and Yoshino highlighted extends to antidiscrimination law and theory as well. A group must have high levels of political power to climb the ladder of recognition; however, with every upward step it must convince courts and the public of its political powerlessness—the specific powerlessness that warrants special protections.

3. Recognition Constructs Rigid Identities

Another consequence of recognition revolves around the way it shapes the identity being recognized. Targeted remedies for discrimination anchor and fixate the identities at the core of antidiscrimination regimes, as "the law creates a juridical person in its image."[227] For instance, to be granted legal protection as a person with a disability or as a woman, one must perform disability or femininity in a certain way that situates them within the protected group. This, in turn, further reinforces the regulatory nature of group boundaries.[228]

Dean Spade provided a vivid illustration of this problem in the context of the transgender community. Examining the specific locus of access to sex reassignment surgery, Spade illustrated how the process of recognizing someone as transgender (and thus as eligible for gender-affirming technologies) became a process of regulating trans bodies and narratives. To be recognized as a "real" transgender person by the medical system, trans people must narrate their identity according to the narrow legal definition of "transgender."[229]

Doron Dorfman similarly described this dynamic in the context of efforts by people with disabilities to receive social security benefits. He wrote, "To comply with the expectations prescribed by the SSA, benefit claimants must 'perform their identities in explicitly self-conscious and theatrical terms' to fit the sick role."[230] One interviewee in Dorfman's study

227. Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421, 433 n.25 (1987).

228. *See* WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 99 (1995).

229. For instance, "to be deemed real I need to want to pass as male all the time, and not feel ambivalent about this." Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 21 (2003). For a similar discussion in the context of prison reform, *see* Lihi Yona & Ido Katri, *The Limits of Transgender Incarceration Reform*, 31 YALE J.L. & FEMINISM 201 (2019).

230. Doron Dorfman, *Disability Identity in Conflict: Performativity in the U.S. Social Security Benefits System*, 38 T. JEFFERSON L. REV. 47, 67 (2015) (citing CARRIE SANDAHL & PHILIP AUSLANDER, BODIES IN COMMOTION: DISABILITY AND PERFORMANCE 2 (2009)) [hereinafter Dorfman, *Disability Identity in Conflict*]; *see also* Doron Dorfman, *Re-claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42 L. & SOC. INQUIRY 195, 218–19 (2017) [hereinafter Dorfman, *Re-Claiming Identity*].

mentioned the toll performing her identity to fit the preexisting scripts has on her:

> [I]t can get very confusing for me because if I was going to be that day "the disabled" then I would have to play the disabled. You know that takes away so much of where I also see disability as an enrichment. I don't get to play the goodness of it. I have to play the identity of it.[231]

This relationship between identities and the law that recognizes them creates a cycle of identity production: through a generalization of individuals to a distinct and defined group, a script is proposed to describe specific identity *X*.[232] People try to fit this script to access the resources, opportunities, and protections associated with *X.* That their performed identity fits so well into the script then becomes a proof of the script's accuracy and a justification of its legitimacy.[233]

Think here of asexuals fighting for recognition. Assuming their struggle for recognition will eventually succeed, how would a person have to prove their asexuality to claim they have been discriminated against on that basis? If they once had some sexual thoughts and desires, will they be incentivized to suppress them to be considered a "true" asexual?[234]

This regulatory potential can be internalized, and thus limiting in and of itself. When plaintiffs repeatedly describe their identity according to the expectations of the law, they can begin to believe that narrative.[235] Such internalization can also occur on the group level. One of the consequences of tying freedom from oppression with the specific language of identity is that members of recognized groups are often pressured by their peers to perform

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231. Dorfman, *Disability Identity in Conflict*, *supra* note 230, at 55.

232. On the generalizing and essentializing power of group identity, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1989). Harris critiqued "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience." *Id.* at 585.

233. This point of the regulatory potential of recognition has been explored by other scholars as well. Judith Butler, for instance, discussed the subjugating power of becoming a subject of regulation. JUDITH BUTLER, UNDOING GENDER 41 (2004) ("[T]o become subject to a regulation is also to become subjectivated by it."). Likewise, Nancy Fraser acknowledged the reifying potential of affirmative, recognition-based remedies for harm. *See* NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE 76 (2003) ("Valorizing group identity along a single axis, [affirmative recognition remedies] drastically simplify people's self-understanding—denying the complexity of their lives."). Janet Halley added to that discussion the power that lawyers—who often design legal strategies for social groups—have in regulating and constructing identities. *See* HALLEY, *supra* note 220, at 46. For a similar discussion regarding the regulatory nature of the ADA, see Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 250 (2001).

234. Emens, *supra* note 30, at 371.

235. Laura Rovner, who represented clients suing for disability discrimination, made this claim. *See* Rovner, *supra* note 233, at 303; *see also* Weller Embler, *Metaphor and Social Belief*, 8 ETC REV. GEN. SEMANTICS 83, 83 (1951). ("More often than not, our thoughts do not select the words we use; instead, words determine the thoughts we have.").

their identity "authentically" as a way of strengthening group boundaries.[236] This oft-hidden side effect of recognition curtails the kaleidoscopic nature of experiences and identities, which are much more fluid and unstable than the language of recognition allows.[237]

The regulatory aspect of recognition prompts the following question: as part of the process of recognition, what are the substantive characteristics that are constituted? While recognized identities and identity groups differ, this Article argues that some specific aspects of identities are nevertheless favored under the regime of legal recognition. Three such aspects warrant attention: immutability, respectability, and attachment to injury.

a. Immutability

Often, when groups seek legal recognition, a strong incentive exists for them to describe their difference as immutable. Immutability holds a key place in antidiscrimination theory due to the common desire to protect people from the "accident of birth":[238] the idea that people should not be treated unfairly due to circumstances they cannot control nor change.[239]

While immutability is not a necessary trait for group recognition,[240] its preferability among legislators and courts have led groups to describe the difference as unchangeable.[241] This de-facto necessity for immutability can be seen in the gay, lesbian, and transgender communities' fights for

236. Ford, *supra* note 187, at 41. Fraser also highlighted the potential of recognition-based approaches "to pressure individuals to conform to a group type, discouraging dissidence and experimentation, which are effectively equated with disloyalty." FRASER & HONNETH, *supra* note 233, at 76.

237. Ford, *supra* note 187, at 56.

238. Frontiero v. Richardson, 411 U.S 677, 686 (1973); *see also* Jessica A. Clarke, *Against Immutability*, YALE L.J. 2 (2015) [hereinafter Clarke, *Against Immutability*]; Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1993).

