

Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity

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I. INTRODUCTION

The workplace is a fulcrum of modern life: both economic survival and the character of our daily lives turn on access to work, and on its terms. Title VII of the Civil Rights Act of 1964¹ (“Title VII”) is a lever, designed to make work a force for equality and to reverse its historical role as a manufacturer of gender and race hierarchy. Congress, the courts, and commentators have long recognized that such a transformation cannot be imposed by law alone but instead requires the active cooperation of myriad individuals and institutions; thus, law should recognize, nurture, and protect such private initiative.

The importance of rank-and-file resistance to discrimination, and legal protection for it, was recently illustrated by the experience of David Childress and six other white men—officers in the traditionally white, male bastion of policing in Richmond²—who found themselves in a work environment inimical to Title VII’s vision.³ Their commanding officer invited them to share in his nostalgia for an all-white, all-male force, a nostalgia grounded in contempt for the women he called his

1. 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. V 1999).

2. See *infra* note 62.

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

“pussy posse,” including the African-American officer he labeled a “mother-fucking worthless black bitch.”⁴ Childress and the others, however, did the right thing: they rejected the call to close ranks as white men against race and gender interlopers. Instead, they joined their black and female coworkers to demand that their supervisor be disciplined for undermining the cross-race, cross-gender teamwork that they asserted was essential to safe and effective policing.⁵ When this vision for their workplace was rebuffed with harassment, threats of discharge, and adverse transfers, many of these officers sought relief under Title VII for “a hostile working environment in which the police officers were divided by gender and race.”⁶ But a federal court itself divided the plaintiffs by gender and race, allowing the women’s claims to go forward while dismissing the white, male officers’ suit on the ground that they faced merely a workplace “biased *in their favor*.”⁷

These events must be analyzed in the context of a growing understanding of how coworker behavior and shop- and office-level work culture act as agents of inequality,⁸ even as the battle against employment discrimination shifts from overt, top-down forms to equally pervasive but often subtle practices.⁹ At stake is not only

4. *Childress*, 907 F. Supp. at 938.

5. *Id.*

6. Brief for Appellants at 17, *Childress v. City of Richmond*, 120 F.3d 476 (4th Cir. 1997) (No. 96-1585).

7. *Childress*, 907 F. Supp. at 939 (emphasis in original).

8. See also JACQUELINE JONES, *AMERICAN WORK: FOUR CENTURIES OF BLACK AND WHITE LABOR* 14, 302, 310, 312, 349 (1998) (demonstrating historically how certain jobs and occupations have been coded as “white” or “black” and how white workers have enforced racial restrictions on black coworkers); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1832-39 (1990) [hereinafter Schultz, *Telling Stories*] (analyzing sexual harassment as a practice that enforces sex segregation at work by deterring entry into male-dominated job categories); see also *infra* note 9. See generally Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (arguing that sexual harassment should be understood as rooted in workplace cultures that fuse competence and gender) [hereinafter Schultz, *Reconceptualizing Sexual Harassment*]; Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998) (arguing that sexual harassment reflects male workers’ struggle to preserve and enforce masculine norms in the workplace).

9. See generally Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (criticizing the emphasis in employment discrimination doctrine on self-conscious bias and arguing for the importance of remedying unconsciously biased evaluations); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing the pervasiveness and variety of unconscious racism); Thomas F. Pettigrew & Joanne Martin, *Shaping the Organizational Context for Black American Inclusion*, 43 J. OF SOC. ISSUES 41 (1987) (analyzing the social psychological processes that disadvantage African-Americans at work, even in the absence of formal practices of exclusion); Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. LAB. & EMP. L. 639 (1998) (arguing that

categorical race- and sex-based exclusion and subordination—whether women and racial minorities will have access equal to white men’s—but also the race and gender terms on which *inclusion* is offered: what workers must do to be white or manly enough for the job.¹⁰ These two questions are intimately related. Workplace cultures intertwine being a good worker with being a good white or man, thereby both excluding nonwhites and women *and* enforcing particular expectations of how whites or men should behave.¹¹

Cases like *Childress* show that these stereotypes may address how employees interact across race and gender lines, and, in particular, may demand cross-race or cross-sex interactions that are themselves exclusionary or subordinating in character. Such race- and sex-specific norms affect not only relations among coworkers but all aspects of workers’ lives on and off the job. On the job, workers deal daily with customers, clients, prisoners, patients, and tenants; and both coworkers and employers know and care about how workers relate to others as parents, neighbors, spouses, and citizens.¹²

The law should encourage and protect workers who reject discriminatory relationships and who instead adopt Title VII’s vision of workplace equality and its catalytic role in eroding other forms of discrimination. The officers in *Childress* felt that their interests aligned them with women and African-American coworkers, aligned in a commitment to teamwork and mutual support despite their supervisors’ invitation to affirm their whiteness and masculinity by driving women and minorities

employment discrimination law needs to adapt to the shift in workplace organization from centralized hierarchy to flexible, decentralized work teams).

10. Abrams, *supra* note 8, at 1209 (discussing “forms of harassment . . . concerned not with resisting women directly but with asserting the primacy of male prerogatives or norms in the workplace”); see also Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 394-95 (arguing that employer grooming standards both exclude black women and lock white women into stereotypical images of white femininity); Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar Baby-LatCrit Theory and the Sticky Mess of Race*, 10 LA RAZA L.J. 499, 552 (1998) (“The project of black liberation is left incomplete if employers are prevented from refusing to hire or promote African-Americans but are free to force them to look and act as ‘white’ as possible.”); Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997) (arguing that sexual harassment is a means by which men express and impose gender-specific norms of sexuality); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Latest Reconstruction*, 100 YALE L.J. 1329, 1375 (1991) (analyzing discrimination based on accent as a practice that enforces conformity to idealized white speech patterns); Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1774-77 (analyzing harassment of men by men as enforcing work-related expectations of masculinity).

11. See Caldwell, *supra* note 10, at 394-95; Phil Cohen, *Laboring Under Whiteness*, in *DISPLACING WHITENESS: ESSAYS IN SOCIAL AND CULTURAL CRITICISM* 244 (Ruth Frankenberg ed., 1995); Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1755.

12. See Karen L. Proudford, *Notes on the Intra-Group Origins of Inter-Group Conflict in Organizations: Black-White Relations as an Exemplar*, 1 U. PA. J. LAB. & EMP. L. 615, 616 (1998) (discussing interconnection between workplace roles and other aspects of employees’ lives).

out of the police force.¹³ If Title VII cannot forbid that invitation and defend the officers who spurned it, then antidiscrimination law misses an opportunity to promote the spontaneous, rank-and-file embrace of Title VII values. Without such protection, employees can be expected to take the path of least resistance and acquiesce in discriminatory workplaces, indeed to develop an investment in them.

More disheartening still is the suggestion that *as a matter of antidiscrimination law itself* men and women, whites and blacks, are inevitably locked in antagonistic relationships in which discrimination against blacks and women necessarily advantages whites and men. This is not the message the courts should be sending to American workers. On such a reading, Title VII cannot seek either to overcome the practices and institutions that offer advantage through discrimination or to promote and protect alternative visions of race and gender relations. Instead, antidiscrimination law resigns itself to managing inevitable intergroup conflict while symbolically endorsing its rationality (for some). Title VII would be no more than a prayer for a fragile truce, not an engine of race and gender peace.

This Article argues that Title VII jurisprudence should aspire to a richer vision of equality by protecting and promoting intergroup relationships against the grain of power. Although the various *Childress* courts ranged from uncomprehending at best to hostile at worst, other courts have laid the foundation for understanding, and vindicating, the claims of the *Childress* plaintiffs and others like them. Nonetheless, even proplaintiff decisions rarely have been grounded in a coherent theory of Title VII discrimination, generating weak opinions easily distinguishable or rejected by courts seeking contrary outcomes.¹⁴

In particular, courts have failed to conceptualize how men's gender and whites' race could be implicated in interactions with members of other groups. Instead, they have turned to expansive standing rules, antiretaliation protections, special doctrines of interracial association, or vague protections against "discriminatory environments." Each approach seeks to ground plaintiffs' claims in someone *else's* race and/or gender.¹⁵

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

14. Cf. Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2481 (1994) (criticizing a similar pattern among cases brought by "complex female subjects" characterized either by "intersectionality" of race and gender or ambivalence about categorization).

15. Commentators have uniformly followed this lead, disagreeing about whether and how to provide Title VII protection but always assuming that the plaintiff's own race and/or sex was not at issue. See Robert J. Aalberts & Lorne H. Seidman, *Should Prudential Standing Requirements Be Applied in Transferred Impact Sexual Harassment Cases? An Analysis of Childress v. City of Richmond*, 26 PEPP. L. REV. 261, 265-81 (1999); Mary-Alice Brady, *White Males Have Standing to Bring Hostile Environment Claims for Discrimination Directed Towards Black and Female Coworkers: Childress v. City of Richmond*, 39 B.C. L. REV. 423, 423-32 (1998); Joseph C. Feldman, *Standing and Delivering on Title VII's Promises: White Employees' Ability to Sue Employers for Discrimination Against Nonwhites*, 25 N.Y.U. REV.

This pattern reflects first a tendency not to see behaviors associated with being white or male as racially or sexually specific in character, the oft-discussed process by which white women are rendered simply “women,” black men simply “black,” and white men simply “human.”¹⁶ Secondly, the focus on discrimination against a third party neglects how race and gender operate through processes of social *interaction*, and instead casts race and gender as static attributes of individuals.¹⁷ Finally, the elision of plaintiffs’ sex or race reflects difficulty conceptualizing how relations within a single racial or sexual group may themselves have a racial or gendered character (for instance, how men can have different relationships to masculinity).¹⁸

L. & SOC. CHANGE 569, 580-602 (1999); David B. Hawley, “*Standing*” *Up for Minority Coworkers? White Males Do Not Have “Aggrieved Person” Standing for Hostile Environment Actions Under Childress v. City of Richmond*, 77 N.C. L. REV. 865 (1999); Laura M. Jordan, *The Empathetic, White Male: An Aggrieved Person Under Title VII?*, 55 WASH. U. J. URB. & CONTEMP. L. 135 (1999); Christopher M. O’Connor, *Stop Harassing Her or We’ll Both Sue: Bystander Injury Sexual Harassment*, 50 CASE W. RES. L. REV. 501, 526-30 (1999); Judith Resnik, *The Rights of Remedies: Collective Accountings for and Insuring Against the Harms of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW (Catharine A. MacKinnon & Reva Siegel eds., forthcoming); N. Morrison Torrey, *Indirect Discrimination Under Title VII: Expanding Male Standing to Sue for Injuries Received as a Result of Employer Discrimination Against Females*, 64 WASH. L. REV. 365, 378 (1989); Recent Cases, *Childress v. City of Richmond*, 112 HARV. L. REV. 725, 730 (1999).

16. See Abrams, *supra* note 14, at 2491-92 (noting that although *all* subjects are “complex,” socially privileged aspects of identity often are not seen as producing any specificity); Matsuda, *supra* note 10, at 1375 (noting the racial and class specificity of supposedly “American” accents); Proudford, *supra* note 12, at 634. See generally Combahee River Collective, *A Black Feminist Statement*, in ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE, (Gloria T. Hull et al. eds., 1982); Kimberle Crenshaw, *Whose Story Is It Anyway?: Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY, 402 (Toni Morrison ed., 1992); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

17. See Candace West & Sarah Fenstermaker, *Doing Difference*, 9 GENDER & SOC’Y 8, 25 (1995) (“Conceiving of race and gender as ongoing accomplishments means we must locate their emergence in social situations, rather than within the individual or some vaguely defined set of role expectations.”); Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC’Y 125, 126 (1987) (“Rather than as a property of individuals, we conceive of gender as an emergent feature of social situations: both as an outcome of and a rationale for various social arrangements and as a means of legitimating one of the most fundamental divisions of society.”).

18. See *Free to Be Me*, in RACE TRAITOR I (Noel Ignatiev & John Garvey eds., 1996) (recounting harassment of white teenagers by white classmates for “acting black”); Abrams, *supra* note 14, at 2506-07 (discussing intrablack discrimination); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PENN. L. REV. 1, 95 (1995) (“Title VII should be understood to encompass sex discrimination suits by men against men when the plaintiffs have resisted participation or indoctrination in

To develop a sound approach to cases like *Childress*, the Article proceeds as follows. In Part II, I discuss how discrimination is mediated by innumerable, and often subtle, acts of cooperation among coworkers. This *intragroup* solidarity among workers who dominate the workplace may be enforced through sanctions against members who break ranks to engage in *intergroup* solidarity. Although Title VII always has been interpreted to encourage private initiative that prevents discrimination, courts' narrow conception of discrimination has stymied Title VII protection for voluntary intergroup solidarity. What I call a "zero-sum game" model posits workplace competition between distinct, opposing groups, rendering nonsensical any simultaneous discrimination against members of more than one "opposed" group: if there is discrimination against women then there can be no discrimination against men.

Despite this conceptual roadblock, some courts have sympathized with plaintiffs aiming to advance intergroup solidarity; the Title VII theories they developed are the subject of Part III. One approach grants plaintiffs standing to sue for injuries caused by discrimination against a third party. Another method broadly construes Title VII's antiretaliation provisions to protect employees who refuse to discriminate. Finally, a long but narrow line of decisions construes sanctions for an employee's interracial association as discrimination based on that employee's race. Each approach shares a hesitation to conceptualize hostility to intergroup solidarity as simultaneously (a) based on the race or sex of the employee sanctioned *and* (b) integrally related to practices of discrimination against another group.

Part IV responds directly to the challenge from *Childress* by interpreting sanctions for intergroup solidarity as discriminatory enforcement of race or sex stereotypes. Drawing on precedents prohibiting discrimination against subsets of race or sex groups, I reconceptualize the theory of protected intergroup association as simply a special case of the prohibition on race and gender stereotyping. Stereotypes may include expectations that members of one race or sex group will engage in particular forms of intergroup behavior. Modes of interaction across group lines are part of what it means to be a man or to be white. When the mandated intergroup interaction is discriminatory, intragroup enforcement of such stereotypes enhances rather than contradicts discrimination against another race or sex group.

Of course, that sanctions for intergroup solidarity *may* constitute actionable discrimination is an entirely separate matter from establishing discrimination in any particular case. Part V explores the proof of race- or sex-based causation in intergroup relations, as well as the special evidentiary and conceptual challenges in identifying when actions directed against third parties, particularly members of other groups, contribute to a racially or sexually discriminatory work environment.

II. INTERGROUP SOLIDARITY AND THE DYNAMICS OF DISCRIMINATION

Title VII's central mission is to dismantle race- and sex-based barriers to full

compulsory masculinity."); Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1774 ("[T]he most prevalent form of harassment experienced by men may be harassment directed at them by their male coworkers or supervisors in an attempt to force conformity to the dominant group's image of suitable masculinity for particular jobs.").

participation in the American workplace. These barriers are erected and sustained not only by formal policies of discrimination but by countless and cumulative acts of individual discretion. Just as discrimination may arise out of or be bolstered by ordinary workers' day-to-day behavior, so too must antidiscrimination efforts tap into ordinary workers' efforts to construct a fair workplace. It makes all the difference whether an employee is welcomed into informal networks of learning and mutual support or frozen out to languish in a hostile environment. Title VII should protect workers in dominant workplace groups who resist discrimination and strive to foster an atmosphere in which loyalty to their employers and coworkers doesn't mean excluding or marginalizing others; such workers not only vindicate the statute's substantive goals but also implement its policy favoring voluntary, private efforts to prevent and remedy discrimination.

Attempts to claim this protection, however, have foundered on courts' conceptualization of both the race and gender dynamics *within* dominant groups and those at work when a common cause is made *across* race and gender lines. Standing in the way is what I label the "zero-sum game" model of race and gender relations, in which internally cohesive groups compete against one another for workplace spoils. This view leaves no place for *intergroup* cooperation that sparks *intragroup* conflict.

A. *The Interdependence of Out-Group Exclusion and In-Group Cohesion*

Between the two extremes of bureaucratically entrenched policies of discrimination¹⁹ and discriminatory application of personal workplace power²⁰ lies a vast terrain of discriminatory practices woven into the social relations of work. Whether women and racial minorities experience discrimination often depends on whether the discriminatory tendencies of a few supervisors or coworkers are amplified or counteracted by other members of the workplace. But if coworkers themselves face sanctions for rejecting discriminatory practices, then their commitment and ability to prevent such discrimination will be seriously taxed. Unprotected by the law, David Childress and others like him may think twice before again reaching across race and gender lines in the spirit of equality.

1. Coworker Cooperation in the Course of Discrimination

Intragroup relations frequently form the basis of *intergroup* discrimination. In any number of cases, employees have complained that their supervisors directed them to engage in or assist in discriminatory acts. In *Bermudez v. TRC Holdings, Inc.*,²¹ for instance, an account executive at an employee placement agency rewarded a white

19. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-33, 436 (1971) (hiring/promotion into favored job categories relied on racially discriminatory educational requirements and tests); *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 191-92 (1991) (company policy of excluding women of child-bearing age from certain jobs).

20. See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 60-61, 66-67 (1986) (manager's campaign of harassment conducted primarily against one employee and largely out of public view).

21. 138 F.3d 1176 (7th Cir. 1998).

worker with flowers and candy for placing only white applicants with his clients.²² Employees may also be punished for *not* discriminating, such as the harassment Pamela Chandler, a white manager, encountered when her restaurant's owners began thwarting her attempts to hire and promote African-Americans.²³

In addition to discrete employment decisions and explicit advocacy of discrimination, studies of workplace dynamics have uncovered far more subtle ways in which exclusionary practices are embedded in workers' everyday relationships. Rosabeth Moss Kanter's classic *Men and Women of the Corporation*²⁴ details how the informal sociability among male managers marks women as outsiders, closes them off from important information and decisionmaking, and deprives them of informal acts of workplace solidarity crucial to job success:

They missed out on important informal training by peers. There were instances in which women trainees did not get direct criticism in time to improve their performance and did not know they were the subjects of criticism in the company until told to find jobs in other divisions. They were not part of the buddy network that uncovered such information quickly, and their managers were reluctant to criticize a woman out of uncertainty about how she would receive the information.²⁵

22. *Id.* at 1180. In *Scott v. Marsh*, No. Civ.A.3:89-3059, 1994 WL 797678, at *1 (D.S.C. Apr. 15, 1994), *aff'd mem.* 43 F.3d 1468 (4th Cir. 1994), a white, Grace Scott, was asked to be an office informer on the activities of her black coworkers, and in *Lyman v. Nabil's*, 903 F. Supp. 1443, 1445 (D. Kan. 1995), a restaurant owner required a male manager to implement discriminatory transfers of women employees. See also *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1180-81 (7th Cir. 1982) (black male employee sanctioned for refusing to participate in scheme of discrimination against white women); *Spillman v. Carter*, 918 F. Supp. 336, 339 (D. Kan. 1996) (white employee sanctioned for refusing to participate in racially discriminatory hiring).

23. *Chandler v. Fast Lane, Inc.*, 868 F. Supp. 1138, 1143 (E.D. Ark. 1994); see also *EEOC v. St. Anne's Hosp. of Chicago, Inc.*, 664 F.2d 128, 130 (7th Cir. 1981) (white woman fired after hiring African-American).

24. ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977).

25. *Id.* at 227; see also C.J. Chivers, *For Black Officers, Diversity Has Its Limits*, N.Y. TIMES, Apr. 2, 2001, at A1 (detailing the failure of the New York City Police Department to recruit and promote black men). Similar dynamics are also critical in blue-collar jobs in which relevant skills are attained largely through on-the-job training. See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1751; Kristen R. Yount, *Ladies, Flirts, and Tomboys: Strategies for Managing Sexual Harassment in an Underground Coal Mine*, 19 J. CONTEMP. ETHNOGRAPHY 396, 405, 410 (1991). Moreover, the camaraderie and mutual commitment holding together such networks may be essential to worker safety when the willingness of coworkers to put themselves at risk is critical to avoiding and defusing workplace hazards. See *Rose Melendez: Police Officer*, in *HARD-HATTED WOMEN: STORIES OF STRUGGLE AND SUCCESS IN THE TRADES* 71, 78 (Molly Martin ed., 1988) [hereinafter *HARD-HATTED WOMEN*]; Charles Vaught & David L. Smith, *Incorporation and Mechanical Solidarity in an Underground Coal Mine*, 7 SOC. OF WORK & OCCUPATIONS 159, 160-61 (1980); Yount, *supra* at 405. Indeed, one of the *Childress* plaintiffs' primary complaints was that the fracturing of workplace

Because reliance on such informal networks is structured into the workplace and its job expectations, there is no clear distinction between failing to provide assistance to coworkers and actively undermining their ability to work successfully.

Far more overt forms of exclusion are also mediated by the social relations of work. Structuring workplace conversations around topics designed to exclude or humiliate outsiders may both directly communicate unwelcomeness and erect a barrier to the social integration important to job success.²⁶ Kanter observes that in the presence of “token” women, male managers exaggerated their use of sexual innuendo, storytelling premised on male protagonists, and portrayals of women as objects of sexual attention incompatible with active professional roles;²⁷ “by raising the issue and forcing the woman to choose not to participate, the men in the group created an occasion for uniting against the outsider and asserting dominant group solidarity.”²⁸ Even more aggressive forms of harassment include group taunting, shunning,²⁹ work sabotage, or physical attacks.³⁰

The collective character of these practices is often critical to their discriminatory effects. A worker requiring training, honest criticism, or an opportunity to test new skills may not need it from all her coworkers but from only a small fraction of them. Only when coworkers systematically fail to provide such support will work competence be undermined.³¹ A similar dynamic attends the recurrent problem of white men’s refusal to accept the workplace authority of women or people of color. Although isolated defiance is problematic enough, the stakes in disciplining an individual worker are much different than in overcoming a collective work stoppage.³²

solidarity would lead to officers hesitating to provide backup in the dangerous situations routine to police work. Brief for Appellants at 13, *Childress v. City of Richmond*, 907 F. Supp. 934 (E.D. Va. 1995) (No. 96-1585).

26. See Abrams, *supra* note 8, at 1197 (describing how workplace practices that are not “explicitly combative” nonetheless render “women perpetually off balance, unclear about whether they will be regarded as serious workers and uncertain what ‘rules of the game’ apply to them in a particular setting”).

27. See KANTER, *supra* note 24, at 222-24; see also Nancy DiTomaso, *Sexuality in the Workplace: Discrimination and Harassment* in *THE SEXUALITY OF ORGANIZATION* 71, 80-81 (Jeff Hearn et al. eds., 1989) (noting how men’s workplace displays of sexuality around women were more exaggerated than outside the workplace).

28. KANTER, *supra* note 24, at 224.

29. See *Rose Melendez: Police Officer*, in *HARD-HATTED WOMEN*, *supra* note 25, at 73 (“None of the men would talk to me. That was the worst.”).

30. See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1752-53.

31. Of course, there may also be situations in which individual workers hold a monopoly over a relevant resource and may individually impose such harms.

32. See JONES, *supra* note 8, at 302, 346. Moreover, when such resistance is uniform, it is much more likely that the problem will appear to lie with the *supervisor’s* ability to wield authority than with the subordinates’ refusal to accept it. Thus, women and minorities in such positions may be forced to adopt supervisory styles that appear inappropriately weak, excessively harsh, or just plain ineffective. See *EMPLOYMENT AND TRAINING ADMIN., U.S. DEP’T OF LABOR, WOMEN IN TRADITIONALLY MALE JOBS: THE EXPERIENCES OF TEN PUBLIC UTILITY COMPANIES*, 62-66 (R & D Monograph 1978); see also Abrams, *supra* note 8, at 1219

Even when threats to work competence originate with isolated individuals, their worst consequences may be avoided if coworkers intervene to stop physical attacks or verbal ridicule, to warn targets of harassment about particular threats, or to complain to supervisors about discriminatory behavior. Thus, even the “aberrant” behavior of individuals may be facilitated by widespread passive acquiescence.

The symbolic dimensions of exclusionary activity are especially reliant on collective behavior. Harassment, including subtle forms of social exclusion, may have the effect of posting a “men only” or “whites only” sign in the workplace.³³ But the impact of this message is a function of workplace uniformity. A world of difference separates a workplace in which one worker obviously objects to your presence while nine others welcome you and a workplace in which all turn their backs and leave when you enter the room.

These, then, were the stakes in *Childress*. Would Lieutenant Carroll’s racism and sexism define the workplace environment or would he stick out as a reviled aberration, vulnerable to his subordinates’ united front?

2. Cooperation and Coercion

Some workers may willingly, even eagerly, participate or acquiesce in discriminatory practices founded on intragroup workplace cooperation.³⁴ Nonetheless, many others, all other things being equal, would reject participation in discriminatory practices and act affirmatively to disrupt them, given the increasingly widespread

(describing how men “are masculinized by exerting control over whether and when women act as self-determining agents”); Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1722; *cf.* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (sex discrimination case turning on evaluations of a woman’s managerial style as excessively harsh and aggressive).

33. *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1498 (M.D. Fla. 1991) (stating that a “men only” sign in workplace contributed to hostile environment); Proudford, *supra* note 12, at 631 (comparing subtle exclusionary dynamics to a door marked “Whites Only”) (quoting Naomi Wolf, *The Racism of Well-Meaning White People*, GLAMOUR, Aug. 1985, at 230).

34. Incumbent workers may (a) stand to benefit economically from reducing competition for their jobs, *see* BARBARA F. RESKIN & PATRICIA A. ROOS, JOB QUEUES, GENDER QUEUES: EXPLAINING WOMEN’S INROADS INTO MALE OCCUPATIONS 310 (1991); Assar Lindbeck & Dennis J. Snower, *Cooperation, Harassment, and Involuntary Unemployment*, 78 AM. ECON. REV. 167, 167-69 (1988); (b) prize a work identity integrated with other forms of group membership that would be undermined by inclusion, *see* Cohen, *supra* note 11, at 248; Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8; (c) believe inclusion incompatible with the proper social role of another racial and/or sexual group, *see* NANCY FOLBRE, WHO PAYS FOR THE KIDS?: GENDER AND THE STRUCTURES OF CONSTRAINT 6 (1994); JONES, *supra* note 8, at 318; or (d) they simply perform the discriminatory activity on other grounds and be indifferent or oblivious to its adverse impacts on others. Courts and commentators have also emphasized the possibility for discriminatory treatment to occur through unselfconscious bias in evaluations and other employment decisions. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) (acknowledging problem of “subconscious stereotypes and prejudices”); Lawrence, *supra* note 9; Krieger, *supra* note 9.

moral opposition to discrimination even among groups that have historically benefitted from it,³⁵ the principled and economic interests in fair workplaces,³⁶ and a simple decency towards mistreated individuals. Less dramatic, but still important, are ordinary workplace interactions across race and sex lines that tend to neutralize the subtle discrimination perpetrated by isolation. All these actions that undermine discrimination may be understood as intergroup solidarity, from initiating grievances over discrimination, chastising coworkers for racist or sexist remarks, supporting a colleague subjected to discrimination, recognizing the value of a professional contribution, offering honest criticism, accepting another's exercise of workplace authority, or avoiding patronizing "protection" from risky but rewarding tasks, to forming social ties across group boundaries.

