

# DISRUPTING THE DISCRIMINATION NARRATIVE: AN ARGUMENT FOR WAGE AND HOUR LAWS' INCLUSION IN ANTISUBORDINATION ADVOCACY

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*The traditional discrimination narrative dominates both legal and popular understanding of workplace exploitation of African American workers. This narrative, however, is incomplete as it fails to consider other chronic workplace challenges such as wage theft. The dominant narrative draws upon an anticlassification framework rather than an antisubordination framework. In addition, post-racial legal analyses complicate the dominant narrative's utility, particularly in a system plagued by structural inequality. Furthermore, both its legal underpinnings and the normative realities of pursuing discrimination claims challenge its efficacy in addressing workplace subordination. Wage theft has largely characterized only the immigrant worker exploitation narrative, despite wage theft's pervasiveness among all low-wage workers, including African Americans. This article disrupts the singular discrimination narrative of African American worker exploitation by identifying its limitations and arguing for the inclusion of wage and hour laws as a component of a broad antisubordination framework for worker protections.*

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## INTRODUCTION

### *A Personal Narrative*

I direct a law school economic justice clinic with a case docket dominated by wage and hour cases involving wage theft claims by low-wage workers. Those claims include, for example, employers' failure to pay workers (1) for any and all of their hours worked, (2) the minimum wage; (3) overtime compensation; and (4) their earned tips. Our clinic is located in the American University Washington College of Law in an affluent neighborhood in Washington, D.C. As a result, we receive our cases via referral from other organizations that operate largely triage or high volume clinics in the neighborhoods in which our clients are more likely to live and work. Over the years, I noticed that nearly all of our clients referred with wage and hour claims were immigrants, including those with delicate immigration statuses.<sup>1</sup> This

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1. This article is not a critique of clinics, legal organizations and advocacy groups critically important to the work of protecting the workplace rights of immigrant workers. Rather, I identify and grapple with structures and narratives that I argue have created a certain level of invisibility of non-immigrant workers, particularly African American workers.

observation was true despite the fact that my clinic is located in Washington, D.C., where our student attorneys represent clients in the District, as well as Montgomery County, Maryland. Given the diverse racial demographics of this region, I wondered, “Where are the African American low-wage workers?”

During a conversation with an attorney from one of the referral organizations, I inquired whether their attorneys ever encountered African American low-wage workers seeking lost wages at its neighborhood clinics. To my surprise, she indicated they rarely saw African Americans explicitly complaining of wage theft. A few months later, I attended a panel at a conference in Chicago. An organizer at a local worker center participated in the panel. The worker center did not contain the word immigrant in the title and as a Chicago-native, I recognized that the center was located on the south side of the city, which has a sizable African American population. I inquired whether they encountered or served African American low-wage workers at the worker center. He gave a surprising and troubling response. It went something like this: “Well, there was that *one* time a black woman came in.” He then proceeded to explain they had difficulty assisting her because all of their materials were in Spanish. As he discussed this situation, I was struck that he used different language to describe the African American worker than the immigrant workers his center regularly assisted. His response made clear that he somehow did not see that client as an exploited worker, at least as he generally conceived of the term. She was somehow different. I am relatively certain he did not realize the terms he used to describe this African American woman and her experiences were different from those he used to describe the immigrant workers his center regularly assisted.

In a third effort to determine why my clinic rarely received African American worker referrals, I inquired with a community organizer involved in the development of a black worker center in Washington D.C. When asked whether she had encountered workers complaining about wage theft, she responded that she, in fact, had not. I explained how wage theft tends to manifest, such as the failure to pay for all hours worked, failure to pay overtime wages, failure to allocate properly tipped wages, failure to pay the minimum wage to tipped workers whose weekly tips do not bring their tipped minimum wage up to the standard minimum wage, etc. She admitted that she did not believe their organizers explicitly asked workers about this type of workplace exploitation.

Finally, after I had some difficulty obtaining data regarding the racial demographics of workers that have filed wage and hour claims with the Department of Labor, I asked my research assistant to further investigate. As a result of his visit to the Department of Labor (“DOL”), he received confirmation that the Wage and Hour Division of the DOL does not take in or record any information on the race or national origin of the persons who file complaints. The DOL representative explained this policy is due largely to their concerns that seeking this information would discourage immigrants from

making claims. I was admittedly surprised to learn of this policy, particularly given the amount of demographic information regularly maintained by government agencies. My years in private practice as a civil rights and employment lawyer had taught me the critical importance of the maintenance of demographic data in identifying racialized patterns and practices. It struck me that the DOL, in its important effort to encourage reporting of wage and hour violations by immigrant workers, was not collecting the information necessary to assess the claims-making rates of various racial and ethnic groups or the potential ways in which wage theft may be racialized.

These experiences sparked my growing interest in assessing the experiences of African American low-wage workers and the relative lack of discussion about their workplace exploitation. This article is the second in a series of related pieces. In *Rendered Invisible: African American Low-Wage Workers and the Workplace Exploitation Paradigm*, I traced the historical and structural mechanisms that contributed to the development of the relative invisibility of African American workers in recent legal scholarship and advocacy and the creation of a Latino Immigrant/White Citizen binary understanding of workplace exploitation.<sup>2</sup> Specifically, I argued that various phenomena have contributed to the increasing invisibility of African American workers, including: (1) civil rights groups' shift from economic to political and social rights in their campaigns; (2) the changing racial composition of the low-wage workforce; (3) the increasing prevalence of worker centers in immigrant communities as the source of advocacy and education on wage and hour rights; and (4) the underserving poor narrative; and (5) the criminalization of the poor (particularly in citizen communities of color).<sup>3</sup>

Here, I consider whether African American low-wage workers' failure to bring claims against their employers for wage theft and other forms of workplace exploitation may contribute to their invisibility. In particular, I explore the role played by the narrative of workplace discrimination—particularly as the stock stories reinforced by the law and jurisprudence have shaped that narrative—in potentially narrowing African American workers' framing of their own workplace experiences and the potential for broadening the discrimination narrative to include other forms of often-racialized exploitation like wage theft.

The exploited undocumented worker narrative that dominates low-wage worker debates relies heavily on the contention that the lack of immigration status and the resulting fear of deportation creates significant vulnerability that

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2. See generally Llezlie Green Coleman, *Rendered Invisible: African-American Low-Wage Workers and the Workplace Exploitation Paradigm*, 60 *How. L.J.* 301 (2016). A recent CNN article similarly questioned the lack of discussion of the experiences of the black working class. See Tanzina Vega, *What About the Working Class?*, CNN (Nov. 23, 2016, 9:25 AM), <http://money.cnn.com/2016/11/23/news/economy/black-working-class-trump/index.html>.

3. Coleman, *supra* note 2, at 84-95.

makes these workers unlikely to pursue claims against their employers. This narrative would seem to suggest that non-immigrant workers, who do not have to navigate threats of deportation for asserting their rights, would be shielded from wage theft and that when it occurs, they would be more likely to pursue their substantive legal rights. Despite quantitative evidence, however, that wage theft is rampant among all low-wage workers,<sup>4</sup> few African Americans appear to pursue these unpaid wages through judicial or administrative mechanisms.<sup>5</sup> What explains this phenomenon?

The possibility that the language of workplace rights that African Americans understand and recognize relies heavily on the traditional racial discrimination narrative may explain a piece of this story. Workers may often lack the language and understanding of the legal frameworks that protect their rights as low-wage workers. While African Americans are well-versed in the sting of racial discrimination in the workplace, and are more readily able to identify and potentially challenge treatment that runs afoul of more familiar racial discrimination laws, they may not as readily recognize other types of workplace exploitation that also have crippling economic consequences. Or, framed a bit differently, civil rights advocacy has largely failed to capture a more nuanced understanding of worker exploitation that considers the racialized aspects of wage theft among African American workers. A better frame must explain both the wage theft itself and African American workers' reluctance to seek those lost wages.<sup>6</sup>

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4. See KIM BOBO, *WAGE THEFT IN AMERICA: WHY MILLIONS OF AMERICANS ARE NOT GETTING PAID – AND WHAT WE CAN DO ABOUT IT* 1-22 (2011) (discussing studies in various cities and various industries that demonstrate the scope and pervasiveness of wage theft); see also Llezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINX L. REV. 1, 8-9 (2013); Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1106-07 (2012) (describing the pervasive nature of wage theft that “result[s] in millions of dollars of lost money for workers who can least afford it”); Ross Eisenbrey, *Wage Theft Is a Bigger Problem Than Other Theft—But Not Enough Is Done to Protect Workers*, ECON. POL’Y INST. (Apr. 2, 2014), <http://www.epi.org/publication/wage-theft-bigger-problem-theft-protect> (“Survey research shows that well over two-thirds of low-wage workers have been the victims of wage theft, but the governmental resources to help them recover their lost wages are scant and largely ineffective.”); Ruth Milkman et al., *Wage and Hour Violations in Urban Labour Markets: A Comparison of Los Angeles, New York and Chicago*, 43 INDUS. REL. J. 378, 379 (2012) (discussing a study that found pervasive wage theft in the nation’s three largest urban labor markets).

5. This claim is based on my own personal experience as a law clinic director, gleaned from the data of the clinic’s cases as well as conversations with attorneys at the legal organizations that refer wage and hour cases to my clinic. It is bolstered by worker center qualitative studies that have identified unreported wage theft among African American workers.

6. As discussed below, lawyers at plaintiffs’ firms seem to be adept at unearthing wage and hour claims from workers that originally contact them to discuss alleged discrimination. Many low-wage workers, of course, do not have access to private counsel, and are, instead receiving legal assistance, if any, from neighborhood legal clinics operated by legal services

In this article, I tie together the pieces of this puzzle to argue that the paradigmatic antidiscrimination narrative that may drive African American workers' conceptualization of workplace exploitation does not sufficiently consider the role of wage theft in their subordination. This incomplete narrative fails to provide an adequate structure for remedying economic injustice. In Part I, I explore the potential that particular legal narratives, grounded in jurisprudence, may solidify particular stock stories that then impact workers' understanding of their workplace rights. In Part II, I consider the dominant discrimination and antidiscrimination narratives and their theoretical and normative limitations. In doing so, I assess both the role of narrative more broadly, as well as how both historical understandings of racial discrimination and more recent theories frame the prominent narrative of African Americans' subordination in the workplace. In Part III, I explore both the procedural and legal limits of relying on Title VII enforcement to address worker discrimination and subordination. In Part IV, I address the importance of wage and hour law enforcement and the relative drought in African American workers' pursuit of those substantive rights. In Part V, I consider the characterization of wage and hour laws as universalist statutes that apply to everyone and do not implicate the role that protected categories, like race, play in the statutory violation. In Part VI, I argue for an antisubordination approach to workplace exploitation of African American workers that considers the enforcement of wage and hour laws an important tool in the pursuit of economic justice. I further contend that an antisubordination framing relieves wage and hour laws from the universalist critique.

#### I. ON NARRATIVE: CATEGORIES, PROTOTYPES, AND STOCK STORIES

Both law school classrooms and popular culture are replete with references to the lawyer as a storyteller and creator of persuasive narratives.<sup>7</sup> The role of

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organizations or workers' centers. It is less clear that attorneys in these spaces are inquiring into wage theft when a worker approaches them for assistance in discrimination cases. Indeed, in the Washington D.C. area, there are few if any legal services organizations that handle employment discrimination cases. As such, it is possible that they may turn away workers who indicate an interest in representation in an employment discrimination case.