239. The Supreme Court has mentioned immutability as a ground for heightened judicial review. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 360 (1978). While there is no full overlap between unchangeable traits and unchosen ones, I discuss both here jointly, as they are often discussed together in the public discourse regarding identity and immutability. *See, e.g.*, Clarke, *Against Immutability*, *supra* note 238, at 16 ("As a practical matter, the law is unlikely to deter private conduct by discriminating on the basis of accidents of birth because their bearers did not choose, or may be powerless to change, these immutable traits."). I thank David Enoch for highlighting this distinction.

240. Clarke, *Against Immutability*, *supra* note 238, at 15.

241. Notably, this preference is found not only among courts and legislators. Describing one's identity as unchangeable or uncontrollable has strategic benefits. Empirical research has shown that when disadvantaged individuals are associated with the concept of choice, people often see them as responsible for their own conditions. Accordingly, when gayness or obesity are associated with the idea of choice, it often leads to more discrimination against gay and obese individuals in the labor market. Similar findings were reported regarding motherhood. *See generally* Tamar Kricheli-Katz, *Choice-Based Discrimination: Labor-Force-Type Discrimination against Gay Men, the Obese, and Mothers*, 10 J. EMPIRICAL LEGAL STUD. 670 (2013); Tamar Kricheli-Katz, *Choice, Discrimination, and the Motherhood Penalty*, 46 L. & SOC. REV. 557 (2012). For the way the preferences for immutability influenced courts' analyses of race discrimination, see Greene, *supra* note 219, at 1369.

recognition[242] as well as in the struggles of asexuals and fat people. All relied, in one form or another, on the argument that members did not choose to engage in the practices associated with their identity, nor could they change their identities or sexual tendencies—they were biologically destined from birth to engage in them. Looking to biology and science indeed has its benefits, as courts and legislators tend to defer to medical authority when constructing and defining identities.[243] It is not surprising that of all the strategies employed by poor whites to combat their discrimination, claiming disability discrimination proved the most fruitful. It grounded their claims and their marginalization in something courts deem "real": medical diagnoses and reports.[244]

One major drawback of this biological turn is the immense power it affords scientists and doctors over group boundaries and interests.[245] Rather than allowing members of the community to negotiate for themselves questions of belonging, the keys to that question are handed over to outside professionals, who often approach these questions with different perspectives and considerations in mind. As Spade showed, when the medical community was assigned with the task of recognizing "real" transgender people, it led to the formation of a category of transness that revolved around sexist stereotypes, for example that real transgender women demonstrate preference to playing with dolls rather than trucks while growing up.[246] This categorization confines transgender individuals and the category of transness itself within archaic and conservative notions of sex and gender ("girls play with dolls"). This is especially problematic when the initial stigma the identity group was formed to push back against originated in the medical establishment. For example, the origin of homosexual identity was in medical classification, yet many gay advocates appeal to this very same establishment in their fight for recognition.

Yofi Tirosh stressed the problematic relationship between the regulating aspect of recognition and the turn to medical discourse and authority. Writing in the context of fat discrimination, she argued that recognizing fat people as a category in antidiscrimination law "would pave the way for a whole new spectrum of oppressive legal discourse about the fat body . . . . The concern here is that the legal discourse on weight would normalize the medical

242. HALLEY, *supra* note 220, at 504. For this argument in the context transgender litigation, see Maayan Sudai, *Toward a Functional Analysis of Sex in Federal Antidiscrimination Law*, 42 HARV. J.L. & GENDER 421 (2019).

243. Recall that earlier in this Article, I showed how the origin of many category groups was a scientific classification. *See supra* notes 61, 95.

244. For more on the connection between disability discrimination and medical reports, see Katherine A. Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59 (2021).

245. Spade, *supra* note 229, at 24; Maayan Sudai, *Revisiting the Limits of Professional Autonomy: The Intersex Rights Movement's Path to De-Medicalization*, 41 HARV. J.L. & GENDER 1, 9 (2018).

246. Spade, *supra* note 229, at 24.

framework for talking about the fat body. The law would thereby partake in disciplining it, rather than assisting in its liberation."[247]

b. Respectability

Another characteristic that groups are incentivized to exhibit is the expression of their identity in a manner that does not challenge or question the hegemonic norms of those charged with doing the recognizing—primarily courts and legislators. Accordingly, many identity groups making their case while trying to climb the ladder of recognition turn to a respectable, or dignified, representation of their difference to show that they *deserve* recognition and equality despite said difference.[248] This turn is not without costs. To present oneself as respectable or dignified usually comes with regulating, normalizing aspects. Individuals who might have found the freedom to be their true selves in the margins of societal hegemonies, who might have found meaning and authenticity in their "deviancy" from traditional norms, find themselves having to cover any "undignified" or "disreputable" behaviors in the struggle to be recognized.

Again, the gay community's struggle provides a vivid example of this toll. Discussing the recognition work the gay community embarked on in the wake of *Bowers v. Hardwick*—the 1986 case that upheld the constitutionality of anti-sodomy laws—Katherine Franke critically assessed the price the community paid. She wrote:

> We understood that we had work to do. We had not made ourselves recognizable to the public and to legal authority as a community worthy of full constitutional protection and the dignity that recognition would confer. So that work began. On school boards, on little league fields, at PTA meetings, in churches, in workplaces, grocery stores—everywhere. We set out to demonstrate in fora both quotidian and extraordinary that we were not a perverse Other, that we were respectable citizens, that we were just like you.[249]

Another version of this argument is what Anna Kirkland called "the logic of functional individualism:"[250] the logic through which people from minority groups stress that they "can do the job"[251] like everyone else. In doing so, they assert their respectability from a perspective that emphasizes the group's ability to fit in not only within the civic order, but also in the industrial one.

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247. Tirosh, *supra* note 151, at 329–30.

248. Kenji Yoshino wrote extensively on the incentive to "cover" minority traits to be deemed eligible for equality and rights. *See* YOSHINO, *supra* note 202.

249. Franke, *supra* note 194, at 1189–90*; see also* Libby Adler, *The Dignity of Sex*, 17 UCLA WOMEN'S L.J. 1 (2008).

250. KIRKLAND, *supra* note 144, at 7.

251. *Id*.

Thus, if recognition's proponents list the fear of assimilation when moving beyond identity-based protections and accommodations, it is worth noting the assimilatory potential embedded in recognition-work, highlighted when viewing recognition from the perspective of groups still in the process of being recognized.