But all other things are not equal; instead, workers' solidaristic acts may run the risk of provoking the same gamut of sanctions that impose intergroup discrimination itself. As Childress and his coworkers discovered, the actions employees should take as a matter of course in a nondiscriminatory world can themselves be met with firings, lost promotions, adverse performance evaluations, reduced responsibilities, threats, insults, isolation, and so on.³⁷ Similarly, *inaction* may provoke reprisals, as when violation of an "expectation that a man will accept and participate in jokes and comments about women [leads to] questioning his masculinity by calling him a 'pussy' or a 'fag.'"³⁸

When a group asserts its control over social territory like a workplace, it should be

35. See, e.g., ALAN WOLFE, *ONE NATION, AFTER ALL* (1998). Abstract opposition to discrimination, however, may be coupled with skepticism that discrimination is a significant phenomenon. See James R. Kluegel, "If There Isn't a Problem, You Don't Need a Solution," 28 AM. BEHAV. SCI. 761, 775-79 (1985) (discussing interaction between white explanations of African-American disadvantage and support for affirmative action); Krieger, *supra* note 9, at 1186-1217 (distinguishing between discrimination originating in motivational desire to inflict disadvantage and cognitive bias in evaluation).

36. See PAULA ENGLAND, *COMPARABLE WORTH: THEORIES AND EVIDENCE* 56-68 (1992) (reviewing neoclassical theories of employment discrimination that predict that nondiscriminating employers have a competitive advantage over discriminators); Samuel Bowles, *The Production Process in a Competitive Economy: Walrasian, Neo-Hobbesian, and Marxian Models*, 75 AM. ECON. REV. 16, 20, 28 (1985) (employees have an interest in overcoming divisions in order to counter employer surveillance); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 1022-34 (1996) (arguing that because diversity makes workplaces more productive and race and gender discrimination signal other workplace failures, economic productivity aligns with norms of fairness and democracy in favoring vigorous antidiscrimination practices).

37. See also Kingsley Clarke, *Running the Ball in Crown Point*, in RACE TRAITOR 39 (Noel Ignatiev & John Garvey eds., 1996) (describing backlash against white high school football player who quit team in protest of coach's racist remark); Selwyn Raab, *Whistle-Blowing Marshal Tells of Long Harassment*, N.Y. TIMES, Oct. 5, 1997, at 39 (describing harassment of white U.S. Marshal who spoke out against white coworkers' racism).

38. Louise F. Fitzgerald et al., *But Was It Really Sexual Harassment: Legal, Behavioral, and Psychological Definitions of the Workplace Victimization of Women*, in SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 5, 24 (William O'Donohue ed., 1997).

no surprise to see coercion brought to bear both on outsiders seeking entry *and* on putative insiders who would open the borders.³⁹ In one case we have interlopers and invaders, in the other traitors and deserters. The situations are by no means symmetrical (an insider may have a luxury of choice unavailable to the outsider), but they remain fundamentally connected. David Childress could have avoided serious harassment by remaining silent, but once he and his black and female coworkers spoke out together, they found themselves in the same boat.

3. Beyond the Coworker Relationship

Inter- and intragroup relations in the workplace may enforce and maintain inequality with respect to more than just employment. This is so because workplaces are not solely places of work. Employees interact with customers, clients, patients, and many others. As a result, workplaces may be sites not only for employment discrimination but for discrimination in housing, health care, education, delivery of government services, and so on. Employees are thus in a position to engage in forms of intergroup solidarity that undermine or prevent a variety of types of

39. A framework of simple insiders and outsiders is oversimplified, of course, and multiple forms of identity may be in play simultaneously. Membership in one group, for instance, may raise doubts as to a person's loyalty to another, triggering more stringent scrutiny. Women entering male-dominated occupations have often been subjected to such loyalty tests, including ones in which they face intense pressure to establish solidarity on other grounds such as race or to disclaim allegiance to other women. See KANTER, *supra* note 24, at 227-29; Vicki Smith: *Sprinkler Fitter*, in HARD-HATTED WOMEN, *supra* note 25, at 143. A simple insider/outsider model is also inadequate because relations across group lines may implicate not stark exclusion but other aspects of inequality. Employment discrimination against women and people of color, after all, has been as much about segregation into dangerous, subordinate, and/or servile work as refusal of employment altogether. See JONES, *supra* note 8 (describing historical shifts in what have been considered "white" and "black" jobs); RESKIN & ROOS, *supra* note 34, at 3-21 (describing occupational segregation by sex and race). The two, of course, are closely related because exclusion from higher status and more attractive jobs has the effect of "crowding" victims of discrimination into worse jobs and, moreover, further worsening those jobs by reducing workers' bargaining power through threat of exit for better work. See, e.g., HEIDI I. HARTMANN & BARBARA F. RESKIN, WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB 9-17 (1986). Discriminatory workplace practices thus may include exercises in subordination, trivialization, petty control, or humiliation across occupational categories between which there is little question of worker mobility. See JONES, *supra* note 8, at 328-29, 336 (describing niche of "black" jobs organized around catering to the needs of wealthy whites and beliefs that black men were particularly well-suited to hot, dirty work); Peggy Crull, *Searching for the Causes of Sexual Harassment: An Examination of Two Prototypes*, in HIDDEN ASPECTS OF WOMEN'S WORK 225, 235 (Christine Bose et al. eds., 1987) (discussing harassment of women in traditionally female jobs); Nancy DiTomaso, *Sexuality in the Workplace: Discrimination and Harassment*, in THE SEXUALITY OF ORGANIZATION 71, 82 (Jeff Hearn et al. eds., 1989) (describing a boss who "wanted to look at a younger woman" so his "spirits could be lifted"); Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1767-68 (discussing harassment of women in traditionally female jobs).

discrimination.⁴⁰ Such assertions of solidarity, even when they involve nonworkers or persons with a different employer, may nonetheless subject an employee to workplace sanctions brought on by, for instance, reporting fellow police officers' discriminatory use of force,⁴¹ serving customers or clients shunned by fellow workers, or objecting to discriminatory processing of housing applications.

Furthermore, workplace sanctions may be prompted by actions taken *outside* the scope of employment. Employees do not relate to one another solely on the basis of their lives at work; leisure activities, family relationships and history, religious and community involvements, neighborhood controversies, and so on all form the basis of workplace conversations, friendships, and suspicions that profoundly influence interactions as workers.⁴² Coworkers may care intensely about such extraworkplace behaviors and respond to them in ways that determine success or failure, acceptance or exclusion, at work. David DeMatteis, for instance, was a white worker at a Kodak plant in Rochester who was hounded from his job for selling his home in an all-white neighborhood to an African-American family.⁴³ Some men have faced harassment at work for taking on domestic responsibilities that coworkers expected to be assumed by wives,⁴⁴ and workers have been fired or otherwise sanctioned for interracial friendships and marriages.⁴⁵

B. Combating Discrimination Through Voluntary Action

40. See, e.g., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991) (criticizing absence of prohibition on sex discrimination in consumer contracting); Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993) (criticizing absence of legal remedies for harassment of women in public spaces).

41. See David Barstow & Kevin Flynn, *Officer Who Broke the Code of Silence Defies Labels*, N.Y. TIMES, May 15, 1999, at B1; Michael Cooper, *New Plan to Protect Police Whistle-Blowers*, N.Y. TIMES, Nov. 26, 1998, at B4; see also Proudford, *supra* note 12, at 616.

42. See KANTER, *supra* note 24, at 48-59 (describing importance of social similarity to workplace trust).

43. See *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306 (2d Cir. 1975).

44. See Jennifer L. Berdahl et al., *The Sexual Harassment of Men?*, 20 PSYCH. OF WOMEN Q. 527, 540 (1996); see also Tamar Lewin, *Father Awarded \$375,000 in a Parental Leave Case*, N.Y. TIMES, Feb. 3, 1999, at A9 (describing a supervisor who refused male employee family leave on the grounds that "unless your wife is in a coma or dead, you can't be the primary care provider").

45. See *infra* notes 221-26. The actions that provoke such workplace penalties may not directly implicate legal questions of discrimination but touch upon racial and/or gender relations that contribute to broad patterns of inequality. Cf. *supra* note 42. Moreover, inequality seemingly "outside" work may contribute to employment inequality but remain beyond the reach of legal regimes focused on employer/employee relations. See, e.g., WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS* 37-42, 117-18 (1996) (arguing that discrimination in housing, lending, and education reduces employment opportunities in minority communities); Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 GEO. L.J. 89 (1993) (arguing that gender inequality in the division of domestic responsibility limits women's access to employment); see also Lewin, *supra* note 44.

“Although Title VII seeks ‘to make persons whole for injuries suffered on account of unlawful employment discrimination,’ its ‘primary objective,’ like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.”⁴⁶ Rank-and-file employees are frequently in a position to fulfill this preventive purpose through the gamut of workplace solidarity. Such initiative can discourage tangible adverse employment actions and counter harassment before it becomes severe or pervasive.⁴⁷

1. Antidiscrimination from the Bottom Up

How can such voluntary action be encouraged? In one approach, employers have implemented training programs and managerial techniques designed to attack the “subjective and interpersonal elements” that elude even the most aggressive institutional efforts at preventing discrimination and that pervade smaller or less committed enterprises.⁴⁸ Whatever their promise, such “sensitivity” programs face criticism for costliness and time-consumption, as well as the ham-handedness that can come with “formal, overt attempts to alleviate prejudice that is, by its very nature, informal and covert.”⁴⁹

An important complement to such top-down approaches is the removal of barriers within organizations that discourage employees already inclined toward positive change. Indeed, the stories in reported cases and research on discrimination in organizations suggest that there are many American workers who, even under current conditions, are willing to risk their jobs to do the right thing. At the very least, we should develop legal strategies that protect such workers and that affirm the place of small acts of everyday decency or outright courage in the broader national struggle for racial and gender equality. More ambitiously and optimistically, such public affirmation and legal protection might itself spur the kinds of intergroup solidarity, great and small, that are indispensable to a robust culture of equality but are deterred by well-placed fear of reprisal.⁵⁰ On this view, organizational change is not just a

46. *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)) (citations omitted). Preventive action is a worthy goal given the sunk costs of even successful litigation, courts’ limited remedial capacities, hesitation by potential plaintiffs to resort to litigation, see Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS: J. OF WOM. IN CULTURE & SOC. 421 (1986), cost barriers to litigating meritorious suits with modest damages, and deep difficulties of proof.

47. *Cf. Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998) (reasoning that appropriate employer liability standards “could encourage employees to report harassing conduct before it becomes severe or pervasive” and thereby “serve Title VII’s deterrent purpose”).

48. See Pettigrew & Martin, *supra* note 9, at 45-46.

49. *Id.* at 70; see also Proudford, *supra* note 12, at 616, 634 n.56 (discussing employee dissatisfaction with diversity training).

50. See *Abolish the White Race*, in RACE TRAITOR 12 (Noel Ignatiev & John Garvey eds., 1996).

It is our faith . . . that the majority of so-called whites in this country are neither

question of enlightened employers educating their recalcitrant workers but one of promoting and protecting ordinary workers' sense of fairness.⁵¹

2. The Place of Private Antidiscrimination Efforts in Title VII Doctrine

Title VII's preventative aspirations have always guided its interpretation, and the courts have consistently construed the statute so as to promote and protect private initiative that serves its broad remedial purposes. Indeed, the House of Representatives' report accompanying the 1964 Civil Rights Act, in a passage the Supreme Court has found particularly significant, sets out the goal that "[f]ederal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination."⁵² Title VII can be deployed to stimulate "voluntary, private . . . efforts to abolish traditional patterns of racial segregation and hierarchy"⁵³ either as a sword or as a shield.⁵⁴ The shield currently limits the liability of defendant employers who implement bona fide

deeply nor consciously committed to white supremacy; like most human beings in most times and places, they would do the right thing if it were convenient . . . [M]ost go along with a system that disturbs them, because the consequences of challenging it are terrifying.

Id. See also Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1434-39 (1993) (discussing how the symbolic congressional endorsement of collective bargaining stimulated labor activism).

51. None of this is an argument *against* employer-initiated programs, only a call that the same voluntary spirit also be nurtured in the grassroots initiative of employees. To the extent this can be done by removing existing disincentives, some of the drawbacks of bureaucratic, formal interventions in the microdynamics of work may be avoided, especially when managerial commitment to organizational change is lacking. Although protections for intergroup solidarity complement organizational efforts at its active promotion, both still share the fundamental limitation of any focus on microlevel interaction: the inability to attack how organizational structure itself leads to problematic intergroup relations. See KANTER, *supra* note 24, at 208-42 (analyzing experiences of token women); Pettigrew & Martin, *supra* note 9, at 70; see also Sturm, *supra* note 9, at 646-50 (describing informal decisionmaking and decentralized work teams as workplace structures that generate discrimination). Although highly structural analyses like Kanter's provide a clear exposition of how numerical imbalance between groups may set in motion organizational dynamics harmful to "tokens" or "out-groups," they can rarely provide a full explanation either of why particular characteristics form the basis for group differentiation or of the particular forms the intergroup dynamics take. For this reason, it would be a mistake to draw the completely pessimistic conclusion that microrelations are entirely driven by numerical distribution or that interventions in microrelations can never induce structural change.

52. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 204 (1979) (quoting H.R. REP. NO. 88-914, pt. 1, at 18 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2393) (emphasis in original).

53. *Id.*

54. See *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 642 (1987) (Stevens, J., concurring).

affirmative action and employee harassment policies,⁵⁵ while the sword already imposes liability under a broad reading of the statute's antiretaliation provisions⁵⁶ and when objects of harassment take preventive or corrective steps to no avail.⁵⁷

From the perspective of employees considering solidaristic acts, or reconsidering them after warnings or reprisals from coworkers, the broader availability of Title VII's sword could shield them from the negative consequences of such solidarity, whether through actual recourse to the courts or through employers' protection of threatened workers in order to avoid liability.⁵⁸ Offering such protection to workers reflects "basic policies of encouraging forethought by employers and saving action by objecting employees,"⁵⁹ not only in the narrow context of post hoc objections to accomplished acts of employment discrimination but in those broader circumstances where "the value of voluntary efforts to further the antidiscrimination purposes of Title VII"⁶⁰ includes "resolution of other forms of discrimination."⁶¹

C. Doctrinal Barriers to a Title VII Claim: Childress and the Zero-Sum Game

From this policy perspective, *Childress* looks like an easy case. In *Childress*, Lt. Arthur Carroll, a white, male supervisor in a traditionally and still-segregated occupation,⁶² began a campaign of harassment against women police officers, especially the lone African-American.⁶³ In addition to harassing the women officers

55. See *Burlington Indus. v. Ellerth*, 542 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Weber*, 443 U.S. 193; *Johnson*, 480 U.S. 616.

56. See *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1138 (5th Cir. Unit A Sept. 1981) (grounding interpretation of retaliation provisions in "'Title VII's central purpose, the elimination of employment discrimination by informal means'" (quoting *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980))).

57. *Burlington Indus.*, 524 U.S. at 765; *Faragher*, 524 U.S. at 806-07.

58. See *Sturm*, *supra* note 9, at 654-55 (discussing preventive sexual harassment policies as an example of interplay between standards of liability and changes in management practices).

59. *Burlington Indus.*, 524 U.S. at 745.

60. *Johnson*, 480 U.S. at 650.

61. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 204 (1979) (quoting H.R. REP. NO. 88-914, pt. 1, at 18 (1963)) (emphasis omitted).

62. See, e.g., *Talbert v. City of Richmond*, 648 F.2d 925, 929-30 (4th Cir. 1981) (describing consent decree settling previous race discrimination charges against the Richmond police department); *Mary Anne C. Case*, *Disaggregating Gender from Sex and Sexual Orientation*, 105 YALE L.J. 1, 85-94 (1995) (discussing historical exclusion of women from policing). Although the record is not clear, it appears that the police unit at issue contained at least sixteen officers and no more than three women. *Childress v. City of Richmond*, 907 F. Supp. 934, 938 (E.D. Va. 1995) (noting supervisor's reference to three women officers as "all my bitches" and that sixteen officers complained about Carroll), *claims dismissed* by 919 F. Supp. 216 (E.D. Va. 1996), *vacated and remanded* by 120 F.3d 476 (4th Cir. 1997) (panel opinion), *panel opinion vacated and judgment below aff'd en banc* by 134 F.3d 1205 (4th Cir. 1998) (per curiam).

63. *Childress*, 907 F. Supp. at 937.

in their presence,⁶⁴ in their absence Carroll expressed racial and gender solidarity with white, male officers, solidarity premised on contempt for and exclusion of white and black women. By making known to white, male officers his racially and sexually hostile attitude towards the worthiness of a black, female coworker and openly cherishing an all-white, all-male roll call as “like it used to be,”⁶⁵ Carroll’s remarks were not simply designed to drive out the women; they also offered to the white men, *as* white men, an affirmation of their race and gender-based claim to workplace dominance. Rather than joining Carroll in the harassing behavior or passively tolerating it, the men joined the women officers in complaining to Carroll’s supervisor about the workplace environment, specifically defending their ideal of cross-race, cross-sex teamwork against the divisiveness Carroll fostered.⁶⁶ In response, they were harassed, threatened, and adversely transferred and evaluated.⁶⁷ When Childress and other officers sought relief under Title VII, however, the men’s claims of discrimination were dismissed on a Rule 12(b)(6) motion for failure to state a claim,⁶⁸ though the same allegations were deemed sufficient for two women’s gender discrimination claims to survive both dismissal and summary judgment.⁶⁹

Judge Williams’s reasoning in support of dismissal and the subsequent reasoning of both the appellate panel and en banc Fourth Circuit each illustrate the conceptual barriers to understanding how a single set of employment practices could discriminate against members of different racial and sexual groups, especially against persons of the same race or sex as those perpetrating the discrimination. From this perspective, race and sex are fixed characteristics of individuals that define membership in stable race and sex categories grounded in identifiable, immutable features of the body. Moreover, these fixed characteristics have a digital quality that places persons in clearly defined groups: one is either a man or a woman, white, black, Asian, or some other racial class. Whatever differences there may be among, for instance, men, they are not differences related to the basis of group membership itself; with regard to sex, they are all simply men.

A corresponding view of race and gender *discrimination* is expressed by the core rationale for dismissing Childress’s claims, namely that Carroll’s discrimination against women and African-Americans⁷⁰ necessarily left the men alleging that Carroll was “biased in their favor.”⁷¹ To reach this conclusion of gender favoritism from the

64. *Id.* at 938 (recounting Carroll’s comments to three women that “[w]ell, I see all my bitches are here, it must not be that time of the month” and references to female officers as his “pussy posse” and “vaginal vigilantes”).

65. *Id.*

66. *Id.*

67. *Id.*

68. FED. R. CIV. P. 12(b)(6).

69. *Childress*, 907 F. Supp. at 940. The race discrimination claims of two white, female officers were also dismissed. *Id.* No claims were brought by any nonwhite officers. *Id.*

70. The court agreed that a claim for discrimination against the two women *had* been stated. *Id.* at 939-40.

71. *Id.* at 939. Judge Williams repeatedly referred to discrimination against women and African-Americans interchangeably with “special treatment,” *id.* at 939, “better treatment,” *id.* at 940, and “favoritism,” *Childress*, 919 F. Supp. at 219, for men and whites. Indeed, the court

premise of gender discrimination against particular women, several analytical steps are necessary, each relying on the model of sex and race outlined above.

First, discrimination against particular women implies a bias against women in general. If discrimination focuses on the characteristic of gender, and gender is the same thing for all women (indeed that sameness defines the group “women”), then women are interchangeable for the purposes of sex discrimination and there is no reason that one would discriminate (based on sex) against one but not against others.

Second, discrimination against one group is always effectively discrimination in favor of another,⁷² since members of one group lack the disadvantage associated with membership in the other and thus are comparatively advantaged. Discrimination, then, locks women and men into a zero-sum oppositional relationship in which sex discrimination against women as a group implies sex favoritism towards men as a group, whether as a goal or as a necessary side effect.⁷³ In order to identify discrimination then, one searches for this comparative disadvantage: “The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”⁷⁴

Finally, the relationship between men as a social group and any individual man is, like that between particular women and women as a group, one of simple substitution: what favors men favors any individual man because of his sex. Therefore, gender discrimination against the female officers implies discrimination against women, which implies favoritism towards men, which in turn implies favoritism towards the male officers.⁷⁵

found the claims so “spurious” that even the employer’s retaliation against the employees for filing charges with the EEOC, an action normally cloaked in “absolute privilege,” would not support a cause of action. *Id.* at 218-19.

72. As Clark Freshman has pointed out, a two-group model of discrimination may be applicable even when—from one perspective—there are multiple groups present. See Clark Freshman, *Whatever Happened to “Anti-Semitism”?: How Social Science Theories Identify Discrimination and Promote Coalitions Between “Different” Minorities*, 85 CORNELL L. REV. 313 (2000) [hereinafter Freshman, *Whatever Happened to “Anti-Semitism”?*]. Thus, if whites act on the basis of a white/nonwhite divide, there may be effectively two groups for the purposes of understanding those whites’ discrimination even if Latinos, African-Americans, Asian-Americans, and Native Americans all face discrimination. *Id.*

73. See also Recent Cases, *supra* note 15, at 730 (criticizing the *Childress* courts for “conceiv[ing] of race and gender relations as a zero-sum game in which a loss to one is a gain to another”).

74. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 25 (1993)). But cf. *infra* text accompanying notes 277-80.

75. Similar reasoning underlies the court’s other ground for dismissing the male officers’ sex discrimination claims: “Title VII addresses only discrimination between the sexes,” a conclusion based on the reasoning that same-sex interactions cannot amount to “discrimination ‘because of’ the plaintiff’s gender.” *Childress*, 907 F. Supp. at 939. As Judge Williams understood it, Title VII aims to protect “a class which is defined against, and protected with respect to, the alleged discriminator.” *Id.* The Supreme Court has since rejected this view. See *Oncale*, 523 U.S. 75 (rejecting the argument that same-sex harassment can never be actionable discrimination).

From this zero-sum game perspective, an employment practice cannot simultaneously discriminate against men and women or whites and blacks; accordingly, once it is clear that a practice *does* discriminate against one race or sex group, it follows that the practice *cannot* ground a claim of discrimination against a non-overlapping race or sex group.⁷⁶ Indeed, such a claim requires a perverse role reversal, presenting oneself as discrimination's victim when in fact one is, as Judge Williams objected, its beneficiary.

The *Childress* court's conceptual framework could nonetheless accommodate injury to the white, male officers *in spite of* their race and sex, precluding only discrimination *because of* their race and sex. Whatever their interest as white men, it remained plausible that interests unrelated to race or sex meant that, on balance, the *Childress* plaintiffs were injured in the course of the discrimination against women and African-American officers. Although they were not discriminated against, perhaps they suffered some other actionable injury. Like others before them, the *Childress* courts explored the possibilities for redress through theories of third-party standing to challenge discrimination against others and of retaliation for opposing discrimination against others. It is to these and related theories that I now turn.

III. CONVENTIONAL THEORIES OF TITLE VII PROTECTION FOR INTERGROUP SOLIDARITY

Courts sympathetic to plaintiffs like the Richmond officers have allowed plaintiffs' claims to go forward under Title VII theories of third-party standing, retaliation, and discrimination based on interracial association. The doctrines suffer from sometimes serious strains in reasoning and unintended consequences, and these weaknesses have not only led other courts to restrict their reach, but have also provided a weak foundation for more vigorous protection of intergroup solidarity. In each case the limitations stem from failure to break cleanly with the zero-sum reasoning on display in *Childress* and to recognize that an integral component of race and sex stereotypes may be the behavior expected towards other groups.

76. Analogous reasoning is often found in opinions grappling with the figure of the "equal opportunity harasser." Some courts have suggested that if both a man and a woman have experienced workplace harassment, then *neither* of them could have been harassed because of their sex. *See, e.g.,* Brennan v. Metro. Opera Ass'n, 192 F.3d 310, 318 (2d Cir. 1999) ("[A]n environment which is equally harsh for both men and women . . . does not constitute a hostile working environment under the civil rights statutes."); Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263, 270-71 (5th Cir. 1998); Pasqua v. Metro. Life Ins. Co., 101 F.3d 514, 517 (7th Cir. 1996). Other courts, however, have rejected this argument and allowed women's harassment claims to go forward, notwithstanding the fact that male coworkers (none of whom were coplaintiffs) had also been harassed. *See* Smith v. First Union Nat'l Bank, 202 F.3d 234, 242 (4th Cir. 2000); McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir. 1996); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994); *see also* Brown v. Henderson, 257 F.3d 246, 252-55 (2d Cir. 2001) (discussing and rejecting the proposition that "there could be no discrimination 'because of sex' where both a woman . . . and a man . . . were harassed," but ruling against plaintiff on other grounds).

A. Third-Party Standing

Broad rules of standing allow whites and men to bring suit even when the zero-sum model assumes they could not have personally suffered race or sex discrimination. This approach directly confronts the complaint that such plaintiffs would recover “for violations of other people’s civil rights”⁷⁷ and embraces it.⁷⁸ Although appealing in some respects, broad standing yields an uneasy fit with the protection of workers engaged in intergroup solidarity. It very broadly grants a right of action to anyone injured by discrimination against others, regardless of whether remedying his or her injury furthers Title VII’s specific statutory purposes. On the other hand, the standing approach narrowly requires the plaintiff to prove employment discrimination against a third party, excluding workers injured in the course of *preventing* discrimination or because of solidarity with nonemployees.

Title VII imposes on employers the duty not to discriminate in the “terms, conditions, or privileges” of an individual’s employment because of that person’s race or sex.⁷⁹ The question of “standing” concerns which persons are entitled to enforce that duty through litigation.⁸⁰ Ordinarily, only the person to whom a legal duty is owed—here, the employee discriminated against—may sue on its breach, not persons “whose only injuries derive from the violation of others’ rights.”⁸¹ This principle, known as a “prudential” limitation on standing, is a presumption of statutory interpretation; Congress may freely override it,⁸² subject only to the less stringent constitutional constraints on the jurisdiction of the federal courts.⁸³ The “case or controversy” requirement of Article III limits access to the federal courts to plaintiffs who can show that they have suffered a concrete injury or “injury in fact,” that this injury was caused by the violation of a statutory duty, and that the injury will be redressed by the remedy sought.⁸⁴

77. *Childress*, 907 F. Supp. at 940.

78. See also Brady, *supra* note 15; Torrey, *supra* note 15.

79. 42 U.S.C. 2000e-2(a)(1) (1994 & Supp. V 1999).

80. See *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 244 (1988).

81. *Fair Employment Council of Greater Wa. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1278 (D.C. Cir. 1994); accord *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979); *Warth*, 422 U.S. at 499.

82. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Warth*, 422 U.S. at 501 (“Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.”); *Fair Employment Council*, 28 F.3d at 1278.

83. *Havens*, 455 U.S. at 372; *Warth*, 422 U.S. at 501; *Fair Employment Council*, 28 F.3d at 1278.