7. Thomas Ross explains: "Trial lawyers tell juries stories of good and evil. Law professors tell their own stories of the cases to their students. Judges tell their audiences the narratives that make the judges' cruel choices seem moral. Stories and storytellers pervade the legal culture." Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 385 (1989); see also Jeremiah Donovan, *Some Off-The-Cuff Remarks About Lawyers as Storytellers*, 18 VT. L. REV. 751, 762 (1994) ("As lawyers, we are storytellers. We learn by storytelling. . . . I really can't define the doctrine of proximate cause, but I sure remember the firecrackers and the scale falling down on Mrs. Palsgraf."); Richard K. Sherwin, *Picturing Justice: Images of Law & Lawyers in the Visual Media*, 30 U.S.F.L. REV. 891, 891-92 (1995) (emphasizing the role of storytelling in adjudication); Phillip H. Miller, *Storytelling: A Technique for Juror Persuasion*, 26 AM. J. TRIAL ADVOC. 489, 489 (2003) (addressing how to develop the skill of storytelling to persuade juries).

narrative in the law, however, is not limited to the stories lawyers tell in courtrooms or in legal motions and other forms of advocacy; rather, those narratives ultimately manifest in the opinions of courts<sup>8</sup> and our understanding of the potential for law to address injustice. Narratives, both those devised by attorneys and those granted legal authority by our courts, can ultimately lead to the creation of tropes, prototypes, and stock stories about our lives and the role that the law can and should play in regulating them. Scholars have produced a plethora of work on the importance of narrative, storytelling, and counter-storytelling to lawyering and the development of legal precedent.<sup>9</sup> Recounting the full breadth of this work is beyond the scope of the article and I therefore provide a more cursory review in order to further my more nuanced goals. For my purposes, I focus here on the potential for legal narratives to become so entrenched and narrow that they fail to properly account for all of the current manifestations of workplace injustice. I further contend these legal narratives may cause workers not to fully contemplate their legal workplace rights beyond those narrow definitions created by advocates and courts and then presented as the reality of the workers' lived experiences. In such a dynamic, wage theft falls out of the narrative frame.

We organize and understand our lives in stories or narratives, created through our categorization of the things we encounter.<sup>10</sup> As Anthony Amsterdam and Jerome Butler aptly explain: "So predisposed is the human mind to narrative that we even experience the events of everyday life, in narrative form and assign them to categories derived from some particular kind of story."<sup>11</sup> This categorization of our life experiences yields the creation of prototypes or tropes that "capture[s] the nature of the *system* from which a set of categories emerges or is derived."<sup>12</sup> While these categories and prototypes are not fixed and can be re-shaped and manipulated based upon our gathering of additional information with which we add layers of meaning, they provide the starting point for how we interpret the world around us.<sup>13</sup>

Clients—and in this case, workers—have stories that attorneys must discover.<sup>14</sup> Attorneys, however, ultimately decide whether they will present

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8. See, e.g., Ross, *supra* note 7, at 385.

9. See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2416-17 (1989) (comparing stories and alternative versions to emphasize that "much of social reality is constructed"); Gerald P. Lopez, *Lay Lawyering*, 32 U.C.L.A. L. REV. 1, 2 (1984) ("Human beings think about social interaction in story form. We see and understand the world through 'stock stories.'").

10. See ANTHONY G. AMSTERDAM & JEROME BUTLER, *MINDING THE LAW* 40-41 (2000) (explaining that people rely on experience and observation when placing a thing or concept into a category).

11. *Id.* at 30-31.

12. *Id.* at 41.

13. See *id.* at 42.

14. See Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 883-84 (2010) (citing Steven L. Winter, *The Cognitive Dimension of*

those stories to a court, and the courts then determine which stories to tell in their opinions.<sup>15</sup> Thomas Ross argues that judicial opinions contain narratives, both intentional or explicit and invited or hidden.<sup>16</sup> In *The Richmond Narratives*, Ross juxtaposes the majority and dissenting decisions in *City of Richmond v. J.A. Croson Co.*<sup>17</sup> in order to illuminate Justice Scalia's and Justice Marshall's use of differing narrative framing to support their rhetorical goals.<sup>18</sup> Ross describes Scalia's opinion invalidating the City of Richmond's affirmative action program as "mostly abstract principles from precedents that Scalia strung together," that are ultimately devoid of contextual framing.<sup>19</sup> He argues that Scalia purposely ignores Richmond's historical and current narratives of racial subordination and, instead, invites the reader to rely on implicit narratives of whites' racialized fears.<sup>20</sup> Justice Marshall, in contrast, considers the constitutionality of the affirmative action program through a narrative lens that considers the broader context in which the program operates.<sup>21</sup> Indeed, "Marshall tells not only the stories of the particular dispute, but also the stories of the city of Richmond, as the capital of the Confederacy, the place of 'apartheid,' the city with a 'disgraceful history.'"<sup>22</sup> As such, Ross highlights the importance of narrative framing to judicial decision-making. The stories told, or not told, valued or ignored, play a role in jurisprudential decision-making.<sup>23</sup>

Narratives also reflect the culture in which they are embedded, while cultures simultaneously reflect the prevalent narratives. Amsterdam and Bruner

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*the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2225 (1989) ("We have long known that client stories are crucial in litigation.")).

15. See *id.* at 884.

16. See Ross, *supra* note 7, at 385-409. Ross draws from James Boyd White's and Robert Cover's reading of opinions as narratives. See *id.* at 385-86. Ross points to White's contention that "the narrative is the archetypal legal and rhetorical form, as it is the archetypal form of human thought in ordinary life as well." *Id.* at 385 (quoting J.B. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW* 175 (1985)). Ross also highlights Cover's contention that "law and narrative are inseparable" in the normative world. *Id.* at 386 (quoting Robert Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 5 (1983) (citing narratives in opinions of Brandeis and Burger)).

17. 488 U.S. 469 (1989) (finding unconstitutional a Richmond ordinance that set aside a percentage of city construction work on city contracts for minority firms).

18. See Ross, *supra* note 7, 385-409.

19. *Id.* at 391.

20. *Id.* at 390, 396, 400-05.

21. *Id.* at 391, 405-06.

22. *Id.* at 391 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 545, 529 (1989) (Marshall, J., dissenting)).

23. Justice Kennedy's opinion upholding the application of disparate impact analysis in Fair Housing Act cases provides another example of the power of narrative in judicial decision-making. See, e.g., *Tex. Dep't. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2515-16 (2015) (tracing the historical housing discrimination narrative that resulted in the passage of the Fair Housing Act, thus placing the challenge to the FHA within historical context).

identify this “chicken and the egg” tension between narratives and culture.<sup>24</sup> They explain that narratives “express that culture’s current way of conceiving of the human condition, the plights that plague it, and how they will play out. . . . Either that, or the culture reflects its narratives.”<sup>25</sup> At some point, it becomes difficult to determine whether art imitates life or life imitates art. This truism, in either form, creates a space to consider whether the dominant narratives, both legal and non-legal, may somehow shape the way we experience and interpret life experiences.

Furthermore, the adversarial storytelling that dominates the development of legal precedent becomes the domain of stock stories. Stock stories are narratives that have taken root in a culture or space such that they inform the way we believe the world works.<sup>26</sup> Attorneys “put a premium on type-casting the elements of every tale to fit the stock model of the ‘relevant’ considerations.”<sup>27</sup> Stock stories create the familiarity necessary for us to order our worlds and fill in the gaps in information.<sup>28</sup> As attorneys, we are trained to consider stock stories—whether to use them to our advantage or to distance our clients from them—in order to persuade a juror that our clients’ truth is more convincing than the opposing parties’.<sup>29</sup> Moreover, stock stories and their archetypal roles become culturally embedded and “orchestrate our understanding of the world, including the world of law.”<sup>30</sup> Stock stories are the means by which we give experiences social meaning.<sup>31</sup> As these stock stories become the bases for legal precedent, they may also impact the way we give

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24. AMSTERDAM & BUTLER, *supra* note 10, at 46-47.

25. *Id.* at 47.

26. Lopez, *supra* note 9, at 3.

27. AMSTERDAM & BUTLER, *supra* note 10, at 118.

28. Gerald P. Lopez explains:

We see and understand the world through “stock stories.” These stories help us interpret the everyday world with limited information and help us make choices about asserting our own needs and responding to other people. These stock stories embody our deepest human, social and political values. At the same time, they help us carry out the routine activities of life without constantly having to analyze or question what we are doing. When we face choices in life, stock stories help us understand and decide; they also may disguise and distort.

Lopez, *supra* note 9, at 1-2.

29. When representing an undocumented immigrant worker in wage theft claims, for example, attorneys may opt to provide details about the worker’s payment in cash, in plain envelopes, with little or no formal records in order to elicit the stock story of the exploited, yet hard-working, immigrant worker toiling in an underground secondary economy and exploited by an employer who takes advantage of her vulnerability.

30. Edwards, *supra* note 14, at 890.

31. See Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 YALE J.L. & HUMAN. 1, 26 (2015) (“[S]tock stories form an ‘essential part’ of a culture’s and an individual’s judgment about the meaning of events or experiences.”) (citing Jennifer Sheppard, *What If the Big Bad Wolf in All of Those Fairy Tales Was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories That Are Harmful to Your Client’s Case*, 34 HASTINGS COMM. & ENT. L.J. 187, 193 (2012)).

experiences legal meaning.

Moreover, scholars have opined that the civil rights movement has figured significantly into the legal consciousness of African Americans.<sup>32</sup> To the extent the prevalent narrative and statutory frameworks that emerged narrowly focused on a particular understanding of workplace “rights” grounded in the statutes like Title VII of the 1964 Civil Rights Act, where do other types of rights fit in? While a lack of data limits my ability to consider an ethnographic analysis of African American low-wage worker legal consciousness,<sup>33</sup> I nevertheless raise important concerns about the dynamics that shape workers’ workplace experiences and their understanding of their various rights.

Finally, critical race theorists have long-utilized both storytelling and counterstorytelling as a means for disrupting subordination.<sup>34</sup> Derrick Bell’s parables are, perhaps, the archetypal example of narrative’s disruptive potential.<sup>35</sup> But, what are the options when the narrow story of exploitation seems to exclude African American workers, the similarly limiting story of discrimination does not fully capture the economic harms they experience in the workplace, and the stories interact in a way that does not position African American workers to pursue the full breadth of claims available to them? How do we disrupt insufficient stock stories?

To answer those questions, it is necessary to first explore the legal framework that has contributed to the limited understanding of the workplace

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32. See, e.g., Calvin Morrill et al., *Legal Mobilization in Schools: The Paradox of Rights and Race Among Youth*, 44 L. & SOC’Y REV. 651, 659-60 (2010) (discussing the legacy of civil rights movement as a feature of African American legal consciousness that distinguishes it from that of other racial groups).

33. Sally Engle Merry’s seminal work on the development of working class legal consciousness, while somewhat instructive, may have limited applicability here as the communities in which she completed her research were ninety-nine percent white. See generally SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990). Indeed, she observed that her interviewees “rarely doubt[ed] the legitimacy of law itself or the value of a legally-oriented society.” *Id.* at 11. This is in tension with scholars’ more recent finding that “the long history of African American oppression and contemporary police surveillance in African American communities has created a pervasive and profound African-American distrust of legal authorities.” Morrill et al., *supra* note 32, at 661.

34. Richard Delgado, for example, explains:

But stories and counterstories can serve an equally important destructive function. They can show what we believe is ridiculous, self-serving, or cruel. They can show us the way out of the trap of unjustified exclusion. They can help us understand when it is time to reallocate power. They are the other half—the destructive half—of the creative dialectic.

Delgado, *supra* note 9, at 2415.

35. See, e.g., Derrick Bell, *After We’re Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U.L.J. 393, 405 (1990) (relying on a fictional story about “trade-oriented visitors from outer space” to comment on the extensive harm of racial subordination).

exploitation of African American low-wage workers. The following section considers the contours of that narrative.

## II. THE PARADIGMATIC DISCRIMINATION/ANTIDISCRIMINATION NARRATIVE

### A. Narrative Grounded in the Explicit Racism of Jim Crow and Segregation

The prototypical workplace law case involves a discrimination narrative situated in the denial of rights to a member or members of a protected class based upon their membership in that class.<sup>36</sup> The narrative contemplates an employer that has taken an adverse action against an employee based upon that employee's identity.<sup>37</sup> The laws articulate which identities are protected categories to which our antidiscrimination laws apply: for example, race, gender, age, ethnicity, national origin, and disability. The prototypical example is the worker denied a job or a promotion based upon her manager's racial animus.<sup>38</sup> This narrative is grounded in difference and negative actions someone with power takes against a worker as a result of that difference.<sup>39</sup>

This narrative is deeply rooted in the historical context in which it arose. Reconstruction, specifically the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments and the concomitant expansion of African Americans' rights following the end of slavery, was short-lived and quickly replaced by the "comprehensive racial regime that we know as segregation or Jim Crow."<sup>40</sup> This regime established a caste system of *de jure and de facto* separation and discrimination that "assured the dominant race of superiority in all realms: social, economic, political, cultural, and legal."<sup>41</sup> Indeed, dominance was both established and reinforced by explicit racism, which the legal system and its actors frequently legitimated or conveniently ignored. Explicit racism maintained this system.<sup>42</sup> As a result, the statutory and jurisprudential remedial

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36. Marion G. Crain, Pauline T. Kim & Michael Selmi, *WORK LAW: CASES AND MATERIALS* 563-69 (3d ed. 2015).