Both versions of the respectability problem are clearly embedded in the fight of liminally recognized groups to achieve recognition. Fat people have used this argument to advance their claims in courts: they submit evidence to prove that their fatness does not keep them from performing productively like any other worker. Recall that the incongruence between such an argument and some courts' interpretation of disability antidiscrimination laws as being grounded in plaintiffs' inability to equally perform job-related functions has cost some plaintiffs their lawsuit. Recall how David Jay, a leading asexual activist, emphasized the community's efforts to push against cultural consideration of members as oddities and to insist that they are "an *important part* of the spectrum of queer identity."[252]

This turn to respectability often also risks leaving out those who cannot easily present themselves via "just like you" arguments, those who cannot easily cover or assimilate to fit in.[253]

Evident from this Part is that many groups fighting for recognition are heavily incentivized to describe their identities as functional, dignified, and respectable.

c. Attachment to Injury

One last aspect of the specific identity constructed when groups climb the ladder is members' attachment to their injury and oppression. As was illuminated by the paradox of political power, arguing from identity is essentially arguing from a position of powerlessness, not a position of power.[254] Even aside from its paradoxical potential, this attachment to injury extracts a price. Achievements that result from winning the recognition battle are always and inherently rooted in individuals expressing their weakness rather than their power. To detach from the injury caused by exclusion and oppression would risk losing recognition—sometimes even lose one's very identity.

This problematic element of securing recognition is most evident in the context of discrimination against disabled people. As Laura Rovner showed,

252. *See* Liao, *supra* note 72 (emphasis added).

253. Franke touched upon this tension in comparing how the struggle for gay marriage assisted gays and lesbians to be recognized as dignified citizens, while African Americans were unable to use marriage in similar ways. Gays and lesbians were able to "cleave out" the sex from homosexuality as part of their struggle for gay marriage, but for Black people, the stigma constituted by their otherness was not so easily detachable. *See* FRANKE, *supra* note 182, at 226.

254. BROWN, *supra* note 228, at 66–68.

for many plaintiffs with disabilities, identifying themselves as "a person with a disability" under the meaning of the law requires a complicated reconciliation of how the law sees them and how they view themselves.[255] She demonstrated how in some cases, a plaintiff's testimony that they have managed to heal from the humiliation and other harm caused by the act of discrimination works against their chances of winning their lawsuit.[256]

This dynamic maintains persons fixated on their exclusion and victimhood, incentivized to suppress other parts of who they are.[257] Having your identity intrinsically connected to your exclusion curtails any possibility of achieving full liberation from that same exclusion without losing *who you are* in the process.[258]

Finally, this attachment to (personal) injury focuses the fault on specific players deemed responsible for the "injury,"[259] as well as on individualized dynamics, thus obscuring the systemic nature of discrimination.[260]

4. Recognition Contains Our Political Demands

One final consequence of recognition is the containment of political demands. Nancy Fraser distinguished between two forms of recognition: affirmative recognition and transformative recognition.[261] Affirmative recognition works within the current system of identities and is focused on addressing the devaluing of marginalized communities. It does so through their revaluation. However, affirmative recognition does not challenge the content of group identities or the boundaries that constitute group difference. Conversely, transformative recognition is more deconstructionist in nature and redresses this devaluation through the destabilization of group identities

255. Rovner, *supra* note 233, at 300–01; *see also* Dorfman, *Re-claiming Identity*, *supra* note 230, at 219.

256. Rovner, *supra* note 233, at 299–300 ("By appearing as a functioning person with coping mechanisms intact, Ms. Rowley departed from the victim script. This departure presented the jury with a difficult question: can one have been victimized without being a victim? By their verdict, the jury seems to have concluded, 'no.'"). See also the following explanation from Lisa, one of the women interviewed in Dorfman's research: "You have to talk to them about how hard it is to live with a disability, how much it limits you, how much trouble it is, how bad you feel, how often you're sick . . . you have to impress [pause] you have to present an image of being pathetic and helpless." Dorfman, *Disability Identity in Conflict*, *supra* note 230, at 68.

257. As Martha Minnow said, "Victimhood is a cramped identity, depending upon and reinforcing the faulty idea that a person can be reduced to a trait." Martha Minnow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1432 (1992).

258. BROWN, *supra* note 228, at 27, 73.

259. *Id.* at 27.

260. This argument echoes the findings of Ellen Berrey, Robert L. Nelson, and Laura Beth Nielsen on the individualization process of antidiscrimination claims discussed above. ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 15 (Illustrated ed. 2017).

261. Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age*, I/212 NEW LEFT REV. 68, 82 (1995).

and boundaries.[262] Notably, the struggle for legal recognition as a distinct identity group takes the form of affirmative recognition, given that it does not challenge the infrastructure of difference that fuels current inequalities. This highlights the contained nature of the political demands at its core.

In the context of the workplace, arguing from the position of recognized identities limits our ability to rethink how our workplaces look and who deserves a place in them. It corrals political demands so that the treatment of minority groups is equated only with the treatment majority groups currently receive and, further, only to instances when minority groups can prove that their difference does not harm their ability to "do the job." This leaves serious questions unaddressed: how are majority groups treated in the workplace? How are workplaces currently shaped and what are the dominant norms that govern them?

Consider, for instance, the catch-22 argument advanced in *Price Waterhouse v. Hopkins*, the Supreme Court case in which the stereotype doctrine of Title VII was developed. The plaintiff, Ann Hopkins, was denied partnership at her firm because she was considered too "masculine" and "overly aggressive" by the firm's partners, who advised her to dress "more femininely" and attend "charm school" to improve her chances of a partnership.[263] This advice was offered although qualities such as aggressiveness and toughness were sought after in potential partners.[264] The Supreme Court determined that denying opportunities to women on the basis of gendered expectations that they act "feminine" is sex discrimination prohibited under Title VII.[265] In his opinion, Justice Brennen condemned the catch-22 women experienced in the workplace: "out of a job if they behave aggressively and out of a job if they do not."[266] Put differently, what drove much of the argument in Ann Hopkins' favor was that gendered expectations placed her in a double bind. If she was to act feminine, she would fail to advance to a partner position for not being aggressive and tough, but when she did portray such qualities, she was rejected for not being feminine enough.

Leaning into the catch-22 of workplaces exposes the limits of current discrimination claims. They clear a path for women to be "masculine" or

262. *Id.* at 82–83; FRASER & HONNETH, *supra* note 233, at 75. Recall the discussion about the gay liberationists of the 1970s, who focused on challenging the boundaries between heterosexuals and homosexuals. *See supra* note 192 and accompanying text.

263. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

264. *Id.* at 235–36. Hopkins' ability to "push hard" and demand much from her staff was praised by some of the partners. *Id*. at 234. The court later highlights this double bind, stating, "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they do not." *Id*. at 251.

265. *Id.* at 241–42, 258.

266. *Id.* at 251.

aggressive, but they often do not have a lot to say about the value of aggressiveness as a desired trait or the masculinity that characterizes aggressive workplaces. Challenges to patriarchal or sexist norms in the workplace not backed by this type of catch-22 argument have been less successful. For example, grooming codes that require women to present themselves as "feminine" in the workplace are generally considered lawful.[267]

This problem intensifies when the lens shifts from gender to another system of othering, such as race. That is because catch-22 arguments work only when expectations of groups are converse (women are expected to "act like women" and men are expected to "act like men"). As Yoshino has shown, the expectation from racial minorities is the opposite—they are usually expected to cover their traits and assimilate to dominant workplace norms: to "dress white" or speak unaccented English.[268] Accordingly, catch-22 arguments are generally irrelevant in the context of racial discrimination. There is no double bind.[269]

The structure and doctrine of antidiscrimination law prevents workers from pushing for more radical visions of their workplaces and from reconfiguring the power balance between employers and workers by curtailing their demands of formal equality to the dominant groups that shape workplace hegemonies.