84. See *Havens*, 455 U.S. at 372; *Gladstone*, 441 U.S. at 99-100; *Fair Employment Council*, 28 F.3d at 1278; Fletcher, *supra* note 80, at 239-240. These prudential and constitutional limits on invoking the federal judicial power ensure that the parties are truly adverse and that the courts do not get drawn into purely speculative disputes or into rehashing legislative policy decisions. See *Warth*, 422 U.S. at 498; Fletcher, *supra* note 80, at 222.

If the prudential limitations apply to Title VII, then a person like Childress may not sue under Title VII's antidiscrimination sections unless his employer discriminated against him based on his race or sex. If, however, Congress intended to grant standing to anyone meeting the lesser Article III requirements, then failure to allege discrimination against oneself does not preclude a valid claim; instead, it is enough to allege injury caused by discrimination against someone else.⁸⁵ The question of whether the statute permits third-party claims to go forward arises only *after* concluding that the plaintiff does not have first-party standing as one claiming discrimination because of her or his own race or sex.⁸⁶

The *Childress* plaintiffs argued that Carroll's behavior disrupted teamwork on the police force, with the consequence that plaintiffs were endangered by their inability to rely on their coworkers for back-up when faced with dangerous situations.⁸⁷ Judge Williams concluded that such claims were illegitimate "attempt[s] to recover for violations of other people's civil rights, which they have no standing to do."⁸⁸ On appeal, plaintiffs expressly claimed that "*they* were subjected by defendants to a sexually . . . and to a racially hostile work environment" that violated "*their* civil rights under Title VII."⁸⁹ The Equal Employment Opportunity Commission ("EEOC") as *amicus curiae*, however, framed the case as turning on standing, not discrimination *against* the officers. As the EEOC saw it, plaintiffs claimed that the Title VII *violation* consisted of the discriminatory racial and sexual harassment of their coworkers, while plaintiffs' *injury* from an unsafe working environment gave them standing to bring suit.⁹⁰ The appellate panel adopted the EEOC's analysis:

The problem is standing. Even if we assume . . . that the City has discriminated against its black and female officers in the "terms, conditions, privileges" of *their* employment, we need to determine whether the plaintiffs are "persons aggrieved" and, if so, whether they have suffered an injury that would entitle them to bring this action.⁹¹

85. As the Supreme Court explained in the context of Title VIII housing discrimination, "[t]he central issue at this stage of the proceedings is not who possesses the legal rights protected . . . but whether respondents were genuinely injured by conduct that violates *someone's* . . . rights, and thus are entitled to seek redress of that harm." *Gladstone*, 441 U.S. at 103 n.9 (emphasis in original).

86. See *Fair Employment Council*, 28 F.3d at 1277.

87. *Childress v. City of Richmond*, 907 F. Supp. 934, 938 (E.D. Va. 1995), *claims dismissed* by 919 F. Supp. 216 (E.D. Va. 1996), *vacated and remanded* by 120 F.3d 476 (4th Cir. 1997) (panel opinion), *panel opinion vacated and judgment below aff'd en banc* by 134 F.3d 1205 (4th Cir. 1998) (per curiam); see also Brief for Appellants at 18, *Childress* (No. 96-1585).

88. *Childress*, 907 F. Supp. at 940.

89. Brief for Appellants at 1, *Childress* (No. 96-1585) (emphasis added).

90. Brief of *Amicus Curiae* EEOC at 2, 9, *Childress* (No. 96-1585). The EEOC took no position on plaintiffs' claim that the hostility of the environment to themselves constituted a Title VII violation. See *id.* at 2 & n.1.

91. *Childress*, 120 F.3d at 480 (emphasis in original).

For the panel, the question was not whether plaintiffs' Title VII rights had been violated but whether Title VII allows suits by persons alleging a loss of teamwork due to discrimination against coworkers.

The threshold issue thus became whether Congress's use of the phrase "person claiming to be aggrieved"⁹² granted standing to any person meeting Article III requirements or instead incorporated the more stringent "prudential" bar on third-party claims.⁹³ Relying on a line of cases in which white plaintiffs have been given standing to challenge discrimination directed against people of color, the panel adopted the former interpretation and remanded for the district court to determine whether the loss of teamwork for the white male officers met the Article III injury requirements.⁹⁴ The full Fourth Circuit subsequently vacated the panel opinion, and the en banc court, though evenly divided as to the outcome, continued to frame the issue as whether "the complaining officers . . . have standing under Title VII to bring an action for discrimination directed at others."⁹⁵

For my purposes, the important part of the *Childress* appeal is not the deadlock within the Fourth Circuit over how to interpret "persons aggrieved." Instead, it is the agreement, shared with the EEOC, that the injuries plaintiffs alleged could not

92. 42 U.S.C. § 2000e-(5)(f)(1) (1994 & Supp. V 1999).

93. The appellate opinions in *Childress* assumed a rather stark choice between the prudential and Article III standards. Indeed, the Supreme Court's decisions on third-party standing in housing discrimination actions have also relied on just this dichotomy by contrasting prudential standing limited to first parties with third-party standing as broad as Article III permits. See *Havens Realty Co. v. Coleman*, 455 U.S. 363, 372, 375-76 (1982); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99-100 (1979); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972). Congress, however, could grant standing to a class broader than so-called first parties but narrower than simply any injured third party regardless of the nature of the injury. "Essentially, the standing question in such [prudential] cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Congress can thus grant standing selectively among those "positions" involving constitutionally sufficient injury. In the context of judicial review of administrative decisions, for instance, the Court has adopted prudential principles granting standing to persons within the "zone of interests" of the statute at issue. See generally *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 394-400 (1987) (discussing the zone of interests test); *Fletcher*, *supra* note 80, at 255-64. In such circumstances the injury suffered by the plaintiff does not itself constitute the alleged statutory violation (usually the claim is that a regulation or administrative determination is inconsistent with the authorizing statute) and thus is not a true "first-party" plaintiff; yet the "zone of interests" test allows suit by such "third-party" plaintiffs when protection of their injured interests is related to the regulatory purposes of the statute in question. *Clarke*, 479 U.S. at 399. The "zone of interests" concept, however, does not appear in the Court's decisions on standing to sue for violations of individual rights.

94. *Childress*, 120 F.3d at 480-81 & n.8.

95. *Childress*, 134 F.3d 1205, 1207 (4th Cir. 1998) (en banc) (per curiam). A concurrence rejected the white male plaintiffs' claims as "assert[ing] only the rights of third-parties to be free from race- or sex-based discrimination in the workplace." *Id.* at 1209 (Luttig, J., concurring).

themselves constitute Title VII violations but were strictly collateral effects of discrimination against others.⁹⁶ Neither opinion even considered whether the alleged injury might itself have been based on plaintiffs' race or sex.⁹⁷

More generally, the standing cases are shaped by a tension between lowering the standing threshold and tying the injury to the discriminatory harms made actionable by Congress. A court granting a plaintiff standing can move in either of two directions: toward expanding the range of injuries that may support standing by moving from the prudential bar on third-party claims to the broad Article III standard, or toward construing the alleged injury as discrimination itself. Courts considering allegations of injury from practices that discriminate against members of groups other than plaintiff's own—generally whites bringing claims based on race discrimination against minorities and men bringing claims based on sex discrimination against women—have increasingly tied the plaintiff's alleged injury to the harms of discrimination. While this approach has narrowed the class of injuries that support standing, it has also pushed courts closer to considering how plaintiffs' own race or sex may be implicated in discrimination against others.

1. *Trafficante* and the Ambivalence Between Statutory Interests and Third-Party Standing

The standing approach originates in *Trafficante v. Metropolitan Life Insurance Co.*,⁹⁸ in which one black and one white tenant of a housing complex brought suit against its owner for a practice of discriminating against black rental applicants.⁹⁹ Plaintiffs claimed that they lost the benefits of living in an interracial community, lost business opportunities from the absence of minority tenants, and were stigmatized for residence in a "white ghetto."¹⁰⁰ The Supreme Court found that Congress intended a

96. Commentators on *Childress* and other standing cases have uniformly shared this view. See, e.g., Recent Cases, *supra* note 15, at 729 ("[T]he plaintiffs were not claiming they themselves were discriminated against . . ."); Torrey, *supra* note 15, at 397 ("The guilty employer in a discriminatory work environment case does not discriminate against white plaintiffs directly—the focus of discrimination is against minorities."); see also *supra* note 16.

97. Judge Luttig's concurrence claimed, for instance, that "[t]he white male plaintiffs have not alleged that they were discriminated against because of *their* race or sex," *Childress*, 134 F.3d at 1207 n.2 (emphasis added), because the fact that Carroll's remarks were made to the white men both in and out of the black and female officers' presence precluded the plaintiffs having been "singled out because of their race or sex." *Id.* Like Judge Williams, Judge Luttig appears to have assumed that a discriminatory employment practice must single out one or another race or sex group and cannot discriminate against members of more than one group simultaneously. See *supra* Part II.C. In its opinion, the panel also assumed that no Title VII violation inhered in the conditions of *plaintiffs'* employment, as is apparent by its conclusion that same-sex harassment cases were irrelevant to *Childress*. See *Childress*, 120 F.3d at 480 n.4.

98. 409 U.S. 205 (1972).

99. *Id.* at 205.

100. *Id.* at 208. Notably, the black and white tenants claimed the *same* injuries, that is, the black tenant did not claim to have been discriminated against in the rental of his or her own

right of action for any person who suffered injury in fact from prohibited discrimination, that is, “to define standing as broadly as is permitted by Article III.”¹⁰¹ The Court concluded that the requisite “injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations.”¹⁰²

Later courts have emphasized *Trafficante*’s discussion of interracial associations, supported by legislative history showing that Congress believed housing discrimination harmed both those excluded and those within the exclusive community.¹⁰³ This focus on the particular injury in question is puzzling because Article III standing requires only a certain *magnitude* of injury and causal connection to the substantive violation,¹⁰⁴ and thus whether Congress was specifically concerned with injury from loss of interracial association should not have been analytically important once the Article III standard was adopted.¹⁰⁵ By moving to a standing formulation, the Court gave a cause of action to “all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute.”¹⁰⁶ Nonetheless, the Court intimated that it was especially concerned with a form of *racial* injury, namely the deprivation of interracial associations.¹⁰⁷ The turn to Article III standing, however, avoided the need to articulate that injury as *discrimination*.

2. The Haphazard Development of a Right to a Nondiscriminatory Work Environment

Courts drawing on *Trafficante* for Title VII purposes have reflected this ambivalence between broad Article III standing and standing based on a specific interest in interracial associations. Courts of appeals have consistently relied on *Trafficante* to confer standing on white plaintiffs raising race discrimination claims based on actions against nonwhite employees, but their decisions show an important evolution in the theories of injury in fact.

In *Waters v. Heublein*,¹⁰⁸ a white woman claimed she had suffered sex

apartment.

101. *Id.* at 209 (quoting *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d. Cir. 1971)). *Hackett* had already offered the same interpretation of Title VII.

102. *Id.* at 209-10.

103. *Id.* at 210-11.

104. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 79-80 (1978); *Fletcher*, *supra* note 80, at 230-31, 258-60 (describing and criticizing established doctrine that “injury in fact” is a purely factual question independent of the substantive content of the statute in question). Also, the interracial association argument only addresses the white tenant’s claims, not the black tenant’s injury from denial of *intra*racial association.

105. *Cf. Fair Employment Council v. BMC Mktg. Corp.*, 28 F.3d 1268 (D.C. Cir. 1994) (holding that advocacy organization has standing under Article III to challenge discrimination discovered by “testers”).

106. *Trafficante*, 409 U.S. at 212.

107. *Id.* at 210.

108. 547 F.2d 466 (9th Cir. 1976).

discrimination in pay and promotions and that black employees had suffered similar race discrimination.¹⁰⁹ The court discussed *Trafficante* at length, concluding that its arguments for an Article III standing standard applied to Title VII and that “interpersonal contacts—between members of the same or different races—are no less a part of the work environment than of the home environment.”¹¹⁰ The court, however, implicitly extended the theory of injury in fact beyond loss of interracial association because the discriminatory practices the plaintiff alleged did not affect the racial (or sexual) *composition* of the workplace, only the distribution of pay and authority within it.¹¹¹

Cases following *Waters*, however, drew on the developing law of workplace harassment to fill this gap in the theory of how white workers could be injured by discrimination against African-Americans. Tentatively in *EEOC v. Bailey Co.*¹¹² and robustly in *EEOC v. Mississippi College*,¹¹³ courts reasoned that all persons, regardless of race, had a right to “work in an environment unaffected by racial discrimination.”¹¹⁴ *Bailey* and *Mississippi College* both relied on the Fifth Circuit’s seminal hostile-environment decision in *Rogers v. EEOC*¹¹⁵ to buttress plaintiffs’ claims to a cognizable injury in fact under *Trafficante*’s rule of broad Article III standing, but the courts did not construe these environments as themselves creating actionable discrimination against the white plaintiffs.

A further shift from third-party standing toward injuries that violate the statute itself came in *Clayton v. White Hall School District*.¹¹⁶ In *Clayton*, a white school employee moved out of the catchment area for schoolchildren, but the school allowed

109. *Id.* at 467.

110. *Id.* at 469.

111. Similarly, in *Stewart v. Hannon*, 675 F.2d 846 (7th Cir. 1982), a white assistant principal sued to enjoin use of a screening test that had a disparate impact on African-Americans in the selection of principals after she had been denied an appointment based on the same test. The Seventh Circuit relied on *Trafficante* both for its application of the Article III standard and for its identification of the relevant injury as harm to interracial association. *Id.* at 850; *see also* *EEOC v. T.I.M.E.-D.C. Freight, Inc.*, 659 F.2d 690 (5th Cir. 1981) (granting standing to white employees injured by discriminatory seniority system). Although the obvious injury in fact, clearly traceable to the racially discriminatory practice, was the direct harm to plaintiff’s employment prospects from use of the test in question, the court again turned to the “loss of important benefits from interracial associations,” *Stewart*, 675 F.2d at 849, even though it acknowledged *Stewart* had failed to allege such injury and even though the possibility that the discriminatory test had affected *Stewart*’s work environment was highly speculative. *Id.* at 850.

112. 563 F.2d 439 (6th Cir. 1977).

113. 626 F.2d 477 (5th Cir. 1980).

114. *Id.* at 483; *see also* *Bailey*, 563 F.2d at 454 (“[T]he EEOC has interpreted Title VII to confer upon every employee the right to a working environment free from unlawful employment discrimination.”); Recent Cases, *supra* note 15, at 730; Torrey, *supra* note 15, at 378; Note, *Work Environment Injury Under Title VII*, 82 YALE L.J. 1695 (1973); Resnick, *supra* note 15.

115. 454 F.2d 234 (5th Cir. 1971).

116. 875 F.2d 676 (8th Cir. 1989).

her child to continue to attend the school.¹¹⁷ When a black employee outside the area attempted to enroll his child in the school as well, the school began to enforce its residency requirement against both children.¹¹⁸ The white employee sued the school, alleging that it had discriminated against the black employee in the granting of a privilege of employment and that this discrimination had created a racially discriminatory environment.¹¹⁹ The Eighth Circuit first found that Clayton had third-party standing to sue because she appropriately alleged “an injury in fact,” identified as deprivation of a “work environment free of racial discrimination.”¹²⁰ The court ignored the obvious direct injury—the racially motivated denial of the privilege of enrolling one’s child in the school—in favor of a theory of injury from “the lost benefits of associating with persons of other racial groups.”¹²¹ The interracial association theory was particularly tenuous here because the practice in question affected neither the racial composition of the workforce nor any employee’s workplace duties.

The *Clayton* court’s analysis of the claim’s merits further elided the distinction between a third-party standing claim (based on injury in fact from an environment infected with employment discrimination against others) and a substantive “first-party” Title VII right of all employees, including whites, to an environment “free of racial discrimination.”¹²² Although Clayton had standing, the court found that her claim failed on its merits because the single change in enrollment policy could not have established an environment sufficiently offensive to violate Title VII.¹²³ If, however, the discriminatory environment had merely established *standing* to challenge the discriminatory decision to refuse the black employee a tangible privilege of employment (allowing nonresident enrollment of employees’ children), then the *merits* of the Title VII claim should have turned on whether the school had discriminated against her black coworker, not on the hostility of the environment to the *plaintiff*.

3. The Retreat from Third-Party Standing in the Context of Sex Discrimination

The emphasis on specific concern for interracial association over Article III standing based on any “distinct and palpable injury”¹²⁴ has led to dramatically curtailed standing in some cases alleging sex rather than race discrimination.¹²⁵

117. The school had a policy allowing such exceptions for children of teaching and administrative personnel, though Clayton, a cafeteria manager, was technically not covered. *Id.* at 678.

118. *Id.*

119. *Id.*

120. *Id.* at 680.

121. *Id.* at 679.

122. *Id.* at 680.

123. *Id.*

124. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

125. Indeed, the *Waters*, *Bailey*, and *Mississippi College* courts all expressly reserved judgment as to whether their reasoning extended beyond race discrimination suits. *EEOC v. Miss. College*, 626 F.2d 477, 483 n.8 (5th Cir.1980); *EEOC v. Bailey Co.*, 563 F.2d 439, 454

Although in *Waters* the Ninth Circuit had pioneered the extension of *Trafficante*'s standing rationale to Title VII, the same court sharply limited the theory in two cases considering "comparable worth" challenges to the pay scale in female-dominated job categories.

In *Spaulding v. University of Washington*¹²⁶ members of the University of Washington nursing faculty, including one man, charged that the university discriminated against them in pay because the faculty was predominantly female.¹²⁷ The court summarily rejected the man's claim that his own salary was "infected" by the discrimination against women faculty.¹²⁸ This argument presented a classic claim for third-party Article III standing: plaintiff suffered a distinct, personal harm (lower pay) because of discrimination against someone else (female faculty). Indeed, despite differences in sex, both male and female nursing faculty suffered the *same* injury: the same reduced pay scale. Yet the same court that in *Waters* had granted standing to a white plaintiff who complained of pay discrimination against African-American coworkers based on the far less direct injury to interracial associations, never even addressed the question of third-party standing in *Spaulding*. Subsequently, in *Patee v. Pacific Northwest Bell Telephone Co.*,¹²⁹ the Ninth Circuit confronted the seeming conflict between *Waters* and *Spaulding*, and it distinguished the interracial standing cases as resting on the "harmful impact on the *plaintiff* because of the denial of association with members of other groups,"¹³⁰ whereas in *Patee* "most of [plaintiff's] coworkers are women."¹³¹ The court never considered whether injuries other than loss of association (like lost pay) could provide third-party standing.

In another comparable worth case, Judge Weinstein relied on *Patee* to repudiate the third-party standing paradigm, declaring, "[t]he law requires that the person claiming discrimination be discriminated against."¹³² This apparent truism, however, is

n.9 (6th Cir. 1977); *Waters v. Heublein*, 547 F.2d 466, 470 (9th Cir. 1976). The Supreme Court, however, has consistently applied the same standards to analysis of race and sex discrimination under Title VII. *E.g.*, *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987). *But see* Robert J. Aalberts & Lorne H. Seidman, *Should Prudential Standing Requirements Be Applied in Transferred Impact Sexual Harassment Cases? An Analysis of Childress v. City of Richmond*, 26 PEPP. L. REV. 261 (1999) (arguing that Title VII should provide third-party standing in race discrimination cases but not in sex discrimination cases).

126. 740 F.2d 686 (9th Cir. 1984).

127. *Id.* at 691-96.

128. *Id.* at 709.

129. 803 F.2d 476 (9th Cir. 1986). In *Patee*, the duties of predominantly male Test Desk Technicians were transferred to predominantly female Maintenance Administrators, who were paid 20% less. *Id.* at 476-77. Male and female Maintenance Administrators brought suit claiming that their pay was depressed because of sex discrimination in pay scales. *Id.* at 476.

130. *Id.* at 478.

131. *Id.* at 479. The district court in *AFSCME v. County of Nassau*, 664 F. Supp. 64 (E.D.N.Y. 1987) followed *Patee*'s reasoning in a similar comparable worth claim by men in a predominantly female job category.

132. *Siegel v. Bd. of Educ.*, 713 F. Supp. 54, 56 (E.D.N.Y. 1989); *see also Spaulding*, 740 F.2d at 709 (rejecting male plaintiff's claims as "bootstrapping" and dismissing them with the observation that "[he] makes no claim that he received a lower wage because of his sex.").

precisely what *Trafficante* rejected; instead, the Court granted standing to anyone genuinely injured by discrimination, including discrimination against others.¹³³

4. Conclusion

Surveying the standing cases, we can see that *Trafficante* really points in two directions: toward a clear rule of Article III standing in which the injury grounding standing need have no relationship to particular statutory purposes so long as it has a causal relationship to an act of discrimination, and toward an as-yet unarticulated theory whereby the effects of discriminatory practices on intergroup relationships—both their very existence and their form—may themselves constitute actionable discrimination against those who at first seem like bystanders.¹³⁴ Although generous third-party standing may permit some plaintiffs to prevail, it fails to advance the conceptual and political project of linking plaintiffs' interests in intergroup relations to Title VII's core commitments to race and gender equality. Indeed, because a strict Article III approach requires only a *causal* connection to discrimination, it allows opportunistic invocations of the statute, against which courts traditionally defend with maxims decrying third-party standing.¹³⁵

133. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972). The alternative, third-party standing path is clearly marked in *Anjelino v. New York Times Co.*, 200 F.3d 73, 79-80 (3d Cir. 2000), where male "extras" alleged that the employer ceased to assign work to extras when the next person on the priority list was a woman. This practice prevented the accumulation of seniority and reduced available work both to all women extras and to those men below the first woman on the priority list. *Id.* Applying Article III standing principles, the court concluded that the men had standing because they "pled specific facts to demonstrate a concrete injury as well as a nexus between the alleged injury and the sex-based discrimination, even though that discrimination was aimed in the first instance at others, we conclude that they have established standing." *Id.* at 92. The *Anjelino* court specifically declined to rest its analysis on any associational loss, relying instead on the injuries from reduced hiring and loss of seniority. *Id.*; see also *Pa. Nurses Ass'n v. Pennsylvania*, No. 86-1586, 1991 WL 120200 (M.D. Pa. Aug. 8, 1988) (granting standing to male employees opposing discriminatorily low pay in predominantly female job category); *Allen v. Am. Home Foods*, 644 F. Supp. 1553 (N.D. Ind. 1986) (holding that male plaintiffs had standing where their employer shut down their plant because it had a predominantly female work force).

134. *Cf. Franke*, *supra* note 18, at 97 (criticizing view of men as "merely observers, not victims, of sexually discriminatory policies that assume a hypermasculine point of view or standard of performance"). Indeed, the very formulation of asking whether a plaintiff asserts "his own legal interests, rather than those of third parties," *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979), merely begs the question whether Congress has determined that injury to a given interest confers standing to sue. Once a given injury is remediable by recourse to litigation, the party who sues to remedy that injury obviously asserts "his own interest." See *Anjelino*, 200 F.3d at 92 n.26 (suggesting that where men and women suffer the same economic harm from discrimination aimed at women, the men's injuries are no more "indirect" than the women's); *Fair Employment Council v. BMC Mktg. Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994); *Fletcher*, *supra* note 80, at 246.

135. The white plaintiff in *Clayton v. White Hall School District*, 778 F.2d 457 (8th Cir.

The other tendency, away from broad Article III standing and toward specific recognition of interests in intergroup association or freedom from work in a non-discriminatory environment, is also problematic. To the extent that injury to these interests would itself give plaintiffs a cause of action, the theory threatens to become untethered from Title VII's language, which requires a showing that an employer discriminated against an individual because of his or her own race or sex. *Clayton's* conclusion that Title VII confers a "right to work in an atmosphere free of discrimination and to enjoy the myriad benefits of associating with members of other racial or ethnic groups,"¹³⁶ would make the Title VII violation, not just standing to sue, turn on "emotional or psychological injury to the plaintiff herself"¹³⁷ without showing *either* that this injury occurred because of plaintiff's race or sex *or* that some other employee was discriminated against because of race or sex.¹³⁸ Additionally, the analogy to residential integration breaks down in situations, such as comparable worth claims, in which the discrimination at issue goes not to persons' presence or absence within the workplace but to forms of discrimination specific to more complex workplace institutions, such as questions of pay, authority, and promotion.

Both approaches allow plaintiffs into court without articulating how a single practice might discriminate against members of groups on different sides of subordinating social relations. Broad standing separates injury from discrimination, permitting a wide class of injured plaintiffs to sue, but only when employment discrimination can be proven against *someone else*. A specific focus on interracial association merges injury with the cause of action, but it threatens to lose any connection with *discrimination* and to reach only a narrow class of injury. Both approaches, moreover, allow litigation by entirely passive plaintiffs injured by past

1985), is particularly unsympathetic, because she suffered from nothing more than the school's decision to enforce its own matriculation rules. If anything, she initially may have been the beneficiary of an exception to rules meant in part to prevent black children from enrolling, to the extent that the line determining which employees' children could enroll—the line between teaching and administrative personnel and service and maintenance personnel—mapped onto occupational segregation in the school.

136. *Id.* at 459; *accord* EEOC v. Miss. College, 626 F.2d 477, 483 (5th Cir. 1980) ("Summers may charge a violation of her own personal right to work in an environment unaffected by racial discrimination.").

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

138. *See also* Resnick, *supra* note 15 (supporting a right not to work in workplace where harassment occurs); Recent Cases, *supra* note 15, at 730 (arguing for a Title VII right to a "nondiscriminatory environment" distinct from a third-party standing claim). To the extent the "nondiscriminatory environment" theory means to emphasize that certain injuries, even when not imposed because of a person's race or sex, are particularly significant under Title VII, the textually and doctrinally sound method of incorporating this claim is through a standing analysis analogous to the "zone of interests" concept in administrative law. *See supra* note 93. Such an approach would grant standing to plaintiffs whose injuries were not themselves statutory violations (that is, not imposed because of race or sex) but whose injuries were nonetheless among those that Title VII specifically aims to prevent and remedy. This approach, however, is irrelevant if Title VII already grants standing to the full extent allowed by Article III.

discrimination without protecting proactive workers who prevent or disrupt discrimination.

B. Retaliation

Title VII's antiretaliation provisions provide an obvious doctrinal basis for protecting intergroup solidarity and have been used to that end widely and successfully. Employees who have explicitly opposed others' discriminatory practices, refused orders to commit discriminatory acts, or even merely acted in nondiscriminatory ways have all brought successful claims.

Title VII not only protects employees from discrimination in employment because of race and sex but also makes it unlawful to retaliate against an employee because she has "opposed any practice" forbidden by Title VII.¹³⁹ The elements of a retaliation claim are "(1) statutorily protected expression, (2) an adverse employment action, and (3) a causal link between the protected expression and the adverse action."¹⁴⁰ Opposition to discrimination is protected regardless of whether the discrimination at issue is directed at the person subjected to retaliation or at another person.¹⁴¹ A finding of retaliation, then, carries no implication that the victim was the subject to race or sex discrimination.¹⁴²

A retaliation approach shifts the basis of the substantive violation to the plaintiff's experience and explicitly recognizes the assertion of intergroup solidarity. As with the standing approach, however, a retaliation theory must identify race- or sex-based employment discrimination against a third party¹⁴³ and thus can reach intergroup solidarity only with coworkers, not nonemployees. Even then, serious difficulties attend defining the scope of worker behavior protected against workplace retaliation.