37. *Id.*

38. See Maria L. Ontiveros et al., *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 97-99 (9th ed. 2016).

39. Cf. Dianne Otto, *Rethinking the "Universality" of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1, 26-27 (1997) (discussing the Declaration on the Elimination of Violence Against Women as an attempt to "relocate antidiscrimination narratives in a jurisprudence of power rather than difference").

40. William M. Wiececk & Judy L. Hamilton, *Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace*, 74 LA. L. REV. 1095, 1099 (2014).

41. *Id.*

42. Deborah Archer characterizes this as the traditional narrative of civil rights and discrimination to which we have become accustomed, that is, "the openly racist individual calling a black person a racial slur, or government officials designating drinking fountains as 'white' or 'colored.'" Deborah N. Archer, *There Is No Santa Claus: The Challenge of Teaching the Next Generation of Civil Rights Lawyers in a "Post-Racial" Society*, 4 COLUM.

measures that emerged following many decades of struggle responded to this narrow understanding of racism premised upon the explicit malfeasance of bad actors. This narrative underlies the prohibitions in the Civil Rights Act of 1964 and its successors, the Voting Rights Act of 1965 and the Fair Housing Act of 1968.<sup>43</sup> Scholars thus characterize the enactment of these statutes, and the jurisprudence that has emerged from their interpretation, as the Second Reconstruction.<sup>44</sup>

The prevalent narrative, and the statutes that attempt to respond to it, cast discrimination as acts a single “bad” actor commits. Animus against the employee based upon that employee’s identity motivates invidious discrimination. This animus is illogical and deviates from accepted societal values. In other words, discrimination, particularly as it is currently conceived, resides in the realm of the outliers. This characterization also fits neatly into the social, political, and judicial conceptualization of a “post-racial” society.<sup>45</sup>

#### B. Narrative Narrowed by History

The discrimination narrative is also an outgrowth of a civil rights narrative that, over time, deviated from a focus on economic rights. Legal historian Risa Goluboff has explored the construction of civil rights in the pre-*Brown v. Board of Education* era and what she has characterized as a significant shift over time from a focus on economic rights to political rights.<sup>46</sup> Indeed,

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J. RACE & L. 55, 56 (2013).

43. Title VII 42 U.S.C. § 1973; Voting Rights Act 52 U.S.C. §§ 10101-10702; Fair Housing Act 42 U.S.C. §§ 3601-19.

44. See, e.g., Peter H. Wood, “*I Did the Best I Could for My Day*”: *The Study of Early Black History During the Second Reconstruction, 1960 to 1976*, 35 WM. & MARY Q. 185, 189 (1978) (referring to the late 1970s as the “second reconstruction”); Harvard Sitkoff, *The Second Reconstruction*, 8 WILSON Q. 49, 49, 59 (1984) (referring to the years following the Civil Rights Act of 1964 as the “second reconstruction”); Richard M. Valelly, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 1-4* (2004) (summarizing the book’s thesis that two reconstructions were necessary to achieve African American voting rights in the U.S.); Wiececk & Hamilton, *supra* note 40, at 1098 (referring to the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968 as the “trilogy of Civil Rights Act [that] constituted the statutory heart of the Second Reconstruction”). Some scholars claim the Second Reconstruction began a decade earlier as the Civil Rights Movement gained increased momentum. See C. Vann Woodward, *THE STRANGE CAREER OF JIM CROW* 9-12 (1955); William G. Carleton, *The Second Reconstruction: An Analysis from the Deep South*, 18 ANTIOCH REV. 171, 171 (1958).

45. See, e.g., Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 (2009) (“[P]ost-racialism in its current iteration is a twenty-first-century ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action.”); Pantea Javidan, *Legal Post-Racialism as an Instrument of Racial Compromise in Shelby County v. Holder*, 16 BERKELEY J. AFR. AM. L. & POL’Y 127, 128 (2015) (noting that “the majority opinion in *Shelby County* strongly indicates a move toward post-racialism”).

46. RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 5 (2007) [hereinafter

Goluboff describes an era in which civil rights “included not only the rights with which we associate the term today but also collective labor rights to governmentally provided economic security and affirmative rights to material and economic equality.”<sup>47</sup> In an earlier period, however, the language and rhetoric of civil rights was more unsettled. Goluboff traces the Department of Justice Section on Civil Rights’ efforts in the 1940s and 1950s to use the Thirteenth Amendment and peonage claims to advance African American workers’ rights.<sup>48</sup> These claims emphasized African American workers’ exploited labor as a kind of peonage, highlighting the lack of reasonable pay and working conditions rather than its discriminatory nature as compared to work done by whites.<sup>49</sup>

Goluboff’s work also explores the NAACP’s focus on economic justice during that same era and its eventual movement to the political and social rights that *Brown v. Board of Education* epitomizes.<sup>50</sup> Although later cases explored many types of rights, in the popular memory, *Brown* stands for the civil rights movement’s pinnacle achievement. According to Goluboff, the 1930s, 1940s, and 1950s witnessed “a framework for a labor-infused civil rights that has, for the most part, since been lost.”<sup>51</sup>

Goluboff’s claims have been complicated by other scholars, such as Tomiko Brown-Nagen, Sophia Lee, and Kenneth Mack, who have documented civil rights activists’ continuing work, in a variety of forums, on economic as well as political rights issues throughout the long history of this movement.<sup>52</sup> The standard narrative, however, remains one in which political equality rights remain salient in memories of the movement’s primary focus. The public face of the Civil Rights movement thus turned increasingly to an anti-discrimination idea.

Other scholars locate the bifurcation of a labor and civil rights infused consciousness to later time periods. In *Black and Blue*, for example, Paul Frymer blamed the decline of the labor movement and the Democratic Party in part on the inability of the civil rights and labor movements to form an alliance

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GOLUBOFF, THE LOST PROMISE]. Goluboff’s book tracks the Department of Justice and NAACP lawyers’ litigation choices from the 1930s through the 1950s and considers how those choices impacted the development of civil rights laws.

47. *Id.*

48. See Risa L. Goluboff, *The Thirteenth Amendment & the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1637-59 (2001) [hereinafter Goluboff, *The Thirteenth Amendment*]; GOLUBOFF, THE LOST PROMISE, *supra* note 46, at 111-40.

49. GOLUBOFF, THE LOST PROMISE, *supra* note 46, at 128-34, 138-40.

50. *Id.* at 174-270.

51. See Goluboff, *The Thirteenth Amendment*, *supra* note 48, at 1615.

52. See generally KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012); Sophia Z. Lee, *Hotspots in a Cold War: The NAACP’s Postwar Workplace Constitutionalism, 1948-1964*, 26 L. & HIST. REV. 327 (2008); TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2011).

in the 1970s and 1980s.<sup>53</sup> Sophia Lee documents the NAACP's litigation within the Department of Labor in the 1950s to 1960s and suggests that the NAACP dropped its labor program at the end of that time period.<sup>54</sup> Tomiko Brown-Nagin sees a focus on labor rights continuing in some parts of the civil rights movement throughout the 1960s.<sup>55</sup> Thus exactly when and how the civil rights movement lost its thrust towards economic empowerment and labor issues is highly contested and unclear, but need not detain us here. The undisputed point is that at the present moment the agendas of the civil rights and labor movements have diverged, and lawyers' consciousness of the connections between these two important yet divergent approaches to workplace fairness has faded.

### C. Post-Racialism in an Era of Structural Racism

#### 1. Structural Racism

Another feature of the current period is structural racism. Scholars argue that the Second Reconstruction has ceded to a third racial regime that displays less overt, explicit racism, and more structures of power that reinforce a racial hierarchy.<sup>56</sup> The statutes passed during the Second Reconstruction focused on punishing specific acts of individual bad actors motivated by racial animus.<sup>57</sup> A structural racism approach instead recognizes the role of societal structures in creating dynamics that reinforce the subordination of disadvantaged populations and systematically position particular races at the bottom of the economic, social, and political ladders.<sup>58</sup> A theory of structural racism, or what Ian Haney Lopez terms "institutional racism," therefore attempts to explain racial subordination in the absence of decision-makers with discriminatory

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53. PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* 1-3 (2008).

54. Lee, *supra* note 52, 330-31.

55. Brown-Nagin, *supra* note 52, at 89-94, 347-49 (discussing civil rights lawyers' efforts to challenge employment discrimination in the Atlanta school system).

56. See Wiececk & Hamilton, *supra* note 40, at 1099 ("In contrast to former slavery and servitude, this [structural racism] new and more subtle system of preference and exclusion is maintained by implicit racism—covertly arising from nominally impartial structural arrangements in society assisted by unconscious biases—which assures racially disparate outcomes without the need to rely on overt discrimination.").

57. Even individual bad actors, however, are influenced by the structural dynamic that either support or suppress their actions. According to Paul Frymer: "To understand manifestations of individual racism, we must recognize that institutional structure and organizational dynamics influence whether racist actors express themselves or whether they remain silent." Paul Frymer, *Racism Revised: Courts, Labor Law, and the Institutional Construction of Racial Animus*, 99 AM. POL. SCI. REV. 373, 374 (2005).

58. See, e.g., Wiececk & Hamilton, *supra* note 40, at 1106 (describing structural racism as "the result of institutional arrangements that distribute resources unequally and inequitably").

intent.<sup>59</sup>

William Wiececk and Judy Hamilton provide an analysis of structural racism in the workplace grounded in a sociological understanding of racism as “founded in ordinary, day-to-day practices of organizations, like businesses firms and government agencies, and resulting from social policies grounded by political decisions.”<sup>60</sup> More specifically, they proffer the following six components as the core of structural racism: “(1) the irrelevance of intent to discriminate; (2) the ideology of individualism; (3) belief in structural neutrality; (4) the normativity of white advantage; and (5) the myth of colorblindness . . . [united by] (6) the invisibility of structural racism.”<sup>61</sup> These principles are fundamentally different from the legal and factual premises upon which current antidiscrimination law and jurisprudence rely.

## 2. Post-Racialism

These theories describing a third racial regime of structural racism have gained great traction. They have emerged, however, in a context in which a very different theory of post-racialism has taken root. Post-racialism is sometimes tied to a colorblind constitutionalism that has taken root in Supreme Court jurisprudence. Some scholars contend colorblind constitutionalism finds its origin in Justice Harlan’s pronouncement in his dissenting opinion in *Plessy v. Ferguson*:

In respect of civil rights, common to all citizens, the Constitution of the United States does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . There is no caste here. Our Constitution is colorblind, and neither knows nor tolerates classes among citizens.<sup>62</sup>

Justice Harlan used this language, however, in a forceful dissent opposing the legal absolution of Jim Crow laws.<sup>63</sup> The colorblind constitution language

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59. Ian F. Haney López, *Institutional Racism: Judicial Conduct & a New Theory of Racial Discrimination*, 109 *YALE L.J.* 1717, 1726-27 (1999). Scholars often proffer a theory of structural racism in combination with explicit bias, which attempts to explain individual acts of racism in the absence of racists. John A. Powell, *Post-Racialism or Targeted Universalism*, 86 *DENV. U.L. REV.* 785, 801 (2008) (identifying structural racism and implicit bias as related “emerging sites for the practice of racialization today”). In addition, a third characterization of modern day racism as “subtle racism” has emerged. Terry Smith describes subtle racism as “an often nuanced, sophisticated, and covert means of differentiating based on race.” Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 *COLUM. HUM. RTS. L. REV.* 529, 534 (2003).

60. Wiececk & Hamilton, *supra* note 40, at 1103.

61. *Id.* at 1111.

