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Toward Praxis

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Toward Praxis

Emily M.S. Houh^{*}

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INTRODUCTION

For several years now, I have been working on a scholarly project that sits at a somewhat (but not entirely) lonely intersection between Critical Race Theory, contract law, and employment discrimination law, and that has crossed paths with law and market economy theory.¹ The project so far has culminated in my proposal of a common law, good faith antidiscrimination claim.² Why, one might ask, in light of existing federal and state statutory antidiscrimination remedies, is such a common law claim needed? Because, as critical race scholars ("race crits") have been arguing for the past two decades, conventional antidiscrimination law is severely limited by its obsession — as a structural and discursive matter — with intentionality as the linchpin of the provable and successful discrimination claim.³ Thus, my good faith claim aims principally to operationalize some recurring and

¹ See Emily M.S. Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455 *passim* (2005) [hereinafter Houh, *Critical Race Realism*] (theorizing common law antidiscrimination claim, grounded doctrinally not in civil rights law, but in contractually implied obligation of good faith, that incorporates contemporary re-conceptualizations of antidiscrimination jurisprudence); Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025 *passim* (2003) [hereinafter Houh, *Critical Interventions*] (employing critical race and law and market economy theories to argue that using doctrine of good faith in contract law to prohibit improper considerations of race in contracting is consistent not only with equitable principles embodied by doctrines of implicit obligation, but also with contractual goals of protecting parties' bargains, wealth formation, and facilitation of exchange transactions). A word about Robin Paul Malloy's "law and market economy theory" may also be useful here. Malloy has developed a semiotic model of market analysis that emphasizes market incentives and disincentives that focus on politics, community, and the culture(s) of market actors, rather than on the maximization of a (Kaldor-Hicks) model of efficiency. See ROBIN PAUL MALLOY, *LAW AND MARKET ECONOMY: REINTERPRETING THE VALUES OF LAW AND ECONOMICS* (2000) [hereinafter MALLOY, *LAW AND MARKET ECONOMY*]; ROBIN PAUL MALLOY, *LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING* (2004) [hereinafter MALLOY, *LAW IN A MARKET CONTEXT*].

² See Houh, *Critical Race Realism*, *supra* note 1 *passim*.

³ See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (arguing that traditional, then-existing antidiscrimination jurisprudence legitimized racial discrimination because it developed from perpetrator, as opposed to victim perspective and, in particular, because of its then narrowing emphasis on perpetrator intent); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (questioning discriminatory intent requirement for equal protection challenges set forth in *Washington v. Davis*, 426 U.S. 229 (1976), and arguing that such requirement ignores more pervasive problem of unconscious and unintentional racism).

foundational insights of Critical Race Theory, such as the race critics' critique of the intentionality requirement in conventional antidiscrimination law. In terms of my work in this regard, the title of this Symposium, of which I am so honored to be a part, inspires related challenges and questions. For example, what does my good faith antidiscrimination claim do for "the future" of Critical Race Feminism? More specifically, does the claim have the potential to also operationalize foundational tenets of Critical Race Feminism? Additionally, how might the insights of critical race feminists ("fem critics") enable the further development of my good faith claim?

This Essay begins to answer those questions. To provide background, Part I.A lays out the theoretical foundations of my proposed good faith antidiscrimination claim, specifically describing Devon Carbado and Mitu Gulati's influential "working identity" theory and its impact on my ongoing project. Part I.B then sets forth aspirations of my proposed good faith claim, as well as for the future of Critical Race Feminism ("CRF") more generally, that call for more aggressive critical engagement and "publicization" of private law. Part II describes the elements of the good faith antidiscrimination claim itself, and explains how the claim was developed to operationalize Carbado and Gulati's working identity theory. Finally, Part III of this Essay begins to explore the potential that my proposed claim may have for transferring the related critical race feminist theories of anti-essentialism and intersectionality into praxis, and, on the flipside, the implications those theories may have for the further refinement and development of my good faith claim. Specifically, Part III.A defines the foundational critical race feminist concepts of anti-essentialism and intersectionality and offers some responses to various critiques of those concepts. Part III.B attempts to operationalize anti-essentialism and intersectionality vis-à-vis my proposed claim, specifically in a sexual harassment situation. In this regard, Part III.B. employs a hypothetical and then applies my proposed claim to that hypothetical, in order to demonstrate how the claim might move CRF toward praxis.