1. Locating the Opposed Discrimination

One important question of the retaliation theory's scope is its ability to reach retaliation for *preventive* action, rather than only post hoc criticism. For instance,

139. 42 U.S.C. § 2000e-3(a) (1994 & Supp. V 1999). Nor may employers retaliate against employees who have "assisted, or participated in any manner" in an EEOC investigation. *Id.*

140. *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1136 (5th Cir. Unit A Sept. 1981) (quoting *Smalley v. City of Eatonville*, 640 F.2d 765, 769 (5th Cir. 1981)); *accord Drake v. 3M*, 134 F.3d 878, 885 (7th Cir. 1998).

141. *See, e.g., Eichman v. Indiana State Univ. Bd. of Trs.*, 597 F.2d 1104, 1107 (7th Cir. 1979) (rejecting the proposition that a valid retaliation claim requires an allegation "that there were racial or sexual overtones in the action taken against [the person subjected to retaliatory action]"); *Robinson v. Shell Oil Co.*, 70 F.3d 325, 327 (4th Cir. 1995) (en banc), *rev'd on other grounds*, 519 U.S. 337 (1997); *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1256 (3d Cir. 1978), *vacated on other grounds by* 422 U.S. 366 (1979).

142. *See McDonnell v. Cisneros*, 84 F.3d 256, 259 (7th Cir. 1996).

143. Unlike the standing cases, however, the plaintiff need not prove that the employer *actually* discriminated, only that the plaintiff *reasonably believed* that it had done so. *Payne*, 654 F.2d at 1137.

Connie Spillman, an assistant manager at a Taco Bell, was ordered by the district manager not to hire, and indeed to fire, any minority (or disabled) workers.¹⁴⁴ When Spillman refused to comply, the manager first verbally abused her and then refused to speak to her; when Spillman formally complained, her immediate supervisor told her that she would find a way to fire Spillman if she pursued her complaints, resulting in a constructive discharge.¹⁴⁵ The district court found that Spillman stated a claim for retaliation because of her opposition to “racially discriminatory acts of defendants,”¹⁴⁶ but never identified those acts with particularity. It seems unlikely that employees targeted by Spillman’s supervisor would have had any claim if Spillman had simply ignored her supervisor’s instructions. In such a scenario it would be difficult to establish that the targeted employees, that is, those Spillman was asked to discriminate against, actually suffered any discrimination in the “terms, conditions, or privileges of employment.”¹⁴⁷

Implicit in *Spillman*, then, is the notion that Title VII’s protection against retaliation for opposition to “any practice made an unlawful employment practice”¹⁴⁸ can be read broadly to encompass any practice that *would* be unlawful if carried out. Thus, an employee retaliated against for simply going on record opposing employment discrimination would be protected. No court has gone that far, but in a case in which a black employee objected to a scheme to discriminate against a white employee, Judge Posner wrote for the Seventh Circuit:

[Plaintiff’s] prompt and vigorous opposition averted unlawful discrimination; and we think an a fortiori violation of section 2000e-3(a) is committed when an employee opposes an attempt to discriminate against a fellow employee so successfully that the employer desists from the attempt and then fires the “whistle blower” for what he had done.¹⁴⁹

This preventive theory is straightforward and compelling in circumstances like those in *Spillman* and *Rucker* where an employer has proposed but not implemented a discriminatory practice and an employee engages in opposition. The opposed unlawful employment practice becomes more elusive, however, when the plaintiff is sanctioned for hiring women or people of color, absent either any prior employer requests to discriminate or plaintiff’s articulated opposition to such discrimination. Such a case arose in *EEOC v. St. Anne’s Hospital*, where Barbara Herzon, a white, Jewish woman who headed St. Anne’s Hospital’s security department, hired a black man as a customer service representative, the first African-American in the department. Later that day, individuals claiming membership in the American Nazi Party began calling the hospital to announce their intention to eliminate blacks and Jews, making bomb threats against the hospital, and threatening “to fix that bitch

144. *Spillman v. Carter*, 918 F. Supp. 336, 339 (D. Kan. 1996).

145. *Id.* at 339, 342.

146. *Id.* at 342.

147. 42 U.S.C. § 2000e-2(a)(1) (1994 & Supp. V 1999).

148. 42 U.S.C. § 2000e-3(a) (1994 & Supp. V 1999).

149. *Rucker v. Higher Educ. Aids. Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1982).

Barbara, head of security, who hired that black assistant.”¹⁵⁰ Several fires were also set at the hospital that afternoon.¹⁵¹ Astonishingly, the hospital responded by asking Herzon to resign because she had offended those making the threats.¹⁵² Herzon charged that she was discriminated against as a woman and a Jew, but the EEOC brought suit on the theory that the hospital had retaliated for Herzon’s opposition to racially discriminatory hiring practices.¹⁵³

The hospital claimed that it could not have engaged in retaliation because the EEOC did not identify any unlawful employment practice to which Herzon registered opposition.¹⁵⁴ The Seventh Circuit rejected this “narrow interpretation,” reasoning that had Herzon *not* hired the black man, she would have committed employment discrimination because, as she did hire him, he presumably was the “most qualified applicant.”¹⁵⁵ Because an employee who protested this hypothetical discrimination would be protected against retaliation, the panel found it “equally clear” that Herzon must be protected as well.¹⁵⁶ The differences, however, between the hypothetical and actual facts are precisely two crucial elements of an ordinary retaliation claim: the presence of an unlawful employment practice (the failure to hire) and an act in opposition to it (the protest). The court seems simply to have reasoned backwards from the reprehensible character of the employer’s behavior:

Surely, it would impede voluntary compliance with Title VII, a primary aim of section 704, if employees in decision-making positions who hired minority applicants had to fear losing their own jobs because of the racial bias of others. Section 704(a) was specifically designed to encourage employees to act to protect Title VII rights, and that is what Herzon has assertedly done.¹⁵⁷

Although the court’s intuition is undoubtedly right, its analysis remains clumsy. Particularly striking is the focus on the hiring of the first black employee¹⁵⁸ to the exclusion of evidence of sexism and anti-Semitism, and, in particular, evidence that the caller saw opposition to “blacks and Jews” as of a single piece.¹⁵⁹ Herzon

150. *Id.* at 129-30.

151. *Id.* at 130.

152. *Id.* Herzon also alleged that she was told that the hospital thought a man could provide better security. *Id.*

153. *Id.*

154. *Id.* at 132.

155. *Id.*

156. *Id.*

157. *Id.* at 133; *see also* Chandler v. Fast Lane, Inc., 868 F. Supp. 1138, 1144 (E.D. Ark. 1994) (“[A]n employee who exercises her authority to promote and employ African-Americans engages in protected ‘opposition’ to her employer’s unlawful employment practice which seeks to deprive African-Americans of such benefits.”).

158. *St. Anne’s Hosp.*, 664 F.2d at 132 n.4.

159. *See generally* Freshman, *Whatever Happened to “Anti-Semitism,” supra* note 72; Clark Freshman, *Beyond Atomized Discrimination: Use of Acts of Discrimination Against “Other” Minorities to Prove Discriminatory Motivation Under Federal Employment Law*, 43

evidently failed to fit the caller's vision of what kind of person should run the hospital security department—a white man who would preserve the staff's whiteness— a vision in which the hospital itself acquiesced. Herzon's actions toward black job applicants—not discriminating against them—further confirmed that deviation.

A step toward articulating the *discriminatory* character of some retaliatory actions was taken by *Moyo v. Gomez*,¹⁶⁰ in which the Ninth Circuit considered the section 704(a) claims of a black corrections officer who alleged retaliation “for protesting against and refusing to cooperate with defendants’ practice of allowing showers after work shifts to white inmates but not to black inmates working the same job shift.”¹⁶¹ Avoiding the question of whether opposition to discrimination against nonemployee inmates could support a Title VII retaliation claim, the court held that Moyo stated a claim based on his opposition to “the unlawful employment practice inherent in requiring Moyo to discriminate against blacks as a term or condition of [Moyo’s] employment.”¹⁶² On this reasoning, requiring discrimination against others may also constitute discrimination against the *employee subject to the requirement*.¹⁶³

Moyo leaves open whether its approach relies on the plaintiff being the same race as those against whom he was required to discriminate. Nearly this exact issue was raised in *Wimmer v. Suffolk County Police Department*,¹⁶⁴ a case concerning a white police officer trainee allegedly “given poor evaluations and eventually terminated for having reported” and protested officers’ discriminatory comments toward and unjustified arrests of black and Hispanic civilians.¹⁶⁵ The court concluded that the plaintiff stated no Title VII retaliation claim because discrimination against nonemployees is not an “unlawful employment practice.”¹⁶⁶ The court briefly considered the *Moyo* theory but dismissed it on the facts because the plaintiff introduced no evidence that “minority employees of the Department felt that they worked in a racially hostile environment.”¹⁶⁷ Thus, the *Wimmer* court acknowledged that white employees’ discrimination toward minority nonemployees could cause a hostile environment for minority employees (opponents of which would be protected from retaliation). However, the *Wimmer* court failed to consider whether such discrimination could have racial significance for other *white* employees. While conscious of the racial connection between *victims* of discrimination and others of the same race, the court overlooked the possibility of a racial connection between *perpetrators* of discrimination and others of the same race.¹⁶⁸

STAN. L. REV. 241 (1990) [hereinafter Freshman, *Beyond Atomized Discrimination*].

160. 40 F.3d 982 (9th Cir. 1994).

161. *Id.* at 984.

162. *Id.* at 985.

163. Indeed, *Moyo* goes on to instruct the district court to allow amendment of the complaint to claim that the requirement created a racially discriminatory hostile work environment. *Id.* at 986.

164. 176 F.3d 125 (2d Cir. 1999).

165. *Id.* at 134-35.

166. *Id.* at 135.

167. *Id.* at 136.

168. *Id.* See also *Sidari v. Orleans County*, 174 F.R.D. 275, 283 (W.D.N.Y. 1996) (dismissing a white corrections officer's attempt to enjoin a prison's racial discrimination

2. Identifying Acts of Opposition

Cases like *St. Anne's Hospital* also raise the problem of identifying the employee acts that are to be treated as opposition to discrimination. Clearly, explicit verbal criticism of discrimination qualifies, and, under *Spillman* and *Rucker*, so too does refusal to carry out discriminatory instructions.¹⁶⁹ But difficult problems remain with more subtle acts. Sometimes, as in *St. Anne's Hospital*, the plaintiff may not know in advance that the employer requires discrimination and may trigger retaliation by performing *nondiscriminatory* acts, not by refusing to perform discriminatory ones. The idea of "opposition" seems to require a prior unlawful practice, whether proposed or carried out, against which one reacts, but *St. Anne's Hospital* suggests a much broader notion encompassing any action merely inconsistent with discrimination.

McDonnell v. Cisneros,¹⁷⁰ another Seventh Circuit case, takes a half step in this direction, granting section 704(a) protection to a male supervisor who alleged a retaliatory transfer for failing to suppress his female subordinate's complaints of discrimination.¹⁷¹ Chief Judge Posner recognized that while situations like *Rucker* "are cases of active opposition," the *McDonnell* plaintiff's "'opposition' was passive. It consisted only of failing to carry out his employer's desire that he prevent his subordinates from filing discrimination complaints."¹⁷² Nonetheless, reasoning that "[p]assive resistance is a time-honored form of opposition," the court found it within

against black inmates on the theory that it created a hostile work environment that discriminated against him personally).

169. See discussion *supra* Part III.B.1. Some authorities, however, suggest that employee action that disrupts discriminatory practices by refusing to accept managerial authority is not protected against retaliation. See *Smith v. Tex. Dep't of Water Res.*, 818 F.2d 363, 366 (5th Cir. 1987) (rejecting retaliation claim in which plaintiff refused to perform secretarial duties outside her job description, and reasoning that "'an employer remains entitled to loyalty and cooperativeness from employees'" and that refusing the assignment was unreasonable because "[i]t had no immediate adverse effect on her salary or other terms of employment") (quoting *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 230 (1st Cir. 1976)); see also *Matima v. Celli*, 228 F.3d 68, 79 (2d Cir. 2000) (noting an employer prerogative "to preserve a workplace environment that is governed by rules, subject to a chain of command, free of commotion, and conducive to the work of the enterprise"). But see *Austin v. Ford Models, Inc.*, 149 F.3d 148, 155 (2d Cir. 1998) ("If indeed Ford denied Austin overtime pay because of her race and denied Austin equal staffing assistance because of her race and age, then it would plainly be discrimination for Ford to fire Austin for refusing to work unpaid overtime hours without an assistant."); *Porta v. Rollins Envtl. Servs.*, 654 F. Supp. 1275, 1284 (D.N.J. 1987), *aff'd*, 845 F.2d 1014 (3d Cir. 1988) (permitting retaliation claim by employee who refused an order to work the same shift as an alleged sexual harasser); *Slack v. Havens*, 7 Fair Empl. Prac. Cas. (BNA) 885, 887 (S.D. Cal. May 15, 1973) (allowing discrimination claim by plaintiffs who were fired for refusing to accept a discriminatory task assignment), *modified and aff'd*, 522 F.2d 1091 (9th Cir. 1975).

170. 84 F.3d 256 (7th Cir. 1996).

171. See *id.* at 262.

172. *Id.*

Title VII's concept of "opposition."¹⁷³ The opinion does not make clear what role "the employer's desire" plays in this analysis.¹⁷⁴ Would plaintiff's "fail[ure] to carry out" this desire constitute "passive resistance" whether or not he was aware of the desire?¹⁷⁵ Must this desire even have existed at the time of the "resistance" rather than emerging only in retrospect?¹⁷⁶

Even if, as *St. Anne's Hospital* reasoned, employee actions, or inactions, constitute "opposition" when any other act would itself violate Title VII, it is difficult to stretch "opposition" to encompass more subtle behaviors that stand in less stark contrast to actionable discrimination. In *Drake v. Minnesota Mining & Manufacturing Co.*¹⁷⁷ Larry and Rosalie Drake filed retaliation claims against their employer, 3M.¹⁷⁸ The "record [was] replete with evidence that some of the employees at 3M's plant were racial bigots,"¹⁷⁹ and the Drakes alleged that their coworkers had harassed them in retaliation for the Drakes' friendship with two black coworkers; for Mr. Drake's aid to them navigating union grievance, pay, and overtime procedures; and for his criticism of plant racism in a local newspaper.¹⁸⁰ The Seventh Circuit, however, concluded that only Mr. Drake's printed comments "can be characterized as protected expression"¹⁸¹ and went on to say that "we do not believe that the spiritual guidance and friendship that [Mrs. Drake] provided . . . constitutes protected activity."¹⁸²

Indeed, expanding Title VII's retaliation provisions to cover such behavior would be to stretch the concept of "oppos[ition to] . . . unlawful employment practice[s]"¹⁸³ to the breaking point, far removed from the paradigm of direct, self-conscious confrontation with an employer's illegal action. There is strong reason, however, to think that seemingly insignificant microbehaviors like providing the interpersonal support and friendship common among coworkers, teaching new workers the rules of the workplace, accepting the authority of supervisors, and so on may be at least as important to preventing hostile work environments as explicit statements of opposition to discrimination.¹⁸⁴

C. Intergroup Association

In a narrow class of cases the courts have recognized injuries based on a worker's relationship to persons of another race as injuries caused by that worker's own race.

173. *Id.*

174. *Id.*

175. *Id.*

176. See Clarke, *supra* note 37, at 40 (noting that student had not self-consciously placed himself in opposition to racist teammates but that his position as someone differentiated by opposition to racism arose only in the aftermath of others' hostile reaction).

177. 134 F.3d 878, 885 (7th Cir. 1998).

178. *Id.* at 885.

179. *Id.* at 881.

180. *Id.* at 881-82.

181. *Id.* at 885.

182. *Id.* at 886.

183. 42 U.S.C. § 2000e-3(a).

184. See *supra* Part II.A.1-2.

When employers sanction white workers for interracial marriage or other intimate relationships, courts forthrightly label the behavior race discrimination against the sanctioned employee, thus taking an important step beyond the third-party underpinnings of standing and retaliation theories.¹⁸⁵ These cases provide an important model for conceptualizing how discrimination based on race or sex includes adverse employment action based on an employee's interactions with members of other race or sex groups. Thus far this promise has been limited by a narrow construction of the forms of intergroup "association" protected by Title VII. Focused on a paradigm of racial intermarriage and integration, courts have refused to take a wider view that would include both broader forms of interaction and relationships between men and women generally.¹⁸⁶

1. The Basic Paradigm: Interracial Marriage

The classic fact pattern is an adverse employment action against an employee because of that employee's interracial marriage or romance. In *Parr v. Woodmen of the World Life Insurance Co.*¹⁸⁷ the Eleventh Circuit considered a white man's Title VII claim that he was refused a job because of his marriage to a black woman.¹⁸⁸ The plaintiff's lawyer apparently thought it implausible to argue that the man had suffered discrimination because of his own race, arguing instead that the "actions taken against him involved racial considerations."¹⁸⁹ The court, however, was not so hesitant and declared that "[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race."¹⁹⁰ In doing so, the court followed the widely accepted argument that identifying an interracial relationship relies on the race of both parties.¹⁹¹ The *locus classicus* is the early case of *Whitney v. Greater New York Corp. of Seventh-Day Adventists*:¹⁹² "Manifestly, if Whitney was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend."¹⁹³

185. See *infra* notes 188-94 and accompanying text.

186. See *infra* notes 210-20 and accompanying text.

187. 791 F.2d 888 (11th Cir. 1986).

188. *Id.* at 889.

189. *Id.* at 891; cf. *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1447 (10th Cir. 1988) (allowing race discrimination claim where, "although [plaintiff] was not fired because of his race, it was a racial situation in which he became involved that resulted in his discharge from his employment") (quoting *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268 (6th Cir. 1977) (alteration in original)).

190. 791 F.2d at 892 (emphasis in original).

191. See *id.* at 891-92.

192. 401 F. Supp. 1363 (S.D.N.Y. 1975).

193. *Id.* at 1366; see also *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) (citing cases on interracial relationships), *vacated*, 169 F.3d 215 (5th Cir. 1999) (en banc), *reinstated*, 182 F.3d 333 (5th Cir. 1999) (en banc) (per curiam); see generally *Rosenblatt v. Bivona & Cohen, P.C.*, 946 F. Supp. 298 (S.D.N.Y. 1996); *Moffett v. Gene B.*

Courts have used this theory—that discrimination based on *difference* in race is indistinguishable from discrimination based on each individual’s race—to defeat employers’ frequent argument that they have discriminated not based on their employee’s race but based only on the race of their spouse, an approach adopted by a minority of courts: “Plaintiff does not contend that he has been discriminated against because of ‘his’ race or because of his color, religion, sex or national origin. He contends that he has been discriminated against because of the race of his wife.”¹⁹⁴ The court in *Gresham v. Waffle House, Inc.*¹⁹⁵ rejected this argument by reasoning: “Clearly, if the plaintiffs in those cases, or the plaintiff in the instant case, had been black, the alleged discrimination would not have occurred. In other words, according to their allegations, *but for* their being white, the plaintiffs in these cases would not have been discriminated against.”¹⁹⁶

This but-for analysis not only assumes but requires that the employer’s discrimination is simply about interracial marriage as such and is not part of a broader discriminatory attitude toward any racial group. This feature leads to conceptual problems when an employer is accused of *both* discriminating against white employees in interracial relationships *and* against black employees in general, and yet such situations are precisely what we should expect when hostility to interracial association is linked to antiblack racism. Just this issue arose in *Parr*.¹⁹⁷ The defendant argued that “Parr cannot state a claim based upon discrimination due to an interracial relationship because he also claimed that Woodmen discriminated against blacks. Woodmen argues that if Parr’s allegations are true, had Parr been black, he still would not have been hired.”¹⁹⁸ Woodmen thus claimed that Parr’s allegation failed a simple “but-for” test of discrimination: whether Parr was black or white made no difference to the hiring decision because Woodmen did not hire whites married to blacks, nor did

Glick Co., 621 F. Supp. 244 (N.D. Ind. 1985); *Gresham v. Waffle House, Inc.*, 586 F. Supp. 1442 (N.D. Ga. 1984); *Holiday v. Belle’s Restaurant*, 409 F. Supp. 904 (W.D. Pa. 1976); *Bryant v. Automatic Data Processing, Inc.*, 390 N.W.2d 732 (Mich. Ct. App. 1986).

194. *Adams v. Governor’s Comm. on Postsecondary Educ.*, 26 Fair Empl. Prac. Cas. (BNA) 1348, 1357, (N.D. Ga. Sept. 3, 1981), *available at* 1981 WL 27101, *3; *accord* *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205, 207 (N.D. Ala. 1973); *Parr v. United Family Life Ins. Co.*, 35 Fair Empl. Prac. Cas. (BNA) 95, 96 (N.D. Ga. June 15, 1983), *available at* 1983 WL 1774. Those courts finding for plaintiffs in interracial relationship cases have frequently rejected similar arguments by employers. *See* *Whitney*, 401 F. Supp. at 1366; *Deffenbaugh-Williams*, 156 F.3d at 588; *Rosenblatt*, 946 F. Supp. at 299; *Holiday*, 409 F. Supp. at 908-09.

195. 586 F. Supp. 1442 (N.D. Ga. 1984).

196. *Id.* at 1445 (emphasis in original).

197. *See generally* 791 F.2d 888 (11th Cir. 1986).

198. *Id.* at 892. In *Deffenbaugh*, defendant Wal-Mart made the opposite argument: because the white plaintiff essentially claimed that her mistreatment was based on discrimination against her black boyfriend, her claim that Wal-Mart discriminated against blacks was refuted by the fact that she was actually replaced by a black employee. *See* 156 F.3d at 588. The court rightly rejected this argument as misconstruing plaintiff’s claim, which as properly understood alleged discrimination “‘because of [her] race’ (white), as a result of her relationship with a black person.” *Id.* (modification in original).

it hire any blacks at all.¹⁹⁹ The *Parr* court rejected defendant's argument but retreated conceptually by simply waving off the hypothetical ("if Parr had been black . . .") as a "lawsuit for another day" and returning to the more diffuse assertion that "Title VII proscribes race-conscious discriminatory practices."²⁰⁰

In other words, the *Parr* court failed to meet the challenge posed by Judge Williams' opinion in *Childress*: how could the employer discriminate against *both* white and black employees because of race? In *Ripp v. Dobbs Houses, Inc.*,²⁰¹ for instance, the court rejected the interracial association claim of one white employee in large part because he also alleged race discrimination against black employees.²⁰² In language strikingly parallel to that in *Childress*, the court found the white plaintiff's associational claim inconsistent with the allegation of discrimination against blacks: "not only is plaintiff not subject to the practices in which he asserts that defendants engage, but he is a member of the class (*i.e.*, white persons) which he avows that defendants favor."²⁰³

Even the proplaintiff reasoning employed in *Parr*, *Whitney*, and *Gresham* does not fully capture the discriminatory dynamics at work.²⁰⁴ By focusing simply on the "interracial" aspect, the approach has difficulty distinguishing the counterargument that the employer "discriminates" against all employees, regardless of race, who engage in interracial relationships (that is, both white and black employees in interracial relationships face discrimination).²⁰⁵ As the Supreme Court recognized as

199. *Parr*, 791 F.2d at 892.

200. *Id.*

201. 366 F. Supp. 205 (N.D. Ala. 1973).

202. *Id.* at 209-10.

203. *Id.* at 209 (emphasis in original). Compare *supra* note 71 and accompanying text.

204. See generally *Parr*, 791 F.2d 888; *Gresham v. Waffle House, Inc.*, 586 F. Supp. 1442 (N.D. Ga. 1984); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975).

205. An analogous argument has been invoked against the theory that discrimination against gay men is sex discrimination because women who love men are treated differently. See *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *9 (6th Cir. Jan. 15, 1992) ("Dillon has not . . . argued that a lesbian would have been accepted at the Center, nor has he argued that a woman known to engage in the disfavored sexual practices would have escaped abuse."). Discrimination based on sexual orientation (or at least some subset of it) has also increasingly come to be articulated as sex discrimination not simply because of the but-for comparison to the treatment of a member of the "opposite" sex with the same sex of object-choice, see, e.g., *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (applying strict scrutiny under state constitution's equal protection clause because marriage statute classifies by sex), but because of the connection between sexual orientation and gender identity. See Franke, *supra* note 10, at 693, 739 (characterizing male heterosexuality as an aspect of masculinity enforced through male-male harassment); Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1776-77, 1786-87 (discussing antigay harassment as "operat[ing] to insult the harassee's manhood"). See generally Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988).

far back as *Loving v. Virginia*,²⁰⁶ however, antimiscegenation laws were specifically designed and understood to regulate and preserve a particular vision of *whiteness* infused with a commitment to white supremacy.²⁰⁷ On this view, discrimination against a white person based on his or her interracial relationship *both* implicates his or her race as a white person *and* may be part and parcel of discrimination towards African-Americans.²⁰⁸

2. Extending the Paradigm to Other Forms of Interaction

Although the emphasis on interracial association *per se* is understandable within a civil rights discourse forged in desegregation battles, it unjustifiably privileges a particular form of interracial interaction rather than seeing hostility to interracial intimacy as just one instance of a broader pattern of race- and sex-specific norms of cross-group interaction.²⁰⁹ For instance, in *Scott v. Marsh*²¹⁰ Grace Scott, a white woman, was denied a promotion after refusing her supervisor's requests to participate in a discriminatory scheme against black employees.²¹¹ Although the court acknowledged that "a cause of action for discrimination under Title VII can flow from

206. 388 U.S. 1 (1967).

207. *Id.* The Court parried the interracial symmetry argument by reference to the structural role of the practice. *Id.* at 8-11 (rejecting theory that because "miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race" in part because "[t]he fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy"); see also RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* 74 (1993) (noting that white-nonwhite unions have been the target of antimiscegenation laws and sentiment). This racial *asymmetry* is also reflected in the fact that all the reported cases of discrimination based on interracial relationships have involved white plaintiffs. I suspect that in a case alleging the firing of a black employee for a relationship with a white person, a court would not invoke rights to interracial association but would instead forthrightly recognize discrimination against the black employee because of her/his race.

208. *Cf.* *Brown v. Henderson*, 257 F.3d 246, 255 (2d Cir. 2001) (suggesting that there could be circumstances in which "both men and women suffer sexually discriminatory harms in the same workplace" if an employer restricted men's interactions with a class of women facing discrimination).

209. One way to see this is to acknowledge the race-sex intersectionality implicit in much hostility to interracial sexuality. Historically, and through the present, anxiety about "miscegenation" has been especially acute regarding white *female*-black *male* relationships. Thus, as Ruth Frankenberg points out, restrictions on interracial sexuality have always also been about paternalistic relations between white *men* and white *women*. See FRANKENBERG, *supra* note 207, at 76, 81.