62. *Plessy v. Ferguson*, 163 U.S. 537, 554, 559 (1896) (Harlan, J. dissenting).

63. *See id.*

lay relatively dormant in jurisprudence for nearly sixty-five years.<sup>64</sup> As Randall Kennedy points out, it emerged from its slumber in Justice Potter Stewart's 1980 dissent to an affirmative action case in which the Court upheld a federal minority business set aside program.<sup>65</sup>

In 1989, Justice Scalia took up the mantle of colorblind constitutionalism to explain his concurrence in *Croson*, an affirmative action case in which the Court invalidated a minority set-aside program in Virginia.<sup>66</sup> Then, in Justice Scalia's concurrence in *Adarand Constructors, Inc. v. Peña*, he announced: "In the eyes of government, we are just one race here. It is American."<sup>67</sup> Chief Justice John Roberts recently repurposed this refrain in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, in which the Court proffered that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>68</sup>

Colorblind constitutionalism thus became the jurisprudential foundation for one strand of the ideology that the United States is predominantly post-racial. But one need not adhere to the ideology of colorblind constitutionalism to espouse post-racialism. Indeed, some post-racialists are liberal supporters of affirmative action and other race conscious measures to rectify the effects of past discrimination. Their argument is that these measures should stay in place only as remedial procedures. They ignore, in other words, the observations of those who point to continuing structural racism to argue that, even with *de jure* segregation having been banned, the working of institutions that embody history and tradition still produce racially differentiated effects even without explicit acts with traceable racial animus. As Sumi Cho explains, post-racialism "reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based

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64. While the Supreme Court's jurisprudence did not explicitly discuss colorblind constitutionalism during this time period, Darren Hutchison argues that legislation and jurisprudence continued to reflect a related "racial exhaustion" rhetoric. Darren L. Hutchinson, *Racial Exhaustion*, 86 WASH. U.L. REV. 917 (2009). Hutchinson explains that "[r]acial exhaustion rhetoric depicts the United States as a post-racist society that rationally views claims of racial injustice and demands for remedial state action with suspicion." *Id.* at 926.

65. See Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1, 5 (2013) (citing Fullilove v. Klutznick, 448 U.S. 448, 522-23 (1980) (Stewart, J., dissenting); see also Fullilove v. Klutznick, 448 U.S. 448, 525 (1980) (Stewart, J., dissenting) ("This history contains one clear lesson. Under our Constitution, the government may never act to the detriment of a person solely because of that person's race. The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government.").

66. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989).

67. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

68. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

remedies, and that civil society should eschew race as a central organizing principle of social action.”<sup>69</sup> Post-racialism is distinct from colorblindness in that the former signals that society has transcended race, while the latter reflects an aspirational “retreat from race.”<sup>70</sup> In other words, the civil rights movement and the resulting legal protections have largely achieved their goals, thus relegating race and race-conscious decision-making to relics of a foregone era.

In her critique of post-racialism, Cho contends it has four key components: (1) societal belief in the trope of racial progress; (2) race-neutral universalism; (3) moral equivalence; and (4) distancing move.<sup>71</sup> The first component calls upon us to focus our attention on the racial progress made and to abandon any preoccupation with either the troubled past or the outlier occurrences of discrimination.<sup>72</sup> Race neutral universalism rejects the utility of race-based policies or remedies as divisive and counter-productive.<sup>73</sup> The liberal conceptualization of race neutral universalism contends that a misguided focus on race obscures the more significant class-based issues central to group subordination,<sup>74</sup> while “[p]ractical post-racialists decry race-based remedies because they pose a ‘zero sum’ game that injures whites in order to benefit people of color.”<sup>75</sup>

Cho’s third component of post-racialism is particularly interesting given its ties to the anti-subordination theory and principles discussed later in this article.<sup>76</sup> It draws a moral equivalence between the use of race to subordinate minorities under Jim Crow and its subsequent use to remedy subordination.<sup>77</sup> This component has synergy with colorblind constitutionalists’ assertion that the Constitution is a static document whose principles must be applied equally, regardless of the context or the existence, or lack of existence of, nefarious intent of those involved.<sup>78</sup> Any consideration of race, therefore, risks the subordination of a group and triggers heightened constitutional scrutiny. History and context thus have no connection to their understanding of subordination.<sup>79</sup>

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69. Cho, *supra* note 45, at 1594.

70. *See id.* at 1597-98.

71. *Id.* at 1600.

72. *See id.* at 1601.

73. *See id.* at 1601-02.

74. *Id.* at 1602. In reaction to and critique of this liberal race neutral universalism, scholars such as Jessica A. Clarke and Kenji Yoshino explore the “universal turn,” discussed further below. *See* Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1221 n.111 (2011).

75. Cho, *supra* note 45, at 1602.

76. *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003).

77. Cho, *supra* note 45, at 1603.

78. *See* Kennedy, *supra* note 65, at 5.

79. Thomas Ross’s discussion of Justice Scalia’s concurring opinion and Justice

Finally, in what she calls a “distancing move,” Cho contends that post-racialism’s practitioners frequently distance themselves from civil rights advocates and critical race theorists in “a hegemonic device” that rises above old-school racism, colorblind racism, political correctness, and racial obsession.<sup>80</sup> This device echoes what Darren Hutchinson has termed “racial exhaustion”; that is, “rhetoric [that] depicts the United States as a post-racist society that rationally views claims of racial injustice and demands for remedial state action with suspicion.”<sup>81</sup> Rationality, therefore, trumps critical theory.

Furthermore, Mario L. Barnes, another critic of post-racialism, has proposed that the Supreme Court has now moved beyond post-racialism to what he terms an “Era of Incredulity.”<sup>82</sup> Barnes contends that recent jurisprudence suggests the Court does not simply deny the salience of race in legal claims, but that it “signals righteous indignation toward most race claims.”<sup>83</sup> For example, Barnes notes that the Court’s decision to find unconstitutional the continued application of Section 4 of the Voting Rights Act in *Shelby County v. Holder*, is laced with language lauding the Act’s success such that the discrimination targeted by Section 4 no longer characterizes voting practices in the covered jurisdictions.<sup>84</sup> He argues that the undercurrent to the Court’s analysis is the suggestion that arguments that this country remains burdened by the sins of its racial past are ridiculous.<sup>85</sup>

The paradigmatic discrimination narrative discussed thus far overshadows other competing narratives about the exploitation and mistreatment of African Americans in the workplace. It lends itself to a singular understanding of workplace subordination that is unsatisfying and fails to capture other, often related, economic harms, like wage theft. The legal narrative does not contemplate the role of structural racism in subordination, and post-racialism often questions its legitimacy.

### III. THE LIMITS OF TITLE VII AS THE SINGULAR SOLUTION TO WORKPLACE SUBORDINATION

In addition to the narrow paradigmatic discrimination narrative, Title VII, as written, enforced, and interpreted by the courts has become increasingly

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Marshall’s dissent in *City of Richmond v. J.A. Croson Co.* illustrates the distinction between decisions reached based upon the application of legal principle with little consideration of the historical context and decisions squarely positioned within the historical context. See Ross, *supra* note 7, at 390-91.

80. Cho, *supra* note 45, at 1603-04.

81. Hutchinson, *supra* note 64, at 926.

82. Mario L. Barnes, “*The More Things Change . . .*”: *New Moves for Legitimizing Racial Discrimination in a “Post-Race” World*, 100 MINN. L. REV. 2043, 2048 (2016).

83. *Id.* at 2067.

84. See *id.* at 2078-79.

85. See *id.* at 2080-81.

ineffective as the primary method for challenging workplace discrimination generally, and African American workers subordination, specifically. This next section considers the statute's current shortcomings.

#### A. Devotion to Formal Equality

Title VII of the Civil Rights Act of 1964 is the culmination of efforts to respond to the paradigm of largely explicit racial animus in workplace hiring and advancement.<sup>86</sup> The statute prohibits employers from discriminating against employees based upon their race, sex, national origin, religion, and color.<sup>87</sup> The intentional discrimination mechanism of the statutory framework contemplates employers motivated by explicit racial animus who deny employees equality on the basis of race or other protected identity characteristics in the terms and conditions of employment (e.g., the job itself, a promotion, equal compensation).<sup>88</sup> This is why under the standard disparate treatment test, the framework requires the existence in the workplace of employees of more than one racial identity; it is only through comparison between otherwise similarly situated employees that the factfinder may determine an African American worker's treatment to have differed from that of a non-African American worker.<sup>89</sup> As many scholars have opined, Title VII, both in its text and in its subsequent jurisprudential interpretation, does not adequately grapple with the systemic vestiges of slavery, Jim Crow, and racial animosity that contribute to the continued subordination of members of racial and ethnic minorities.<sup>90</sup> Indeed, scholars have repeatedly commented on courts'

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86. See generally HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972* (1990).

87. 42 U.S.C. § 2000e-2(b) (2017) ("It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.")

88. *Id.* Private attorneys general may pursue class actions alleging statutory violations under Rule 23 of the Federal Rules of Civil Procedure and the Department of Justice may pursue pattern and practice claims. Fed. R. Civ. P. 23; Equal Employment Opportunity Act § 5, 86 Stat. 103, 107 (1972).

89. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973) ("Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment."). Equal protection jurisprudence similarly requires this comparison. See Rebecca E. Zietlow, *Belonging and Empowerment: A New "Civil Rights" Paradigm Based on Lessons from the Past*, 5 CONST. COMMENT. 353, 357 (2009) ("To oversimplify, only 'likes' need be treated 'alike.'").

90. See, e.g., *Terry Smith*, *supra* note 59, at 534 (arguing Title VII fails to adequately cognize the "subtle discrimination" in the workplace); Darren L. Hutchinson, *Factless Jurisprudence*, 34 COLUM. HUM. RTS. L. REV. 615, 624-25 (2003) ("Paradoxically, the attainment of formal racial equality has made it more difficult for victims of discrimination to litigate equality claims."); Susan D. Carle, *Angry Employees: Revisiting Insubordination*

reiteration and consolidation of a commitment to addressing formal inequality rather than the structural inequality more typical today.<sup>91</sup> This narrow focus is particularly ill-suited for capturing the racialized work experiences of African American low-wage workers who often toil in occupations whose origins and regulation were explicitly or implicitly racialized.

Atiba Ellis's analysis of the civil rights model's focus on formal rather than structural equality provides important context for the dynamics discussed herein.<sup>92</sup> Ellis argues that the normative conceptions of equality and democracy broadly accepted and reinforced by our civil rights laws are socially contingent and therefore may often result in the exclusion of minorities from full access to their substantive rights.<sup>93</sup> He critiques the over-reliance on a civil rights framework that negates or ignores the interplay of race and social class in the subordination of groups.<sup>94</sup> According to Ellis, the problem of class has characterized the lived experiences of African Americans, has intensified with every period of the civil rights struggle, and has "even served as a proxy for, the recreation of the color line."<sup>95</sup> Ultimately, he argues that the exclusion of class issues from the development of a civil rights model calls for the "expansion of the meaning of horizontal democracy"<sup>96</sup> that includes a focus on the broader economic participation of African Americans.<sup>97</sup>

#### B. Procedural and Legal Barriers

The pursuit of a discrimination claim under Title VII is procedurally lengthy and complicated. Employees with Title VII claims must engage in a

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in *Title VII Cases*, 10 HARV. L. & POL'Y REV. 185, 185-86 (2016) (critiquing Title VII's failure to protect workers in cases involving insubordination in response to employers' demeaning treatment).

91. See, e.g., Wiececk & Hamilton, *supra* note 40, at 1011 (arguing the Supreme Court ignores social and historical context in discrimination cases and therefore mandates an abstract and formalistic resolution to race-related claims). See generally Susan Sturm, *Law's Role in Addressing Complex Discrimination*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 35-39 (Laura Beth Nielsen & Robert L. Nelson eds., 2005).

92. Atiba R. Ellis, *Reviving the Dream: Equality and the Democratic Promise in the Post-Civil Rights Era*, 2014 MICH. ST. L. REV. 789, 793-94 (2014).

93. *Id.* at 807.

94. *Id.* at 844.

95. *Id.* at 848.