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Considering the costs of climbing the ladder of recognition, liminally recognized groups may wish to explore alternatives routes to workplace justice. The final Part of this Article offers two such alternatives. Notably, these strategies need not replace recognition-based strategies; they may be advanced alongside them. These alternatives are meant to put more tools in liminally recognized groups' hands and give them a possibility of advancing their struggle in non-identitarian ways.

III. MOVING BEYOND RECOGNITION

Janet Halley, in her exploration of identity-based legal rules, urged us to "seek identity-indifferent norms of distributive justice."[270] Following her suggestion, this Article introduces two ways to do so. The first strategy examines the possibility of moving beyond recognition *within* the realm of antidiscrimination law via anti-essentialist interpretations of it. The second

267. For cases in which women attempted to challenge grooming policies in the workplace (for instance, policies requiring them to wear makeup), see Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006).

268. YOSHINO, *supra* note 202, at 146.

269. This might explain why Title VII jurisprudence has not developed a racial stereotype doctrine alongside its sex stereotype one. *See* Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 964 (2016).

270. Halley, *supra* note 188, at 46.

strategy explores the prospect of moving beyond recognition and *beyond* antidiscrimination law. It focuses on the potential of labor law and union power to pioneer a route for liminally recognized groups via universal protections granted to all workers and on the capacity of universal protections to address "discrimination-like" wrongs sustained by persons from unrecognized or liminally recognized groups.

Notably, the following strategies are not meant to act as replacements to antidiscrimination law or identity-based protections. As mentioned earlier, recognition has advantages worth considering, and solving the larger dilemma regarding identity's place within law is a task beyond the scope of this Article. However, the specific problems rooted in recognition and the immense work required to achieve it urges us to chart new paths for liminally recognized groups seeking alternatives. These alternatives also prove relevant for members of already recognized groups that do not necessarily wish to tie their claims to the chains of recognition. Advancing identity-indifferent alternatives for individuals in their meeting points with the law allows us to ease the strong grip identity has on the lives of individuals and on our legal system, without losing the benefits that category-based models of antidiscrimination do have to offer.

A. Moving Antidiscrimination Law beyond Recognition

Earlier, this Article used Fraser's distinction between affirmative and transformative recognition to argue that discrimination rooted in identity advances the former rather than the latter. How might we approach antidiscrimination legislation in a way that promotes transformative recognition? Or moving beyond recognition entirely?

One key question in antidiscrimination theory is what harm antidiscrimination law aims to repair. While most theorists agree that the primary goal of antidiscrimination law is to promote equality, they differ in the proper way to achieve this objective. Often, this question manifests via the debate between anti-classification and anti-subordination theories. Anti-classification theory places the harm of discrimination in the act of classifying or distinguishing among individuals.[271] According to anti-classificationists, the way to achieve equality is to ignore identitarian traits (such as race or gender) that are deemed irrelevant, illegitimate grounds for classifying individuals.[272] Anti-subordination theory, on the other hand, focuses on antidiscrimination law's role in remedying the conditions of

271. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 16 (2003).

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

groups that have been historically oppressed.[273] Rather than ignoring identitarian traits such as race or sex, anti-subordinationists seek to acknowledge their role in creating inequality.[274]

Moving beyond recognition could create a middle ground between anti-classificationists and anti-subordinationists. Notably, critical scholars have offered a third paradigm from which to promote the goals of anti-discrimination law: anti-essentialism. Anti-essentialists "see group-based identities as constructed and contested through social interaction, not as fixed and stable properties of individuals."[275] Anti-essentialism shares anti-subordinationists' aim of dismantling power structures. Simultaneously, it also shares anti-classificationists' disdain for policies centered on identity.

One way of promoting an anti-essentialist reading of antidiscrimination law is to shift its gaze from identities towards ideologies. Such an anti-essentialist paradigm redirects the goal of antidiscrimination law from recognizing and protecting specific identities toward combating the equality-hindering ideologies that construct them.[276] Rather than focusing on the recognized groups protected by antidiscrimination law, an ideology-based approach would focus on the *ideologies* that birth discriminatory practices (e.g., white supremacy, racism, sexism, etc.).[277] This approach connects antidiscrimination law with the substantive value at its core—the aspiration to achieve equal workplaces—without having to lean on identity to do so. It acknowledges that identity operates as a mere proxy in antidiscrimination law,[278] primarily as a shortcut through which to acknowledge patterns of discrimination and subordination. Accordingly, discriminatory practices that contradict antidiscrimination law's primary objective of promoting equality in the workplace should be deemed unlawful regardless of whether or not the plaintiff in the case belongs to a recognized group or not.[279] In other words,

273. Clarke, *Protected Class Gatekeeping*, *supra* note 38, at 155; Balkin & Siegel, *supra* note 271, at 9.

274. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1472–73 (2004). Reva Seigal has offered an additional approach to antidiscrimination law: antibalkanization. According to this approach, the role of antidiscrimination law is to address social divisiveness and promote social cohesion. *See generally*, Reva Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278–66 (2011). Given that this approach is less concerned with the identitarian clash within theories of antidiscrimination law, I do not discuss it in this Article.

275. Clarke, *Protected Class Gatekeeping*, *supra* note 38, at 145.

276. *Id*.

277. For example, sexism as an ideology genders workplaces in ways that disadvantage anyone who does not conform to sexist expectations. *See* Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 696 (1997); Carbado & Gulati, *supra* note 41, at 1262.

278. Lauren Sudeall Lucas, *Identity as Proxy*, 115 COLUM. L. REV. 1605 (2015).

279. Lauren Lucas formulated a similar argument in the context of constitutional law, coining her alternative as the "value-based approach" to equal protection. *See generally id*. However, when considering the problems rooted in the category-based model of equal protection, she too misses the unique positionality of liminally recognized groups.

when a women is discriminated against in the workplace, we may say that the way to identify the discriminatory act is by acknowledging her identity as a woman: an identity protected under antidiscrimination laws. Alternatively, we can instead recognize sexism as an equality-hindering ideology which shapes and genders workplaces in ways that lead to discrimination against women. We can then utilize the recognition of sexism, not of women, as the way through which we may identify the discriminatory act. Liminally recognized groups may advocate for an ideology-based reading of antidiscrimination law when they bring claims to the courts.