210. *Scott v. Marsh*, No. Civ.A.3:89-3059, 1994 WL 797678, at *1 (D.S.C. Apr. 15, 1994), *aff'd mem.* 43 F.3d 1468 (4th Cir. 1994).

211. *Id.* at *1, *3.

a plaintiff's association with a protected minority,²¹² it concluded that Scott had not stated such a claim because her "allegation does not suggest that her supervisor's motive for not selecting Plaintiff related to any repulsion for a white woman who would associate with blacks,"²¹³ thereby invoking the special role of taboos against interracial sociability.

Limiting the cause of action to one mode of cross-racial interaction (friendly or romantic "association") while failing to protect another mode (refusal to participate in discrimination) wrongfully confines protected intergroup association to a private sphere outside the relations of work. It is not "interracial association" that is protected by Title VII; rather, Title VII protects employees against *any* requirement that, because of one's race, one must interact, or not interact, with persons of another race in a particular fashion.²¹⁴ One may violate workplace norms regarding racial or gender roles in any number of different ways to which Title VII should rightly be indifferent; antidiscrimination law attends to the imposition of those norms as a condition of employment in the first place.²¹⁵

Indeed, the limited range of intergroup relationships protected by the interracial association paradigm repeatedly has led courts to reject claims by white and/or male plaintiffs who were sanctioned not for loving or befriending persons of another race but for treating women and people of color fairly or professionally or for refusing to be party to discrimination against them. In *Sidari v. Orleans County*,²¹⁶ for instance, a white corrections officer invoked the associational theory to protect his interest in not joining an array of discriminatory harassment of black prisoners; the court dismissed the claim, reasoning that Sidari could not suffer an "associational loss" because he had "a professional obligation not to fraternize with inmates."²¹⁷ Similar reasoning prevailed in *Lyman v. Nabil's, Inc.*,²¹⁸ where the court confused Title VII *discrimination* based on interracial association with the *Trafficante* line of cases basing *standing* on injury to interracial associations, producing a single, muddled theory of "associational benefit."²¹⁹ The court, however, simply declared that cases

212. *Id.* at *1.

213. *Id.* at *3.

214. Compare, for instance, the treatment of Ann Hopkins in *Price Waterhouse*. The core of Hopkins' case was *not* that Title VII specifically protects women's right to engage in behavior that some people find abrasive and unfeminine but rather that an employer cannot require that its female employees behave in a "feminine" manner. *Price Waterhouse v. Hopkins* 490 U.S. 228, 258 ("We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.").

215. See Franke, *supra* note 18, at 7-8 (arguing that "[t]he wrong of sex discrimination must be understood to include all gender role stereotypes whether imposed upon men, women, or both men and women in a particular workplace" and that "sexual equality jurisprudence should include a commitment to a fundamental right to determine one's gender independent of one's biological sex").

216. 174 F.R.D. 275 (W.D.N.Y. 1996).

217. *Id.* at 284.

218. 903 F. Supp. 1443 (D. Kan. 1995).

219. See *id.* at 1446. See generally Feldman, *supra* note 15 (treating both the standing cases and the interracial association cases as reflecting a single legal principle); *Johnson v.*

based on interracial association were irrelevant to questions of cross-sex association.²²⁰ But if sanctioning white employees for associating with nonwhites is race discrimination, the same reasoning demands that sanctioning male employees for associating with women is sex discrimination.²²¹

Even courts finding *for* plaintiffs have foundered on a narrow concept of “association.” One case on which *Lyman* relied, *Chandler v. Fast Lane, Inc.*,²²² involved almost precisely analogous facts with the sole difference of a cross-race rather than a cross-sex relationship. Chandler, a white employee, was harassed by her supervisor when she attempted to hire and promote African-Americans. The court attempted to squeeze its facts into the “associational benefits” framework.²²³ The court read Chandler’s complaint to claim “that defendants’ insistence that she enforce these [discriminatory] practices violated her fundamental right to associate with African-Americans”²²⁴ and went on to cite *Loving v. Virginia* and a string of interracial marriage cases before concluding that “an employment practice that impinges upon this right is actionable under Title VII.”²²⁵ Once again, the fundamental question—whether Chandler was discriminated against because of her race when her employer sanctioned her for violating its expectations for how white employees should interact with African-Americans—was obscured by invocation of a discrete Title VII “right” to associate.²²⁶

Absent a clear conception of how discrimination against an employee based on his or her intergroup “association” implicates the *employee’s* race, there is a strong tendency to shift the focus back to the race of the person with whom the employee associates. In another successful association case, a district court refused to dismiss a white plaintiff’s Title VII claim alleging that her employer discriminated against her based on her close “association with the Hispanic community.”²²⁷ The court concluded that “[t]he underlying rationale in these cases is that the plaintiff was discriminated against on the basis of his race because his race was different from the race of the people he associated with.”²²⁸ The court’s stated holding—“discriminatory

Univ. of Cincinnati, 215 F.3d 561 (6th Cir. 2000) (same).

220. *Lyman*, 903 F. Supp. at 1446.

221. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78-79 (1998) (applying to same-sex discrimination the principles developed for same-race discrimination); *Johnson v. Transp. Agency*, 480 U.S. 616, 619, 627-28 (1987) (applying to affirmative action based on sex the principles developed for affirmative action based on race); see also *Brown v. Henderson*, 257 F.3d 246, 254-55 (2d Cir. 2001) (assuming the precedents addressing interracial association apply to questions of sex discrimination (citing *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986), and *Loving v. Virginia*, 388 U.S. 1 (1967))). Cf. *supra* Part III.A.3, noting the tendency to apply the *Trafficante* injury in fact doctrine to interracial but not intersex association.

222. 868 F. Supp. 1138 (E.D. Ark 1994).

223. *Id.* at 1143.

224. *Id.*

225. *Id.* at 1143-44.

226. See *id.*

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

228. *Id.* at 1460.

employment practices based on an individual's association with people of a particular race or national origin are prohibited under Title VII"—nevertheless entirely omits reference to the plaintiff's race.²²⁹

As the Seventh Circuit recently made clear in *Drake v. Minnesota Mining & Manufacturing Co.*,²³⁰ the “key inquiry” is not the nature or “degree of association” but simply whether the employee was discriminated against because of his or her race, such discrimination sometimes being based on whether and how the employee associates with persons of another race.²³¹ The association cases, however, fail to spell out just what the connection is between an employee's race and his or her interactions with other groups. That connection is the race-specific expectation of particular forms of interaction with other groups: it is not just “association” with black or Hispanic people that is at issue in these cases but rather such associations undertaken by *white* employees.

D. Limitations of the Traditional Approaches

Third-party standing, retaliation, and intergroup association theories all share the same fundamental weakness: none articulates how harms to one employee may be “because of such individual's race [or] sex,”²³² based on how he or she relates to persons of a different race or sex. When the persons with whom the employee has a solidaristic relationship are themselves employees, courts see the plaintiff as merely complaining about discrimination directed at others.²³³ Moreover, when courts rely on a model of discrimination as employers taking sides in a zero-sum game, they have difficulty conceptualizing how employers could simultaneously discriminate against some employees because they are black and others because they are white. A retaliation theory ameliorates this problem by granting a cause of action to members

229. *Id.*; see also *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, and GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999) (interpreting interracial association cases as holding that Title VII “protect[s] individuals who are the victims of discriminatory animus towards third persons with whom the individuals associate”). Once the focus shifts back to persons with whom the employee associates, the interracial association framework begins to collapse into a third-party standing analysis. See *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 572-78 (6th Cir. 2000). *Johnson* is especially interesting because it applied the interracial association theory to an African-American university vice president's association with other black employees by virtue of his advocacy of an affirmative action policy. Thus, the but-for reasoning of *interracial* cases was displaced by an exclusive focus on the race of those with whom the employee associated. Johnson's race can be reintroduced into the picture, however, if we interpret his experience as arising from his deviation from the whiteness his employer demanded of its high-ranking administrators. Cf. *Espinoza & Harris*, *supra* note 10, at 550-51 (arguing that “[e]thnic groups lacking a stable identification with either” blackness or whiteness face the choice of whether to “proclaim themselves ‘black,’” strive toward “whiteness . . . through cultural assimilation,” or “struggle to be accepted as neither”).

230. 134 F.3d 878 (7th Cir. 1998).

231. *Id.* at 884.

232. 42 U.S.C. § 2000e-2(a).

233. See, e.g., *supra* notes 134 & 203 and accompanying text.

of nominally “opposed” groups by labeling one group’s injuries “discrimination” and another’s “retaliation.” When, however, the employee’s relationship is to a *non*employee or an employee for whom a discrimination claim is difficult to make out, both standing and retaliation theories falter for lack of someone *other than the plaintiff* whose race- or sex-based injuries bring the controversy under the aegis of Title VII.

The conceptual interconnection between these theories, and the importance of identifying the workplace race- or sex-based norms imposed on plaintiffs, are illustrated in a striking 1975 Second Circuit case. In *DeMatteis v. Eastman Kodak Co.*,²³⁴ David DeMatteis, a white Kodak employee of long tenure, sold to a black coworker his house in a predominantly white neighborhood where many Kodak employees lived. In response, DeMatteis was constructively discharged by denial of medical treatment, of equipment needed to do his job, and of protection from coworkers’ harassment.²³⁵ DeMatteis could not have sought Title VII relief under even a broad standing approach because no Kodak *employment* discrimination was at stake in the *housing* transaction.

The Second Circuit moved beyond standing to reason that DeMatteis could bring the claim under the Civil Rights Act of 1866²³⁶ because the constructive discharge was “allegedly in reprisal for his part in vindicating the right of a black fellow-employee ‘to make . . . [a] contract[]’ similar to that which whites in the neighborhood have freely been able to make.”²³⁷ Formally, then, *DeMatteis* is analogous to the nondiscrimination-as-opposition cases of *St. Anne’s Hospital* and *Chandler*.²³⁸

This formulation has two weaknesses. First, it focuses entirely on the race of the party to whom DeMatteis sold his home, even though DeMatteis’s and his harassers’ race, and his neighborhood’s racial composition, were clearly central to the case. Had DeMatteis not already lived in a white neighborhood in which his white coworkers had an interest, the reaction would likely have been less virulent. Apparently, what enraged his coworkers was not so much that *any* house was sold to a black family, but that a white coworker broke the racist solidarity that maintained the whiteness of the residential community.²³⁹

Second, the reasoning turns entirely on the happenstance that the claim was

234. 511 F.2d 306 (2d Cir. 1975).

235. *Id.* at 307 & n.1.

236. 42 U.S.C. § 1981 (1994).

237. *Id.* at 312 (quoting § 1981) (alterations and omissions in original). The court relied on *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), which gave standing to a white tenant expelled from a homeowner’s association for leasing to a black family, on the theory that the white tenant was merely challenging the association’s practice of racial discrimination against African-Americans. A broader theory was needed in *DeMatteis* because Kodak had no housing relationship at all to the purchasing family.

238. *See supra* Part III.B.1-2.

239. *Cf. Schultz, Reconceptualizing Sexual Harassment, supra* note 8, at 1788-89 (arguing that harassment of a male manager who refused to carry out the owner’s desired sex discrimination against female employees came about because he “betrayed the type of dominant masculinity his supervisor expected of him as a manager”).

litigated under § 1981,²⁴⁰ which covers race discrimination in all contracting. Under Title VII, DeMatteis's sale to a black family would not have vindicated *their* rights under the statute, which has no direct bearing on housing transactions. Thus, even under the broad theory of *St. Anne's Hospital*—that any nondiscriminatory act counts as “opposition,” even absent a contrary employer request—DeMatteis could not claim retaliation because his opposition would not have been to an unlawful *employment* practice.²⁴¹

Instead, DeMatteis should have been able to state a claim for discrimination against *himself* based on *his* race. As a white resident of a segregated community, he was expected to do his loyal part maintaining its whiteness, but he violated these race-specific norms and was brutally sanctioned at work. Interference with DeMatteis's employment was the stick that disciplined him for violating the prevailing view at Kodak of how white workers should behave, even outside the workplace.

The court's narrow analysis renders DeMatteis's own race invisible, leaving him not a *target* of Kodak's race discrimination in *employment* but a mere conduit for its endorsement of discrimination in housing. The tension between this approach and the one taken in the interracial association cases is made clear in another Second Circuit decision, *Albert v. Carovano*.²⁴² There, the court offered a cramped reading of claims for § 1981 discrimination based on white employees' interracial marriages, recasting them as claims that plaintiffs had been “retaliated against . . . because they did *not* engage in purposeful racial discrimination in a contractual or marital context.”²⁴³ This approach would eviscerate protection for intergroup association by collapsing it into the category of “retaliation” and making it derivative of some other act of discrimination. If taken literally it would conceptualize discrimination against people who enter interracial marriages as really retaliation for failure to discriminate in “marital contracting” and thus offer no protection for persons fired for intimate relationships not formalized in marriage.²⁴⁴ Moreover, on this theory, even employees fired for interracial marriage would have no *Title VII* claim because the action for which they were retaliated against—interracial marital “contracting”—is not itself protected by the statute.²⁴⁵

240. DeMatteis's Title VII claims were dismissed as time barred. *See DeMatteis*, 511 F.2d at 309-11.

241. *See* 42 U.S.C. § 2000e-3(a) (1994) (barring retaliation against employees who complain about an unlawful employment practice); *Wimmer v. Suffolk County Police Dep't*, 176 F.3d 125, 134-36 (2d Cir. 1999); *see also supra* notes 164-68 and accompanying text.

242. 851 F.2d 561 (2d Cir. 1988) (en banc).

243. *Id.* at 572-73 (emphasis in original).

244. Moreover, the approach would provide no protection for any form of cross-sex interaction, since § 1981 applies only to race discrimination. *See* 42 U.S.C. § 1981 (1994). *See generally* *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 609-613 (1987); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 821 (1991) (noting the “gaping hole in our civil rights laws regarding gender discrimination”).

245. *Albert* thus flies in the face of the overwhelming precedent under both § 1981 and Title VII that discrimination against person A based on a cross-race relationship with person B is discrimination based on *person A's* race. *See supra* Part III.C.; *see also* *Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878 (7th Cir. 1998) (noting that § 1981 and Title VII

By limiting so-called association claims to situations in which they can be reframed as retaliation-for-nondiscrimination, the *Albert* court reached for a bright-line rule defining those interracial “associations” protected against discrimination: only those themselves subject to § 1981’s ban on race discrimination in contracting.²⁴⁶ The Seventh Circuit’s recent opinion in *Drake* has the better approach. The *Drake* court declined to limit associational claims to particular forms or degrees of association and relied instead on the fundamental elements of a Title VII claim: a cognizable injury because of the plaintiff’s race (or sex, religion, or national origin).²⁴⁷ The next Part sets out how employees sanctioned for acts of solidarity toward other groups may assert such discrimination against themselves, heeding *Drake*’s counsel to integrate the theory behind interracial association claims into ordinary Title VII analysis.

IV. A STEREOTYPING ANALYSIS OF INTERGROUP SOLIDARITY

Despite some courts’ outright rejection of Title VII claims by employees sanctioned for intergroup solidarity and other courts’ awkward attempts to address them through third-party standing, retaliation, and intergroup association theories, such claims can be understood squarely within existing Title VII doctrine. If employers insist that employees conform to sex- or race-based stereotypes regarding interactions with other race or sex groups, employment practices enforcing those stereotypes constitute actionable discrimination because of race or sex.

By placing a rich understanding of stereotyping at the center of Title VII analysis, we can draw on accounts of race and sex as processes of social interaction rather than as static attributes of individuals. Because a critical way that group identities and boundaries are formed is through relationships that mark some persons as inside and others as outside the group, it should be no surprise that intergroup interaction is central to those normative expectations of group members that constitute one form of stereotyping. Moreover, because group relations often are structured hierarchically, not simply as relationships of difference, stereotypical intergroup interactions may involve discrimination.

From this perspective, we can elaborate on the observation from Part II that discriminatory conduct frequently relies for its effectiveness upon coercion within the

retaliation cases “provide little guidance” in association claims that turn on discrimination based on plaintiff’s race); *Fiedler v. Marumco Christian Sch.*, 631 F.2d 1144 (4th Cir. 1980) (considering § 1981 claim stated by white schoolboy discriminated against for friendship with black girl).

246. This position allowed the *Albert* court to dismiss the § 1981 complaints of white students who alleged that they were disciplined “because they are . . . supportive of the rights of blacks [and] Latinos” in the course of a campus protest but who did not identify any § 1981 rights that their actions protected. *Albert*, 851 F.2d at 572 (alterations and omissions in original). Indeed, the en banc court warned that “[o]therwise, non-minority plaintiffs could bring actions where § 1981 rights are not implicated.” *Id.* This prediction, however, is simply false. White plaintiffs could bring actions where no § 1981 rights of *nonwhites* were implicated but only where they alleged that *their own* § 1981 rights against race discrimination had been violated: in *Albert*, rights arising from contracts for education.

247. *Drake*, 134 F.3d at 884.

group that may, in aggregate, benefit from discrimination. Enforcing expectations that group members will cooperate with, or acquiesce in, subordinating behavior toward others constitutes discriminatory race or gender stereotyping against members of the “in-group.” Far from *contradicting* simultaneous discrimination against an “out-group,” such suppression of intergroup solidarity can be integral to that discrimination. This analysis applies not only to sanctions *responsive* to acts of intergroup solidarity but also to threatened sanctions that deter such acts by creating an environment hostile to them. In either case, Title VII’s remedial and preventive aims are well served by protecting persons who are injured at work for violating race- or sex-based norms that frown on intergroup solidarity and that favor agonistic intergroup relations.

A. Title VII Recognition of Discrimination Beyond the Zero-Sum Game

The fundamental conceptual roadblock to viewing harms based on assertions of intergroup solidarity as actionable discrimination is the zero-sum game model of discrimination, which itself builds on a view of race and sex as static, homogeneous traits. From this perspective, discrimination confers disadvantage on groups as a whole, without internal differentiation, because among women, for instance, there are not differences themselves based on gender.²⁴⁸ With this model in mind, it becomes difficult to understand why a member of one group would discriminate against members of her own group based on the characteristic they share, so same-race and same-sex discrimination seem implausible. Finally, because discrimination consists simply of putting a thumb on the scales and depressing the opportunities of one group, it confers a relative advantage on other groups not similarly burdened. From this view, a discriminatory practice cannot harm members of two different groups *because of* the trait that defines each group: if African-Americans are discriminated against, any harms to whites are *despite*, not because of, their race.

Despite the elegance and familiarity of this reasoning, which underwrites both the rejection of plaintiffs’ discrimination claims in *Childress* and most offers of Title VII protection under the theories discussed in Part III, courts long have recognized that discrimination takes more complex forms than the zero-sum game; and Title VII doctrine has responded accordingly. Indeed, each prong of the model—discrimination does not select among group members, discrimination does not occur between members of the same group, discrimination against one group cannot also constitute or even coexist with discrimination against another—has been rejected by the Supreme Court and by influential decisions in the courts of appeals.

1. From Disadvantaging Groups to Enforcing Stereotypes

Beginning in the early 1970s, the Supreme Court recognized that discriminatory

248. Race and sex thus differ from features like a fingerprint or height, which, though fixed, do not easily define internally invariant *groups*. One might assign all persons with a height above five feet to one group, but the group would be internally differentiated by differences in height, the same characteristic defining the group in the first place. Race and sex, by contrast, are characteristics that allow only two forms of comparison: same or different.

practices need not affect all members of the victimized race or sex group equally. In a type of case known as “sex-plus,” the courts struck down employer rules that harmed only women, but not all women, such as bars on the employment of married women or women with children.²⁴⁹ Again, in *UAW v. Johnson Controls*,²⁵⁰ the Court found that a “fetal protection policy” violated Title VII despite the employer’s claim that its practice of denying employment to any unsterilized woman within child-bearing years was intended not to discriminate against women but to protect their unborn children.²⁵¹ Actionable discrimination does not require either the aim or the effect of conferring blanket disadvantage on members of one group; the test instead is whether workplace consequences flow because of an *individual’s* sex or race.²⁵² Thus, whether *other* persons of the same sex or race are also discriminated against (or favored) is not dispositive of an employee’s claim.²⁵³

The enforcement of race- or sex-based stereotypes exemplifies discrimination that directly harms only some members of a group and yet is based on the characteristic the entire group shares. The leading case is *Price Waterhouse v. Hopkins*.²⁵⁴ The accounting firm Price Waterhouse denied Ann Hopkins partnership in part because she was perceived to be insufficiently “feminine.”²⁵⁵ Her demeanor, including the manner in which she exercised authority over subordinates, was seen as inappropriately aggressive for a woman,²⁵⁶ and she was counseled to modify both her appearance and behavior to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”²⁵⁷ In his plurality opinion, Justice Brennan observed that “we are beyond the day when an employer

249. *See, e.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam) (denying employment to women, but not men, with preschool aged children violates Title VII); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (no-marriage rule for women violates Title VII). *See generally* Wendi D. Barish, Comment, “Sex-Plus” Discrimination: A Discussion of *Fisher v. Vassar College*, 13 HOFSTRA LAB. L.J. 239 (1995) (discussing the evolution and application of the “sex-plus” doctrine).

250. 499 U.S. 187 (1991).

251. *Id.* at 199 (holding that a finding of discrimination “does not depend on why the employer discriminates”).

252. *See Connecticut v. Teal*, 457 U.S. 440, 453-54 (1982) (“The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole.”).

253. *See id.* at 455 (“It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees’ group.”); *Brown v. Henderson*, 257 F.3d 246, 253-54 (2d Cir. 2001) (“[W]hat matters in the end is not how the employer treated *other* employees, if any, of a different sex, but how the employer *would have treated the plaintiff* had she been of a different sex.”) (emphasis in original); *see also Carson v. Bethlehem Steel Corp.*, 82 F.3d 157 (7th Cir. 1996) (per curiam) (rejecting argument that plaintiff’s replacement by worker of same race precluded establishment of a prima facie case of race discrimination).

254. 490 U.S. 228 (1989).

255. *Id.* at 234-35.

256. *Id.*

257. *Id.* at 235.

could evaluate employees by assuming *or insisting* that they matched the stereotype associated with their group.”²⁵⁸ In other words, employment decisions may not be made on the basis of either *empirical* assumptions or *normative* expectations regarding how group members behave.²⁵⁹

The bar on enforcing sex- or race-based stereotypes applies regardless of whether the stereotype concerns behavior in or out of the workplace. Although Price Waterhouse violated Title VII by penalizing Hopkins for not acting at work as it thought a woman should, others have violated Title VII by penalizing women for taking on family roles such as marriage and parenting thought incompatible with employment for women, though not for men.²⁶⁰ Similarly, in the interracial association cases discussed above, courts found Title VII violations when white workers were penalized for developing friendly, intimate, or assistive relationships with nonwhites, regardless of whether those relationships were with coworkers or with nonemployees.²⁶¹

Price Waterhouse demonstrates that the zero-sum game is an incomplete account of discrimination under Title VII. The cause of discrimination was not solely membership in a group defined by fixed bodily features, but was group membership *in conjunction* with individual behavior, including forms of interpersonal interaction, physical appearance, and bodily deportment. Rather than being discriminated against for the sex characteristic that marked her as the *same* as all other women (with respect to sex), Ann Hopkins was discriminated against for her *difference* from what her employers believed women ought to be.

2. Intragroup Discrimination

258. *Id.* at 251 (emphasis added). In addition to the three Justices joining Justice Brennan’s plurality opinion, Justices White and O’Connor concurred in the judgment and agreed that evidence concerning Hopkins’s “failure to conform to the stereotypes credited by a number of the decisionmakers” showed that sex discrimination was a substantial factor in the partnership decision. *Id.* at 272 (O’Connor, J., concurring in the judgment); *see id.* at 259 (White, J., concurring in the judgment).

259. *See also* City of Los Angeles Dep’t of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) (“Myths and purely habitual assumptions about a woman’s inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.”).

260. *See, e.g.,* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Sprogis v. United Airlines, 444 F.2d 1194 (7th Cir. 1971). These decisions show that the Sixth Circuit in *Dillon v. Frank* misconstrued the *Price Waterhouse* Court’s reference to the Catch-22 women faced—“out of a job if they behave aggressively and out of a job if they do not,” 490 U.S. at 251—as limiting Title VII’s reach to those stereotypes concerning workplace behavior. *See Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *10 (6th Cir. Jan. 15, 1992).

261. *See, e.g.,* Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888 (11th Cir. 1986) (marriage to nonemployee); Reiter v. Ctr. Consol. Sch. Dist. No. 26-JT, 618 F. Supp. 1458, 1459 (D. Colo. 1985) (association with the local Hispanic community); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975) (friendship with nonemployee).

Once we recognize that discriminatory behavior need not affect all persons with the “same” race or sex as the victim of discrimination nor even be motivated in racial or sexual terms,²⁶² the incomprehensibility of same-group discrimination disappears. Indeed, the Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.*²⁶³ firmly repudiated any presumption that individuals will not discriminate against members of their own groups. After *Oncale*, the idea that discrimination necessarily involves members of one group imposing disadvantages on other groups in order to favor their own simply misstates the breadth and basis of Title VII coverage.²⁶⁴

A full consideration of stereotyping makes intragroup discrimination especially understandable. Although Hopkins was discriminated against by men, nothing in the stereotyping analysis requires an intergroup context.²⁶⁵ Individuals and institutions may have ideas about how both men and women ought to look and behave, and there is no reason not to expect attempts by men to secure other men’s conformity to their ideal of what men ought to be like.²⁶⁶ The Seventh Circuit offered just such an account in *Doe v. City of Belleville*.²⁶⁷ Assessing claims that a boy was harassed by male coworkers for, among other things, wearing an earring, the court observed that “the evidence suggests not that H. Doe’s coworkers were biased against men per se, but against men who did not conform to their notions of masculinity.”²⁶⁸ Drawing on *Price Waterhouse*, the *Belleville* court rejected the notion that discrimination must be motivated by “gender-based animus—the harasser’s dislike of men or women”²⁶⁹ as

262. See *supra* note 247 and accompanying text; see also *Parker v. Sony Pictures Entm’t, Inc.*, 260 F.3d 100, 109 (2d Cir. 2001) (noting that the issue in a disability discrimination claim is “whether plaintiff’s disability made a difference to [the employer’s] decision-making, regardless of [the employer’s] exact motives in considering [plaintiff’s] disability”).

263. 523 U.S. 75 (1998).

264. Courts have not explored at length the dynamics of intragroup discrimination, simply citing “the many facets of human motivation,” *id.* at 78 (quoting *Castaneda v. Partida*, 430 U.S. 482, 499 (1977)), and focusing instead on the abstract possibility that plaintiffs could show discrimination because of race or sex; see *id.* at 79-80; see also *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 158-59 (7th Cir. 1996).

265. See *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 870, 874-75 (9th Cir. 2001) (applying *Price Waterhouse* to a situation in which a male plaintiff’s male coworkers and supervisor “harassed him because he failed to conform to a male stereotype”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (noting that because *Oncale* requires applying to same-sex discrimination the same Title VII standards applied to cross-sex discrimination, “a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity”).