96. *Id.* at 847.

97. See *id.* at 851. Many other scholars have made similar arguments. See, e.g., Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1292-1302 (2012) (surveying the social psychology literature documenting fact-finders' tendency to discount evidence of discrimination); Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN L. & POL'Y REV. 237, 238 (2004) (analyzing media reporting and negative public perception of Title VII cases, such as a case in which the media portrayed a plaintiff as "not strong-willed enough to withstand teasing").

procedural process before their claims can reach a court. Employees must file a claim with the Equal Employment Opportunity Commission (“EEOC”) in an effort to exhaust their administrative remedies.<sup>98</sup> The EEOC, created as part of Title VII in 1964, originally could only investigate and attempt to conciliate claims of workplace discrimination; if these efforts failed, individuals had to mount a case in court by themselves, with no agency support.<sup>99</sup> In 1972, the Equal Employment Opportunity Act expanded the agency’s mandate to empower it to bring suit on behalf of employees.<sup>100</sup> Over the years, the overwhelming number of charges the EEOC receives, combined with the often limited resources available to properly investigate, conciliate, and possibly litigate them, has resulted in the agency continuing to operate as an intake unit tasked with preliminary assessment of charges and the issuance of a “right to sue” letter that permits employees to file their discrimination claims in court.<sup>101</sup> The EEOC has between 180 days and 270 days to resolve the charge or issue a right to sue letter.<sup>102</sup> Accordingly, an employee alleging race discrimination must wait approximately six months before even beginning the then lengthy process of pursuing a discrimination claim in court.

The implications of the time-consuming procedural machinations involved in getting a racial discrimination claim to court are substantial. For the working poor, whose wages fail to elevate them from poverty and who face the vulnerability inherent in financial instability, the impact of lost wages—whether as a result of discriminatory practices or other statutory violations that deny workers proper compensation—may be swift and traumatic. In my Civil Advocacy Clinic, for example, we have represented clients evicted for failure to pay rent based upon an employer’s theft of their wages. In large cities where affordable housing is scarce, it can be exceedingly difficult to find new housing after an eviction. Indeed, low-wage workers often do not earn sufficient income to lift themselves out of poverty and the denial of even those minimal wages sinks workers further into poverty.<sup>103</sup> In addition, lost wages may prevent a

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98. 42 U.S.C. §2000e-5(f)(1)(2006) (discussing the right to file suit after the exhaustion of administrative remedies). *See also* Graham *supra* note 86.

99. *See* Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1239-40 (2010).

100. Modesitt, *supra* note 99, at 1240 (“Th[e] complete absence of enforcement authority was partially remedied by the passage of the Equal Employment Opportunity Act of 1972. The Act gave the EEOC the authority to bring suit on behalf of employees as well as the power to bring suit on its own when lacking an employee-plaintiff.”); Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 323-25 (2001) (discussing the 1972 amendments as giving the EEOC “some teeth” through enforcement litigation).

101. *See* Modesitt, *supra* note 99, at 1263 (arguing for changes to the EEOC’s role as a complaint-processing body).

102. *See After You Have Filed a Charge*, EEOC, <https://www.eeoc.gov/employees/afterfiling.cfm>.

103. *See, e.g.*, Barbara Ehrenreich, *It is Expensive to be Poor*, THE ATLANTIC (Jan. 13,

worker from making child support payments, thus exposing him or her to the threat of child support enforcement mechanisms, including jail time.<sup>104</sup>

Once a case clears the potential procedural hurdles to court adjudication, there remain significant legal hurdles to a discrimination claim.<sup>105</sup> Claimants must find lawyers willing to take their cases, which is very difficult, especially because increasingly restrictive doctrines make it very hard to win Title VII cases. Winning is imperative if lawyers are to be paid under fee-shifting statutes.<sup>106</sup> Under Title VII doctrine, an employee must first make a prima facie case of discrimination that demonstrates: (1) he or she is a member of a protected class; (2) he or she experienced an adverse employment action; and (3) his or her protected class status was a motivating factor in the challenged employment action.<sup>107</sup> After this showing, the burden then shifts to the employer to show a legitimate reason for the employment action.<sup>108</sup> The employee must then demonstrate that the proffered reason is merely a pretext for discrimination and that discrimination was the real reason for the employment action.<sup>109</sup>

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2014), <http://www.theatlantic.com/business/archive/2014/01/it-is-expensive-to-be-poor/282979> (describing low-wage jobs as paying so little that workers are unable to accumulate even a couple hundred dollars); Steven Greenhouse, *Low-Wage Workers are Finding Poverty Harder to Escape*, THE NEW YORK TIMES (Mar. 16, 2014), [http://www.nytimes.com/2014/03/17/business/economy/low-wage-workers-finding-its-easier-to-fall-into-poverty-and-harder-to-get-out.html?\\_r=0](http://www.nytimes.com/2014/03/17/business/economy/low-wage-workers-finding-its-easier-to-fall-into-poverty-and-harder-to-get-out.html?_r=0).

104. See 18 U.S.C. § 228 (2015) (providing for six months to two years of imprisonment for anyone who “willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than \$5,000”).

105. See generally Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010) (discussing the trend by federal courts to prematurely dismiss employment discrimination and other civil rights cases); Michael J. Zimmer, *Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 575 (2003) (analyzing causes of legal system’s lack of empathy for employment discrimination plaintiffs); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001) (arguing that various kinds of bias account for inordinately low win rates for plaintiffs and ruling out other explanations).

106. 42 U.S.C. § 2000e-5(k) (2015) (“In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney’s fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.”).

107. See Sahar F. Aziz, *Coercive Assimilationism: The Perils of Muslim Women’s Identity Performance in the Workplace*, 20 MICH. J. RACE & L. 1, 47 (2014).

108. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); see also *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 502 (1993) (determining that under *McDonnell Douglas*, once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to “produc[e] evidence that the adverse actions were taken for legitimate, nondiscriminatory reasons, which, if believed by the trier of fact, would support a finding that unlawful discrimination did not cause their actions.”).

109. *Hicks*, 509 U.S. at 508; see also *Reeves v. Sanderson Plumbing Products, Inc.*,

In addition, workers rarely possess explicit evidence that race played a role in the employer's decision making, and, even when they do, courts frequently dismiss this evidence under the "stray comments" doctrine.<sup>110</sup> Largely gone are the days when employers drafted policies of exclusion or sent emails articulating their animus toward employees based upon their membership in a protected class. And even when supervisors more explicitly display their racial animus toward workers with racist words and deeds, courts do not necessarily find for employees.<sup>111</sup>

Furthermore, Title VII on its face involves more complicated analyses than the FLSA. The individual plaintiff must prove the employer's discriminatory intent; he or she must convince the trier of fact about the motives in the employer's heart or head.<sup>112</sup> FLSA has no such requirement—the employer's state of mind is only relevant to challenging an employer's attempt to evade liquidated damages by claiming he or she engaged in a good faith effort to comply with the statute.<sup>113</sup>

The development of increasingly restrictive Title VII jurisprudence has also made it more difficult for employees to successfully prove discrimination.<sup>114</sup> Indeed, many scholars argue that courts' creation of various

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530 U.S. 133, 143 (2000).

110. See David M. Litman, *What is the Stray Remarks Doctrine? An Explanation and a Defense*, 65 CASE W. RES. L. REV. 823, 824, 834-42 (2015); Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 149 (2012).

111. For example, in *Twymon v. Wells Fargo & Co.*, the Eight Circuit refused to find racial discrimination where the employee claimed her supervisor made racially-charged statements like "you don't know your place." 462 F.3d 925, 934 (8th Cir. 2006); see also, Eyer, *supra* note 97, at 1289 ("Indeed, even those cases that have so-called direct evidence of discriminatory animus (for example explicit use of racial or gender-based epithets) are quite routinely dismissed at summary judgment and on judgment as a matter of law."); Catherine J. Lancot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 98-99 (1991); Selmi, *supra* note 105, at 563-64 (discussing *St. Mary's Honor Center v. Hicks* in which the court found that the employer's underlying rationale for firing the plaintiff was personal bias, despite the court's finding that the employer's proffered reasons for the termination were pretextual); *A Tale of Two Cases: Why Some Employment Discrimination Plaintiffs Win and Others Lose*, WARSHAWSKY L. FIRM BLOG (Sept. 21, 2015), [http://warshawskylawfirm.com/lawyer/2015/09/21/Employment-Law/A-Tale-Of-Two-Cases-Why-Some-Employment-Discrimination-Plaintiffs-Win-And-Others-Lose\\_bl21407.htm](http://warshawskylawfirm.com/lawyer/2015/09/21/Employment-Law/A-Tale-Of-Two-Cases-Why-Some-Employment-Discrimination-Plaintiffs-Win-And-Others-Lose_bl21407.htm).

112. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 519 (1993) (finding it is not enough to just prove the employer's reason is not the real reason, the trier of fact must also conclude that invidious discrimination was the real reason for the action).

113. See 29 U.S.C. § 216(b)(2015)

114. See, e.g., Schneider, *supra* note 105, at 532 (discussing increasingly difficult pleading requirements for Title VII plaintiffs and a rising bar for employment discrimination pleadings to survive dismissal); Zimmer, *supra* note 105 (analyzing causes of legal system's lack of empathy for employment discrimination plaintiffs); Selmi, *supra* note 105 (arguing that various kinds of bias account for inordinately low win rates for plaintiffs and ruling out

jurisprudential hurdles to pleading, sustaining cases past motions to dismiss and summary judgment, and proving pretext has made it particularly difficult for plaintiffs to prevail in Title VII cases as compared to all other types.<sup>115</sup> In contrast, while some wage and hour disputes may require establishing that the worker was an employee—and not, for example, an independent contractor—or that a worker was not exempt from the minimum wage and overtime provisions of the FLSA, the factual predicate upon which an FLSA claim is established is more straightforward than a Title VII claim.

In the event a worker navigates the difficult terrain of bringing a claim for racial discrimination, the likelihood their case will result in a litigated finding of discrimination remains relatively small. Indeed, less than five percent of discrimination cases proceed to trial and a finding for the plaintiff.<sup>116</sup> Indeed, eighty-six percent of litigated cases are resolved via motions to dismiss or motions for summary judgment.<sup>117</sup> Moreover, forty-one percent of successful plaintiffs face reversal on appeal.<sup>118</sup> Even robust evidence of discrimination may not be sufficient to convince jurors of discriminatory intent.<sup>119</sup> Katie Eyer drew from psychologists' findings to contend that people resist attributing behavior to discrimination due to an overwhelmingly "American" belief in the meritocracy and the influence of widespread views that discrimination is both uncommon and typically involves strong, explicit evidence of invidious intent.<sup>120</sup>

#### IV. IMPORTANCE OF PRIVATE ENFORCEMENT OF WAGE LAWS

To the extent the dominant narrative of African American workers' exploitation and subordination relies heavily on Title VII as the available statutory remedy, African American workers face significant hurdles in remedying workplace wrongs. While traditional antidiscrimination statutes remain important legal tools to protect workers, the inclusion of wage and hour protections is critically important.

The protection of broader economic participation Atiba Ellis describes may be found not only in a progressive civil rights framework, but also in other statutes, like the Fair Labor Standards Act ("FLSA") and its state law counterparts. These statutes provide protection for earned wages as well as other important terms of employment. The FLSA provides that employees must

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other explanations).

115. See Charlotte S. Alexander et al., *Post-Racial Hydraulics: The Hidden Dangers of the Universal Turn*, 91 N.Y.U. L. REV. 1, 14-16 (2016); Schneider, *supra* note 105, at 532.