Utilizing the concept of ideology in the context of employment antidiscrimination adjudication could alarm some readers who might fear that it opens up a possibility for courts to read *other* ideologies—such as feminism or Critical Race Theory—into the core of Title VII and label them as forbidden in the workplace.[280] This, in turn, might allow majority groups to misuse antidiscrimination law to their benefit. While this fear is understandable, my suggestion's focus on equality-hindering ideologies restricts courts to examine only ideologies that defy the original objective of antidiscrimination law: promoting equality and combating discrimination. In addition, it is important to note that the ability to misuse antidiscrimination law to the benefit of strong, majority groups already exists today[281] so the shift to ideology does not open up any new avenues for exploitation in that regard.

Shifting antidiscrimination's gaze towards ideological apparatuses holds two main benefits. First, it allows antidiscrimination law to include many plaintiffs currently barred from its gates. Second, and no less important, insisting on ideologies (rather than merely forbidden motivations, or a color-blind blanket bar of dignity or respect) allows antidiscrimination law to connect to historical patterns of subordination rather than ignoring them.

Recognizing ideological apparatuses within workplaces helps us shift the focus from employers' mental states towards the larger context within which their actions are performed. Accordingly, an employer can promote sexism in the workplace not out of malice per se, but due to a broader ideological system that constitutes societies and actions.[282] Thus, the concept of ideology allows for an independent judicial exploration of employment patterns that contribute to discrimination against employees based on race, sex, disability, etc. without resorting either to the identity of the employee or to the subjective mental state of the employer.

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280. The recent attack on Critical Race Theory provides us with some cause for concern.

281. To be clear, not every claim of discrimination made by a majority member is misuse of antidiscrimination law.

282. For a broader explanation of the role of ideological apparatuses in the formation of subjects and larger social order, see Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, *in* LENIN AND PHILOSOPHY AND OTHER ESSAYS 85–126 (1970).

Despite anti-essentialism's radical stance toward social institutions (such as law itself), an ideology-based approach is congruent with the language of major antidiscrimination laws. Adopting a textual approach to major antidiscrimination laws opens up surprising avenues for radical transformations of antidiscrimination law and theory.[283] Below are two examples.

1. Title VII

The most important thing to note when reading Title VII is that it does not designate any protected identities. Unlawful employment practices are defined under section 703(a) as practices that discriminate against *any individual* "because of such individual's race, color, religion, sex, or national origin."[284] This is different from an identity-centered language that names specific identities such as women, Black people, etc. The non-identitarian language of Title VII received reinforcement in the 1991 amendment that added section 703(m).[285] Section 703(m) states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice."[286]

Promoting an ideology-based reading of Title VII, 703(m) may be read as shifting the focus of discrimination claims from the victim's identity to the ideological apparatus behind the discriminatory act. The concept of "motivating factor" can thus be understood not as something we ought to look for within employers' minds, but rather as a manifestation of specific equality-hindering ideologies in the workplace. Accordingly, section 703(m) may be read as signaling a step away from recognition and toward ideology-based claims. Under section 703(m), plaintiffs can show (1) that the *ideology* behind the relevant employment practice provided a motivating element for the employment practice[287] and, (2) that such ideology contradicts Title VII's purposive aspiration for equality. Simply put, under this reading of Title VII, its goal is not necessarily to protect Black people in the workplace but rather

283. Notably, *Bostock* is a vivid example of the possibilities offered by "progressive textualism" to advance Title VII interpretation, and specifically to expand coverage for liminally recognized groups like gay and transgender plaintiffs. *See* Katie Eyer, *Symposium: Progressive Textualism and LGBTQ Rights*, SCOTUSBLOG (June 16, 2020), https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights/ [https://perma.cc/398D-3RAA]; Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 66 (2019).

284. Title VII, 42 U.S.C. § 2000e-2(a) (2018).

285. Clarke, *Protected Class Gatekeeping*, *supra* note 38, at 114.

286. 42 U.S.C. § 2000e-2(m). *See also* Clarke, *Protected Class Gatekeeping*, *supra* note 38, at 114.

287. Importantly, section 703(m) was added following *Price Waterhouse* to account for instances of gender stereotyping. *See* Jeffrey A. Van Detta, *The Strange Career of Title VII's Section 703(m): An Essay on the Unfulfilled Promise of the Civil Rights Act of 1991 Symposium: Title VII at 50*, 89 ST. JOHN'S L. REV. 883, 886 (2015). As I have argued, the stereotype doctrine is congruent with an ideology-based approach to antidiscrimination law. Yona, *supra* note 32, at 131.

to prevent racism or white supremacy from motivating employment practices.

This shift echoes the Supreme Court's analysis in *Bostock v. Clayton County*.[288] Rather than recognizing gay and transgender people as protected classes under Title VII, Justice Gorsuch focused on whether a decision to fire a transgender employee was wrongly motivated by sex. Accordingly, the Court dedicated most of its decision to the motivation behind employment practices rather than the identity of the plaintiffs.[289] Being gay or transgender, the Court tells us, is equivalent to being a woman with young children.[290] Discrimination against women with young children is forbidden not because Title VII recognized the unique identity of this subgroup as distinct but because such discrimination is inevitably wrapped up in considerations of sex.[291]

For liminally recognized groups, this means that rather than pushing toward recognition, they may focus on demonstrating the forbidden grounds that motivated the discrimination against them. Elsewhere, I have shown how poor whites can explain bias against them as rooted in white supremacy. Specifically, I argued, white supremacy fuels expectations of how white people ought to act, dress, and look. Poor whites are failing to perform their whiteness similarly to the way some men are failing to perform their masculinity according to patriarchal norms.[292] Under this framework, rather than grounding their claims in a specific identity, plaintiffs can demonstrate that the motivation behind the harassment or discrimination they faced is grounded in race and racist ideology and that it therefore amounts to unlawful employment practice according to the Supreme Court stereotype doctrine.

2. The ADA

Unlike Title VII, the ADA seems to be centered on the specific identity of people with disabilities.[293] Discussing the definition of disability, the statute clarifies that it is meant to protect persons who have "a physical or

288. Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020).

289. That plaintiffs might have understood their dismissal as resulting from their homosexual or transgender identity is disregarded by the Court as irrelevant to its decision. *Id*. at 1745. I acknowledge that Justice Gorsuch's understanding of motivation is different than the one I propose here. However, I discuss his reasoning as it nevertheless signals a move away from identity in the interpretation of Title VII.

290. Justice Gorsuch analogized the facts in *Bostock* to *Phillips v. Martin Marietta Corp*., 400 U.S. 542 (1971), which revolved around an employer's refusal to hire women with young children. *Id.* at 1743–49, 1752.

291. *Id*. at 1745.

292. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998). Oncale, who worked at an oil platform, was sexually harassed repeatedly by his crew members, and the company's Safety Compliance Clerk called him names "suggesting homosexuality." *Id*. at 77.