I. FOUNDATIONS AND ASPIRATIONS OF THE GOOD FAITH ANTIDISCRIMINATION CLAIM

At the outset, my good faith project employs critical race and law and market economy theories to make its primary normative argument. In short, I argue that due to the inadequacies of statutory civil rights

remedies, the contractual obligation of good faith⁴ should be used to prohibit discriminatory conduct in the contractual context based on race, gender, sexual identity, age, and/or other categories of identity.⁵ With respect to this project, I have also consistently and explicitly argued that good faith doctrine should be used to assist in the elimination of “discrimination,” as that term has been defined by race critics, and, similarly, to achieve a critical race conception of “equality.” That is, my project aims to contribute to the elimination of forms of discrimination that are not only intentional and overt (which forms are largely addressed by conventional statutory remedies), but also the more pervasive and damaging forms of discrimination that are covert and *unintentional*. In particular, my project aims (in part) to discard of intentionality as the cornerstone of discrimination discourse. In this regard, it also aims to shift antidiscrimination discourse away from that jurisprudence’s continuing move toward the wholesale adoption of an overly narrow view of equality and an understanding of discrimination as discrete sets of de-contextualized acts that are inflicted on a victim by an individually motivated perpetrator who must intend to do harm.⁶

A. Carbado and Gulati’s “Working Identity” Theory

I have begun to refine and further develop this project, both theoretically and doctrinally, with the specific goal of formulating and proposing an alternative antidiscrimination claim. This alternative claim gets away from the discursive hurdle of intentionalism in conventional antidiscrimination discourse. Further, it avoids the structural hurdle of statutory burden-shifting frameworks that most often result in the failure of plaintiffs’ statutory claims.⁷ Theoretically, the project has focused

⁴ It is well-established in American contract law that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981). Additionally, the Uniform Commercial Code (“U.C.C.”) statutorily imposes a good faith and fair dealing obligation into every contract falling within its scope, defining good faith as “honesty in fact and the observance of reasonable commercial standards of fair dealing.” U.C.C. § 1-201(b)(20) (amended 2003).

⁵ Houh, *Critical Interventions*, *supra* note 1 *passim*. As a preliminary matter and for practical purposes, my project limits application of this argument to employer-employee contracts, although I believe there is potential for expansion into other contractual areas.

⁶ See Houh, *Critical Interventions*, *supra* note 1, at 1054-66, 1089-96.

⁷ For example, according to the well-known burden-shifting framework established by *McDonnell Douglas Corp. v. Green*, a plaintiff who brings a disparate treatment, or intentional discrimination, claim under Title VII must show that: she belongs to a protected class traditionally discriminated against in the workplace; that she was adequately qualified, but despite her qualifications, she received adverse treatment; and

specifically on the recent critical race insights of Devon Carbado and Mitu Gulati.⁸ Carbado and Gulati's interdisciplinary work has expanded the discourse of antidiscrimination law by theorizing forms of workplace discrimination based on the behavioral concepts of "performative" or "working" identity and how those concepts negatively impact outsider individuals (i.e., racial, gender, and sexual minorities) in the workplace. That is, Carbado and Gulati argue that "the 'working identity' phenomenon is a form of employment discrimination."⁹ Their theory of "working identity" explores behavioral concepts of signaling and identity performance in the employment context. They posit that members of outsider groups in the workplace often must do extra identity work because those outsiders correctly perceive themselves as subject to negative stereotypes and expectations in the workplace to which majority employees are *not* subject.¹⁰ As a result, members of outsider groups in the workplace often feel compelled to perform and signal loudly against negative identity-related stereotypes in order to prevent discrimination based on those stereotypes.¹¹

Identity work, according to Carbado and Gulati, burdens outsiders not only in that this work requires them to do more on a physical, mental, and emotional level, but also because it causes them to incur work and

that similarly situated, non-protected employees did not receive similar treatment. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The employer-defendant may then rebut the plaintiff's prima facie case simply by producing some legally sufficient evidence of a legitimate, nondiscriminatory reason for the adverse treatment. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981). If the employer-defendant meets this burden, then the plaintiff must show by a preponderance of the evidence that the legitimate reasons offered by the employer are mere pretext. *Id.* at 255-56; *McDonnell Douglas*, 411 U.S. at 804-05.

