

4-2020

## Identity: Obstacles and Openings

Osamudia R. James  
*University of Miami School of Law*

---

### Recommended Citation

Osamudia R James, *Identity: Obstacles and Openings*, 73 SMU L. REV. F. 156 (2020)  
<https://doi.org/10.25172/slrf.73.1.14>

This Collection: Foundational Voices in 2020 and Beyond is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review Forum by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# SMU Law Review Forum

Volume 73

April 2020

156–167

## IDENTITY: OBSTACLES AND OPENINGS

Osamudia R. James\*

### TABLE OF CONTENTS

- I. THE PROMISE OF IDENTITY
- II. THE CHALLENGES OF IDENTITY
  - A. LAW
  - B. STATUS
  - C. WHITE IDENTITY POLITICS
- III. 2020 AND BEYOND

### ABSTRACT

*Progress regarding equality and social identities has moved in a bipolar fashion: popular engagement with the concept of social identities has increased even as courts have signaled decreasing interest in engaging identity. Maintaining and deepening the liberatory potential of identity, particularly in legal and policymaking spheres, will require understanding trends in judicial hostility toward “identity politics,” the impact of status hierarchy even within minoritized identity groups, and the threat that white racial grievance poses to identitarian claims.*

### INTRODUCTION

Progress regarding equality and social identities has moved in a bipolar fashion: popular engagement with the concept of social identities and the disparities that can accompany them has increased even as the courts have signaled decreasing interest in engaging identity, particularly in the context of race. Broader recognition of social identities has undercut neither resistance to identitarian equality claims nor the disdain with which some engage “identity politics.” The successes of the past, therefore, are threatened. Absent more productive engagement with identity, particularly in the context of policies that shape institutions and address structural inequality, the liberatory potential of identity will be wasted. This Article engages the challenges to that potential, highlighting three obstacles that lie ahead: waning legal engagement with identity, the

---

\* Dean’s Distinguished Scholar and Professor of Law, University of Miami School of Law. I am grateful to Griffin Rubin and the staff of the SMU Law Review for the invitation to contribute to this Collection Issue and for excellent editorial assistance.

challenge of status hierarchies to intersectional identities, and a rise in the salience of white racial identity.

## I. THE PROMISE OF IDENTITY

Unlike the factors that make up our personal identities and give humans a sense of individuality—our names, our favorite music, our birth order in our family—social identities are groups to which we are assigned at birth and that give us a sense of collective belonging and social membership. Formed on the basis of nominal characteristics like race, gender, or ethnicity, they are imposed externally—although, depending on circumstance and phenotype, individuals can navigate those assignments with varying levels of agency.<sup>1</sup> Social identities can seem permanent but are often developed continually according to both social meanings and physical attributes<sup>2</sup> and can be performed in a strategic and social-constructivist manner. Performances of identity must correspond to symbolic representations that are culturally understood and evocative of a particular group.<sup>3</sup>

American society has experienced a broadening willingness to engage identity in social spaces. Who could forget, for example, Beyoncé’s wildly successful visual album, *Lemonade*,<sup>4</sup> a meditation on black Southern womanhood that captivated audiences far beyond those the project centered? On social media, the ways in which identity shapes the consumption and digestion of current events and cultural patterns are made manifest in hashtags like #BlackWomenDidThat, #NotYourAsianSidekick, #BlackLivesMatter, #NotYourCostume,<sup>5</sup> and #MeToo.<sup>6</sup>

1. See Christopher A. Ford, *Administering Identity: The Determination of “Race” in Race-Conscious Law*, 82 CALIF. L. REV. 1231, 1239 (1994) (discussing “self-reported identity” and “other-ascribed identity”); Nancy Leong, *Identity Entrepreneurs*, 104 CALIF. L. REV. 1333, 1334 (2016) (“[O]ut-group members leverage their out-group status to derive social and economic value for themselves.”). See generally KENNETH L. KARST, *LAW’S PROMISE, LAW’S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* (1993) (explaining that creating and maintaining social identity is an ongoing negotiation between oneself and others).

2. See Angela Onwuachi-Willig, *Undercover Other*, 94 CALIF. L. REV. 873, 883 (2006) (“[R]ace, while often signaled by phenotype, is not biologically defined. . . . Instead, race is socially constructed; it is formed through human interactions and commonly held notions of what it means to be a person of a certain race.” (footnotes omitted)).

3. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1265 n.11 (2000) (explaining the difference between identity performed as a result of social construction and identity performed as a strategic decision).

4. BEYONCÉ, *LEMONADE* (Parkwood Entertainment & Columbia Records 2016); see Lizzie Plaugic, *Beyoncé’s Lemonade Debuts at No. 1 on the Billboard Charts*, VERGE (May 1, 2016, 5:08 PM), <https://www.theverge.com/2016/5/1/11552580/beyonce-lemonade-no-1-billboard-charts> [https://perma.cc/A3G3-DEM3].