293. The ADA was enacted with the stated goal of preventing discrimination against people with disabilities. Clarke, *Protected Class Gatekeeping*, *supra* note 38, at 111.

mental impairment that substantially limits one or more major life activities," or have a record of such impairment.[294]

Despite this identitarian language, however, the ADA too allows for an ideology-based reading in that it also protects from discrimination an individual "regarded as having" a physical or mental impairment (i.e., a disability).[295] The inclusion of the "regarded as" option shifts the focus of the legal examination from the identity of the plaintiff to the perception, stereotypes, and fears behind the employer's employment decision. As the legislative history of the ADA illustrates, for Congress, these fears and stereotypes were sufficient—on their own—to impose employment liability.[296]

In addition, following courts' narrow interpretations of the "regarded as" requirement,[297] Congress amended the ADA via the ADA Amendment Act (ADAAA) of 2008 to broaden the scope of protection. The ADAAA states that "[a]n individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment."[298]

Here too, the language of the ADAAA stresses the motives behind employment decisions, barring employers from acting according to ableist assumptions. The rubric of "regarded as" or "perceived as" a person with a disability clarifies that the ADA's intention is to not only protect certain identities, but also to abolish certain ideologies from motivating work decisions and actions.[299]

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The strategy of moving beyond recognition within the framework of antidiscrimination law allows groups that are liminally recognized to situate themselves within existing antidiscrimination legislation without fully climbing the ladder of recognition. Accordingly, this strategy manages to avoid some of the perils of recognition discussed above. It partially prevents misrecognition*,* as some groups who are not fully recognized may still find a path to workplace equality and justice—if they can show that the bias against them is rooted in one of the ideologies antidiscrimination laws currently

294. ADA, 42 U.S.C. § 12101(1)(a) (2000).

295. *Id.* § 12102(1)(a), (c).

296. *See* Senn, *supra* note 34, at 835–38. For instance, the Committee on the Judiciary, discussing the Act, stressed that a person denied a job due to "the myths, fears and stereotypes associated with disabilities would be covered" regardless of that person's physical or mental condition. H.R. Rep. No. 101-485(111), at 30 (1990).

297. *See* Sutton v. United Airlines, Inc.*,* 527 U.S. 471, 482–83 (1999).

298. ADA, 42 U.S.C. § 12102(3)(a) (2012). The Act limits this, however, for perceived impairments that are "transitory and minor." *See id*. §12102(3)(b).

299. Notably, courts have interpreted "regarded as" quite narrowly. However, this analysis is meant only to demonstrate that a textual anti-essentialist reading of the ADA is possible.

address and that judges may recognize as ideologies that curb antidiscrimination law's egalitarian objective. It also avoids the challenge of recognition as identity construction, as plaintiffs are not required to define their identity to redress discrimination. Further, it manages to tackle the problem of contained political demands. Because this strategy focuses on the ideologies at the core of workplace hegemonies, it is well suited to challenging them. Moreover, allowing plaintiffs from liminally recognized groups to sue for discrimination—even before they have gone through the normalizing and regulatory process of climbing the ladder of recognition—would open up the possibility of truly diversifying workplaces.

This strategy is, however, still limited. It is ill-equipped to fully deal with the paradox of political power. While groups would not have to climb the ladder fully, they still would need to do the work of showing courts that bias against them is rooted in specific suspect ideologies. This in itself may require some form of epistemic recognition that a group exists, as seen in *Bostock*. In addition, this strategy does not address plaintiffs' attachment to injury, as legal redress is still contingent upon a victim narrative. Moreover, moving away from identity might prevent plaintiffs from arguing their cases through a disparate impact paradigm, which largely rests on the ability of courts to recognize the identities of harmed employees.[300] Finally, this strategy rests on courts' willingness to broadly interpret antidiscrimination law. Given all that we know, we cannot hold out much hope for it; courts hesitate to broaden the scope of employers' liability.

Nevertheless, the potential of "open-ended" antidiscrimination legislation may offer a path for liminally recognized groups seeking legal protection from bias. Perhaps no less important, it also offers a lesson for groups that *do* manage to climb the ladder and shape designated legislation targeting their specific conditions: when advocating for a designated law, groups should consider promoting a version that does not gatekeep other groups from finding room in its language.[301]

300. Notably, the path of disparate impact, while promising, is hardly ever used in reality. According to Berrey, Nelson, and Nielsen, "only 1% of cases today seek class action certification, 93% of claims are made by one plaintiff, and 93% of claims only involve an allegation of disparate treatment." BERREY, NELSON & NIELSEN, *supra* note 260, at 15.

301. *See, e.g.*, Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83 (2008). Pushing for legislation that leaves an open door for liminal groups may seem counterintuitive at first, as the nature of identity-based recognition often pushes groups to compete with others for protection and entitlements. However, as I show earlier in the Article, group protection from discrimination is not a zero-sum game. Allowing more individuals to bring claims of discrimination can actually distribute the burden of fighting for egalitarian workplace among more people. *See supra* Part II.A.3.

B. Moving beyond Antidiscrimination Law

Another path that would allow groups to move beyond recognition is advancing labor protections under which *all* workers can address discrimination against them in the workplace because of their specific vulnerabilities.[302]

Consider, for instance, arbitrary or biased dismissals. While workers who are members of protected classes can argue that such dismissal is wrong because it amounts to discrimination against them, we might want to consider labeling unjust dismissals as universally wrong.[303] Under this framework, when an employer fires *any* employee for a reason not rooted in a business necessity, it would be unlawful regardless of whether the employer's arbitrary reason was traditionally discriminatory.

Likewise, consider workplace harassment. Under Title VII, employers are prohibited from creating a work environment that is hostile to a worker because of race, sex, nationality, etc. But there are good reasons to prohibit any kind of hostile workplace environment, even one that affects workers who are not members of any recognized groups. Think of the example with which this Article opens: the supervisor at the fast-food chain who humiliates and bullies the three employees. While the framework of antidiscrimination law would help the first two employees, who might be able to show the behavior was motivated by forbidden discrimination, a universal, labor-based protection prohibiting humiliation or bullying of *all* workers would protect all three.

Some universal employment protections currently address harms such as workplace harassment or arbitrary dismissal. The tort of intentional infliction of emotional distress and the tort of termination against public policy, for instance, have been asserted by employees suing their employer for harassment or unjust dismissal, both in scenarios where the practice was clearly discriminatory and where it was not.[304] Likewise, some localities currently require just cause for termination decisions in some instances.[305]

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302. Paraphrasing Benjamin Sachs, I suggest using labor law *as* employment law. *See generally* Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685 (2007); *see also* Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163 (2007).

303. Katie Eyer, for instance, has suggested that just cause requirements could potentially operate as "extra-discrimination remedies." *See* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-discrimination Law*, 96 MINN. L. REV. 1275, 1341 (2011).

304. RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965); RESTATEMENT OF EMP'T LAW § 2.01(e) (AM. LAW INST. 2015).

305. New York courts have developed a doctrine that requires just cause for dismissing corporate directors. Campbell v. Loew's Inc., 36 Del. Ch. 563, 573 (1957). In addition, the state of Montana has a law that requires just cause in firing decisions. *See* the Montana Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 39-2-901 to -914 (1995).

Many collective bargaining agreements incorporate a just-cause clause that protects workers from being fired without cause.[306]

Unions and activists are currently fighting for broader employment protections. Recent efforts to expand just-cause requirements in New York City pushed the municipality to pass legislation that secured just-cause protection for fast-food workers.[307] This protection could be relevant to liminally recognized groups. Similarly, recent years have witnessed the rise of the anti-bullying movement, which promotes the incorporation of anti-bullying laws around the world.[308] In both instances, universalizing a ban on discriminatory behavior resulted in universal employment protections that may benefit liminally recognized groups.[309]

For liminal groups considering how to improve their status in workplaces, labor laws and workers' power are productive sites from which to push for more egalitarian workplaces. Mobilizing communities to invest their organizing power in strengthening union power (in addition to, or instead of recognition work) may prove fruitful for liminally recognized groups and, for that matter, all workers. While the structure of antidiscrimination law sends each community to fight independently,[310] labor movements could help build networks fighting together to improve workers'

306. Fischl, *supra* note 302, at 171. Dagan and Dorfman argued that the core value of private common law is constructing "frameworks of respectful interaction" between individuals. *See* Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1397 (2016). Under this formulation of private law, its commitment to constituting "just relationships" between individuals may provide a non-identitarian route from which to regulate workplace discrimination. *Id.* Dagan and Dorfman made this point explicitly. See, for instance, in regard to hiring decisions: "Under our account of private law, for the terms of the interaction between an employer and a would-be employee to count as relationally just, the responsibility in question must be borne, at least in part, by the employer." *Id.* at 1443. Accordingly, they argued, this responsibility "should ground a negligence duty to exercise reasonable care in making relevant employment decisions, rather than merely a duty to refrain from making intentionally discriminatory decisions." *Id*. They further stressed Title VII's limits in accommodating negligent discrimination. *Id.* at 1443 n.205.

307. Kimiko de Freytas-Tamura, *'No One Should Get Fired on a Whim': Fast Food Workers Win More Job Security*, N.Y. TIMES (Dec. 17, 2020), https://www.nytimes.com/2020/12/17/nyregion/nyc-fast-food-workers-job-security.html [https://perma.cc/A8MG-T685].

308. Yamada, *supra* note 9; Benita Whitcher, *Workplace Bullying Law: Is It Feasible?*, 31 INDUS. L.J. 43 (2010); Michael E. Chaplin, *Workplace Bullying: The Problem and the Cure*, 12 U. PA. J. BUS. L. 437 (2009).

309. Davidov and Mundlak, for instance, specifically explored the possibility of expanding antidiscrimination protections and accommodation allocation to all workers and the use of labor law doctrines for that purpose. Davidov & Mundlak, *supra* note 204; *see also* Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223 (2017) (arguing for the expansion of just cause dismissal to all workers).

310. Sachs, *supra* note 302, at 2728 ("The most significant of these is that law will function to galvanize one particular subgrouping of workers while excluding other groups."); *see also* FRASER & HONNETH, *supra* note 233, at 76. (stating that affirmative strategies which valorize group identity "mask the power of dominant fractions and reinforce cross-cutting axes of subordination"); HAIDER, *supra* note 94, at 24 (detailing Black Nationalist organizing in response to obstacles unaccounted for under Voting Rights Act and Civil Rights Act of 1964).

conditions.[311] Exploring the possibility of moving beyond recognition and antidiscrimination into the realm of universal labor protections thus has the potential to reshape workplaces, shifting the balance of power between employers and employees via broad, cross-cutting coalitions of power.[312]

Moving from antidiscrimination law to labor law (and, accordingly, from "identity politics" as an overarching paradigm to the paradigm of class solidarity)[313] has some disadvantages worth considering. First, for workers who need specific accommodations, a universal rule might not be sufficient.[314] In addition, turning to labor law as an alternative to antidiscrimination could risk losing the battle against harmful ideologies rooted in hierarchy, such as white supremacy, sexism, ableism, etc. Universal policies like anti-bullying might not be able to escape patterns of racialization and sexism.[315] As scholars have shown, courts tend to understand dignity—

311. *See generally* JULIUS G. GETMAN, RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT (2010); Benjamin I. Sachs, Essay, *Law, Organizing, and Status Quo Vulnerability*, 96 TEX. L. REV. 351, 351 (2017); Catherine L. Fisk & Diana Reddy, *Protection by Law, Repression by Law: Bringing Labor Back into the Study of Law and Social Movements*, 70 EMORY L.J. 63, 63 (2020).

312. For many scholars, the rise of antidiscrimination law as the key norm in the regulation of workplaces—along with the strengthening of individual employment rights—came at the expense of workers' collective power and has thus legitimated economic inequality. Nelson Lichtenstein argued that during the same time the United States was transformed by ideas of racial and gender justice, culminating in antidiscrimination legislation such as Title VII, "the rights of workers, as workers, and especially as workers acting in an autonomous, collective fashion, have moved well into the shadows." NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 3 (2003). James Brudney explained that the rise of individual employment rights encouraged workers to view themselves (mainly, if not only) as passive individuals dependent on the state and the courts for any improvement of their working conditions. James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 939–40 (1995); *see also* Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 319 (2005). Deborah Dinner recently argued that Title VII was historically used to promote businesses' interests in a labor market free from regulation. Deborah Dinner, *Beyond Best Practices: Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059, 1059–60 (2016). Given the neoliberal narratives that shaped Title VII's language and adjudication, "[e]mployment-discrimination law operates today as a means to perfect the market rather than to challenge its logic and operation." *Id*. at 1097.

313. Notably, these are not necessarily competing or mutually exclusive paradigms. *See* Combahee River Collective, *The Combahee River Collective Statement*, *in* HOME GIRLS 264 (Barbara Smith ed., 2000) (foundational text in Women of Color organizing urging cross-identity and class solidarity); *see also* HAIDER, *supra* note 94, at 12, 15–30 (detailing actions by Black Panther Party to build coalition and class solidarity across global political movements).

314. Recall my earlier distinction between types of accommodations. *See supra* note 204. However, as I also mention earlier, many scholars stress that despite some workers' need for special accommodation, a basic accommodation standard afforded to all workers, for instance, universal health insurance, could potentially help eradicate "the most significant barrier to employment for people with disabilities." *See* BAGENSTOS, *supra* note 204, at 53–54; *see also* Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights after* Shelby*) Symposium Issue: The Meaning of the Civil Rights Revolution: Essay*, 123 YALE L.J. 2838 (2013) [hereinafter Bagenstos, *Universalism and Civil Rights*]; Arnow-Richman, *supra* note 204.

315. Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 88 (2001) (detailing limitations of legal frameworks to address humiliation and gender, class, and racial bias); Clarke, *Beyond Equality*, supra note 201, at 1221–23 (setting out limitations of shift in workplace protection laws to universalize protections across identity).

as well as its negation and conversely humiliation—in gendered, racialized, and classist ways.[316]

The history of the labor movement itself has not been free of such ideologies. Unions have been historically tainted by racism, racial exclusion, and by the preservation of gender hierarchies, anti-immigration sentiment, etc.[317] Labor law likewise has not been free from them.[318] However, the history of unions is also a history of overcoming these barriers and advancing coalitions able to transcend them.[319]

Finally, to those who have tracked the decline of labor law in the past few decades, the idea of finding a broader solution to workplace discrimination in the realm of labor law rather in the realm of antidiscrimination law might sound naïve. If anything, for those who have lost faith in the possibility of pushing for more labor protections, antidiscrimination law has been a raft keeping them afloat.[320] But if antidiscrimination law is a raft, perhaps efforts to envision a more robust framework of labor protections and labor power are efforts dedicated to building a ship.[321]

For groups that do not enjoy full legal recognition, turning to labor law holds immense advantages. First and foremost, it would avoid most of the perils associated with recognition. Given that universal labor protections cover all workers, they manage to avoid the problems of misrecognition and recognition as identity construction: under the framework of just cause, for instance, workers do not have to prove they belong to any protected group, and the burden shifts to the employer to explain and justify their workplace practices. The paradigm of labor also avoids the paradox of political power: while antidiscrimination law requires that a group prove its weakness, under the paradigm of labor, strong coalitions of workers and unions do not delegitimize their own demands. Accordingly, workers who speak from a

316. The question of what humiliates someone is intimately linked to societal notions regarding hierarchy, sexual norms, class expectations, etc. *See* Fisk, *supra* note 315; Adler, *supra* note 249; Franke, *supra* note 194; Lihi Yona, *Coming Out of the Shadows: The Non-Western Critique of Dignity*, 27 COLUM. J. EUR. L. 34 (2021).

317. Benjamin Levin, *What's Wrong with Police Unions? Essay*, 120 COLUM. L. REV. 1333 (2020); Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767 (2001); Einat Albin, *Union Responsibility to Migrant Workers: A Global Justice Approach*, 34 OXFORD J. LEGAL STUD. 133 (2014).

318. Arianne Renan Barzilay, *Labor Regulation as Family Regulation: Decent Work and Decent Families*, 33 BERKELEY J. EMP. & LAB. L. 119 (2012).

319. Thomas J. Sugrue, *Power of Unlikely Coalitions Symposium: Activism and the Law: The Intersection of the Labor and Civil Rights Movements*, 2 U. PA. J. LAB. & EMP. L. 737 (1999); HAIDER, *supra* note 94. A recent article found that membership in a union lowered white workers' racial resentment, as well as increased their support of affirmative action plans for racial minorities. Paul Frymer & Jacob M. Grumbach, *Labor Unions and White Racial Politics*, 65 AM. J. POL. SCI. 225 (2021).

320. Sachs, *supra* note 300.

321. *See, e.g.*, *About*, CLEAN SLATE FOR WORKERS' POWER PROJECT, https://www.cleanslateworkerpower.org/about [https://perma.cc/C4WA-J3KA]. The Biden administration's recent actions in the field of labor law give some initial reasons for cautious hope.

position of (union) power can mostly avoid the attachment to injury associated with recognition.

Perhaps most importantly, the shift to a universal paradigm could overcome the problem of contained political demands: it may allow workers to reimagine the workplace and the power structures that shape it in ways that go beyond the gendering/racing of workplaces to other forms of exploitations and hierarchy.

Harnessing social movements' power to move toward union and worker power would carry one final, surprising political gain. To this point, this Article has discussed law's power to recognize identities, highlighting individuals' and communities' dependency on the law to recognize them. But law's recognition is a two-way street. The law is always recognizing and being recognized simultaneously. When political subjects turn to the law to recognize them as deserving of tailored and specific protections (being recognized as a "protected class" or as worthy of affirmative policies), their plea recognizes the authority of the law to allocate rights and entitlements. Put differently, they recognize the law as the body that has the authority to recognize.

Moving from social struggles centered on gaining legal recognition to struggles centered on strengthening unions would challenge law's monopoly on the distribution of power. Workers unionizing and collectively fighting for their working conditions can do so without recognizing the law as the sole entity charged with the allocation of power and rights. Of course, any collective action that occurs in the shadow of the law will inevitably be affected by it.[322] But the position is different vis-à-vis the law when the main driver of action is gaining power, not recognition, and when access to power is not contingent on legal language. In that respect, the move beyond recognition via the framework of labor would also be a move beyond political subjects' recognition of the law itself.

CONCLUSION

Liminally recognized groups remind us that identities, and specifically legally recognized identities, sometimes take a lot of work to constitute. This Article argued that recognition work, as well as its consequences, can distance us from fulfilling the ultimate goal of antidiscrimination law: creating equal and fair workplaces. In that sense, while working from identity can sometimes create radical and profound politics,[323] moving beyond

322. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). Indeed, even negotiations that operate outside the law's reach cannot really escape it and are dramatically bound by legal rules that govern the relationship between the sides of the negotiation table.

323. Combahee River Collective, *supra* note 313.

identities and beyond recognition has the potential to include everyone currently excluded from the egalitarian vision of antidiscrimination law.

This Article used the position of liminally recognized groups to highlight the inherently limited framework of recognition and to offer alternative paths. Various groups may adopt different strategies in different contexts. I would assume many groups would choose to advance both identitarian and non-identitarian tactics simultaneously.[324] Every path requires work, and each strategy comes with its own ladders. But liminally recognized groups (as well as members of recognized groups) ought to acknowledge the costs and benefits of both arguing from recognition and arguing outside it to make more knowledgeable decisions.

The perspective of liminally recognized individuals and groups further reminds us that rigid division of workers—minority/majority, privileged/underprivileged, vulnerable/strong—requires more caution. From this complexity, this Article argued, we may establish stronger networks of workers fighting together to end exploitation, humiliation, and discrimination for all.

324. Samuel Bagenstos, when discussing the differences between particular and universal civil rights, argued that "in any specific context—whether voting, higher education, employment, disability, or the interpretation of the Fourteenth Amendment—a mix of universalistic and particularistic approaches is likely to offer the most traction in addressing those problems." Bagenstos, *Universalism and Civil Rights*, *supra* note 314, at 2841.