⁸ *See, e.g.,* Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1646 (2004) [hereinafter Carbado & Gulati, *Race to the Top*] (arguing that because of ways in which institutional workplace incentives and workplace culture shape racial conduct and performance, racial minorities who make it to "top" of corporate ladder may not be likely to "lift as they climb"); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1765-66 (2003) [hereinafter Carbado & Gulati, *The Law and Economics of CRT*] (arguing that employment of "homogeneity incentive" in workplace — whereby employers develop institutional incentives around efficiency concerns that result in racially homogeneous workplaces — gives rise to racial discrimination, and results further in "mass-produce[ment] and clone[ing]" of racially palatable identities in workplace); *see also infra* notes 9-11 and accompanying text.

⁹ Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000) [hereinafter Carbado & Gulati, *Working Identity*].

¹⁰ *Id.* at 1267-78; Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103, 114-22 (2000) [hereinafter Carbado & Gulati, *Conversations at Work*].

¹¹ Carbado & Gulati, *Working Identity*, *supra* note 9, at 1260-61.

identity-related risks that their insider counterparts do not incur.¹² Thus, the shaping of workplace institutional incentives to perform or counter-perform one's identity are at the heart of Carbado and Gulati's work. They critique the existing law's failure to recognize this form of discrimination and its failure to distinguish between discrimination based on racial status and that based on racial conduct. In so doing, Carbado and Gulati problematize the meaning of discrimination by exposing the cultural, social, and psychological linkages between, for example, a woman of color's racial conduct (which is continually susceptible to a fixed set of negatively presumed outsider stereotypes, or a fixed "image repertoire")¹³ and her racial status, to which that image repertoire is attached in the first place. That a non-minority insider need not negotiate his racial status by altering his conduct in the workplace, that he need not do the extra identity work that an outsider is expected to do, demonstrates just how normalized his culture and experiences in the workplace are, and the extent to which workplaces can function as materially and ideologically colonized and colonizing spaces.

Carbado and Gulati have effected a pathbreaking intervention in their theorizing of working identity. Importantly, they have done so not only within the parameters of existing antidiscrimination law by arguing that

¹² *Id.* at 1279-84 (explaining hypothetically how black male criminal procedure professor's pedagogical choices about teaching are impacted by his race and gender).

¹³ Feminist film theorist and post-colonial scholar Trinh Minh-ha uses the term "image repertoire," in the specific context of Third-World post-colonialism, to refer to a finite set of representations that a dominant entity creates to "Orientalize" and dominate a subjugated entity as "Other." Trinh writes:

This is the way the West carries the burden of the Other. Naming is part of the human rituals of incorporation, and the unnamed remains less human than the inhuman or sub-human. The threatening Otherness must, therefore, be transformed into figures that belong to a definite image-repertoire The perception of the outsider as the one who needs help has taken on the successive forms of the barbarian, the pagan, the infidel, the wild man, the "native," and the underdeveloped.

TRINH T. MINH-HA, *WOMAN NATIVE OTHER: WRITING POSTCOLONIALITY AND FEMINISM* 54 (1989).

"Orientalism," first theorized by the late literary critic, cultural theorist, and post-colonial scholar Edward W. Said, refers to a specific discursive iteration of the Other as a "Western style for dominating, restructuring, and having authority over the Orient." EDWARD W. SAID, *ORIENTALISM* 3 (1978). Further, Orientalism names the "enormously systematic discipline by which European culture was able to manage, and even produce, the Orient politically, sociologically, militarily, ideologically, scientifically, and imaginatively during the post-Enlightenment period," through European colonialism in the Middle East. *Id.* Theorizing Orientalism, Said also has demonstrated that "European culture gained in strength and identity by setting itself off against the Orient as sort of a surrogate and even underground self." *Id.*

the working identity phenomenon constitutes discrimination. They also have framed their arguments in the context of corporate law and law and economics, by articulating such discrimination as a problem of corporate and institutional incentives and practices that shape racial conduct and workplace culture.¹⁴ This is important and necessary work.