5. Identities Team, *13 Twitter Hashtags that Made Identity Part of Everyone’s Conversation*, MIC (Mar. 21, 2016), <https://www.mic.com/articles/138404/13-twitter-hashtags-that-made-identity-part-of-everyone-s-conversation> [https://perma.cc/VG2L-E7ZJ]; Nicole Puglise, *#BlackWomenDidThat: Twitter Campaign Celebrates American Pioneers*, GUARDIAN (July 30, 2016, 10:08 AM), <https://www.theguardian.com/us-news/2016/jul/30/black-women-did-that-twitter-campaign> [https://perma.cc/7Z9Q-KV88].

6. Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RES. CTR. (Oct. 11, 2018), [https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/ft\\_18-10-11\\_metooanniversary\\_hashtag-used-19m\\_times/](https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/ft_18-10-11_metooanniversary_hashtag-used-19m_times/) [https://perma.cc/3MSD-WMQV].

The visibility of transgendered individuals in our society is also steadily increasing. Bathroom bills notwithstanding, celebrity—that hallmark of cultural relevance, if not outright acceptance—has been extended to people like Janet Mock, Laverne Cox, and Trace Lysette.

Legally, social identity also serves as the cornerstone of equality jurisprudence in the United States. The Fourteenth Amendment, ratified by the states during Reconstruction, was animated by a commitment to securing the freedom of formerly enslaved blacks, ensuring their full citizenship, and addressing grievances borne out of race.<sup>7</sup> Equal protection, with its tiered levels of judicial review for discrimination on the basis of race, ethnicity, gender, and nationality, necessarily contemplates equality movements anchored in identity.

Identity continues to drive equality movements, and for good reason. Minoritized<sup>8</sup> identity can provide curative and protective benefits for individuals who use their identity status as an anchor for positive psychosocial adaptation and as inspiration for enhanced democratic practice.<sup>9</sup> Identity can also spur mobilization and inspire progress. African-Americans, for example, tend to use assessment of what is good for the status of their entire racial group as a proxy for what is good for themselves as individuals.<sup>10</sup> And the Supreme Court's 2015 decision in *Obergefell*<sup>11</sup> was the culmination of an identity movement that moved past requests for tolerance and non-criminalization of gay and lesbian sex to demands for affirmative acceptance and inclusion in the form of same-sex marriage. Despite the Court's unwillingness to deem sexual orientation a suspect classification to which a tiered level of equal protection review would extend, the movement was animated by a commitment to recognizing and affirming the social identities of gay and lesbian couples.

Of course, no one is just one identity, and the idea of overlapping identities

---

Although #MeToo has centered women as the primary victims of sexual assault and abuse, the movement is not exclusive to women. This has been highlighted by men like Terry Crews, who came forward to tell his story amid the #MeToo movement. Christine Hauser, *Terry Crews Shares 'Apology' Letter from Executive Who Resigned in His #MeToo Case*, N.Y. TIMES (Sept. 17, 2018), <https://www.nytimes.com/2018/09/17/arts/terry-crews-me-too.html> [https://perma.cc/M3QA-V4ND].

7. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872) (describing the “pervading purpose” of the Fourteenth Amendment as securing the “freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him”).

8. Some social groups are positioned as outsiders to dominant norms and are thus characterized as falling short of dominant group standards. When this deviation is the basis for social, cultural, and political exclusion, those groups are minoritized. The term “minoritized” is preferable to “minority,” as the phenomenon is affirmative and occurs independently of a group's size or proportion relative to other groups. See Debra A. Harley et al., *Race, Class, and Gender: A Constellation of Positionalities with Implications for Counseling*, 30 J. MULTICULTURAL COUNSELING & DEV. 216, 216–17, 228–30 (2002).

9. See Osamudia R. James, *Valuing Identity*, 102 MINN. L. REV. 127, 147–57 (2017).

10. MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS 10–11 (1994). *But see* ISMAIL K. WHITE & CHRYL N. LAIRD, STEADFAST DEMOCRATS: HOW SOCIAL FORCES SHAPE BLACK POLITICAL BEHAVIOR 13–15 (2020) (arguing that the adversities of slavery and segregation formed the roots of black political unity, producing a social pressure that operates as the key element to unwavering support of black Americans for the Democratic Party).

11. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

has gained traction outside of legal circles in the last decade. Intersectionality theory, an analytical framework articulated by Kimberlé Crenshaw in 1989, refers to the practice of centering the multidimensionality of black women's experiences in law and policy.<sup>12</sup> Having observed that antidiscrimination law treated race and gender as mutually exclusive categories of experience, Crenshaw argued that this single-category axis erased black women in the conceptualization and identification of race and sex discrimination.<sup>13</sup> As a result, inquiry and remediation regarding discrimination were limited for the most privileged of either group—sex- and class-privileged blacks or race- and class-privileged women—marginalizing those who were “multiply-burdened” and obscuring claims that could not be exclusively assessed under either gender or race theories.<sup>14</sup> Crenshaw's intervention, then, further deepened the promise of identity. Ultimately, intersectionality theory translates into legal terms the assertion of the Combahee River Collective that “[i]f Black women were free, it would mean that everyone else would have to be free since [black women's] freedom would necessitate the destruction of all the systems of oppression.”<sup>15</sup>