266. See *Abrams*, *supra* note 8, at 1225-29; *Franke*, *supra* note 18, at 95; *Schultz, Reconceptualizing Sexual Harassment*, *supra* note 8, at 1774-76.

267. 119 F.3d 563 (7th Cir. 1997), *vacated by* 523 U.S. 1001 (1998) (mem.). The *Belleville* opinion was vacated and remanded in light of *Oncale*, so it is offered not for its precedential value but for the persuasiveness of its reasoning, which is consistent with other authorities on stereotyping.

268. *Id.* at 592; accord *Nichols*, 256 F.3d at 874-75; *Higgins*, 194 F.3d at 261 n.4.

269. *Belleville*, 119 F.3d at 592; accord *U.A.W. v. Johnson Controls, Inc.*, 499 U.S. 187, 261 n.4 (1991) (“Whether an employment practice involves disparate treatment through

a class—and embraced Title VII liability for “harassment stemming from the employee’s failure to meet the stereotypical expectations of his gender.”²⁷⁰ Of course, sex- and race-based stereotyping implicitly rely on disparate treatment of race or sex classes exposed to differing standards, but to incur Title VII liability such disparate treatment need not confer relative disadvantage on the entire class so long as it harms individuals because of their race or sex.²⁷¹

3. Connecting Intragroup Stereotyping and Intergroup Discrimination

Once we recognize that employees harmed because of their deviation from race- or sex-based stereotypes have been discriminated against under Title VII, the way is clear to recognizing how members of two nominally “opposed” workplace groups may *both* be discriminated against simultaneously. The crucial insight is that one group’s wholesale exclusion from or subordination in the workplace may be linked

explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.”); *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1283-84 (11th Cir. 2000) (“[A] plaintiff need not prove that a defendant harbored some special ‘animus’ or ‘malice’ towards the protected group to which she belongs.”); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58-60 (1st Cir. 1999) (holding that “unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus”).

270. *Belleville*, 119 F.3d at 592.

271. *See* *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001) (“[T]he courts have consistently emphasized that the ultimate issue is the reasons for *the individual plaintiff’s* treatment, not the relative treatment of different *groups* within the workplace.”) (emphasis in original); *Carroll v. Talman Fed. Sav. & Loan Ass’n*, 604 F.2d 1028, 1030 (7th Cir. 1979) (rejecting argument that Title VII forbids only those sex stereotypes that “substantially burden the female employees more than male employees”). *But cf.* *Gerdom v. Cont’l Airlines, Inc.*, 692 F.2d 602, 605-06 (9th Cir. 1982) (en banc) (characterizing “permissible grooming rules for male and female employees as those which do not significantly deprive either sex of employment opportunities, and which are even-handedly applied to employees of both sexes”). The concept of relative disadvantage is inadequate to capture the constraints that may be placed on employees because of their race or sex. Consider, for instance, an employer who requires male employees to be married and female employees to be unmarried. Surely such a policy would violate Title VII, even though it may be impossible to characterize men or women as more severely burdened by the requirement: the burden depends not on whether one is male or female, but on whether one diverges from the applicable stereotype. Although comparisons between similarly situated groups of employees may be analytically helpful, they are unnecessary so long as there is some other basis on which to establish the causal role of the employee’s race, sex, or other protected characteristic. *See* *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467-68 (2d Cir. 2001); *Brown*, 257 F.3d at 252-55. In many cases, however, such stereotypes are part of broader systems of inequality that privilege the characteristics and behaviors associated with one group. *See* *Abrams*, *supra* note 8, at 1208-09 & n.206 (discussing differential significance of male and female stereotypes because of their different relationship to the hierarchical valuation of masculine over feminine norms).

to the unlawful imposition of stereotypes on the members of the group or groups for whom workplace privilege is reserved.²⁷² In particular, such discriminatory dynamics may be premised on the organization of the workplace into agonistic groups defined along race and gender lines.²⁷³

This dynamic has long been recognized in institutions that have simultaneously excluded men while furthering stereotypes of women. In *Mississippi University for Women v. Hogan*,²⁷⁴ for instance, the Supreme Court held that a public nursing school discriminated against Joe Hogan in violation of the Equal Protection Clause by excluding him from its baccalaureate program because of his sex.²⁷⁵ Countering the school's argument that its women-only policy was justified as an attempt to counteract women's educational disadvantages, the Court concluded that the policy actually perpetuated stereotypes that "women, not men, should become nurses"²⁷⁶ in furtherance of "archaic and overbroad generalizations about women."²⁷⁷ The Court also noted that such stereotyping could harm women within nursing through sex discrimination in wages even while it also harmed men who sought a nursing education but were excluded.²⁷⁸ A similar pattern is clear in a long line of employment discrimination cases involving flight attendants, a job category from which airlines have frequently sought to exclude men in violation of Title VII,²⁷⁹ and within which airlines have routinely imposed stereotypical notions of ideal women workers as "single, thin, young, . . . not pregnant,"²⁸⁰ and possessing female "sex appeal"²⁸¹

272. See Franke, *supra* note 18, at 86-87 (arguing that formerly all-male military educational institutions were "dedicated to the parodic celebration of, and ritual indoctrination in, the ways of masculinity for men") (emphasis in original).

273. See Abrams, *supra* note 8, at 1220 (arguing for understanding "sexual harassment as a practice rooted in a struggle between men and women in the workplace that perpetuates both male control and the primacy of conventionally masculine norms"). Although I generally agree with Abrams' approach, one aim of this Article is to stress that a workplace organized around a struggle between men and women, or whites and racial minorities, is not merely the backdrop against which discrimination plays out; instead, this form of agonistic workplace organization is itself the *product* of discriminatory practices that force workers into such relationships which then go on to manufacture other forms of discrimination.

274. 458 U.S. 718 (1982).

275. *Id.* at 719-21.

276. *Id.* at 730.

277. *Id.* at 730 n.16.

278. *Id.* at 730-31 n.15.

279. See, e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981).

280. Martha Chamallas, *Exploring the 'Entire Spectrum' of Disparate Treatment Under Title VII: Rules Governing Predominantly Female Jobs*, 1984 U. ILL. L. REV. 1, 30; accord *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 606 (9th Cir. 1982) (en banc) (holding that weight requirements for all-female job category violated Title VII and noting that "[t]he exclusively female classification in this case typifies the then-prevailing pattern in the airline industry of restricting job opportunities and imposing special conditions on the basis of gender stereotypes"); see also *Sangster v. United Air Lines, Inc.*, 633 F.2d 864 (9th Cir. 1980) (no-marriage requirement); *Burwell v. E. Air Lines, Inc.*, 633 F.2d 361 (4th Cir. 1980) (en banc)

and/or feminine capacities for caring service.²⁸² Courts considering women flight attendants' discrimination claims have repeatedly rejected the notion that the airlines' "favoritism" toward women in the sex composition of the job category negated the possibility of "sex-plus" discrimination in requiring female flight attendants to conform to sex stereotypes.²⁸³

(per curiam) (mandatory maternity leave during pregnancy); *Loper v. Am. Airlines, Inc.*, 582 F.2d 956 (5th Cir. 1978) (mandatory resignation at age 32); *In re Consolidated Pretrial Proceedings*, 582 F.2d 1142 (7th Cir. 1978) (policy barring employment of mothers but not fathers), *rev'd on other grounds sub nom.*, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Inda v. United Air Lines, Inc.*, 565 F.2d 554 (9th Cir. 1977) (no-marriage requirement); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976) (weight requirements); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (no-marriage requirement).

281. *Wilson*, 517 F. Supp. at 293, 304 (noting that Title VII "does not eliminate the commercial exploitation of sex appeal" but does require that employers only "exploit that attractiveness and allure of a sexually integrated workforce").

282. *See Diaz*, 442 F.2d 385, 387 (describing airline's assertions that its passengers' "psychological needs are better attended to by females" who excel at "courteous personalized service"). *See generally* Chamallas, *supra* note 280, at 30; Toni Scott Reed, *Flight Attendant Furies: Is Title VII Really the Solution to Hiring Policy Problems?*, 58 J. AIR L. & COM. 267, 270 (1992) (explaining that "[t]he stewardess, as the ultimate sales pitch, had to be the ultimate woman").

283. *See, e.g., Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 605-07 (9th Cir. 1982) (rejecting airline's argument that "these employees cannot complain of discrimination because the flight hostess position was a popular one, sought by many women and denied to men, and therefore the only victims of discrimination were men"); *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) (rejecting airline's contention that its no-marriage rule could not violate Title VII because it applied only to the all-female category of "stewardess"). *But see* *Stroud v. Delta Air Lines, Inc.*, 544 F.2d 892, 893 (5th Cir. 1977) (upholding no-marriage rule applied to all-female category of flight attendant but not to other job categories because men "simply were not involved in the functioning of the policy"); *Malarkey v. Texaco, Inc.*, 704 F.2d 674 (2d Cir. 1983) (per curiam) (following *Stroud* and dismissing Title VII complaint alleging sex-based policy of promoting women considered more attractive because "nowhere does she allege that she has at any time been in competition with a male"). *Stroud's* requirement that a Title VII plaintiff identify a worker of a different sex not subject to the allegedly discriminatory policy is inconsistent with the Supreme Court's clear direction that Title VII claims are governed by a "but-for" concept of causation, under which the proper question is whether the same employment policy or decision would have been imposed if (hypothetically) the plaintiff had been a member of a different group, not *Stroud's* question of whether the policy was imposed (actually) on *someone else* who is a member of a different group. *See City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (holding that Title VII liability turns on the "simple test" of whether the evidence shows "treatment of a person in a manner which but for that person's sex would be different"); *Brown v. Henderson*, 257 F.3d 246, 253-54 (2d Cir. 2001). In *County of Washington v. Gunther*, 452 U.S. 161 (1981), the Court rejected *Stroud's* reasoning when it held that women prison guards could press Title VII claims of wage discrimination despite their membership in an all-female job category that differed substantially from an all-male category of prison guards. The Court

Applying this analysis to *male*- and/or *white*-dominated workplaces simply requires looking to the specific content of stereotypes in such workplaces. If, for instance, men expect each other to discriminate against women, then a systematic campaign of discrimination against women may coexist with discrimination against *some* male workers, namely those who violate the stereotyped expectation that they will close ranks with other men against women workers. Indeed, far from *contradicting* the allegation of discrimination against women, discrimination against those male workers complements and bolsters discrimination against women by suppressing resistance and encouraging complicity.²⁸⁴

This framework offers a way to understand the intergroup association cases, not as a special category implicating a “right to interracial association,” but rather as addressing a form of stereotyping especially repugnant to Title VII values. In *Chandler v. Fast Lane, Inc.*, for instance, the white plaintiff alleged that her employer harassed her for refusing to discriminate against African-Americans. The employer argued that the allegation of “discriminatory hiring and promotional practices targeted only at African-Americans” was incompatible with a claim of race discrimination against a white plaintiff and that Chandler was simply seeking to assert the Title VII claims of African-Americans.²⁸⁵ Although the court concluded that Chandler had a Title VII claim because the employer’s conduct “violated her fundamental right to associate with African-Americans,”²⁸⁶ the holding that Chandler stated a Title VII claim can be placed on a firmer footing and integrated with general Title VII principles by recharacterizing the employer’s conduct as insisting that Chandler conform to its expectation that white employees facilitate the perpetuation of racially discriminatory hiring practices.

On this view, employer opposition to white employees’ interracial “associations”

specifically rejected the idea that “a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimination might be—unless her employer also employed a man in an equal job in the same establishment.” *Id.* at 178; *see also* *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467 (2d Cir. 2001) (rejecting notion that “the only way a plaintiff can make out an inference of discrimination is to demonstrate that he was treated differently from other similarly situated employees”). *See generally* Chamallas, *supra* note 280, at 30-39. In sexual harassment decisions inferring sex discrimination from sex-specific sexual desire, for instance, courts have no trouble recognizing sex-based causation without resorting to comparative analysis of other workers in the same job category. *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (noting that “comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace” is merely one “evidentiary route” to a showing of sex discrimination).

284. *See* Franke, *supra* note 10, at 759 (“Workplace sexual conduct may injure women because it objectifies them as sex objects, and it may injure men because it assumes that all men conform to and join into a kind of sexualized hetero-masculine culture.”); Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1774-76 (arguing that male workers’ harassment of men has in common with harassment of women origins in preservation of masculine image of their jobs); *cf. Brown*, 257 F.3d at 255 (noting that harassment of a male coworker could be “part of a campaign to isolate her from workplace allies”).

285. *Chandler v. Fast Lane, Inc.*, 868 F. Supp. 1138, 1143 (E.D. Ark. 1994).

286. *Id.*

simply exemplifies the general phenomenon of racial stereotyping. Whether the “association” at issue involves employees or nonemployees and whether it involves friendship, sex, acceptance of authority, sale of a home, professional collaboration, or other interactions is irrelevant for Title VII purposes. A woman who is harassed because she tries to break into a male-dominated welding job is not discriminated against because of welding, just as Ann Hopkins was not discriminated against because of assertiveness. Rather, each is discriminated against because of sex, and Chandler was discriminated against because of race. We can explain *why* the discrimination is based on race or sex by tracing plaintiff’s experience to the specific gendered and racialized norms in a given workplace, but we need not create special categories for each of the many ways in which persons may be positioned outside of such norms.²⁸⁷ What matters is simply whether an employee is discriminated against because of that individual’s race or sex, including because of her or his violation of stereotyped expectation of how a person of such race and/or sex relates to members of another race and/or sex.²⁸⁸ Intra- and intergroup relations are fundamentally connected: being “one of the guys” often means adopting a certain stance toward women.²⁸⁹

B. A Richer Account of Race, Gender, and Discrimination

In order to move beyond the zero-sum game, we need different ways of conceptualizing race and gender and different ways of conceptualizing race and gender discrimination. Two key concepts integrate the idea of discriminatory stereotypes concerning intergroup relations with our understanding of the dynamics of race and gender. First, race and gender are active processes rather than static traits. Second, these processes are fundamentally social, constituted through the practices of human interactions and institutions. These ideas help identify additional forms of discrimination: disciplining individuals who stray from practices necessary to retain group membership, and generating the very differences between groups that become associated with and define group membership itself.²⁹⁰ Glimmers of such a reconceptualization abound in courts’ embrace of the concept of stereotyping, their recognition of same-group discrimination, and in their theories of standing, retaliation, and intergroup association. These doctrinal developments complement the efforts of scholars in a wide range of academic fields to articulate more robust accounts of how gender and race actually operate in social life.

287. *See* Gregory v. Daly, 243 F.3d 687, 699 (2d Cir. 2001) (“The law does not create separate causes of action for sex discrimination depending on the reason the employer denies a woman a job or a job benefit.”).

288. *See* Drake v. Minnesota Mining & Mfg. Co., 134 F.3d 878, 884 (7th Cir. 1998) (holding that the “key inquir[y]” was “whether that discrimination was ‘because of’ the employee’s race,” not the “degree of association” with a member of another race).

289. *See* Abrams, *supra* note 8, at 1229 n.311 (noting the pattern of “an intragroup dynamic that derives from an intergroup dynamic of subordination”).

290. *See* Schultz, *Telling Stories*, *supra* note 8, at 1824-32 (arguing that discriminatory segregation into jobs with blocked opportunities for advancement and job satisfaction forces women to curtail their career ambitions and refocus their goals on other parts of their lives).

1. Reconceptualizing Race and Gender As Ongoing Social Processes

The understanding of race and gender I am advocating is summed up by Candace West and Sarah Fenstermaker as “an ongoing interactional accomplishment.”²⁹¹ On this view, categorization grounded in the body constitutes only part of what it means to be a woman or a man, a white, black, or Latino person. Instead, what West and Fenstermaker refer to as “sex category” or “race category” is coupled with normative expectations of how members of those categories will look and act. Based on a perception of biological sex or physically grounded racial categorization,²⁹² one will expect other traits and behaviors to follow. Living up to these expectations is a constant, active process of wearing the right clothes, adopting the right mannerisms, and responding to others in the right fashion, as well as choosing the right job, playing the right role within a family, and so on. Though we can readily conceive of a female who is unfeminine, femininity names what we expect of women. Moreover, convincingly engaging in what Judith Butler refers to as this “performance” that constitutes being a man or a woman is not ultimately distinct from membership in the “underlying” group.²⁹³ Thus, if someone who initially appears white acts in ways associated with African-Americans, we may begin to wonder whether we hadn’t simply made a mistake in our initial categorization: perhaps the individual is just very

291. West & Fenstermaker, *supra* note 17, at 9; *see also* JERRY A. JACOBS, *REVOLVING DOORS: SEX SEGREGATION AND WOMEN’S CAREERS* 48, 106-07 (1989) (developing a theory of “lifelong social control” in which gender roles are not the product of early socialization but are constantly reinforced).

292. I say “perception” because this process of categorization generally does not rely upon any direct observation of the bodily features that supposedly ground these categories in the first place. A person’s sex is something that we habitually infer from a host of features including body shape, hair length and styling, demeanor, clothing, and so on, not from genitals, chromosomes, or hormones. *See generally* Franke, *supra* note 18, at 38-40 (describing the primary role of “cultural genitals”) (quoting HAROLD GARFINKEL, *STUDIES IN ETHNOMETHODOLOGY* 116-85 (1967)); SUZANNE J. KESSLER & WENDY MCKENNA, *GENDER: AN ETHNOMETHODOLOGICAL APPROACH* (University of Chicago Press 1985) (1978); *see also* SANDRA LIPSITZ BEM, *THE LENSES OF GENDER* 114 (1993) (discussing research showing that children learn to categorize by sex based on hair styling and clothing and that very young children are better able to make sex distinctions using such criteria than by direct observation of genitalia); Suzanne J. Kessler, *The Medical Construction of Gender: Case Management of Intersexed Infants*, 16 *SIGNS* 3, 18-21 (1990) (describing medical interventions in infants with ambiguous biological markers of sex guided by goal of bringing the body into alignment with gendered social behavior). Whether or not these categories have any “real” grounding in biological types is not relevant to this analysis; what matters is that people in practice incessantly, and usually with great confidence, impute membership in these categories. *See also* Michael Omi & Harold Winant, *Racial Formations*, in *RACE, CLASS, AND GENDER IN THE UNITED STATES* 13, 16 (Paula Rothenberg ed., 3d ed. 1995) (noting how “[r]ace becomes ‘common sense’—a way of comprehending, explaining and acting in the world” and the disorientation that follows “when people do not act ‘black,’ ‘Latino,’ or indeed ‘white’”).

293. JUDITH BUTLER, *GENDER TROUBLE* 134-41 (1990).

light skinned.²⁹⁴ Expectations of race- and gender-appropriate behaviors do not simply follow from an underlying categorization; the reverse may equally be true.²⁹⁵

Masculinity and whiteness are not static adjectives unproblematically attached to bodies, but are ongoing *achievements* that must be continually reenacted, lest they dissolve for lack of a natural foundation in the body itself.²⁹⁶ As Simone de Beauvoir put it long ago, “[o]ne is not born, but rather becomes, a woman.”²⁹⁷

These are profoundly *social* achievements. This is so in many respects, including matters of cultural meaning²⁹⁸ and institutional structure,²⁹⁹ but for my purposes here,

294. See Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 112-13 (1998) (documenting the role of racial “performance,” “[d]oing the things a white man or woman did,” in legal determinations of racial classification).

295. See BUTLER, *supra* note 293, at 134-41 (characterizing gender as a performance that produces the fiction of an underlying category of sex); Franke, *supra* note 18, at 3 (arguing that “[t]he targets of antidiscrimination law . . . should also include the social processes that construct and make coherent the categories male and female”); Gross, *supra* note 294, at 158-76.

296. See BUTLER, *supra* note 293, at 16-25, 66-67; Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents*, 10 LA RAZA L.J. 261, 281-86 (1998) (criticizing conceptions of race and sex grounded in immutable features of the body); Gross, *supra* note 294, at 156 (documenting how in the nineteenth-century American South, “[w]hile the essence of white identity might have been white ‘blood,’ because blood could not be transparently known, the evidence that mattered most was evidence about the way people acted out their true nature”); Angela P. Harris, *The Unbearable Lightness of Identity*, 2 AFR.-AM. L. & POL’Y REP. 207, 217 (1995) (criticizing “the concept of race as a characteristic of persons rather than as the marker of a relation of power”); Omi & Winant, *supra* note 292, at 17, 19 (rejecting idea of “race as something fixed and immutable—something rooted in ‘nature’”—in favor of a concept of “racial formations”: an “unstable and ‘decentered’ complex of social meanings constantly being transformed by political struggle”); West & Fenstermaker, *supra* note 17, at 9; West & Zimmerman, *supra* note 17, at 126 (proposing an understanding of gender as a routine, methodical, and recurring accomplishment). A focus on race and gender as *products* rather than static characteristics is perfectly compatible with attributing an important role to the body itself, both because bodies themselves are shaped through practices of medicine, exercise, diet, grooming, and so on and because the social significance granted to physical characteristics is not determined by the body itself. See Espinoza & Harris, *supra* note 10, at 514-15, 542 (arguing that antiblack racism can neither be understood without an account of skin color nor reduced to it); Kessler, *supra* note 292, at 17.

297. SIMONE DE BEAUVOIR, *THE SECOND SEX* 267 (H.M. Parshley trans., Vintage Books ed., 1989) (1952).

298. See, e.g., R.W. CONNELL, *MASCULINITIES* 44 (1995) (“Masculinity and femininity are inherently relational concepts, which have meaning in relation to each other, as a social demarcation and a cultural opposition.”); DRUCILLA CORNELL, *BEYOND ACCOMMODATION* 79-118 (1991) (discussing how concepts of male and female are defined and understood through opposition to the other within a hierarchical framework); Espinoza & Harris, *supra* note 10, at 511 (arguing that whiteness has been constructed through contrast with blackness).

299. See, e.g., WILSON, *supra* note 45 (describing how African-American disadvantage

the relevant aspect is interpersonal interaction, from trivial encounters to ongoing relationships within institutions. For instance, in some contexts establishing an identity as a white woman has included exercising authority over nonwhite domestic servants;³⁰⁰ in another, becoming an adult white woman has required being sexually sought by white men;³⁰¹ a man's guiding of a woman's arm affirms the gender positions of each;³⁰² establishing and maintaining a familial role of economic "provider" by earning a "family wage" has been central to modern masculinity, while economic independence from fathers and husbands has been a threat to respectable femininity;³⁰³ in some circumstances, one retains one's whiteness by deferring to white supremacy;³⁰⁴ one affirms masculinity by participating in sexual banter about women;³⁰⁵ and so on.³⁰⁶ These constitutive forms of interaction may be both inter- and intragroup; indeed, group boundaries may themselves be established through such performances. Notably, many of the ways of *doing* race or gender involve interactions that assert and enact relationships not only of *difference*, but of *hierarchy*.³⁰⁷

has been created through systematically discriminatory practices in housing, lending, transportation, education, and employment); Evelyn N. Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, 18 SIGNS 1, 8 (1992) (noting that the labor of women of color has allowed white women to achieve normative domesticity by maintaining middle-class standards without performing demanding menial labor); Schultz, *Telling Stories*, *supra* note 8, at 1832-39 (arguing that sex differences in attitudes towards employment are produced by institutional practices of sex segregation); Symposium, *On West and Fenstermaker's "Doing Difference,"* 9 GENDER & SOC'Y 491, 500, 504-05 (1995) (criticizing West & Fenstermaker, *supra* note 17, for excessive focus on face-to-face relations without adequate consideration of institutional context).

300. Glenn, *supra* note 299, at 9.

301. Frances W. Twine, *Brown-Skinned White Girls*, in DISPLACING WHITENESS: ESSAYS IN SOCIAL AND CULTURAL CRITICISM 214, 232 (Ruth Frankenberg ed., 1995) ("A woman must be desired and publicly recognized as the legitimate romantic partner of a white male in order to maintain a white cultural identity.").

302. West & Zimmerman, *supra* note 17, at 135.

303. See generally ARDIS CAMERON, RADICALS OF THE WORST SORT: LABORING WOMEN IN LAWRENCE, MASSACHUSETTS, 1860-1912 (1993); ALICE KESSLER-HARRIS, A WOMAN'S WAGE (1990).

304. See *When Does the Unreasonable Act Make Sense?*, in RACE TRAITOR 36 (Noel Ignatiev & John Garvey eds., 1996) ("The rules of the white club do not require that all members be strong advocates of white supremacy, merely that they defer to the prejudices of others. The need to maintain racial solidarity imposes a stifling conformity on whites, on any subject touching even remotely on race.").

305. See Franke, *supra* note 10, at 739.

306. See also Omi & Winant, *supra* note 292, at 16-17 (describing "racial etiquette" governing the "interactions of daily life" and "presentation of self").

307. See, e.g., JONES, *supra* note 8, at 318 (discussing association of African-Americans with jobs requiring servile relationships to whites); Espinoza & Harris, *supra* note 10, at 516 ("Learning to distinguish oneself from and express contempt for blacks is part of the ritual through which immigrant groups become 'American.'") (citing Toni Morrison in Bonnie Angelo, *The Pain of Being Black*, TIME, May 22, 1989, at 120); Franke, *supra* note 10, at 760

A virtue of the “performance” metaphor is its implicit assumption of an audience, and different audiences have different expectations. The content of race- and gender-specific norms of interaction change with context. Masculinity may require relating to men one way and women another, and may further depend on the race of both oneself and others.³⁰⁸ More generally, group-specific standards of social interaction may vary with considerations other than those defining the group: gender-appropriate behavior may depend on age, family relation, place in organizational structure, and so on, and it may vary among social settings, such as whether one is on the job or at home, in a position of authority or inferiority, and so on.³⁰⁹

2. Reconceptualizing Discrimination As the Creation of Unequal Group Relations

Nothing in this understanding of gender and race prevents us from recognizing familiar forms of discrimination in which advantages and harms are distributed on the basis of established group membership. The new understanding does, however, bring to the fore other modes of discrimination that implicate the creation and maintenance of group membership and the social relations implicit in it. Stereotyping presents the simplest example. Because of membership in a race or sex category, an individual is expected to behave in a particular fashion in a particular context. When Ann Hopkins did not conform to the image and behavior Price Waterhouse expected from her as a woman worker, she was refused entry to the partnership. This is a form of sex discrimination, as the Supreme Court recognized.³¹⁰

Regulating behavior based on race or sex categorization, however, goes beyond simple *enforcement* of preexisting norms. The very act of enforcement may itself function to *produce* both differentiation among groups and relationships between them.³¹¹ If a male superior harasses a female subordinate when she asserts her independence and desire for advancement, he not only disciplines her for deviating from gendered expectations but simultaneously communicates to others in the workplace the expectation that men ought to exercise workplace authority and women

(arguing that sexual subordination of women is a central component of masculine identity enforced through workplace harassment); Yount, *supra* note 25, at 410 (noting that male miners demonstrated their masculinity by asserting women’s dependence on them to perform physically demanding tasks).