B. The Need for the "Publicization" of Private Law

Like Carbado and Gulati, I am not persuaded that equality — as race critics define it — can be achieved if it is only civil rights law that expressly aspires to achieve it. Thus, I have attempted to similarly push the boundaries of the theory from which my work is derived. Specifically, I argue that doctrinal fields outside of traditional and statutory antidiscrimination law can and should aspire towards equality and the elimination of all forms of discrimination and subordination. In answer to the question *which* other areas of law should so aspire, I have turned naturally — as a contracts teacher as well as a race and fem crit — to the law of contracts. In particular, I have focused on the doctrine of good faith in the context of the contractual relationship between employer and employee.

Does it make sense to turn to contract law and to the doctrine of good faith in this way? I have asked and begun to answer these questions (affirmatively, of course) in my other writings.¹⁵ For the sake of brevity, I now offer two rather oversimplified responses, based on those writings, to these questions. First, in terms of contract doctrine and as a descriptive matter, I have argued that the doctrine of good faith and fair dealing, despite some theoretical controversy in the established scholarship, functions in contemporary contract law not so much as an implied contract term but as a rhetorical proxy for judicial analyses of material breach and constructive conditions relating to the underlying breach of contract claims. While such applications of good faith have functional value, they have caused good faith jurisprudence to languish in an impoverished state, and to further detach from the doctrine's

¹⁴ See Carbado & Gulati, *Race to the Top*, *supra* note 8 *passim*; Carbado & Gulati, *The Law and Economics of CRT*, *supra* note 8 *passim*.

¹⁵ See Houh, *Critical Interventions*, *supra* note 1, at 1047-49 (critiquing dominant economic model of good faith employed by courts); *id.* at 1089-95 (discussing Delaware Supreme Court's decision in *Schuster v. Derocili*, 775 A.2d 1029 (Del. 2001), in which it held that plaintiff could bring contractual breach of good faith claim to allege sexual harassment against former employer); Houh, *Critical Race Realism*, *supra* note 1, at 474-85 (arguing that because good faith doctrine in contract law is in flux, it "furnishes an ideal vehicle by which" to infuse private law of contract with public law norms of equality).

equitable roots in implicit contractual obligation.¹⁶ Second, normatively and more theoretically, I have argued from critical race (discussed briefly above) and law and market economy perspectives that due to the inadequacies of civil rights remedies, good faith should be used to prohibit, in the contractual context, discriminatory conduct based on race, gender, sexual identity, age, and/or other categories of identity.¹⁷

My proposed good faith antidiscrimination claim explicitly aims to drive these descriptive, normative, and theoretical critiques into praxis first by incorporating contemporary re-conceptualizations of antidiscrimination jurisprudence. Second, my proposed claim moves toward critical race praxis in that it grounds itself doctrinally not in statutory antidiscrimination law, but in the contractually implied obligation of good faith. Moreover, my proposed claim seeks to re-conceive explicitly the private law doctrine of good faith as one that might assist in effecting a public law norm of equality (critically defined).

Many, if not most, traditional legal scholars might take issue with such attempts to tamper with the well-entrenched distinction between private law and public law.¹⁸ However, I argue that deconstructing the public-private law distinction should play a more central role in the critical scholarly project because of the ways in which the distinction has been used to legally preserve and perpetuate existing structures and distributions of power. I am certainly not the first to make this argument. Critical and liberal scholars have long taken issue with the public-private distinction, both as a descriptive and normative matter, and have asked whether and to what extent the distinction between private and public law should be maintained or deconstructed.

For example, Morris Cohen's realist critiques of the classical will theory of contractualism in the early 1900s¹⁹ are foundational to much of the work of contemporary scholars — critical and non-critical alike —

¹⁶ Emily M.S. Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?*, 2005 UTAH L. REV. 1, 49-56 [hereinafter Houh, *Empty Vessel*].

¹⁷ Houh, *Critical Interventions*, *supra* note 1 *passim*.