## II. THE CHALLENGES OF IDENTITY

The power of identity has not been without qualification. The Black Lives Matter (BLM) movement, for example, has encountered significant backlash, ranging from the relatively mild “All Lives Matter” retort to the severe labeling of activists that work in the BLM network as terrorists.<sup>16</sup> Criticism, moreover, of “safe spaces” in higher education is, in part, hostility to the idea that we should encourage minoritized identities to “take refuge” or “find comfort” only among members of their group. Intersectionality, too, has engendered pushback. Crenshaw's theory was germinal, providing a new framework for understanding the limits and potential of identity politics in the context of the law. Today, the idea inspires progressive activists and scholars but also draws critique from opponents who question the methods of remediation, if not the legal concept

12. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139–40. Crenshaw extended the application of her theory to violence committed against women of color. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–45 (1991). Crenshaw's articulations were anticipated by the work of Pauli Murray, which placed black women at the center of a universal human rights framework that contemplated interracial and intergenerational alliances. See Serena Mayeri, *After Suffrage: The Unfinished Business of Feminist Legal Advocacy*, 129 YALE L.J. F. 512, 515–34 (2020) (considering post-suffrage women's citizenship through the eyes of Pauli Murray).

13. Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 12, at 140.

14. *Id.*

15. Combahee River Collective, *The Combahee River Collective Statement*, in HOME GIRLS: A BLACK FEMINIST ANTHOLOGY 264, 270 (Barbara Smith ed., Rutgers Univ. Press 2000) (1983).

16. Michael Barbaro & Yamiche Alcindor, *Black Lives Matter Was Gaining Ground. Then a Sniper Opened Fire.*, N.Y. TIMES (July 9, 2016), <https://www.nytimes.com/2016/07/10/us/black-lives-matter-reaction.html> [<https://perma.cc/NR7V-HYQX>] (highlighting Rush Limbaugh's accusation that BLM is a “terrorist group committing hate crimes”); Adam Goldman & Nicholas Fandos, *Lawmakers Confront F.B.I. Director Over Report on Black Extremists*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/us/politics/fbi-black-identity-extremist-report.html> [<https://perma.cc/22Z6-DC4Y>].

itself.<sup>17</sup>

The previous decade has brought challenges to identity in general, and intersectional identities in particular, in three key ways. The first is in a legal context, where jurisprudence is increasingly hostile to identity and intersectional identities are still not accounted for in legal frameworks. Second, societal status and hierarchy continue to deny both recognition and affirmation to minoritized identity groups seeking justice and equality, a phenomenon that is amplified in the context of multiply burdened identities and that sometimes drives wedges between groups that might otherwise be allied. Third, a resurgence in white racial identity necessarily complicates the liberatory possibilities of identitarian movements, intersectional or otherwise.

#### A. LAW

Despite liberatory origins and current social engagement, jurists, activists, and scholars have expressed concerns regarding the centrality of identity in our legal and social spaces. Identitarian claims, for example, have been characterized as tactically weak because they are vulnerable to assertions that they undermine social cohesion by awarding benefits or protection to groups at the expense of others.<sup>18</sup> Other critiques include concerns that identitarian claims essentialize individuals, reducing them to prototypes of their identity alone.<sup>19</sup> Progressive scholars have lamented the Court's refusal to engage an anti-subordination or redistributive-justice model of equal protection, which would impose an affirmative obligation on the state to dismantle unequal conditions between identity groups created by historical systems of inequity.<sup>20</sup> And as a counter to increased positive social engagement with identity, "identity politics" remains a characterization used to denigrate the claims of minoritized groups in their efforts to address the ways in which identity informs access to opportunities and resources in the United States.

Further, the cachet of identity in popular culture operates in sharp contrast to how identity is considered in law and policy. Although remediating discrimination based on identity is a foundation of equality jurisprudence in the United States, actual application of that jurisprudence is increasingly hostile to identitarian movements. The identity canon is closed, with the Court refusing as late as 2015 to go any further than race, gender, and ethnicity in characterizing suspect classifications.<sup>21</sup> For those classifications like race that have been

---

17. Jane Coaston, *The Intersectionality Wars*, VOX, <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination> [https://perma.cc/9CBF-U7MT] (last updated May 28, 2019, 9:09 AM).

18. See Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2847-55 (2014).

19. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 795 (2011); see also Lauren Sudeall Lucas, *Identity as Proxy*, 115 COLUM. L. REV. 1605, 1621-22 (2015).

20. See Darren Lenard Hutchinson, "Unexplainable on Grounds Other than Race": *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 622-24; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 345 n.115 (1987).