116. See Eyer, *supra* note 97, at 1276.

117. See *id.*

118. See *id.* at 1289.

119. See *id.* at 1294.

120. See *id.* at 1304-17.

receive at least the federal minimum wage,<sup>121</sup> be compensated for all of their time worked, and receive one and half time their hourly rate for any hours worked beyond forty in a single work week.<sup>122</sup> The statute also requires that courts award liquidated damages for successful claims provided the employer has not demonstrated it made a “good faith” effort to comply with the statute.<sup>123</sup> In the absence of good faith, the award of liquidated damages is not discretionary.<sup>124</sup> State wage and hour statutes are often more expansive than FLSA, providing for a higher minimum wage, statutory coverage for commissions and other forms of pay beyond an hourly rate, as well as the recovery of treble damages for lost wages.<sup>125</sup> Like Title VII, the FLSA and many of its state counterparts also provide for the award of attorneys’ fees.<sup>126</sup>

In contrast with the more difficult procedural and legal maneuvering required under Title VII, FLSA claims are generally more straightforward. In order to file a Title VII claim in court, the employee must first proceed through

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121. 29 U.S.C. § 206 (2015). The current federal minimum wage is \$7.25 per hour. 29 U.S.C. § 206(a)(1)(C) (2015). State and local statutes often provide for a higher minimum wage than the federal statute. Twenty-nine states and the District of Columbia currently have minimum wages above the federal minimum wage of \$7.25. For example, California’s minimum wage is \$11.00, Maryland’s minimum wage is \$9.25, and New York’s is \$10.40. Many of these states will have additional increases in 2018. *State Minimum Wages 2018 Minimum Wage by State* (Jan. 2, 2018), <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx>.

122. *See* 29 U.S.C. § 206(a) (2015); 29 U.S.C. § 207(a)(2)(c) (2015).

123. *See* 29 U.S.C. § 216(b)(2015); 29 U.S.C. § 260 (2015) (“In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.”). Many state wage and hour statutes provide for treble damages. For example, under the Maryland Wage Payment and Collection Act, an employee may recover up to treble damages where the defendant is unable to demonstrate the failure to pay the owed wages was the result of a bona fide dispute. MD. CODE ANN., LAB. & EMPL. §3-507(1) (2016).

124. *See* 29 U.S.C. § 216(b) (“Any employer who violates [the act] *shall* be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of [the act], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an equal amount as liquidated damages.”) (emphasis added).

125. *See, e.g.*, MD. CODE ANN., LAB. & EMPL. §3-413(c), §3-507 (2016); *see Medex v. McCabe*, 372 Md. 28, 35 (Md. App. 2000) (“Commissions are clearly within the scope of the Act and a case may arise under the Act for an employer’s failure to pay commissions earned during employment yet not payable until after resignation.”). The D.C. wage and hour laws provide for quadruple damages. D.C. CODE § 32-1012(b)(1) (2017) (“any employer . . . shall be liable to that employee in the amount of unpaid wages, statutory penalties, and an additional amount as liquidated damages equal to treble the amount of unpaid wages.”) (emphasis added).

126. *See* 29 U.S.C. § 216(b) (2015); *see, e.g.*, D.C. CODE § 32-1308 (2017).

a lengthy process with the Equal Employment Opportunity Commission (“EEOC”) to obtain the required “right to sue” letter or navigate a similar process through a state agency.<sup>127</sup> In contrast, wage and hour laws do not require that employees exhaust any administrative remedies before filing a claim in court.<sup>128</sup> From the beginning, therefore, cases alleging FLSA violations may proceed much more quickly than those alleging Title VII violations.

Wage and hour laws, like civil rights statutes, are largely reliant on private enforcement through private attorneys general.<sup>129</sup> Indeed, the abrogation of the “American Rule” that each side pay its own attorney’s fees and its replacement with specific fee-shifting language in the FLSA that permits the prevailing plaintiff to obtain fees and costs associated with wage and hour litigation evidences Congress’s recognition of the importance of private enforcement to the wage and hour statutory scheme.<sup>130</sup>

The normative realities, or limitations, of the federal government’s enforcement of the FLSA also makes the private enforcement mechanism critical to the statute’s efficacy. Despite increasing the size of its wage and hour investigatory staff in recent years,<sup>131</sup> the DOL Wage and Hour Division (“WHD”)—responsible for government enforcement of the FLSA—has

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127. Alexander et al., *supra* note 115, at 29 n.117 (2016).

128. Compare 29 U.S.C. §216(b) (“An action . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and on behalf of himself or themselves and other employees similarly situated.”), with *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 854 (3d Cir. 2000) (“Under Title VII and the ADEA, plaintiffs residing in states having an agency authorized to grant relief for federally prohibited employment discrimination must resort to the state remedy before they will be allowed access to federal judicial relief.”).

129. The term private attorney general refers to the private individuals (and/or their counsel) that adopt both private and public roles by enforcing certain statutes, like the wage and hour statutes, through private advocacy and litigation. See Lezlie Green Coleman, *Exploited at the Intersection: A Critical Race Feminist Analysis of Undocumented Latina Workers and the Role of the Private Attorney General*, 22 VA. J. SOC. POL’Y & L. 1, 20 (2015); see also Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 248 (2009) (“For civil rights enforcement, the State depends heavily on private actors to take on the responsibility of “private attorneys general private individuals who act in the place of the State in order to increase compliance with antidiscrimination laws.”) (quoting Juliet Stumpf and Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 131, 135 (2002-2003)); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (2003) (explaining that Congress created a private right of action, with the incentive of the ability to collect attorneys’ fee for a prevailing party, that permits individuals to enforce important public policy goals).

130. 29 U.S.C. § 216(b); see also Coleman, *supra* note 129, at 416.

131. See Elizabeth J. Kennedy, *Wage Theft as Public Larceny*, 81 BROOK. L. REV. 517, 534 (2016) (“Since 2009, the WHD has hired 300 new investigators to target industries and employers likely to violate workplace standards, resulting in a recovery of over \$1.3 billion in unpaid and owed wages.”).

maintained a significant backlog of claims filed by workers.<sup>132</sup> WHD received 25,420 FLSA complaints in 2012, 25,628 in 2013, 22,557 in 2014, and 21,902 in 2015.<sup>133</sup> This vast number of claims received, which does not include claims made to state agencies for violations of state wage and hour claims or claims that were actually brought in court, demonstrates both the prevalence of wage theft and the need for private enforcement.

#### A. Drought in African American Worker Claims-Making

Various studies have documented the prevalence of wage theft in low-wage worker communities. Indeed, a landmark study of more than 4,000 workers in low-wage industries in Chicago, Los Angeles, and New York City found that more than a quarter of all workers in the sample received less than the minimum wage, seventy-six percent of the workers who worked more than forty hours in a week were not paid overtime wages, seventy percent of the workers who arrived early or stayed late did not receive compensation for that time, thirty percent of tipped workers were not paid the tipped worker minimum wage, and twelve percent of tipped workers were the victims of tip stealing by their employers or supervisors.<sup>134</sup>

Despite data that wage theft is rampant across a variety of employment sectors,<sup>135</sup> available evidence suggests that relatively few African American workers actually bring claims alleging wage theft. For example, a black workers' center in Chicago reported that a survey of their workers found that more than sixty percent had experienced wage theft, but none had filed a complaint or pursued their wages through other measures.<sup>136</sup>

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132. *See id.* at 535-36 (discussing the recent reduction in the backlog, but also noting the DOL remains unable to adequately enforce the FLSA alone).

133. *Id.* While the decline in claims filed with the Department of Labor is encouraging, it's juxtaposition with an increase in private individual and collective actions may demonstrate that more workers are simply pursuing claims through private actions instead of federal administrative actions. The number of wage and hour cases filed in federal court, for example, rose from 1,935 to 8,871 between 2000 and 2015. *See* Lydia DePillis, *Why Wage and Hour Litigation Is Skyrocketing*, WASH. POST (Nov. 25, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/11/25/people-are-suing-more-than-ever-over-wages-and-hours/?utm\\_term=.be6fbaf60810](https://www.washingtonpost.com/news/wonk/wp/2015/11/25/people-are-suing-more-than-ever-over-wages-and-hours/?utm_term=.be6fbaf60810). As DePillis points out, however, advocates also believe this 358 percent increase may also reflect the move away from unionized work places and, as a result, the pursuit of claims alleging violations of the wage and hour statutes has replaced the pursuit of claims with the National Labor Relations Board. *Id.*

134. ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 2-3* (2009), <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf>. The study identified additional workplace law violations, including improper paycheck deductions, failure to provide required meal breaks, and failure to provide required documentation (e.g., pay stubs) of employees' earnings and deductions. *Id.* at 3.

135. BOBO, *supra* note 4, at 7-15.

136. *Dignity of Work Campaign*, WORKERS CTR. FOR RACIAL JUSTICE,

In their recent article, Charlotte S. Alexander, Zev J. Eigen, and Camille Gear Rich shared the results of interviews conducted with plaintiffs' attorneys that represent workers in employment discrimination and wage and hour cases.<sup>137</sup> Alexander, Eigen, and Gear conclude from their interviews that some plaintiffs' attorneys may be "recharacterizing what previously would have been brought as a race discrimination claim as a wage and hour case."<sup>138</sup> One of their interview subjects described as typical the process of employees seeking representation for what they describe as racial discrimination, but the case then shifting to a wage and hour case when the attorney or paralegal ultimately requests to see a copy of a paystub from which he or she identifies an FLSA violation.<sup>139</sup> Another interview participant explained, "If a potential claimant walked through most plaintiff-side lawyers' door today, and presented a claim that seemed most closely aligned with a . . . discrimination claim, it is likely that the lawyer will seek to see whether there are viable [FLSA] claims that the lawyer would prefer to bring instead."<sup>140</sup> Alexander, Eigen, and Rich express concern that these interviews suggest that plaintiff's side attorneys are pushing employees with discrimination claims to abandon those claims in favor of FLSA claims that face fewer procedural and legal hurdles.<sup>141</sup> While their concern about both the legal and client agency implications of the abandonment of potentially valid discrimination claims is legitimate, it is also disconcerting that workers with wage and hour claims may be seeking to pursue their substantive rights only when those rights are tied to the traditional employment discrimination framework.

#### V. AVOIDING THE UNIVERSAL TURN

Any effort to re-prioritize wage and hour claims as critical spaces for worker advocacy must also consider the possibility that such claims, given their relative ease of proof and litigation in comparison with traditional Title VII claims, will operate to weaken the efficacy of Title VII as an antidiscrimination mechanism.<sup>142</sup> In recent years, antidiscrimination scholars have debated the potential for what has been termed a "universal turn" in workplace law. This universal turn encompasses arguments in favor of reframing workplace

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<http://center4racialjustice.org/index.php?page=dignity-of-work-campaign> (last visited Nov. 21, 2017).

137. Alexander et al., *supra* note 115, at 2.

138. *Id.* at 35.

139. *Id.* at 37.

140. *Id.* (alterations in original).

141. *Id.* at 37, 53.

142. Jessica Clarke, for example, has expressed concern that "[i]f the universal rule swallows the antidiscrimination rule, the transformative potential of requiring employers and the public to scrutinize the workplace for gender discrimination is lost." Clarke, *supra* note 74, at 1219-20.

protections based upon workers' identities—such as race, gender, national origin, and disability—to protections based upon a more general right to dignity in the workplace.<sup>143</sup> Samuel Bagenstos “define[d] a universalist approach to civil rights law as one that either guarantees a uniform floor of rights or benefits for all persons or, at least, guarantees a set of rights or benefits to a broad group of people not defined according to the identity axes (e.g., race, sex) highlighted by our antidiscrimination laws.”<sup>144</sup>

Advocates for this shift argue that protections grounded in broader, more generally applicable, concepts of dignity and liberty are more palatable in a post-racial society and jurisprudential space that is particularly critical and suspicious of protections grounded in the protections of persons based on their identities. Kenji Yoshino, for example, has argued that a “liberty paradigm” in antidiscrimination law better protects the authentic self than the “equality paradigm.”<sup>145</sup> Others attribute more practical or tactical benefits to a move toward universalist laws. According to Bagenstos, advocates contend that universal protections are more likely to garner political support since they do not raise the political ire or discomfort of those who bristle at discussions of identity-based protections.<sup>146</sup> In other words, universalist protections are more palatable within the eagerly-embraced “post-racial” narrative. He further proffers that universalism advocates advance its judicial benefits—that is, the belief that judges applying heightened legal scrutiny to identity-based claims would more broadly apply universalist claims.<sup>147</sup>

Arguments in support of a universal turn in antidiscrimination law have emerged in various contexts.<sup>148</sup> In voting rights, scholars responding to the Supreme Court's imposition of limitations on the Voting Rights Act in *Shelby County v. Holder* have argued that statutes providing universal protections of suffrage, rather than those devised to protect a particular group from discrimination are necessary and more effective measures.<sup>149</sup> In the workplace harassment context, supporters of universalist statutes have advanced the enactment of anti-bullying laws that would not turn on discriminatory intent.<sup>150</sup> Similarly, scholars have advocated for a shift away from maternity leave in

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143. See *id.* at 1221 n.11.

144. Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2842 (2014).

145. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 191 (2006).

146. Bagenstos, *supra* note 144, at 2848.

147. *Id.* at 2850-51.

148. This interest in universalism is consistent with Michelle Alexander's observation in the criminal law realm that, “[t]he striking reluctance of whites, in particular, to talk about or even acknowledge race has led many scholars and advocates to conclude that we would be better off not talking about race at all.” MICHELLE ALEXANDER, THE NEW JIM CROW 238 (2012).

149. See Bagenstos, *supra* note 144, at 2866-69.

150. Clarke, *supra* note 74, at 1230-33.

favor of expanding family medical leave and other laws that facilitate workplace flexibility.<sup>151</sup>

Alexander, Eigen, and Rich provide a rich critique of the potential overreliance on universalist statutes. They make a number of critical arguments regarding the implications of what they term “post-racial hydraulics” in workplace law.<sup>152</sup> Specifically, they argue that the “advent of a post-racial era” has led to an increased interest in abandoning the traditional race-based civil rights framework for the universalist wage and hour framework.<sup>153</sup> Within a post-racial frame, universalism advocates the pursuit of “race-neutral dignity, fairness, and liberty claims.”<sup>154</sup>

They further contend that a shift to post-racial, universalist claims, in combination with the increasing difficulty in litigating successful discrimination claims and the ubiquitous nature of employers’ wage and hour violations, is a major factor leading plaintiffs’ attorneys to steer their clients away from discrimination claims and toward wage and hour claims.<sup>155</sup> The resulting dearth of discrimination claims pursued, even where clients raise potential claims, has significant implications for the development of discrimination law. Alexander, Eigen, and Rich express concern that the harms clients prioritize may not be addressed where attorneys intervene to discourage them from pursuing more complicated racial discrimination claims.<sup>156</sup>

## VI. RE-FRAMING FLSA: ANTI-SUBORDINATION FRAMEWORK

### A. An Argument Against FLSA Universality

While many scholars seem to assume the FLSA is a universalist statute, given its broad application to all employees regardless of their identity or group membership, a closer look at the origins of the statute and its troubled relationship with African American workers complicates claims of its universality.

#### 1. The FLSA’s Racialized Origins

African American workers’ alienation from wage and hour laws today may find their exclusion from those protections at the laws’ origins. When Congress enacted the Fair Labor Standards Act in 1938, it explicitly excluded agricultural and domestic workers, who were overwhelmingly African American at that

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151. *Id.* at 1233-39.

152. Alexander et al., *supra* note 115, at 2.

153. *Id.* at 3-4.

154. *Id.* at 17.

155. *Id.* at 17, 33-35.

156. *Id.* at 53.

time, from its coverage.<sup>157</sup> This implicit exclusion of African American workers was grounded in southern contempt for the possibility that the new law would similarly situate African American and White workers.<sup>158</sup>

A similar history of exclusion plagues the origins of the tipped wage industry. In the midst of a labor and consumer advocate effort to end tipping,<sup>159</sup> early industries with predominantly African American employees, such as railroad porters and restaurant workers, advocated for the right not to pay their employees, but to instead permit them to rely upon customer tips for their pay.<sup>160</sup> With the enactment of the FLSA, this differentiation of workers evolved into the lower minimum wage for tipped workers.<sup>161</sup> The current federal minimum wage for tipped workers is \$2.13 per hour and has remained unchanged for the last twenty-five years.<sup>162</sup> Despite the statutory requirement that employers supplement tipped workers income where the tips are insufficient for the worker to earn the minimum wage, violations of this provision of the FLSA are rampant.

Scholarly assessment of the intersection of race and the enactment of worker protections through the New Deal reveals a clear effort to protect white workers while maintaining the racial subordination of African American workers in the South. Juan Perea argues Congress systematically excluded African Americans from all of the New Deal statutes, in order to accommodate racism.<sup>163</sup> According to Perea, Congress accomplished this goal “through

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157. See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Workers Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 114-17 (2011).

158. See *id.*; Coleman, *supra* note 2, at 85 (citing Goluboff, *supra* note 48, at 1679).

159. The advocacy led to antitipping legislation in several states. See SARU JAYARAMAN, FORKED 33 (2016).

160. Maddie Oatman, *The Racist, Twisted History of Tipping*, MOTHER JONES (May/June 2016), <http://www.motherjones.com/environment/2016/04/restaurants-tipping-racist-origins-saru-jayaraman-forked>. However, recently a new round of unionization has targeted restaurants and tipped workers, including the Fight for \$15 movement. See Steven Greenhouse, *How to Get Low-Wage Workers Into the Middle Class*, THE ATLANTIC (Aug. 19, 2015), <https://www.theatlantic.com/business/archive/2015/08/fifteen-dollars-minimum-wage/401540>.

161. Oatman, *supra* note 160. Some states, however, have a tipped minimum wage greater than \$2.13 but lower than the standard federal minimum wage of \$7.25. In a 2014 report, researchers at the Economic Policy Institute found nineteen states with their own wage and hour statutes had adopted the \$2.13 tipped minimum wage, and twenty-five states had adopted a rate between \$2.13 and their state minimum wages. SYLVIA A. ALLEGRETTO & DAVID COOPER, ECON. POL'Y INST., TWENTY-THREE YEARS AND STILL WAITING FOR CHANGE 8 tbl.1 (July 10, 2014), <http://www.epi.org/files/2014/EPI-CWED-BP379.pdf>.

162. Worker advocate Saru Jayaraman argues the minimum wage has remained unchanged due to an agreement between members of Congress and the National Restaurant Association lobby that the latter would support increases in the minimum wage, provided that the former agreed to leave unchanged the tipped minimum wage. JAYARAMAN, *supra* note 159 at 9, 35-37.

163. See Perea, *supra* note 157, at 104, 114. Marc Linder provides a historical analysis

occupational exclusions and by allowing southerners to discriminate against blacks through local, rather than federal administration of benefits.”<sup>164</sup> Indeed, Mark Linder argues the exclusion of agricultural workers from coverage by FLSA and other New Deal statutes is racially discriminatory in violation of the constitution.<sup>165</sup>

The historical underpinnings of the tipped minimum wage, in combination with the depression of the wage and the rampant violation of the employer’s duty to make up the difference between the tipped wage and the standard minimum wage, are particularly disconcerting given the current prevalence of African American workers in the service and restaurant industries where tipping is prevalent.<sup>166</sup> We have a legal structure put in place in response to employers’ efforts to subordinate African American workers by paying them less per hour and requiring them to rely upon the benevolence of patron to earn a livable wage.<sup>167</sup>

When considered within this historical context, the racial underpinnings of the rampant exploitation of workers either legally through their exclusion from these laws, or illegally by the violation of these laws by their employers, takes new meaning. The prevalence of wage theft, particularly within African-American and other communities of color and in industries frequently populated with workers of color, creates a distinctly different narrative when positioned within the problematic historical context of FLSA’s enactment. While Congress has now lifted many of the legal impediments to African American low-wage workers’ access to wage and hour protections<sup>168</sup>—although, for example, the tipped minimum wage remains—workers’ exploitation through unpaid wages remains a significant problem and adds to systemic challenges to economic justice.<sup>169</sup>

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of the New Deal statutes and reaches the same conclusion. See Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1336 (1987).

164. Perea, *supra* note 157, at 104.

165. Linder, *supra* note 163, at 1337-38. While agricultural workers are no longer totally excluded from the statute, Linder argues the discrimination survives as FLSA now provides minimum wage protections to agricultural workers, but not the maximum hours of protection or overtime compensation provided other workers. *Id.* at 1337.

166. See Oatman, *supra* note 160.

167. Where employers take the “tip credit” and pay workers the tipped minimum wage, the law requires that the employer make up the difference between the tipped minimum wage and the standard minimum wage when a worker’s weekly tips fail to do so. 29 U.S.C. § 203(m). Employers, however, frequently fail to follow this provision of FLSA. See Oatman, *supra* note 160.

168. While FLSA’s minimum wage provisions now apply to agricultural workers, the maximum hour and overtime provisions do not. See Linder, *supra* note 163, at 1336-37.

169. Bryan Stevenson argues slavery did not actually end with the Emancipation Proclamation; rather it simply shifted to the Jim Crow system of racial subordination and other structural systems that continue to subordinate African Americans. BRYAN STEVENSON, JUST MERCY 192-93 (2014). Wage theft contributes to this historic subordination of the poor,

## B. Racialized Violations of the FLSA

Violations of FLSA do not occur within a vacuum; instead they may occur within the systems of explicit and structural racism. While few cases filed in federal court appear to contain racialized allegations of FLSA violations,<sup>170</sup> the facts alleged in *Bryant v. Johnny Kynard Logging, Inc.* provide a vivid example of explicit racialized workplace exploitation.

### *A Case Narrative*

Roderick Bryant, an African American male, worked as a log truck driver for Kynard Logging and its related companies, Double K Logging and Wiggins Trucking, from 2003 to 2010.<sup>171</sup> He was paid between \$140 and \$160 per week, despite working 60 to 70 hours each week.<sup>172</sup> As a result, he received an hourly wage of between \$2.00 and \$2.67 and he did not receive overtime compensation for the hours he worked in excess of 40 in a week.<sup>173</sup> When he complained about not receiving overtime compensation, his employer told not to come into work if he was unwilling to work the required hours for the pay he received.

Roderick noticed differences in the treatment of African American log truck workers and White log truck drivers. Kynard required African American workers to work on Saturdays and Sundays, but did not impose the same requirement upon White workers.<sup>174</sup> African American workers were paid less than their White counterparts.<sup>175</sup> Log trucks driven by White drivers were preferentially repaired.<sup>176</sup> When White log drivers' trucks broke down, the drivers sent home continued to receive compensation. African American workers sent home due to truck problems were not paid.<sup>177</sup> Roderick also

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particularly the African American poor.

170. A lack of wage and hour cases explicitly making allegations concerning the intersection of racial discrimination and wage theft is not surprising given attorneys' tendency to not to plead the intersectional facts in cases where they can point to a simple statutory violation. Kate Sebloksly Elengold identified an undercurrent of racialized sexual harassment that was inconsistent with the stock story of sexual harassment in cases alleging violations of the Fair Housing Act. See Kate S. Elengold, *Structural Subjugation: Theorizing Racialized Sexual Harassment in Housing*, 27 YALE J.L. & FEMINISM 227 (2015). Elengold argues that removing race from consideration in cases "ignores the structural forces perpetuating the acceptance of the sexual subjugation of women, particularly Black women." *Id.* at 262.

171. Complaint at 20, *Bryant v. Johnny Kynard Logging, Inc.*, 930 F. Supp. 2d 1272 (N.D. Ala. 2011) (No. 2:11-cv-563).

172. *Id.*

173. *Id.* at 8.

174. *Id.* at 9.

175. *Id.*

176. *Id.*

177. *Id.*

believed White workers received employment benefits, such as health and/or dental insurance that were largely denied to African American workers.<sup>178</sup>

When a group of African American employees filed a lawsuit against Kynard Logging and Johnny Kynard alleging race discrimination and violations of the Fair Labor Standards Act, Kynard formed Wiggins Trucking in what Roderick characterized as an attempt to circumvent provisions of Title VII, section 1981, and the FLSA.<sup>179</sup> Kynard transferred his African American log drivers to this new smaller company, in hopes that the lack of any White employees to whom they could compare the terms of their employment would dissipate any discrimination claims.<sup>180</sup> Kynard also believed that since Wiggins Trucking had fewer than eight employees, the company could evade coverage by the Fair Labor Standards Act. Once the initial lawsuit settled and the case was dismissed, Kynard terminated Roderick's employment.<sup>181</sup> In 2010, Roderick and another employee filed suit alleging violations of the Fair Labor Standards, Title VII and section 1981. After three years of litigation, they settled their claims.