¹⁸ Conventional doctrinal categories of private law include fields such as contract, property, and corporate law, while conventional doctrinal categories of public law include fields such as constitutional and criminal law. For further discussion of the history of the public-private law distinction, see Houh, *Critical Race Realism*, *supra* note 1, at 480-85.

¹⁹ See, e.g., Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 589 (1933) (critiquing will theory and contractualism, and arguing that contract law, although perceived as being "private" in nature, has essential public functions such as "to standardize conduct by penalizing departures from the legal norm," both through awarding of damages or specific performance for breaches of contract and through declaration of certain contracts as void or voidable).

and, in particular, to the work of those who continue to challenge the now all-pervasive conventional economic analysis of the law.²⁰ During the same period, legal realist Robert Hale revealed the ways in which legal and philosophical discourse had, until then, obscured the private aspects of coercion while simultaneously vilifying its public aspects. To Hale, threats and promises, whether public in the form of state regulation or private in the form of negotiated contracts, were both coercive in the amoral sense in that both function to influence a person's conduct in positive and negative ways.²¹ To Hale, what made the difference was power. That is, his distributive analysis focused not on the coercive nature of public regulation and private exchange transactions, but on whether power (as in "power of free initiative all around," not absence of governmental restraint) was concentrated in the hands of private or public actors.²²

Hale's analysis in this regard prefigured theories of the circulative nature of power. These theories are foundational to cultural studies and critical theory.²³ Theorizing how power circulates prompts the further related question: to the extent American jurisprudence maintains the distinction between public and private law, how does the institutional and systemic line-drawing between the public and private domains impact distributions of power and, consequently, economic and socio-political equality? Critical scholars like Duncan Kennedy²⁴ and Clare Dalton,²⁵ among many others, have made cogent, persuasive, and

²⁰ See, e.g., MALLOY, *LAW AND MARKET ECONOMY*, *supra* note 1, at 2-4 (using Peircian semiotics to reinterpret traditional economic analyses of law, and arguing that creativity and discovery, not efficiency, drive wealth formation and maximization); Ian Ayres, *Never Confuse Efficiency with a Liver Complaint*, 1997 WIS. L. REV. 503, 504-06 (describing "hegemony of economic analysis" in law); Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235 (1998) (applying reconception of "rational choice" theory to effect feminist economic analysis of contract law); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1740-53, 1762-66, 1776 (arguing that economic principles embedded in legal rules and standards are "instrumental to the pursuit of substantive objectives").

²¹ Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471-79 (1923).

²² *Id.* at 477-78.

²³ See Stuart Hall, *The Work of Representation*, in REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 41-51 (Stuart Hall ed., 1997) (discussing circulative nature of discourse and its relationship to knowledge, truth, and power in society).

²⁴ Kennedy, *supra* note 20, at 1740-53, 1762-66, 1776.

²⁵ Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1014 (1985) (arguing that "the Realist challenge to the 'privateness' of contract ha[d] been assimilated and defused" within decades of original challenges in early twentieth century

influential arguments about how the public-private law distinction functions to mask structural and substantive inequalities in the legal system.

Despite the significant scholarly contributions and triumphs of other aspects of the legal realism movement,²⁶ the continued entrenchment of the public-private distinction remains to my mind one of the movement's greatest failures. Feminist, critical, and liberal scholars attempted to resuscitate the realist challenge to the public-private distinction throughout the late 1970s and 1980s,²⁷ but were largely unsuccessful, perhaps because they were having more success staking out their intellectual territories in other ways. In recent years, some scholars interested in the public-private distinction have begun to redirect their theoretical and doctrinal inquiries and advocate the extension of public law norms through privatization.²⁸ This shift toward the "publicization" of private domains is an extraordinarily important one, given the increasingly important role private actors play in public governance and administrative law, and given the spread of American capitalism and the political and economic trend toward privatization of institutions and systems historically regarded as essentially public.

My good faith project thus has another normative goal which is to effect the "publicization" of the sub-category of the employer-employee

to public-private distinction).