21. Indeed, the Court's same-sex marriage pronouncements were grounded in dignity rather

maintained, the Court's concerns about the corrosive effect of characterizing people by identity categories has limited the reach of doctrine. Affirmative action in higher education, for example, is circumscribed in part because considering the race of applicants in the admissions process purportedly balkanizes Americans.<sup>22</sup>

Nor is this trend new. Take, for example, desegregation jurisprudence. Defined by cases like *Brown v. Board of Education*<sup>23</sup> and *Loving v. Virginia*,<sup>24</sup> the popular narrative about these early civil rights victories is one of a Court prepared to reckon with the ways that identity, and racial identity in particular, inform equality and access. By the early 1990s, however, the Court in *Board of Education of Oklahoma v. Dowell* endorsed the termination of desegregation orders once a school district was unitary even if termination would immediately lead to resegregation.<sup>25</sup> One year later, in *Freeman v. Pitts*, the Court authorized federal courts to relinquish supervisory authority over desegregation efforts even if integration had been achieved only partially or in piecemeal fashion.<sup>26</sup> In 2007, the Court in *Parents Involved* declined to recognize diversity as a compelling interest that would justify considering student race in K-12 student assignments in an attempt to integrate public schools,<sup>27</sup> despite having narrowly upheld diversity as a compelling interest four years earlier in its higher-education affirmative action cases.<sup>28</sup> In justifying the Court's move away from identity, Chief Justice Roberts likened engagement with identity to racism, memorializing judicial impatience with identity by writing, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>29</sup>

Voting rights cases reflect similarly negative conclusions about the utility and wisdom of considering racial identity. In *Shaw v. Reno*, the Court struck down a plan which used race when drawing district lines in an attempt to avoid dilution of black voting strength in North Carolina.<sup>30</sup> In supporting her decision, Justice O'Connor asserted that racial classifications necessarily balkanize.<sup>31</sup> More recently, in *Shelby County v. Holder*, Section 4 of the Voting Rights Act<sup>32</sup> was gutted

---

than the idea that sexual orientation was a suspect identity classification to which the Court should apply strict scrutiny. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594-96 (2015).

22. See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1301 (2011) (explaining that those committed to antibalkanization worry that race-conscious remedies undermine community and "are prepared to subordinate the pursuit of racial justice to the preservation of social cohesion").

23. 347 U.S. 483 (1954).

24. 388 U.S. 1 (1967).

25. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249 (1991) (deciding that the court of appeals's measure for successful integration would unacceptably condemn a district to "judicial tutelage for the indefinite future").

26. *Freeman v. Pitts*, 503 U.S. 467, 490 (1992).

27. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723-25 (2007).

28. See *Gratz v. Bollinger*, 539 U.S. 244, 270-71 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 322-25 (2003).

29. *Parents Involved*, 551 U.S. at 748 (plurality opinion).

30. *Shaw v. Reno*, 509 U.S. 630 (1993).

31. *Id.* at 657 (concluding that racial classifications "balkanize us into competing racial factions" and "carry us further from the goal of a political system in which race no longer matters").

32. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438-39 (codified as amended at 52 U.S.C. § 10303(a)-(e) (2018)).

because “[b]latantly discriminatory evasions of federal decrees are rare.”<sup>33</sup> If the majority opinion is to be taken at face value, racial identity is simply no longer relevant when thinking about how to maximize democratic participation.<sup>34</sup>

## B. STATUS

Moreover, some identities are valued more than others, a reflection of America’s status-informed society. Status refers to a system of social hierarchy in which identities are ranked and organized by legal, political, and cultural criteria,<sup>35</sup> creating claims to esteem.<sup>36</sup> The hierarchy these rankings produce distinguishes between individuals and groups on the basis of honor, influence, and worth,<sup>37</sup> ultimately reflecting how society values social identities and the individuals that hold them. Status operates through shared stereotypes and beliefs that embody cultural knowledge about what “most people” think<sup>38</sup> and are reflected, for example, in widely shared assumptions that it is more valuable to be white or male than it is to be black or female.<sup>39</sup> Status hierarchies not only marginalize those groups toward the bottom of the hierarchy but can also undercut progressive identitarian movements from within. When #MeToo initially went viral, it did not properly credit Tarana Burke, who originally coined the phrase a decade earlier, grounding the movement in her experiences and work as an activist to end gender-based harassment and violence against women.<sup>40</sup> #MeToo has since expanded to credit women like Burke properly and challenge the erasure of women of color, queer people, the poor, and men from the movement.<sup>41</sup> Nevertheless, it is impossible to ignore the ways #MeToo originally erased these groups in favor of white women as the face of victims.<sup>42</sup> And it is this

33. *Shelby Cty. v. Holder*, 570 U.S. 529, 547 (2013) (internal quotation marks omitted) (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)).

34. *See id.* at 547–50.

35. Vasiliki Kantzara, *Status*, in *THE BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY* 4757, 4757–60 (George Ritzer ed., 2007).

36. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 306 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. Cal. Press 1978) (1921).