308. See generally FRANKENBERG, *supra* note 207, at 74-87 (discussing intersection between race and gender-based norms of sexual interaction); Peggie R. Smith, *Separate Identities: Black Women, Work, and Title VII*, 14 HARV. WOMEN’S L.J. 21 (1991) (discussing specificity of discrimination to African-American women inadequately captured by considering race and gender separately); Caldwell, *supra* note 10.

309. See, e.g., Yount, *supra* note 25, at 399 (arguing that gendered workplace norms are specific to the coal mines Yount studied rather than simply being the “spillover” into the mines of general patterns); CYNTHIA COCKBURN, *MACHINERY OF DOMINANCE: WOMEN, MEN, AND TECHNICAL KNOW-HOW* 195-97 (1988); Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1760-61, 1776 & n.475 (emphasizing specificity of gender-based norms to particular workplace contexts).

310. See *supra* notes 252-59 and accompanying text.

311. See Abrams, *supra* note 8, at 1218-19.

submit to it. Moreover, his behavior helps make it *true* that men are comfortable exerting authority and that women tend to submit to it. Over time, such patterns may influence the preferences of men and women to conform with these expectations, such that men learn to seek and take pleasure in authority and high-ranking jobs while women are discouraged from doing so and orient their goals toward other sources of workplace rewards or toward satisfactions offered by other parts of life.³¹²

Understanding race and gender as active, ongoing processes also opens up the possibility that they can be done differently.³¹³ These moments of resistance, and the sanctions that follow, characterize the cases discussed above and many similar instances of employment discrimination: women in traditionally female jobs who resist being cast as sexualized, trivialized playthings of authoritative men;³¹⁴ whites who integrate their neighborhoods by selling their houses to blacks; whites who refuse to carry out discriminatory orders; men who take time off work to share childcare and housekeeping responsibilities with female partners;³¹⁵ black women who refuse ad hoc

312. See Schultz, *Telling Stories*, *supra* note 8, at 1832-39; see also Nancy Folbre & Thomas E. Weisskopf, *Did Father Know Best? Families, Markets, and the Supply of Caring Labor*, in *ECONOMICS, VALUES, AND ORGANIZATION* 171, 175, 183-84 (A. Ben-Ner & L. Putterman eds., 1998) (discussing social shaping of attitudes towards caretaking work); cf. Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 *COLUM. L. REV.* 753, 801-24 (1994) (examining ways in which coercive and subordinating workplace governance regimes may function to generate worker acceptance of those regimes as legitimate).

313. See BUTLER, *supra* note 293, at 136-49 (arguing for seeing in the practice of drag the possibilities for subversive repetitions that expose the contingencies of gender through parody). Jerry Jacobs' examination of women's occupational preferences, for instance, shows that adult women's segregation into female-dominated jobs cannot be explained by childhood socialization, and thus that gendered divisions of labor are much more open to revision than a theory of fixed preferences would predict. JACOBS, *supra* note 291, at 52-53 (noting that instability of adult preferences explains changes in sex segregation among adults, in contrast to theories that assume the formation of fixed preferences in childhood and early adulthood). Not only does the need for continual reenactment provide opportunities for disruption through resistance, but the inherent ambiguities in how norms are to be extended to new circumstances, and in which among many possible norms are most applicable to a given circumstance, make room for individual and collective agency. See, e.g., SABINA LOVIBOND, *REALISM AND IMAGINATION IN ETHICS* 192-93, 197-200 (1983).

314. See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1767-68.

315. See Berdahl, *supra* note 44, at 540.

I decided that I would take three weeks off to help my wife get adjusted to having a baby and a 19-month-old. . . . Comments were made and my work wasn't being covered so I ended up only taking a week and two days off. It made me feel like I wasn't a "man" if I choose to stay home and take care of the kids. This same attitude manifests when I ask to take time off so I can take the kids to the doctor, after all my wife works outside the home as well and we try to share these types of chores equally.

Id.

assignments to heavy cleaning unrelated to their normal duties,³¹⁶ and so on.

If engaging in particular patterns of relationships between persons of different races and genders is part of what constitutes being a certain race and gender, then changing these relationships means changing, or resisting, the normative race and gender roles of *all* the parties to the interaction.³¹⁷ This remains true when the forms of interaction being resisted are hierarchical ones. If part of being white consists of disparaging or subordinating blacks, and part of being black consists of being subjected to degradation and subordination by whites, then creating egalitarian relationships between whites and blacks means challenging what it has meant *both* to be white and to be black, notwithstanding that the relationship has offered relative advantage to whites.

Conversely, enforcing a system of social relations in which whites and blacks are socially differentiated into dominant and subordinate groups is a practice that enforces a particular vision of what it means to be white on whites and a particular vision of what it means to be black on blacks; in so doing, enforcing stereotypes *produces* racial domination arrayed across socially significant racial difference.³¹⁸ This, I argue, is racial discrimination. The zero-sum game is not just the premise of discrimination, it is its product.

V. IDENTIFYING DISCRIMINATION BASED ON INTERGROUP SOLIDARITY

A way to solve the puzzle of *Childress* is now before us. Hostility to intergroup solidarity may constitute actionable employment discrimination when it imposes race- or sex-based stereotypes on employees. A single set of social relationships between members of, for instance, different sexes may implicate the gender identity of both groups, even when the relationship is a hierarchical one. Practices that promote or require such relationships can therefore discriminate based on the sex of members of both groups through a process of simultaneous stereotyping. The disadvantages imposed on the subordinated group may constitute an independent basis for charging discrimination, but this does not undermine the claims of members of a dominant group who engage in intergroup solidarity contrary to stereotyped expectations.

In *Childress* the white and male plaintiffs attempted to resist the race and gender roles their superiors expected of them. The supervisors created an environment in which a real Richmond police officer was a white man who lived up to that identity by disparaging female and/or black coworkers. Obviously hostile to any women or persons of color, this environment was also hostile to whites and men committed to an egalitarian ideal of cross-race, cross-sex cooperation. When the officers contested these expectations, they were severely sanctioned. The plaintiffs claimed that in a

316. See *Slack v. Havens*, No. 72-59-GT, 1973 WL 339, at *5 (S.D. Cal. July 17, 1973), *aff'd in part, rev'd in part on other grounds*, 522 F.2d 1091 (9th Cir. 1975).

317. See *supra* Part IV.A.

318. Indeed, Katherine Franke posits a similar dynamic as the essence of sexual harassment: “[S]exual harassment of a woman by a man is an instance of sexism precisely because the act embodies fundamental gender stereotypes: men as sexual conquerors and women as sexually conquered, men as masculine sexual subjects and women as feminine sexual objects.” Franke, *supra* note 10, at 693.

working environment where racial and sexual antagonism was itself normative, all workers suffered from abusive conditions of employment based on each individual's race and sex.³¹⁹ In such a situation, especially in an occupation as historically dominated by white men as policing,³²⁰ one might have expected the white male officers themselves to join in the harassment of their peers, attempting to establish an environment conducive to "teamwork" solely among themselves through discriminatory practices that claimed policing as an exclusively white, male domain.³²¹ By rejecting a model of policing and, implicitly, of their own racial and gender identity, that relied on the force looking "like it used to be" and on relating to white and black women not as coworkers but as "pussies" and "worthless black bitches," the officers acted on the vision of racial and sexual equality embedded in Title VII. And yet they found no protection in the statute.

This Part analyzes how claims of discrimination, like those in *Childress*, based on intergroup solidarity fit into the doctrinal framework of Title VII litigation. Like all Title VII plaintiffs, employees asserting such claims must prove that their workplace injuries occurred because of their own race or sex and, when those injuries are not tangible employment actions, that they result from a severely or pervasively hostile work environment.³²² These requirements provide appropriate fact-sensitive safeguards against unmeritorious claims rather than per se limits on the circumstances in which employees may allege discrimination.

A. Identifying the Role of Race and/or Sex Stereotyping in Intergroup Behavior

In *Childress*, as in many cases brought under either retaliation or association theories, the plaintiffs were personally targeted for formal employment sanctions and workplace harassment in response to some form of intergroup behavior. The primary question in such cases is whether the response can be interpreted as being based on

319. Of course, if some white, male officers had opted for their supervisors' model of intergroup antagonism, it would not have been abusive to them, but this was not the case. See *infra* Part V.C.2.

320. See *supra* note 62.

321. See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1755 (explaining "harassment as a means to reclaim favored lines of work and work competence as masculine-identified turf—in the face of a threat posed by the presence of women (or lesser men) who seek to claim these prerogatives as their own").

322. See generally *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751-54 (1998) (discussing distinction between tangible employment actions and hostile work environments). In hostile work environment cases, Title VII also requires a separate inquiry into whether an employer is responsible for the hostile environment, whereas such responsibility is automatic in the case of a tangible employment action. *Id.* at 761-63. When the hostile work environment is created by a supervisor, the plaintiff's burden is to prove sex- or race-based causation and sufficient severity to modify the terms or conditions of employment; the employer may affirmatively defend by proving that it took reasonable steps to prevent or correct such an environment and that the plaintiff unreasonably failed to take advantage of preventive or corrective opportunities offered by the employer. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998). My focus here is on the plaintiff's burden.

the *plaintiff's* sex or race. Without such a prohibited cause, no workplace injury, no matter how severe or unjustified, comes within the purview of Title VII.³²³ Focusing on this point, the *Childress* court, for instance, simply assumed that disadvantageous transfers and negative performance evaluations following complaints about harassment of coworkers could not have been because of the white, male officers' race and sex. Courts have long emphasized, however, that proof that an employee's race or sex played a role may come in a wide variety of forms,³²⁴ and numerous features of the workplace context—its structure and its explicit and implicit norms—may suggest the role of race and sex stereotyping in cases arising out of intergroup solidarity.

Occasionally, employers make explicit their expectations of race- or sex-based intergroup interactions, either spontaneously or in response to a breach. Some interracial association cases have fit this model, with white plaintiffs alleging that they were explicitly warned not to associate with black coworkers or that they “would never move up with the company being associated with a black man.”³²⁵ Similarly, in many male-male harassment cases, coworkers have made clear that a male worker's masculinity would be called into doubt if he failed to engage in particular kinds of relationships with women, such as the insistence “that one had to be married to work there.”³²⁶ Such comments directly reveal expectations of particular forms of intergroup behavior.³²⁷

323. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998).

324. See, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141, 147 (2000) (noting the need for employment discrimination plaintiffs to rely on circumstantial evidence and holding that the falsity of an employer's explanation of its actions supports an inference of discrimination); *Chertkova v. Conn. Gen. Life Ins. Co.*, 92 F.3d 81, 91 (2d Cir. 1996).

325. *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 585 (5th Cir. 1998), *vacated en banc*, 169 F.3d 215 (5th Cir. 1999), *panel opinion reinstated en banc*, 182 F.3d 333 (5th Cir. 1999) (per curiam). Similarly, in *Moffett*, a colleague told a white woman that “‘Hey, if you go out with that goddamn nigger, I'm going to kick your ass . . . You should have learned from the last one,’ referring to a previous relationship [plaintiff] had with a black man.” *Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244, 253 (N.D. Ind. 1985); see also *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205, 208 (N.D. Ala. 1973).

326. *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1453 (N.D. Ill. 1988); see also *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (supporting the conclusion that plaintiff was discriminated against based on gender stereotypes with the fact that his coworkers “derided [him] for not having sexual intercourse with a waitress who was his friend”); SHARON TRAWEEK, *BEAMTIMES AND LIFETIMES: THE WORLD OF HIGH ENERGY PHYSICISTS* 83-84 (1988) (discussing how marriage is integral to the image and lifestyle of the successful male physicist); Franke, *supra* note 10, at 739 (describing expectations of men's heterosexual experience with and interest in women). Other comments might articulate expectations that whites or men not show professional respect for women or people of color by taking their ideas seriously, accepting their authority, providing ordinary mentoring, back-up, or informal training, or otherwise recognizing and welcoming their legitimate workplace presence as full equals. See JONES, *supra* note 8, at 302, 349; Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1763-65.

327. There is no need for racial or gendered commentary to occur in a plaintiff's presence

Evidence of discriminatory causation may also be found in workplace behavior that clearly marks certain actions towards members of other groups as breaking ranks with one's own. Negative references to fondness for other groups or "disloyalty" to one's own are important signals that an employee has violated workplace expectations that set groups against each other and rigidly restrict the range of relationships available across group boundaries. In *Drake v. Minnesota Mining & Manufacturing Co.*,³²⁸ for instance, a white man initiated a friendship with two black newcomers and later filed an unrelated grievance against a white coworker.³²⁹ During an argument over the grievance, the coworker explicitly gave a racial cast to Drake's actions, linking his apparent disloyalty to white coworkers with his inappropriately warm relations with black coworkers by demanding, "Why don't you take your nose and put it up the black's ass like you have always got it and keep it there?"³³⁰ In such circumstances, acts of intergroup workplace solidarity are marked as violating a group identity itself built on exclusionary or subordinating relations with other groups. Signals of such expectations may include explicit accusations of "disloyalty";³³¹ symbolic rejections of group membership through rhetorical linkage to other groups, such as calling a white person "nigger lover"³³² or targeting a man with epithets usually directed at women;³³³ or social shunning.³³⁴

When what is at issue are workplace expectations of how members of different groups should interact, conduct directed at one group may also be relevant to separate actions directed at another. Consider, for instance, a workplace in which male workers refuse to treat women as competent coworkers but instead insist on interacting with them in sexualized terms, patronizing them, and questioning their competence and authority. Because such behavior makes clear *to women* the gendered terms on which

nor for it to refer directly to him or her. A supervisor's race- or sex-specific expectations of intergroup behavior may simply be revealed to one employee and enforced against another. The *Price Waterhouse* Court, for instance, relied in part on remarks made in confidential evaluations. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235, 256 (1989).

328. 134 F.3d 878 (7th Cir. 1998).

329. See *id.* at 881.

330. *Id.* at 882.

331. See *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1441 (10th Cir. 1988); *Gavenda v. Orleans City*, No. 97-CV-0074E(SC), 1997 WL 662353, at *2 (W.D.N.Y. Oct. 24, 1997). In another case, a white employee was harassed with the epithet "white rat" for his opposition to discrimination against African-American colleagues. See *Raab*, *supra* note 37, at 39.

332. *Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244, 254 (N.D. Ind. 1985).

333. See *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (supporting the conclusion that plaintiff was discriminated against based on gender stereotypes with the fact that his coworkers referred to him as "she," "her," and vulgar names "cast in female terms"); *Schultz, Reconceptualizing Sexual Harassment*, *supra* note 8, at 1802; see also *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 575 (6th Cir. 2000) (noting process by which an employer "impute[s]" to a person engaging in intergroup solidarity the race of those with whom he is associated).

334. See *Drake*, 134 F.3d at 882 (discussing plaintiff's claim that "no one would talk to him at the plant and that whenever he or [his coworker and wife] went into the plant's break room, the other workers would 'get up and walk off'").

they are expected to interact with these workers *as men*, it could also support an inference that workplace sanctions against *men* who violate these norms are likewise based on sex. Norms may be articulated by example as well as by explicit statement.

The causation inquiry should also incorporate attention to the structural context of the workplace.³³⁵ As Vicki Schultz has argued, in occupations and workplaces characterized by significant race or sex segregation, it is especially likely that what it means to be a good worker will be identified with membership in the predominant race or sex group and with conformity to behaviors expected of such members; in such circumstances, jobs themselves become racially or sexually coded as *white* jobs or *men's* jobs.³³⁶ In a male-dominated job, for instance, it may be important to establish one's masculinity by joining with other men to maintain the gendered character of the job through such practices as excluding women from the workplace altogether, confining them to distinct and subordinate niches, or engaging in gendered behavior towards nonemployee women on or off the job.³³⁷ The facts of *Childress* reflect this dynamic.³³⁸

This structural analysis of the link between occupational segregation and stereotyping is especially applicable when intergroup behavior is at issue. When a member of a race or sex group that dominates a job category breaks from a pattern of workplace norms concerning interactions with other race or sex groups,³³⁹ an especially strong inference can be drawn that any resulting sanctions are based on the employee's race or sex. In other words, when a group of male workers enforces particular expectations of how one interacts with women, it is particularly likely that masculinity itself is at stake, more so than for expectations that have no overt

335. See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1800; see also *Howley v. Town of Stratford*, 217 F.3d 141, 154 (2d Cir. 2000) (noting significance of the fact that harassment occurred "in a large group in which [plaintiff] was the only female").

336. See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1800. See generally JONES, *supra* note 8.

337. See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1776; Deborah M. Thompson, "The Woman in the Street:" Reclaiming the Public Space from Sexual Harassment, 6 YALE J.L. & FEMINISM 313, 324 (1994) (characterizing construction workers' harassment of women passersby as "perpetuat[ing] the invidious stereotype that blue-collar jobs are male turf"). Similarly, when women enter trades dominated by white men, they are often subjected to loyalty tests through which they are expected to establish a common work identity, despite difference in gender, by joining in racially exclusive behaviors. See *supra* note 39 and accompanying text.

338. Not only was the Richmond police department dominated by white men, see *supra* text accompanying note 62, but Lieutenant Carroll explicitly articulated his racism and sexism through a preference for an all-white, all-male police force.

339. Such a break could take various forms: verbal objection to common practice, such as the officers' complaints in *Childress*; active refusal to join in the practice, such as noncooperation with schemes to discriminate, see, e.g., *Spillman v. Carter*, 918 F.Supp. 336, 339 (D. Kan. 1996); or affirmative acts that run contrary to the expected practice, such as hiring, promoting, or otherwise facilitating entry of women or people of color into traditionally segregated jobs, see, e.g., *EEOC v. St. Anne's Hosp. of Chicago*, 664 F.2d 128, 129-30 (7th Cir. 1981); *supra* notes 21-23, 149-156, 221-25, 282-87 and accompanying text.

gendered character. When no intergroup behavior is at issue, it is more likely that normative conduct in a segregated workplace does not implicate the common race or gender trait, such as in a male-dominated workplace in which workers may face abuse because they support the wrong political party or listen to the wrong kind of music.

B. The Dual Significance of Race- and/or Sex-Based Workplace Hostility

In *Childress*, the clearest evidence that race and sex were at issue in the Richmond police department's reaction to the officers' complaints was Lieutenant Carroll's racist and sexist behavior prior to the complaint. His remarks plainly reflected hostility to women and African-American officers. I argued above that it is perfectly consistent for this antiblack, antiwoman animus to be coupled with race- and sex-based expectations that other white, male officers share in and act on this hostility. The further question, which I address in this Section, is whether the same specific *acts* that contribute to a racially and/or sexually hostile work environment for black or female officers can also do so for white men. In other words, when employers explicitly direct employees to discriminate against members of other groups,³⁴⁰ overrule employees' nondiscriminatory efforts,³⁴¹ or fill their workplaces with discrimination against other groups,³⁴² can employees have what the Eight Circuit in *Clayton v. White Hall School District*³⁴³ called a Title VII cause of action for "racial or other discrimination in the workplace [so] offensive or distasteful . . . [that] it violates that employee's right to work in an atmosphere free of discrimination"?³⁴⁴

Considering how an employee's *own* race or sex is implicated by employer actions toward members of other groups significantly affects which actions are relevant to establishing the severity and pervasiveness of harassment, as well as the ability to show that subsequent harassment or tangible employment actions were based on race or sex.³⁴⁵ In cases like *Lyman* or *Childress*, a supervisor or coworker first requests, reveals, or begins discriminatory behaviors toward others and subsequently sanctions an employee who responds with intergroup solidarity. The question is whether the first phase of discrimination against others contributes to a hostile environment on the basis of the subsequently sanctioned employee's race or sex, or whether only behavior

340. See *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179 (7th Cir. 1982); *Spillman v. Carter*, 918 F. Supp. 336 (D. Kan. 1996); *Lyman v. Nabil's Inc.*, 903 F. Supp. 1443 (D. Kan. 1995); *Scott v. Marsh*, No. Civ.A.3:89-3059, 1994 WL 797678, at *1, *3 (D.S.C. Apr. 15, 1994), *aff'd mem.* 43 F.3d 1468 (4th Cir. 1994); *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973).

341. See *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1447 (10th Cir. 1988); *Chandler v. Fast Lane, Inc.*, 868 F. Supp. 1138, 1143-44 (E.D. Ark. 1994).

342. See *Sidari v. Orleans County*, 174 F.R.D. 275, 282-83 (W.D.N.Y. 1996); *Lyman*, 903 F. Supp. at 1448.

343. 778 F.2d 457 (8th Cir. 1985).

344. *Id.* at 459.

345. In many cases, conduct that reflects discriminatory animus will both (a) contribute to the creation of a hostile work environment, and (b) provide evidence that other, facially neutral conduct was in fact based on race or sex. See, e.g., *Gregory v. Daly*, 243 F.3d 687, 696 (2d Cir. 2001); *Pitre v. W. Elec. Co.*, 843 F.2d 1262, 1270 (10th Cir. 1988).

targeted at the plaintiff individually may be considered.³⁴⁶ Once we dispense with the zero-sum game model, there is no reason to assume that a single act or statement cannot express and convey hostility *both* to members of groups targeted for discrimination *and* to members of other groups who refuse to join in that discriminatory endeavor.³⁴⁷

To connect, for instance, discriminatory behavior toward people of color to an environment hostile to a white worker, we must cross three hurdles: first, that the actions generating a hostile environment need not be overtly directed at the discriminatee; second, that the actions generating the hostile environment need not on their face target persons of the same race or sex as the discriminatee; and third, that actions overtly discriminatory against one group may create an environment hostile to *some* members of the group generally advantaged by that discrimination. Each problem reflects the concern expressed in *Childress* about recovery for “discrimination directed at others.”³⁴⁸

1. Connecting Discrimination Against Others to Discrimination Against Oneself

Behaviors, statements, and symbols directed at other members of one’s group, or even at no individuals in particular, have long been recognized to contribute to hostile work environments.³⁴⁹ The D.C. Circuit first suggested the possibility in *Meritor* itself: “Even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere where such harassment was pervasive,”³⁵⁰ and courts have had little trouble with it since.³⁵¹

Indeed, an important recent decision held that a discriminatorily hostile environment may be created *entirely* by actions directed at others. In *Leibovitz v. New*

346. The answer is potentially significant for two reasons. First, it affects analysis of the number and temporal span of incidents alleged to create a hostile environment, key elements in assessing the severity and pervasiveness of a hostile environment. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). Second, if discrimination against others is continuous with the harassment of plaintiff, then plaintiff’s complaints to supervisors concerning that discrimination may satisfy his or her obligation to take advantage of internal grievance mechanisms prior to holding the employer vicariously liable for a hostile work environment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

347. I am leaving aside questions of *severity*, that is, *how* hostile the environment is, and focusing simply on causation, that is, whether whatever impact the environment has is because of the employee’s race or sex.

348. *Childress v. City of Richmond*, 134 F.3d 1205, 1207 (4th Cir. 1998) (per curiam).

349. *See generally* O’Connor, *supra* note 15, at 508-12.

350. *Vinson v. Taylor*, 753 F.2d 141, 146 (D.C. Cir. 1985), *aff’d in part and rev’d in part sub nom*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

351. In *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), for instance, the court held that “behavior that is not directed at a particular individual or group of individuals” may “create[] a barrier to the progress of women in the workplace because it conveys the message that they do not belong, that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment.” *Id.* at 1522-23; *see also* *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987).

York City Transit Authority,³⁵² the plaintiff “was always treated appropriately and with respect by her coworkers and by her employer” and was never “personally the target of inappropriate sexual behavior.”³⁵³ A jury found, however, that as a result of harassment of other women in her shop “her workplace was so permeated with discriminatory sexual behavior that was so severe or pervasive that it altered the conditions of her own employment, and created an abusive working environment for her.”³⁵⁴ Rejecting defendant’s motions for a directed verdict or a new trial, Judge Weinstein held that “[p]ersonal harassment is not the gravamen of a hostile work environment claim.”³⁵⁵ The court addressed the psychological and emotional plausibility of such a claim as follows:

Would a rare Jewish person in a Nazi concentration camp afforded privileged treatment while other Jews were being horribly persecuted have no claim for the psychological trauma of having to witness the abuse? The deterioration of the humanity, spirit, and dignity of a member of an abused class, granted personal immunity on her promise that she will remain silent . . . is impermissible under fundamental ethics and law. . . .

No one would suggest that the conditions at plaintiff’s workplace were comparable to those at the death camps. Nevertheless, the general principle regarding a responsible person’s distress at observing other’s [sic] suffering does apply.³⁵⁶

352. 4 F. Supp. 2d 144 (E.D.N.Y. 1998), *rev’d*, 252 F.3d 179 (2d Cir. 2001). The significance of the reversal is discussed *infra* at note 355.

353. *Id.* at 146.

354. *Id.* at 147. *Leibovitz* thus differs from *Broderick v. Ruder*, 685 F. Supp. 1269, 1278 (D.D.C. 1988), and *King v. Palmer*, 778 F.2d 878, 879 (D.C. Cir. 1985), which also allowed harassment claims based on conduct directed at others, but in the distinct context of claims based on supervisors’ favoritism toward other women who accepted the supervisors’ sexual advances. Other courts have questioned whether this scenario can constitute sex discrimination, given that those *not* sexually involved with the supervisor include both men and women. See *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 307 (2d Cir. 1986); Mary C. Manemann, *The Meaning of “Sex” in Title VII: Is Favoring an Employee Lover a Violation of the Act?*, 83 NW. U. L. REV. 612, 653-54 (1989) (interpreting *Broderick* as a case not of an isolated instance of nepotism but rather of systematically valuing women employees according to their interest and success in relating to male supervisors in a sexual manner). These objections to claims based on sexual favoritism, however, are not applicable to *Leibovitz*.

355. *Leibovitz*, 4 F. Supp. 2d. at 150. In reversing the district court’s decision, the Second Circuit did not rule on Judge Weinstein’s conclusion that personal harassment was unnecessary to a hostile environment claim. See 252 F.3d at 190. Instead, the court concluded that the hostility of the environment lacked the severity necessary for a successful claim because *Leibovitz* (1) did not personally witness *any* of the incidents of harassment, (2) learned of the incidents second hand, and (3) did not share a job, work area, or supervisor who harassed her coworkers. *Id.*; see also discussion *infra* Part V.C.2 (arguing that plaintiff’s own reaction to workplace harassment is probative of the severity of the hostility); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1456 (7th Cir. 1994).

356. *Leibovitz*, 4 F. Supp. 2d at 152.