²⁶ For example, the U.C.C., a Realist project, has been adopted by every state in the country, except Louisiana. David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 379 (2003). Its chief architect, Karl Llewellyn, was among the most important and well known of the Realists. He argued that commercial law developed into its modern, stabilized state not because it embodied and formalistically enacted a set of legal rules, but because particularized social and economic circumstances compelled the judicial creation of a body of law that developed into a coherent doctrine. See Note, 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 HARV. L. REV. 1669, 1671-73 (1982) (discussing Karl Llewellyn, *On Warranty of Quality, and Society* (pts. 1 & 2), 36 COLUM. L. REV. 699 (1936), 37 COLUM. L. REV. 341 (1937)).

²⁷ See, e.g., Dalton, *supra* note 25 (reviving Realist public-private debate in context of contract law); Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503 (1982) (tracing development of landlord-tenant law from its historical roots in private law of contract, to its publicly regulated form); Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982) (this symposium on public-private distinction in law featured paper topics such as history of distinction, state action and liberal theory, and distinction in contexts of labor law and corporate law).

²⁸ See, e.g., Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1288 (2003) (advocating for extension of public law norms through privatization, given development of "relationship between administrative law and role private actors play in public governance"); Snyder, *supra* note 26, at 371 (arguing that because significant amount of law is privately made, such law should be subjected to same kinds of questioning as publicly made law).

contract vis-à-vis the good faith doctrine. The specific and explicit goal is to eliminate economic and socio-political subordination based on categories of identity such as race, gender, and sex. Doctrinally, the implied obligation of good faith is the ideal vehicle for such publicization, given its murky definitional contours and its currently hollow doctrinal state. Theoretically, it makes sense to use the implied obligation of good faith to these ends because implied contractual obligations arise for the very purpose of effecting and prescribing certain cultural and social norms between contracting parties. The courts transmit and enforce these norms as both a descriptive and normative matter. In that sense, implied obligations are by their very nature public obligations. Thus, they should incorporate public law norms.

Here, I want to address directly the "Future of Critical Race Feminism" by suggesting that critical race feminists who also teach and write in the traditional "private law" areas — such as contracts, commercial law, business law, property, etc. — should begin and/or continue to seriously (re-)engage and deconstruct the public-private distinction in our work, for the reasons briefly discussed above. Fem crits and race crits can and should make conscious and forceful interventions not only into the conventionally race crit and fem crit areas of constitutional law, criminal law, and statutory antidiscrimination law, but also into areas that are not typically associated with Critical Race Theory and/or Critical Race Feminism.

I want to make clear that I am not the first to suggest and am certainly not among the first to do this kind of work. As discussed above, Carbado and Gulati are doing this work in their ongoing exploration and interrogation of how corporate and workplace institutional practices and incentives shape racial conduct and expectations. The late Jerome Culp taught and wrote at the intersections of Critical Race Theory and law and economics for much of his brilliant career.²⁹ In addition, critical race

²⁹ See, e.g., Jerome McCristal Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965 (1993) (arguing that dominant judicial interpretations of Title VII, which assume law's ineffectiveness in controlling market forces to alleviate economic plight of black Americans, suffer from several false assumptions); Jerome McCristal Culp, Jr., *Small Numbers, Big Problems, Black Men, and the Supreme Court: A Reform Program for Title VII After Hicks*, 23 CAP. U. L. REV. 241, 260-62 (1994) (arguing that existing Title VII jurisprudence does not give employers incentive to hire and promote black employees, and proposing model for increasing numbers of black workers hired by reducing costs associated with antidiscrimination litigation); see also Robert S. Chang and Jerome McCristal Culp, Jr., *Business as Usual? Brown and the Continuing Conundrum of Race in America*, 2004 U. ILL. L. REV. 1181, 1182-92 (2004) (examining, inter alia, racial wealth disparities and interlocking systems that perpetuate racial inequalities from one generation to next and arguing that cycle of wealth

feminists such as Patricia Williams,³⁰ Cheryl Harris,³¹ Elizabeth Iglesias,³² Emma Coleman Jordan,³³ Angela Harris,³⁴ and Dorothy Brown,³⁵ as well as aligned feminist scholars like Kristin Brandser Kalsem,³⁶ have

is self-perpetuating from generation to generation because of ways in which racial discrimination in education, housing, family, health care, employment, and criminal justice result in intergenerational perpetuation of racial economic disparities).