37. Cecilia L. Ridgeway, *Why Status Matters for Inequality*, 79 *AM. SOC. REV.* 1, 5 (2014).

38. *Id.*

39. Laurie T. O’Brien & Brenda Major, *System-Justifying Beliefs and Psychological Well-Being: The Roles of Group Status and Identity*, 31 *PERSONALITY & SOC. PSYCHOL. BULL.* 1718, 1720 (2005) (categorizing Latinos and blacks as low-status ethnic groups, and whites as a high-status ethnic group); Cecilia L. Ridgeway & Shelley J. Correll, *Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations*, 18 *GENDER & SOC’Y* 510, 513 (2004) (explaining that “[m]en are viewed as more status worthy and competent overall and more competent at the things that ‘count most’”); Cecilia Ridgeway, *The Social Construction of Status Value: Gender and Other Nominal Characteristics*, 70 *SOC. FORCES* 367, 368 (1991).

40. Liz Rowley, *The Architect of #MeToo Says the Movement Has Lost Its Way*, *N.Y. MAG.: THE CUT* (Oct. 23, 2018), <https://www.thecut.com/2018/10/tarana-burke-me-too-founder-movement-has-lost-its-way.html> [<https://perma.cc/7RKP-GD7U>].

41. In December 2017, Burke was left off of *Time*’s “Person of the Year” magazine cover, where they featured “The Silence Breakers” women, including Taylor Swift, who “launched a movement.” *Person of the Year: The Silence Breakers*, *TIME*, Dec. 18, 2018, at cover. Burke did, however, grace the cover of the *Time*’s “100 Most Influential People” issue in April 2018. *Time 100 List of the World’s Most Influential People*, *TIME*, Apr. 30/May 7, 2018, at cover.

42. As Tarana Burke put it, the success of the movement is due in part to how society perceives the victims: “white, cisgender, heterosexual, famous women.” Rowley, *supra* note 40. *See generally*

centering of white women—a subject considered, by virtue of whiteness, a universal subject that legitimated the movement—that will help ensure its longevity.<sup>43</sup>

The same-sex marriage movement, too, has been similarly critiqued as collapsing layered identities. The *Obergefell* litigation team, for example, represented plaintiffs who were disproportionately white, gender-conforming, and affluent, despite the fact that members of the LGBTQ community are more likely to be low-income, non-white, and in interracial relationships.<sup>44</sup> This strategic litigation decision implied that human rights are those that must be earned by performing whiteness, straightness, and wealth as completely as possible<sup>45</sup>—in short, by rejecting intersectional and minoritized identities.

In contrast, BLM intentionally centered women with multiple minoritized identities. Departing from mid-twentieth-century civil rights movements that placed men at the forefront, BLM was led by black and queer women. This leadership translated into a platform that emphasized the importance of understanding not only race, but gender, sexual orientation, class, and the way those identities can intersect to present unique perspectives and challenges. Refusing to concede to a societal hierarchy that places men and heterosexuals at the top, BLM presented a contrast to #MeToo regarding status and intersectionality.

In part for these reasons, BLM has been received much less evenly than #MeToo. Despite BLM successfully launching policy prescriptives to address racial disparities in wealth and the criminal justice system, serving as an organizational platform to enable progressive political action, and pushing candidates in the 2016 presidential election to address institutionalized and systemic racism (the superficiality of their answers notwithstanding), the FBI coined the term “black

---

Linda S. Greene et al., *Talking About Black Lives Matter and #MeToo*, 34 WIS. J.L. GENDER & SOC'Y 109, 127–36 (2019) (discussing the independence of and overlaps between the Black Lives Matter and #MeToo movements).

43. Even with white women as the face of the movement, there are limits to how far identity can go. Although #MeToo will likely never be labeled an extremist group in the ways that BLM has been, as #MeToo continues to animate the toppling and tarnishing of powerful men, questions regarding whether the movement has “gone too far” have dogged progress. See, e.g., Katie Packer Beeson, *Has #MeToo Gone Too Far?*, U.S. NEWS & WORLD REP. (Feb. 12, 2018, 7:00 AM), <https://www.usnews.com/opinion/civil-wars/articles/2018-02-12/metoo-movement-shouldnt-be-exploited-to-ruin-mens-careers-without-cause> [<https://perma.cc/D42J-K6CZ>]; Mary Papenfuss, *Liam Neeson Calls the #MeToo Movement a ‘Bit of a Witch Hunt,’* HUFFINGTON POST (Jan. 13, 2018, 11:30 PM), [https://www.huffpost.com/entry/liam-neeson-metoo-witch-hunt\\_n\\_5a5ac105e4b0fbc3a10bdf3](https://www.huffpost.com/entry/liam-neeson-metoo-witch-hunt_n_5a5ac105e4b0fbc3a10bdf3) [<https://perma.cc/2T35-PE9N>]; Tovia Smith, *On #MeToo, Americans More Divided by Party Than Gender*, NAT'L PUB. RADIO (Oct 31, 2018, 5:00 AM), <https://www.npr.org/2018/10/31/662178315/on-metoo-americans-more-divided-by-party-than-gender> [<https://perma.cc/DVX5-RQXB>]; Cathy Young, *Is ‘Weinsteining’ Getting Out of Hand?*, L.A. TIMES (Nov. 1, 2017, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-young-weinsteining-goes-too-far-20171101-story.html> [<https://perma.cc/2A48-X5RA>].

44. Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J. F. 136, 145–50 (2015).

45. *Id.* at 155 (reviewing information about the *Obergefell* plaintiffs to draw conclusions about the image the plaintiffs were meant to project); see also I. Bennett Capers, *Enron, DOMA, and Spousal Privileges: Rethinking the Marriage Plot*, 81 FORDHAM L. REV. 715, 729 (2012) (asking why the queer community is surrendering to the normativity and hegemony of marriage instead of interrogating its disciplining function).

identity extremists”<sup>46</sup> to describe the movement’s members. The term and accompanying report linked black political activists protesting police violence with domestic terrorists organizations<sup>47</sup>—during a period, no less, when domestic terrorism committed by white men is on the rise.<sup>48</sup> Ultimately, #MeToo will likely go on to enduring prominence even as the light may be dimming for BLM, due in no small part to the identities that society does and does not value. White women, by virtue of their race, enjoy a status that prompts care, protection, and empathy in ways that black, female, and queer victims of state and private violence do not.

The embrace of intersectionality is not without victories. The 2017 Women’s March, for example, was organized in response to the election of Donald Trump as President.<sup>49</sup> Early concerns about the centering of white, cisgendered women in the March prompted leadership selection that included women of color—even as the focus on race alienated some participants.<sup>50</sup> Thinking explicitly about how intersectionality informed leadership led to a broad and progressive mission and vision for the March that contemplated: violence against women; reproductive rights; workers’ rights; LGBTQIA rights; civil rights regardless of race, gender, age, religion or citizenship; disability rights; immigrant rights; and environmental justice.<sup>51</sup>

Still, the March’s development has been rocky. Accusations of anti-Semitism leveled against March leaders and reports of infighting among co-chairs have dogged the organization.<sup>52</sup> Further, symbols of solidarity among women—including the “pussy hat,” meant as a rejoinder to Trump’s comments about

46. Adam Goldman & Nicholas Fandos, *Lawmakers Confront F.B.I. Director over Report on Black Extremists*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/us/politics/fbi-black-identity-extremist-report.html> [<https://perma.cc/J7FF-46ZR>].

47. Khaled A. Beydoun & Justin Hansford, Opinion, *The F.B.I.’s Dangerous Crackdown on ‘Black Identity Extremists’*, N.Y. TIMES (Nov. 15, 2017), <https://www.nytimes.com/2017/11/15/opinion/black-identity-extremism-fbi-trump.html> [<https://perma.cc/L84D-33U2>].

48. See, e.g., Zack Beauchamp, *The El Paso Shooting Isn’t an Anomaly. It’s American History Repeating Itself*, VOX (Aug. 6, 2019, 1:00 PM), <https://www.vox.com/policy-and-politics/2019/8/6/20754828/el-paso-shooting-white-supremacy-rise> [<https://perma.cc/4VJE-SY6Q>]; Elisha Fieldstadt & Ken Dilanian, *White Nationalism-Fueled Violence Is on the Rise, but FBI Is Slow to Call It Domestic Terrorism*, NBC NEWS (Aug. 5, 2019, 2:49 PM), <https://www.nbcnews.com/news/us-news/white-nationalism-fueled-violence-rise-fbi-slow-call-it-domestic-n1039206> [<https://perma.cc/ZU69-CEK4>]; Max Fisher, *White Terrorism Shows ‘Stunning’ Parallels to Islamic State’s Rise*, N.Y. TIMES (Aug. 5, 2019), <https://www.nytimes.com/2019/08/05/world/americas/terrorism-white-nationalist-supremacy-isis.html> [<https://perma.cc/75U3-5XAT>] (reporting that white nationalism and its accompanying “violent fringe” have been on the rise for several years).

49. See Ellen Wulffhorst, *Women Planning Mass March on Washington When Trump Takes Office*, REUTERS (Nov. 11, 2016, 2:00 PM), <https://www.reuters.com/article/us-usa-women-march-idUSKBN13626O> [<https://perma.cc/E3QD-4TJ8>].

50. Farah Stockman, *Women’s March on Washington Opens Contentious Dialogues About Race*, N.Y. TIMES (Jan. 9, 2017), <https://www.nytimes.com/2017/01/09/us/womens-march-on-washington-opens-contentious-dialogues-about-race.html> [<https://perma.cc/NU33-ELPC>].

51. See *Mission and Principles*, WOMEN’S MARCH, <https://womensmarch.com/mission-and-principles> [<https://perma.cc/YK52-TT2L>] (last visited Nov. 8, 2019).