As this analysis suggests, the workplace environment may also be rendered hostile by actions directed at nonemployees. Indeed, Judge Goldberg's seminal opinion in *Rogers v. EEOC*³⁵⁷ grew out of precisely such facts: Josephine Chavez charged that her employer's practice of "segregating the patients" at its optometry practice discriminated against her on the basis of her national origin.³⁵⁸ That the behavior was directed at *patients* was irrelevant because it could nonetheless subject the plaintiff to the "terms, conditions, or privileges of employment" of working in an "environment heavily charged with ethnic or racial discrimination."³⁵⁹ Thus, "[t]he concept that witnessing the harassment of others can create an actionable hostile work environment" originates with the hostile work environment theory itself.³⁶⁰

2. Hostile Work Environments That Cross Group Boundaries

Strikingly, Judge Goldberg's elaboration of the hostile environment concept never relied on the racial or ethnic position of Chavez, the plaintiff, but focused solely on how discrimination against nonemployee patients affected the workplace atmosphere.³⁶¹ This feature and the opinion's reference to "ethnic or racial discrimination"³⁶² are hardly accidental because, contrary to how it is routinely described, *Rogers* involved the segregation of *African-American* patients and a complaint by a *Hispanic* employee.³⁶³

Although no court has commented on this aspect of *Rogers*, the racial difference between the overt objects of discrimination and the plaintiff posed no barrier to plaintiff's hostile work environment claim. What matters is whether the work environment is personally abusive because of plaintiff's race or sex, not whether the environment is "about" the plaintiff's race or gender.

357. 454 F.2d 234 (5th Cir. 1971); *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (citing *Rogers* as the origin of the Court's hostile work environment jurisprudence); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-67 (1986) (relying extensively and approvingly on *Rogers*).

358. *Rogers*, 454 F.2d at 236.

359. *Id.* at 238. Indeed, Judge Goldberg stated explicitly that "petitioners' failure to direct intentionally any discriminatory treatment toward Mrs. Chavez is simply not material to the finding of an unlawful employment practice." *Id.* at 239.

360. *Leibovitz*, 4 F. Supp. 2d at 150.

361. Indeed, the opinion seemingly authorizes a cause of action for *any* employee required to work in an environment charged with discrimination. *Cf. supra* text accompanying note 130.

362. *Rogers*, 454 F.2d at 238.

363. For references to *Rogers* as involving segregation of Hispanic patients, *see*, for example, *Meritor*, 477 U.S. at 66; Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What Is It and How Should It Be Assessed After Harris v. Forklift Systems, Inc.*, 21 N.Y.U. REV. L. & SOC. CHANGE 357, 363 (1994); Franke, *supra* note 10, at 708. *Rogers* arose from an effort by the EEOC to enforce its request for information in the course of an investigation, and the demand with which *Rogers* refused to comply inquired, "Does Texas State Optical instruct its employees at any of its Houston facilities to fill in Negro patients' applications for service with red ink or red pencil and to use black or blue ink or pencil for patients other than Negroes[?]" *Rogers v. EEOC*, 316 F. Supp. 422, 424 n.1 (E.D. Tex. 1970).

Whether this is so depends on the employee's relationship to that environment. Thus, a work environment may be hostile to some but not all women,³⁶⁴ and when the workplace environment expresses hostility to members of one group, members of other groups may well also experience it as hostile. Consider a hypothetical workplace containing members of the American Nazi Party who cost Barbara Herzon her job when she hired an African-American.³⁶⁵ The neo-Nazis render the workplace pervasively hostile to African-Americans through racially specific abuse. Barbara Herzon is hired. She is Jewish, but no one in the workplace knows this; no specifically anti-Semitic acts occur. Herzon, however, is well aware that, for neo-Nazis at least, racism and anti-Semitism go hand-in-hand. The "closeted" Herzon may well experience the environment as hostile *to herself on account of her Jewishness*, and reasonably so, even though no harassment has been knowingly "directed" at her, nor has the environment included any reference to "her" group.

Such an environment fits Clark Freshman's "generalized discrimination" model³⁶⁶ in which the discriminator does not distinguish among occupants of a wide range of race, sex, and other protected positions but instead practices either "in-group" favoritism towards a favored class (such as whites) or "out-group hostility" towards nonmembers of favored classes (such as nonwhites).³⁶⁷ Presumably a similar dynamic was at work in *Rogers*, in which a Hispanic woman might reasonably have inferred hostility based on her own race from racism toward African-Americans.

3. Crossing Boundaries Between Members of "In" and "Out" Groups

The relationship between discrimination against women and African-Americans in the Richmond police department and the *Childress* plaintiffs' position as white men is not, however, one of straightforward analogy. Although Chavez and the

364. See *Harris v. Forklift Systems*, 510 U.S. 17, 21-22 (1993) (requiring that plaintiff subjectively experience the workplace as hostile because otherwise "the conduct has not actually altered the conditions of the victim's employment"). Thus, for instance, a female employee who shared and embraced her employer's gender stereotypes could not claim that reliance on such stereotypes created a hostile work environment. Of course, conformity to normative femininity may be incompatible with being welcomed as a competent coworker and competence as a coworker may require violation of normative femininity. This is the Catch-22 in which Ann Hopkins was caught. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989); see also CYNTHIA COCKBURN, *IN THE WAY OF WOMEN: MEN'S RESISTANCE TO SEX EQUALITY WITHIN ORGANIZATIONS* 155 (1993); Yount, *supra* note 25, at 402 ("Demanding that she be treated like a miner, however, meant inclusion in highly sexualized banter that was normative among men but which held a different significance for women in that the talk frequently conveyed a shared understanding of women as sexual objects.")

365. See *supra* text accompanying notes 152-62.

366. See Freshman, *Beyond Atomized Discrimination*, *supra* note 159, at 244-45; see also Freshman, *Whatever Happened to "Anti-Semitism"?*, *supra* note 72, at 320-26.

367. Freshman, *Whatever Happened to "Anti-Semitism"?*, *supra* note 72, at 322; see also *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000) ("Remarks targeting members of other minorities . . . may contribute to the overall hostility of the working environment for a minority employee.").

hypothetical Herzon experienced their environments as abusive because they imagined themselves as *like* the targeted African-Americans, swept within indiscriminate hostility to racialized “others,” the racism and sexism polluting the *Childress* work environment positioned white males as *superior* to and *different* from women and people of color. Freshman’s “generalized discrimination” cannot apply without further elaboration.³⁶⁸

The necessary refinement recognizes the potential gap between workplace expectations of white men and the lived experiences and commitments of particular individuals, the possible space between stereotype and reality. Racial categorization as white and sexual categorization as male may be necessary but not sufficient for inclusion within a workplace environment that privileges white-maleness.³⁶⁹ Just as harassment based on fitting stereotypes may create an environment hostile to some but not all women, workplace environments hostile to women may also be hostile to men who fail or refuse to conform to normative conceptions of masculinity.³⁷⁰ In specifying that women and minorities are to be marginalized, subordinated, sexualized, or excluded, workplace norms may simultaneously specify, and enact, that whites and men are to marginalize, subordinate, sexualize, and exclude. One would expect all women or people of color to experience such an environment as hostile because of their race or sex, but the same could be true of those whites or men in conflict with the race- or sex-specific normative roles the environment demands of *them*.

Consider the story of Denise Chacon, a white woman married to a Hispanic man.³⁷¹ Her supervisor, who knew of the marriage, made derogatory remarks about Hispanics, mimicked and mocked them, and told offensive jokes about Mexicans.³⁷² Chacon claimed a hostile environment based on her race, and the defendant, predictably, claimed that the behavior complained of could only constitute discrimination against Hispanics and not against a white person.³⁷³

Chacon demonstrates the futility of using “at whom is the discrimination directed” as a helpful limiting principle. There were no Latinos in Chacon’s workplace, and yet Chacon’s white supervisor insistently ridiculed Latinos in her presence. Although these remarks did not *refer to* Chacon, they were certainly *directed at* her and reflected on her interracial relationship. In other words, discriminatory comments or

368. Cf. O’Connor, *supra* note 15, at 538-39 (distinguishing claims by “bystanders” of the same sex as the “target” of discrimination from those by persons of different sex).

369. See *supra* Part IV.B.1.

370. See Abrams, *supra* note 8, at 1225-26 (arguing that “[s]anctioning men who do not manifest prototypical, (hetero-)sexualized masculinity is an important way of entrenching masculine norms in the workplace”); Franke, *supra* note 10, at 757 & n. 353 (stating that some environments hostile to women may also be hostile to men “who do not conform to heteropatriarchal expectations”); Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1787 (“[O]nce a sexual desire model is abandoned, the fact that the men who harass seek to police their occupational boundaries against *both* women and nonconforming men might be evidence that the harassment of *each* group is based on gender.”) (emphasis in original).

371. *Chacon v. Ochs*, 780 F. Supp. 680 (C.D. Cal. 1991).

372. *Id.* at 680 & n.1.

373. *Id.* at 681.

actions overtly aimed at one group may have nonmembers as their *audience*.³⁷⁴ Given the context, a jury could reasonably conclude that the supervisor's invective reflected a white supremacist attitude with respect to Hispanics, and one facet of this attitude was belief in the inappropriateness of a white woman's intimate relationship with a Hispanic man.³⁷⁵

The same analysis applies to the racist and sexist commentary that Lieutenant Carroll offered to an audience of white men and to requests that a member of one group take discriminatory action against another: the request *refers* to one group and yet is *directed at* another.³⁷⁶ There is simply no reason to assume, as the Fourth Circuit did in *Childress*, that one is necessarily a mere bystander whenever comments refer to, or discriminatory actions are directed against, other groups. To the contrary, racially or sexually hostile behavior towards absent groups may set an example for those present and seek to affirm a common racial or gender identity.

A work environment's hostility to persons engaging in intergroup solidarity begins when they reasonably experience it as hostile, not only when they are personally targeted. Courts should recognize the continuity between workplace actions that express race- or sex-based norms of intergroup behavior—including ones in which that expression is conveyed through acting out those norms in concrete acts of discrimination—and workplace actions that enforce those norms against persons who reject them in favor of intergroup solidarity.

C. Meeting the Standard of Harm in Workplaces Hostile to Intergroup Solidarity

I have argued that white or male employees may be implicated, based on their race or sex, in practices of discrimination against other groups. My focus has been those who violate stereotyped expectations of how they should interact with members of other groups. But, of course, too many employees conform, passively or actively, to such stereotypes. Had the *Childress* plaintiffs joined in the harassment of their female

374. See Christine E. Sleeter, *White Silence, White Solidarity*, in RACE TRAITOR 257, 261 (Noel Ignatiev & John Garvey eds., 1996) (discussing phenomenon of "white racial bonding" in which conversations among whites ostensibly "about" African-Americans serve to reinforce conversants' common white racial identity); Proudford, *supra* note 12, at 631 (using example of conversations among whites concerning affirmative action to illustrate how intragroup relations are constructed through references to intergroup interactions); Raab, *supra* note 37 (noting that one way a white worker who opposed discrimination against African-Americans was harassed was by leaving pornographic pictures of blacks on his desk).

375. See *supra* note 206-07 and accompanying text (discussing *Loving v. Virginia*, 388 U.S. 1 (1967)).

376. A variant on this notion has been accepted in situations in which actions taken against one person are construed as retaliation against another. See *De Medina v. Reinhardt*, 444 F. Supp. 573, 580 (D.D.C. 1978) (allowing plaintiff to proceed with Title VII claim for retaliation based on reprisals for her husband's protected activity because "tolerance of third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights"), *aff'd in part and remanded in part on other grounds*, 686 F.2d 997 (D.C. Cir. 1982); see also *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 543-44 (6th Cir. 1993) (following *De Medina*).

and African-American peers, surely they could not claim to have suffered a hostile environment because of race and sex; one might be similarly skeptical had they remained purely passive bystanders.³⁷⁷ Indeed, the *Childress* court assumed that unambiguously misogynist and antiblack comments could not create a hostile environment for white men because they would feel favored, not threatened, by such an atmosphere.³⁷⁸

When plaintiffs suffer such individualized harms as attacks, threats, work sabotage, or unfair task assignments as a result of their intergroup solidarity, it is easy to see why they would experience the workplace as hostile or abusive, and so the critical question is simply whether these harms flowed because of sex or race. But subjective reactions to an “abusive working environment” may also contribute to its being “sufficiently severe or pervasive to alter the conditions of the victim’s employment.”³⁷⁹ *Harris* not only emphasized such experiential reactions as intimidation, insult, humiliation, and discouragement, but specifically noted that such reactions need not either “seriously affect employees’ psychological well-being” or result in “tangible effects” such as deterioration of job performance or interference with career advancement.³⁸⁰ This experience of hostility, however, must be reasonable and must derive from more serious circumstances than “mere utterance of an . . . epithet which engenders offensive feelings in an employee.”³⁸¹

Courts considering hostile work environment claims like those in *Childress* have been deeply skeptical that plaintiffs could meet this standard. Although some claims will certainly fail on this point, it is important to distinguish the practical difficulty of establishing a discrimination claim on a particular theory from the categorical rejection of the possibility.³⁸² Unfortunately, courts entrenched in the zero-sum view

377. In many of the third-party standing cases, for instance, plaintiffs alleged only that their employer had discriminated against members of other groups in hiring, pay, or promotion. Without a basis not only for imputing any expectation of plaintiffs’ intergroup behavior, but also for concluding that the plaintiffs ran afoul of such an expectation, there would be no claim that plaintiffs were themselves discriminated against, even though their claims might go forward under a theory of third-party standing.

378. *Childress v. City of Richmond*, 907 F. Supp. 934, 938-39 (E.D. Va. 1995).

379. *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)) (internal citations omitted).

380. *Id.* at 22.

381. *Id.* at 21 (quoting *Meritor*, 477 U.S. at 67).

382. *Oncale* illustrates this approach, rejecting a per se bar on same-sex harassment claims in favor of applying the general Title VII requirements of impermissible causation and cognizable harm. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (noting that fears of overbreadth are “adequately met by careful attention to the requirements of the statute”). Procedurally, the question of whether Title VII protection is available for persons alleging race or sex discrimination as a consequence of their intergroup solidarity has generally arisen on motions to dismiss for failure to state a claim or for summary judgment. Courts like those in *Lyman* and *Childress* have typically ruled not that plaintiffs have produced insufficient evidence of discrimination because of race or sex but that as a matter of law the facts they alleged could not make out a claim for Title VII discrimination. *Childress*, 907 F. Supp. at 940 (dismissing white men’s complaints for failure to state a claim); *Lyman v.*

of discrimination refuse to accept that white or male workers could ever reasonably find a work environment severely or pervasively hostile on account of white or male coworkers' discriminatory attitudes and practices towards others. As a result, they not only dismiss out of hand white or male workers' claims of subjective experiences of workplace hostility, but also refuse to see the sometimes obvious connections between such experiences and blatant incidents of harassment.

1. The Reasonable Commitment to Intergroup Solidarity

Courts have frequently belittled the idea that whites or men might find hostile those workplaces in which intergroup hostility is the norm, even when plaintiffs have actively resisted such practices and have been personally targeted for abusive behavior.³⁸³ This incredulity reflects both assumptions about intractable, zero-sum intergroup conflict, and a broader tendency to undermine hostile work environment claims by disaggregating superficially different workplace behaviors rather than considering the hostility of the environment as a whole.³⁸⁴

Courts often fail to acknowledge the intergroup aspects of the behavior at issue, instead seeing actions *directed* at one group without ever considering the race- or sex-specific actors *originating* the behavior: the actions *go to* one group but *come from* none in particular. From this perspective, whites or men simply have no stake in discriminatory behavior directed at other groups, and courts articulate their position as third-party bystanders.³⁸⁵ In *Bermudez v. TRC Holdings, Inc.*,³⁸⁶ for instance, Linda Schlichting, a white woman, worked in a firm in which the Seventh Circuit found triable evidence of discrimination against African-Americans, in which Schlichting was asked directly to cater to white clients' preferences for white workers, and in

Nabil's, Inc., 903 F. Supp. 1443, 1445-48 (D. Kan. 1995) (dismissing male employee's discrimination complaint for failure to state a claim). The Second Circuit took the better approach in *Leibovitz v. N.Y. Transit Authority*, in which it eschewed any categorical rule against claims brought by individuals who were not individually targeted by harassment and instead ruled against plaintiff by applying the general principle that the work environment's hostility must be severe or pervasive for it to be actionable under Title VII. 252 F.3d 179, 188-90 (2d Cir. 2001); see also *supra* note 355. Notably Leibovitz's connection to the harassment was far more tenuous than was the plaintiffs' in *Childress, Lyman*, and most of the other cases discussed in this Article.

383. See *Drake v. 3M*, 134 F.3d 878, 883-85 (7th Cir. 1998); *Childress*, 907 F. Supp. at 939-40; *Lyman*, 903 F. Supp. at 1446-48.

384. See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 8, at 1714, 1798 (criticizing disaggregation of sexual from nonsexual forms of harassment and of harassment from other forms of discrimination).

385. Similarly, commentators consistently characterize whites and men in workplaces plagued by discrimination toward members of other groups as having merely an "indirect" relationship to the discrimination, that is, they are not directly implicated in its racial and gender dynamics but are brought in only by the mediating role of its victims. See, e.g., Brady, *supra* note 15, at 424 (characterizing *Childress* as involving "indirect discrimination"); Jordan, *supra* note 15, at 135-36.

386. 138 F.3d 1176 (7th Cir. 1998).

which other white employees were rewarded for complicity in racial discrimination.³⁸⁷ Nonetheless, the court dismissed Schlichting's complaints of a hostile work environment because this behavior "posed no threat to her personally" as one who was merely a "bystander[] appalled to learn that discrimination is ongoing."³⁸⁸ In this worldview, discrimination simply occurs in the passive voice: it happens *to* certain groups but is not done *by* anyone in particular, and even explicit expectations of complicity still leave workers mere bystanders. By refusing to see that actions *toward* one group may also be *from* another, courts fail to recognize how persons in the originating group might reasonably experience as hostile a workplace in which complicity was expected and resistance punished.

In *Childress*, Judge Williams expressed the more extreme view that members of groups expected to participate in discriminatory intergroup behaviors are positioned not as *bystanders* but as *beneficiaries*. But the question of whether it is *unreasonable* for an individual white or male employee to view as personally hostile any expectations of complicity in discrimination against others must be distinguished from that of whether discrimination may, in aggregate, offer workplace advantages to one's group. By collapsing the two, the court suggests that white or male employees *ought* to experience a discriminatory atmosphere as especially welcoming, and that those who feel otherwise are unreasonable.

Such a view turns Title VII values on their head by suggesting that, as a matter of law, workers embrace the very practices the statute outlaws. The "reasonable person" standard should never be confused with the perspective of the ordinary bigot or passive beneficiary of discrimination, regardless of their numerical incidence. Instead, as Kathryn Abrams has argued, the only way to insure that Title VII's objective harm requirement reflects the statute's normative, and transformative, aspirations is to incorporate into the legal standard of "reasonableness" an appreciation of Title VII's commitment to workplace equality and a thoroughgoing understanding of the barriers to it.³⁸⁹ The "reasonable" worker does not take for granted a workplace structured by race- and sex-based competition or antagonism.

The zero-sum perspective also leaves courts blind to quite concrete harms suffered by workers whose intergroup solidarity the courts find so unreasonable. The assertion in *Childress* that the officers should have experienced the workplace favorably simply contradicts the evidence that their intergroup solidarity provoked a pattern of hostile and harmful behavior.³⁹⁰ To similar effect, courts also trivialize the possibility of

387. *Id.* at 1178, 1180.

388. *Id.* at 1181.

389. See Abrams, *supra* note 8, at 1177-78, 1223-24 (arguing that the "reasonable person" should be "a well informed person, a person armed with context-specific information" about sexual harassment); see also Franke, *supra* note 10, at 751-52 (discussing Kathryn Abrams, *The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law*, 1995 DISSENT 48 (1995)).

390. See *Childress v. City of Richmond*, 907 F. Supp. 934, 938 (E.D. Va. 1995). Cf. Schultz, *Telling Stories*, *supra* note 8, at 1805 (describing how courts describe women's jobs as "more desirable" than men's "even where women's jobs pay lower wages, afford less prestige, and offer fewer opportunities for advancement" based on "the courts' own construction of women's point of view").

reasonably experiencing a workplace as hostile by disaggregating different components of the workplace environment. The *Drake* court concluded that Drake's coworker's comment "Why don't you take your nose and put it up the black's ass like you have always got it and keep it there?"³⁹¹ was merely "an isolated incident" that could not support a claim of a hostile environment,³⁹² but it failed to consider the racially explicit comment in light of the "evidence that some of the employees . . . were racial bigots"³⁹³ and that coworkers shunned Drake by leaving the plant's breakroom whenever he entered.³⁹⁴

If every incident is considered in isolation, it is trivial to conclude that each is an isolated incident. But a critique of the zero-sum model demonstrates how behavior directed at members of a "favored" workplace group must be understood together with discriminatory conduct towards others, with particular attention to whether individual employees embrace or reject the offer of "favored" status.

2. Proving Subjective Harm

Even if workers *ought* to experience as hostile, and to resist, any workplace pressures to participate in discriminatory practices, they too often fail to do so. The traditional arguments against third-party standing, the doctrinal requirements of Title VII claims, and the policy goal of encouraging voluntary, grassroots intergroup solidarity all counsel caution in permitting members of dominant workplace groups to bring suit based on workplace environments that primarily victimize members of marginalized or excluded groups. In a case like *Childress*, the legitimate worry is that whites or men might claim a racially or sexually hostile environment even though they were indifferent to, preferred, or even promoted that environment.

In many situations, subjective harm may be established by the obviously abusive character of the harassment directed at the plaintiff. Physical attacks, work sabotage, public humiliation, and other targeted harassment would support inferences of subjective harm without requiring other assurances that a plaintiff found the environment to be hostile. In such circumstances, the plaintiff's coworkers make clear plaintiff's divergence from a workplace orthodoxy.³⁹⁵

In other cases, such divergence is made publicly apparent by the plaintiff's own conduct, whether through explicit objection to norms disfavoring intergroup solidarity

391. *Drake v. 3M*, 134 F.3d 878, 882 (7th Cir. 1998).

392. *Id.* at 885.

393. *Id.* at 881.

394. *See id.* at 882.

395. Thus, I disagree with Katherine Franke's suggestion that, for same-sex harassment to be actionable, the law always should require the plaintiff to indicate his objections to workplace norms and then bring a Title VII action only after he "is targeted for hostile treatment because of his failure to conform to the workplace norms." Franke, *supra* note 10, at 768. An explicit objection is not required to distinguish employees who oppose the behavioral expectations of the workplace from those affirmed by or indifferent to them. Moreover, Franke's proposal runs contrary to the principle that workplace conduct that does not individually target the plaintiff may nonetheless give rise to a hostile environment. *See supra* Part V.B.

or by direct violation of those norms.³⁹⁶ Such self-identification makes it plausible for the employee to treat workplace demands for discriminatory intergroup relations as threats to his or her own employment security.³⁹⁷

Without either harassing conduct specifically directed at the plaintiff or some assertion of intergroup solidarity, however, it is difficult to see how the subjective harm requirement can be satisfied. Even when a white or male employee is personally implicated in discriminatory conduct by virtue of sex- or race-specific expectations of intragroup cooperation in such conduct, there is no reason simply to assume that the employee finds the subjection to such stereotypes to be threatening, humiliating, or otherwise giving rise to a hostile or abusive environment. In *Bermudez*, for instance, Schlichting was not simply a racial bystander,³⁹⁸ but the reported facts leave no basis to infer that she found a workplace culture where white intraracial solidarity manifested itself in race discrimination against nonwhites to be alienating and hostile, rather than reassuring, or that any discomfort with the situation rose beyond the level of mere offended sensibilities.

Even though anyone in a discriminatory work environment *ought* to experience that environment as profoundly hostile, such environments persist in part because the opposite is too often true: workers' confidence in and comfort with themselves as white or male may rely on, or be untroubled by, practices of intergroup exclusion and subordination. Title VII coverage should encourage a realignment of those environments workers experience as hostile, rather than give comfort to the sensibilities that aid and abet discrimination. It is entirely appropriate, then, to require that plaintiffs demonstrate their actual experience of workplace harm and to favor plaintiffs whose conduct reflects their rejection of exclusionary or subordinating intergroup norms and their commitment to intergroup solidarity.

396. *See, e.g.*, *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1982); *Eichman v. Indiana State Univ. Bd. of Trs.*, 597 F.2d 1104, 1106-08 (7th Cir. 1979); *Spillman v. Carter*, 918 F. Supp. 336, 339 (D. Kan. 1996); *Price v. Fed. Express Corp.*, 660 F. Supp. 1388, 1389-90 (D. Colo. 1987). There is no need, however, that the employer know of this commitment to intergroup solidarity. If, for instance, David DeMatteis had known with confidence (perhaps by observing prior incidents) that discovery by his white coworkers of his sale of his home to an African-American coworker would have led to such severe harassment as to paralyze his ability to do his job, threaten him with physical injury, and jeopardize his health, he might well reasonably have found the constant threat of being "outed" (and the consequences to follow) sufficient to render the work environment severely hostile. *Cf.* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000) (discussing the harms inflicted on gays and lesbians by being coerced into remaining closeted for fear of exposing themselves to antigay violence, harassment, and other forms of discrimination).

397. Such considerations rely on the credibility of difficult-to-verify claims about how the plaintiff experienced the workplace. But evidence might be found in deteriorating work performance associated with changes in the workplace environment, communications about the workplace with friends and coworkers, or the need for medical treatment of the psychological consequences of the environment.

398. *See supra* Part V.C.1.

VI. CONCLUSION

Title VII enshrines in law an aspiration for an American workplace structured around intergroup solidarity rather than race- and sex-based competition, exclusion, and hierarchy. Title VII jurisprudence cannot do justice to that dream while beholden to the same zero-sum model of race and gender relations that underpins so much discrimination itself. Moving beyond the zero-sum game requires recognizing how practices of racism and sexism are not simply about abstract valuations of different kinds of persons, or even just about stereotypic race- or gender-specific norms, but also are about maintaining systems of relationships between and within groups. As Chantal Mouffe has put it, “the struggle for the equality of women . . . [is not] a struggle for realizing the equality of a definable empirical group with a common essence or identity, women, but rather [is] a struggle against the multiple forms in which the category ‘woman’ is constructed in subordination.”³⁹⁹ When intergroup interactions become intragroup conditions of membership, regulating those interactions promotes particular forms of race and gender *relations* while simultaneously demarcating the very groups that interact.

Recognizing this point allows us to understand how Title VII’s prohibition on same-sex and same-race discrimination can play an integral role in the statute’s core pursuit of racial and gender equity, rather than being merely a curious byproduct of its structure.⁴⁰⁰ Moreover, conceptualizing race and gender not as static attributes but as social processes may help us to see the discrimination, often overlooked, that inheres in the relationship between workers in female- or minority-dominated job categories and their supervisors, customers, or clients, rather than focusing exclusively on the disparate treatment of similarly situated employees.⁴⁰¹ Moving beyond the zero-sum game will enable us to understand these dynamics and to protect attempts, by persons of all races and genders, to construct new ways of life and work in the spirit of equality.

399. Chantal Mouffe, *Feminism, Citizenship, and Radical Democratic Politics*, in *FEMINISTS THEORIZE THE POLITICAL* 369, 382 (Judith Butler & Joan W. Scott eds., 1992).

400. See Abrams, *supra* note 8, at 1225 (arguing that same-sex harassment should be actionable “through its connection to a system of sex and gender subordination”); cf. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (characterizing same-sex harassment as “not the principal evil Congress was concerned with when it enacted Title VII”).

401. Cf. *supra* note 271 (discussing courts’ reluctance to find sex discrimination absent comparative disadvantage between men and women).