Roderick alleged that the employer violated the wage and hour statute with regard to its African American workers, but not its White workers.<sup>182</sup> Indeed, he claimed that the employer re-organized his businesses, separating African American employees into a separate smaller company, in order to evade the responsibility to comply with the wage and hour statutes for those workers.<sup>183</sup> In cases like *Bryant*, the racialization of the workplace exploitation would be clear, and indeed, the complaint includes claims of both employment discrimination and wage and hour violations.

Less clear, however, is our understanding of wage and hour violations that are tainted with structural racism. The widespread violation of wage and hour statutes, particularly in industries with high percentages of black and brown workers,<sup>184</sup> may point to an intersection of workplace exploitation and structural racism. What if the employer in *Kynard* had only employed African American workers as loggers because he believed he could pay them less and could violate wage and hours laws with less risk of employee complaint than if he hired White workers? In such circumstances, racial subordination is operating within the wage and hour framework.

Leticia Saucedo's work on the development of "brown collar" workplaces is instructive here. Saucedo contends that employers have created segregated workplaces in which Latinos are concentrated or overrepresented, based on

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178. *Id.* at 10.

179. *Id.* at 11-12.

180. *Id.* at 12.

181. *Id.*

182. *Id.* at 15.

183. *Id.* at 12.

184. See Coleman, *supra* note 2, at 69-72.

their presumptions of Latino worker subservience, and which offer a substandard pay and work environment.<sup>185</sup> She argues that employment discrimination law does not capture these discriminatory practices and argues for an expansion of the law to contemplate a broader understanding of the ways discrimination against Latino workers manifests in the workplace.<sup>186</sup>

Likewise, African American workers may experience racialized subordination that does not fit neatly into the boxes created by employment discrimination jurisprudence. While an expansion of the discrimination framework, like that suggested by Saucedo, is one possible solution, many of the normative challenges to pursuing employment discrimination claims discussed above remain. A shift in African American worker's conceptualization of the workplace exploitation narrative to include an understanding of wage theft and available remedies provides another potential remedy.

Thus far, this article has provided a framework for conceptualizing a antidiscrimination narrative that fails to capture the combination of structural racism and economic injustice of wage and hour theft, considered the impact upon this narrative of the related theories of colorblindness and post-racialism, and wrestled with potential implications of the broader application of wage and hour statutes as arguably universalist. With this in mind, it now turns to a consideration of FLSA as part of an ant子subordination regime that would more fully address the workplace exploitation experienced by African American low-wage workers.

### C. The Role of the FLSA in an Anti-Subordination Framework—Reframing the Antidiscrimination Narrative

Theorists and practitioners typically consider traditional civil rights legal protections—such as Title VII,<sup>187</sup> Section 1981,<sup>188</sup> Section 1983, and the Equal Protection Clause of the Constitution—the traditional mechanisms for protecting racially subordinated groups from racial animus and advancing their

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185. Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303, 305-14 (2004) [hereinafter, Saucedo, *Browning of the American Workplace*]. See generally Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 966-70, 977-79 (2006) [hereinafter, Saucedo, *Employer Preference*]; Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J.L. REFORM 447, 447-48 (2008) [hereinafter Saucedo, *Addressing Segregation*].

186. Saucedo, *Browning of the American Workplace*, *supra* note 185, at 317-30; Saucedo, *Employer Preference*, *supra* note 185, at 1018-20; Saucedo, *Addressing Segregation*, *supra* note 185, at 486-504.

187. 42 U.S.C. § 2000e et. seq. (2015).

188. 42 U.S.C. § 1981 (2015).

opportunities.<sup>189</sup> They often categorize wage and hour statutes like FLSA as important vehicles for worker protections, but do not engage in serious consideration of ways in which such statutes contribute to the broader goal of anti-subordination and economic justice. Perhaps an outlier among scholars, Noah Zatz, has proffered the somewhat controversial argument that scholars have mis-framed the debate about the minimum wage by failing to consider it a civil rights remedy for workers.<sup>190</sup> Indeed, he explains:

It is no accident that women, people of color, immigrants and people with disabilities are concentrated in the lowest wage jobs. In some cases the mechanisms underlying this fact can be attacked directly through antidiscrimination law theories. But when these theories exhaust the evidentiary capacity of employment discrimination law, the minimum wage can serve as a kind of civil rights safety net, catching some of the cases that would otherwise slip through. While race and gender inequality are not the only cause of unfairly low wages, they are important ones that a minimum wage can address in a fashion that complements traditional antidiscrimination law.<sup>191</sup>

While Zatz's work presents this understanding of the minimum wage as a theoretical argument for the utility of a minimum wage, it also sets the stage for an analysis of some of the normative benefits of re-framing wage and hour law detailed below.

### 1. Defining Anti-Subordination

Two competing principles or theories of antidiscrimination law dominate the literature: anticlassification and antisubordination. Anticlassification theory prohibits the classification of people "overtly or surreptitiously on the basis of a forbidden category."<sup>192</sup> This principle is typically thought to characterize much of the recent jurisprudential interpretation of our civil rights law.<sup>193</sup>

An anti-subordination theory of equality focuses on the elimination of mechanisms that subjugate or subordinate a protected class, such as African American workers.<sup>194</sup> Indeed, "[t]he principle works on the assumption that the law should do everything it can to remove the conditions that contribute to the establishment of an underclass in society."<sup>195</sup> This theory also considers the law

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189. 42 U.S.C. § 1983 (2015).

190. Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments*, 2009 U. CHI. LEGAL F. 1, 1 (2009).

191. *Id.* at 40.

192. Balkin & Siegel, *supra* note 76, at 9-10.

193. *Id.*

194. Saucedo, *Employer Preference*, *supra* note 185, at 1018.

195. *Id.*

a mechanism for reforming institutions and practices that perpetuate the secondary status of particular groups.<sup>196</sup> Anti-subordination is a critical tenet of the critical race theory movement<sup>197</sup> and has found support among constitutional law scholars and others committed to the law and legal institutions' ability to not just prevent discrimination but to elevate the social, economic, and political positions of subordinated groups.<sup>198</sup>

Violations of the wage and hour laws works to further subordinate all low-wage workers, but particularly those whose identities make them especially vulnerable. Indeed, the theft of African American workers' wages has particular significance. Many African American workers are the descendants of slaves in this country. As such, a refusal to pay them for hours worked harkens to their ancestral origins in the United States. Those same communities endured the theft of their wages as sharecroppers and in other jobs during Jim Crow when both the laws and social terror blocked their access to any judicial remedy for an employer's decision not to pay them.

Furthermore, the implications of wage theft are particularly problematic, given recent reports on the wealth gap between African Americans and others racial groups, based largely on a historical lack of access to capital and opportunities and the inability to generate wealth.<sup>199</sup> The Pew Research Center, for example, reports that the wealth of white households was 13 times that of African American households.<sup>200</sup> According to a 2016 NPR report, for example, the White household median net worth in Boston was \$247,500 while the African American median net worth was an astounding \$8.<sup>201</sup> As such, wage theft has a significant impact on communities that have struggled to accumulate economic stability and wealth. Employers' engaging in wage theft are thus engaging in the further subordination of African American workers.

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196. Balkin & Siegel, *supra* note 76, at 9.

197. See Athena Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 374 (2006).

198. See, e.g., 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, 622-23 (2003) (discussing anti-subordination and related theories' focus on whether a law "reinforces the marginalized social, economic, or political status of historically disadvantaged classes").

199. Ta-Nehisi Coates, *The Ghetto Is Public Policy*, ATLANTIC (May 13, 2013), <https://www.theatlantic.com/national/archive/2013/05/the-ghetto-is-public-policy/275456/>; Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), at 54, <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

200. Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Depression*, PEW RESEARCH CTR. (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession>.

201. Anthony Brooks, *Amid a Business Boom, Wealth Gap Between Races Leaves Some Struggling*, NPR (Sept. 22, 2016), <http://www.npr.org/2016/09/22/494900001/amid-a-business-boom-a-wealth-gap-between-races-leaves-some-struggling>.

## 2. Anti-Subordination Praxis: Disrupting and Reframing the Narrative

Critical race theorists' commitment to anti-subordination extends beyond an articulation of or engagement with the theory to a consideration of its implementation in practice.<sup>202</sup> Indeed, this critical race praxis requires then that antistubordination principles and the pursuit of economic justice considered herein consider the practices that will alter structures of power.<sup>203</sup> Athena Mutua explains:

[A] critical race praxis or antistubordination praxis also refers to the idea that critical theorizing should and needs to be informed by practice, by active engagement with developments on the ground while practice should and needs to be informed by theorizing and theories about what is happening, all for the benefit for oppressed communities.<sup>204</sup>

An understanding of civil rights that includes FLSA and state wage and hour statutes in a broader campaign against anti-subordination must, therefore, also consider the importance of the role of practitioners in utilizing these statutes, along with others, in their advocacy for African American low-wage workers.

This realization leads me back to the personal discussions with attorneys and community organizers working with African American workers that I described in the introduction to this article. That none of them seemed to have considered the potential for wage theft among African American workers spoke volumes to the assumptions inherent in their practices. It also raised concerns that African American workers either are not identifying or are not voicing their wage and hour violations. Given our understanding about the pervasive nature of wage theft, bolstered by private attorneys' admissions that they regularly uncover wage theft once they view a worker's paystub or ask detailed questions about their work and pay, workers' failure to complain speaks to a gap in their understanding of their legal rights.

Further, in my experience representing workers in wage theft cases for more than 10 years, I have found that many of the workers claiming wage theft sought the counsel of a lawyer because their employers failed to pay them at all. Upon consultation with a lawyer, they would then either admit or discover other forms of wage theft: for example, that their employer had not paid the minimum wage, had not paid time and a half for overtime hours, and/or had denied them tipped income. Some had learned of the wage and hour violations

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202. See Mutua, *supra* note 197, at 375.

203. See Erick Y. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH L. REV. 821, 829-30 (1997); Adrien K. Wing & Christine A. Willis, *From Theory to Praxis: Black Women, Gangs, and Critical Race Feminism*, 11 BERKELEY LA RAZA L.J. 1, 2-3 (1999).

204. See Mutua, *supra* note 197, at 375.

at local worker centers<sup>205</sup> and received a referral to our clinic. Nearly all of these clients were immigrants. Given their particular vulnerability, including a lack of knowledge of all of their legal rights and concerns about deportation, it is reasonable to conclude that employers are more likely to deny them any payment. Wage theft among citizens, like African Americans, likely appears as underpayment, rather than non-payment.

Critical race praxis requires that practitioners and advocates engage in campaigns to educate workers about their rights, as well as to change two narratives: (1) the narrative of discrimination framed by a Second Reconstruction (or response to the Jim Crow era) understanding of the way racism and racialization operate; and (2) the narrative that has increasingly positioned worker exploitation discussions within a largely immigrant justice frame. In order to accomplish this work, it will be necessary to engage African American workers in community education programs that explain the nuances of wage theft and their remedies available. Framing these violations within broader antisubordination goals will further empower workers to pursue their wages.

#### CONCLUSION

Narratives are powerful tools in both the development of the law and our understanding of our rights. The discrimination and antidiscrimination narratives have so dominated the consideration of African American workers' exploitation, that they have left a void in workers' understanding and pursuit of other substantive legal rights, like earned wages. Title VII's efficacy as the singular solution to workplace subordination is limited and it fails to capture other subordinating aspects of worker exploitation. Wage and hour violations are not typically included in the narrative of African American worker subordination, despite the prevalence of wage theft in the low-wage workplace. Instead, scholars consider them universalist statutes with no relationship to the racial identity of the workers. Both the historical underpinnings of the wage and hour laws and their racialized violations, however, call to question their pure universality. Their inclusion in the toolkit of antisubordination advocacy would be an important step toward achieving economic justice for African American workers.

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205. For a discussion of the expansion of worker centers as the locale of worker advocacy, see JANICE FINE, ECON. POL'Y INST., *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF A DREAM*, (Dec. 13, 2005), <http://www.epi.org/publication/bp159>; and BOBO, *supra* note 4, at 101-02.