52. Farah Stockman, *Women’s March Roiled by Accusations of Anti-Semitism*, N.Y. TIMES (Dec. 23, 2018), <https://www.nytimes.com/2018/12/23/us/womens-march-anti-semitism.html> [<https://perma.cc/V4JZ-F3QS>].

sexual assault during the previous year—alienated some transgender activists and potential participants.<sup>53</sup> In September 2019, three of the March’s leaders, including Linda Sarsour, a Palestinian-American activist, and Tamika Mallory, a black gun-control activist with ties to the Nation of Islam, stepped down from the organization’s board.<sup>54</sup> Conflicts between cisgendered and transgendered women similarly betray status conflicts. Radical feminists, for example, insist on regarding transgender women as men who should not be allowed to attend women’s events or use women’s facilities. In 2019, controversy erupted over the exclusion of trans women from the BET BlackGirlsRock! Awards. Manifest in the ways that access to spaces reserved exclusively for women is patrolled<sup>55</sup> are questions about how identity, even within a subordinated group, should inform leadership and belonging.

### C. WHITE IDENTITY POLITICS

Even as questions of status complicate identity movements within minoritized groups, a resurgence in the salience of white racial identity presents rhetorical and substantive challenges to progressive deployments of identity.<sup>56</sup> From increases in claims of reverse racism<sup>57</sup> to multi-pronged legal campaigns meant to dismantle all race-conscious policies<sup>58</sup> to a rise in the politics of white racial resentment,<sup>59</sup> racial identity is increasingly salient for whites,<sup>60</sup> manifesting at its most extreme

53. Marie Solis, *How the Women’s March’s “Genital-Based” Feminism Isolated the Transgender Community*, MIC (Jan. 23, 2017), <https://www.mic.com/articles/166273/how-the-women-s-march-genital-based-feminism-isolated-the-transgender-community> [https://perma.cc/JLA3-YNJP].

54. Farah Stockman, *Three Leaders of Women’s March Group Step Down After Controversies*, N.Y. TIMES (Sept. 16, 2019), <https://www.nytimes.com/2019/09/16/us/womens-march-anti-semitism.html> [https://perma.cc/2VW5-ENZ2].

55. Michelle Goldberg, *What Is a Woman?*, NEW YORKER (July 28, 2014), <https://www.newyorker.com/magazine/2014/08/04/woman-2> [https://perma.cc/5GNS-BJYT]; see also Victoria Uwumarogie, *Pose Star Angelica Ross Calls Out BET for Excluding Trans Women from Black Girls Rock!*, MADAMENOIRE (Sept. 9, 2019), <https://madamenoire.com/1098488/black-trans-girls-rock/> [https://perma.cc/79Z5-NJDH].

56. For background on the conceptualization and formation of white racial identity, see Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 465–70 (2014).

57. Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSP. ON PSYCHOL. SCI. 215, 215 (2011); *Does Affirmative Action Punish Whites?*, NBC NEWS, [www.nbcnews.com/id/30462129/ns/us\\_news-life/t/does-affirmative-action-punish-whites/#.Xa\\_HRuhKg2w](http://www.nbcnews.com/id/30462129/ns/us_news-life/t/does-affirmative-action-punish-whites/#.Xa_HRuhKg2w) [https://perma.cc/DXU9-4SB9] (last updated Apr. 28, 2009, 7:19 PM) (cataloging reverse discrimination cases).

58. Anemona Hartocollis, *U.N.C. Admissions Lawsuit Brings Another Attack on Affirmative Action*, N.Y. TIMES (Jan. 18, 2019), <https://www.nytimes.com/2019/01/18/us/unc-affirmative-action-lawsuit.html> [https://perma.cc/88H4-4JVL] (detailing the coordinated legal challenges to affirmative action in higher education).

59. See, e.g., Ann M. Oberhauser et al., *Political Moderation and Polarization in the Heartland: Economics, Rurality, and Social Identity in the 2016 U.S. Presidential Election*, 60 SOC. Q. 224, 224, 239–40 (2019) (using data from the 2016 Iowa caucuses to show that “rurality and social identity, but not economic distress, were significantly correlated with Iowa’s swing to Trump”); Brian F. Schaffner et al., *Understanding White Polarization in the 2016 Vote for President: The Sobering Role of Racism and Sexism*, 133 POL. SCI. Q. 9, 30 (2018) (concluding that very little of the polarization in the vote choices of whites based on education levels could be explained by economic difficulties of less-educated whites and instead was associated with denial of racism and sexism).

60. But see generally Heather Digby Parton, *The Truth About Donald Trump’s Angry White Men*:

as nativism and white supremacist violence.<sup>61</sup> In this political moment, comparisons are drawn between the deployment of minoritized identity and the rise of white supremacy, a false equivalency to which the Court has been receptive through its commitment to “colorblindness.”<sup>62</sup> In a “color-blind” regime, the Court refuses to draw distinctions between benign and invidious discrimination, striking down or limiting race-conscious policies meant to address racial disparities and upholding “race-neutral” policies that entrench racial disparities. This commitment preserves white identity politics enshrined in political and cultural structures while dismissing the identity politics of minoritized groups.