³⁰ See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 8-14, 216-36 (1991) (critiquing purported objectivity and neutrality of law, particularly in contexts of contract and property law); Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990) (analyzing implications of *Metro Broadcasting* for racially diverse ownership of property within and beyond context of commercial broadcasting).

³¹ See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (arguing that whiteness as racial identity is deeply interrelated with concept of property and examining effects of whiteness as racial property right in interpretation and application of affirmative action law).

³² See Elizabeth M. Iglesias, *Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, 45 VILL. L. REV. 1037 (2000) (discussing global market effects of economic practices in racist societies and, in particular, how racial segregation and discrimination have prevented free movement of people and capital, and how free markets have not produced unrestricted access to housing, employment, or credit, all of which are necessary to achieving social racial justice).

³³ See, e.g., Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557 (2003) (proposing that call for reparations for slavery be replaced by reparations for lynchings from 1865 to 1955 in order to conform with conventional private law requirement of correlativity); see also EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS* 1-72, 323-419 (2005) (engaging connections between critical legal scholarship and law and economics).

³⁴ JORDAN & HARRIS, *supra* note 33, at 323-419.

³⁵ See, e.g., Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485 (2004) (providing overview of symposium on nexus between Critical Race Theory and empirical studies in, inter alia, federal tax policy, race relations in employment context, and lack of racial diversity on corporate boards); Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501 (2004) (analyzing racial factors relating to employee participation in employer-provided pension plans); Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469 (1997) (exploring beneficial and penalizing impacts of federal tax law on married women based upon their race, class, and gender, and discussing how federal tax laws tend to confer benefits upon upper-income white households, while penalizing African-American households and middle and low-income white households); Dorothy A. Brown, *Racial Equality in the Twenty-First Century: What's Tax Policy Got to Do with It?*, 21 U. ARK. LITTLE ROCK L. REV. 759 (1999) (arguing that federal tax laws permitting employers to deduct discriminatory damage awards and discriminatory wages reinforce and exacerbate societal racism); Dorothy A. Brown, *The Marriage Penalty/Bonus Debate: Legislative Issues in Black and White*, 16 N.Y.L. SCH. J. HUM. RTS. 287, 287 (1999) (discussing impact of race on federal income tax benefits and penalties and finding that "African-American households are more likely to pay a marriage penalty and White households are more likely to receive a marriage bonus").

³⁶ See Kristin Brandser Kalsem, *Bankruptcy Reform and Financial Well-Being: How Intersectionality Matters in Money Matters*, 71 BROOK. L. REV. (forthcoming 2006) (arguing

integrated perspectives from private law areas such as property, transnational globalism, commercial law, and economic analyses of law into fem crit discourse, and vice versa.

This trend of critically engaging private law, however, has yet to establish itself as a central part of the critical race tradition. We should labor consciously to further establish this trend, not only because private law provides us with rich substantive areas in which to continue our work, but also because critically engaging conventional private law areas is important as a strategic matter. Given the strength of our collective intellect and the sharpness of our analyses, we can be more effective in actually changing law as it is practiced by lawyers and interpreted by judges if we, collectively and individually, broaden the scope of our areas of expertise. Thus, I urge us to take a page from the playbook of conventional law and economics scholars — if we are to be effective in terms of praxis, we should tackle as many fields as possible. If there can exist a Posnerian economic analysis of everything from contract law³⁷ to constitutional law³⁸ to employment discrimination³⁹ to sexuality,⁴⁰ there

that discourse surrounding recent 2005 bankruptcy reform frames and analyzes women's issues in essentialist ways, and calling for intersectional framing and analysis of women's issues in context of such reform).

³⁷ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 93-143 (2003) (applying economic analysis to various aspects of contract law).