Minoritized groups in the United States have long been misrecognized in our democracy,<sup>63</sup> an experience channeled into adaptive political and social coping mechanisms.<sup>64</sup> Whether prompted by economic dislocation or the election of a black President that signaled the decentering of whiteness in political and cultural spheres, this rise in salience of white racial identity is proving maladaptive. Responding to it will require robust defenses of more progressive deployments of identity and a continued commitment to using historical accounts of power and subordination consistently to frame those deployments so as to fend off the false equivalencies that threaten liberatory movements.

### III. 2020 AND BEYOND

Law and policy might look very different if we embraced a more affirmative, curative, and positive conception of identity. That for which I am advocating is not just increased willingness to use identity as a tool but also a shift in recognizing the value of minoritized identity for both identity-holders themselves and society more generally.

Doctrinally, this would mean reevaluating the conclusions about essentialization and stigmatization that undermine a fuller, more productive use of identity. As it stands now, anxieties about both litter antidiscrimination doctrine, animating a commitment to avoiding the racial classification of people at all costs.<sup>65</sup> To be sure, there are legitimate concerns about the racial scripts to which people may feel forced to conform when race is simplified for ease of litigation or policy. If, however, we understand essentialization not as how every minoritized identity-holder behaves but rather about that to which members of minoritized groups are consistently exposed, we can be less anxious about racial

---

*Inside the Media Narrative That the Media Doesn't Understand*, SALON (Mar. 29, 2016, 1:41 AM), [https://www.salon.com/2016/03/28/the\\_truth\\_about\\_donald\\_trumps\\_angry\\_white\\_men\\_inside\\_the\\_media\\_narrative\\_that\\_the\\_media\\_doesnt\\_understand/](https://www.salon.com/2016/03/28/the_truth_about_donald_trumps_angry_white_men_inside_the_media_narrative_that_the_media_doesnt_understand/) [<https://perma.cc/AVG7-MXFP>].

61. Zolan Kanno-Youngs, *Homeland Security Dept. Affirms Threat of White Supremacy After Years of Prodding*, N.Y. TIMES (Oct. 1, 2019), <https://www.nytimes.com/2019/10/01/us/politics/white-supremacy-homeland-security.html> [<https://perma.cc/8228-NTPW>].

62. See James, *Valuing Identity*, *supra* note 9, at 135–38.

63. Recognition scholarship underscores the importance of mutually affirming social relationships that enable citizens to interact as equals. MELISSA V. HARRIS-PERRY, *SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA* 35–36 (2011).

64. James, *Valuing Identity*, *supra* note 9, at 147–60.

65. *Id.* at 170–77 (documenting and rebutting anxieties about stigma and essentialism that inform equality jurisprudence).

classification.

Concerns about stigma are similarly overblown, with students in higher education benefitting from affirmative action, for example, reporting satisfaction with their experiences and presumably preferring stigma and admission over no stigma and rejection.<sup>66</sup> Moreover, stigma regarding students of color predates race-conscious admissions policies. Conclusions about the inferior intellectual capacity of people of color started with attempts to justify racial subordination hundreds of years ago and will continue with or without the affirmative action policies that attempt to remediate it. Placing concerns about essentialization and stigmatization in their proper context allows for more effective race-conscious policies. We can also more precisely use racial identity as a guide to dysfunction in our political system, even in the absence of explicit racial discrimination.

Using identity, however, will require more than judicial willingness to embrace it or the use of more curative conceptions of identity in political process and policy. Rather, it will also require confronting the status hierarchies that undercut gains made by minoritized groups when dominant groups perceive those gains as a threat to their own status security or ignore history and context to erroneously position themselves as marginalized.<sup>67</sup> Litigation strategists must remain committed to both challenging the restrictive equality paradigms anchored in “sameness” instead of difference and resisting the pulls of social status that can undercut the goals of litigation itself. Nor is status an obstacle to equality that operates only between in-groups and out-groups. Rather, status also operates within minoritized communities and must be accounted for.

The future of identity, then, will lie in the ability of scholars, activists, and policymakers to successfully navigate the challenges inherent to the construct. Social movements will bring about more enduring change if coalitions can be built with intersectionality in mind, even when tuning into difference presents organizational challenges. And finally, our national dialogue about identity and belonging for our most marginalized communities must continue, no matter the backlash identity may continue to prompt.

---

66. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 265 (1998) (drawing on a forty-year, longitudinal study of more than 80,000 undergraduate students who matriculated to twenty-eight academically selective colleges and universities to conclude that affirmative action beneficiaries ultimately do not believe they were harmed as a result of the policies).

67. See, e.g., Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257, 282 (characterizing the plaintiff in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* as motivated by a sense that his morals no longer dominate majoritarian culture—a sense ultimately affirmed by the Supreme Court).