³⁸ See *id.* at 647-80 (applying economic analysis to wide range of constitutional issues such as: separation of powers, protection of rights, equal protection and due process; economic due process; federalism; discrimination; freedom of speech and freedom of religion; and Fourth Amendment searches, seizures, and interrogations). See generally Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 *FORDHAM L. REV.* 111 (1993) (developing economic theory of constitutional amendment process that focuses particularly on roles of Congress and interest groups in that process); John J. Donohue III, *Is Title VII Efficient?*, 134 *U. PA. L. REV.* 1411 (1986) (arguing that Title VII may enhance rather than impair economic efficiency); Richard A. Posner, *The Constitution as an Economic Document*, 56 *GEO. WASH. L. REV.* 4 (1987) (discussing eight ways in which economics might be used to study and interpret Constitution); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 *SUFFOLK U. L. REV.* 1, 3 (1986) (developing (tentatively) "explicit economic approach to the regulation of speech generally"); Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*, 80 *GEO. L.J.* 1787 (1992) (exploring impact of social choice theory on judicial review of statutes that burden fundamental rights or employ suspect classifications).

³⁹ See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 66-69 (1992) (arguing that discrimination based on irrational hatred of or distaste for people belonging to certain classifications (such as women or minorities) will be extinguished by market forces because such distaste is inefficient, but that "voluntary sorting" based on "commonality of preferences"— which often tracks along racial, ethnic, or gender lines — will (and should) survive because it increases satisfaction in workplace by allowing workers to avoid distasteful associations).

⁴⁰ See generally RICHARD A. POSNER, *SEX AND REASON* (1994) (applying rational choice

should also exist critical race and fem crit analyses across a similar breadth of fields. Law and economics scholars have made such trenchant inroads into the legal academy and judiciary, not only because of the ideological conservatism of their positions, but also because they have provided economic analyses for just about everything. To be effective, we — fem crits and race crits — must at least do the same, with the specific and explicit goal of infusing private law with critical race and feminist norms. One small but hopeful contribution to this end is my ongoing work on good faith in contract law. Having set out some theoretical foundations for my contractual good faith antidiscrimination claim, I now turn to some doctrine, and describe the elements of the claim.

II. THE ELEMENTS OF THE GOOD FAITH ANTIDISCRIMINATION CLAIM: OPERATIONALIZING “WORKING IDENTITY” THEORY

Before describing the elements of the claim, it would be helpful to set forth briefly the modern definition of contractual good faith. As I have explained elsewhere, because good faith jurisprudence remains in an unsettled state, the task is a somewhat difficult one.⁴¹ Very generally speaking, the implied obligation of good faith requires that neither of the contracting parties perform in such a way that deprives the other of her reasonable expectations under the contract.⁴²

My proposed good faith claim focuses on what constitutes “reasonable expectations” with respect to racial or gender subordination in the workplace. In an attempt to move the “outsider” to the center of the good faith discrimination claim, its proposed elements are framed around the following assumption: as part of their contractual relationship with their employers, employees may reasonably expect *not* to be bound to perform in a certain way based on pre-existing racial and/or gender stereotypes. That is, employees may reasonably expect *not* to have to perform within a set image repertoire. Any “scripted” expectation that an employer has of a particular employee related to his race and/or gender and, subsequently, to his work performance would

theory to history and development of sexuality and sexual controls).

⁴¹ Houh, *Empty Vessel*, *supra* note 16 (arguing that, as descriptive matter, good faith doctrine in contemporary contract law functions as rhetorical proxy for judicial analyses of material breach and constructive conditions relating to underlying breach of contract claims, rather than as true implied obligation).

⁴² Houh, *Empty Vessel*, *supra* note 16, at 49-50 (summarizing and clarifying different courts’ articulation and use of good faith standards based on different categories of commercial contract cases).

be deemed unreasonable. This underlying premise incorporates important critical race and feminist insights. It rejects the neoconservative colorblindness notions of racial equality and seeks to remedy the ways in which existing outsider stereotypes negatively impact how non-majority employees perform (and are incentivized to perform) in the workplace. Framing reasonable expectations in this way recognizes the harm to outsider employees not as a function of the intentional acts of individual perpetrators, but as a function of institutional and hegemonic cultural perceptions of and practices related to outsider employees. As a practical matter, then, my proposed claim shifts factual proof questions away from those relating to the alleged perpetrator's intention to discriminate and toward those relating to how the existence of race and gender stereotypes manifest and burden those to whom such stereotypes attach.

Briefly, the elements of my proposed good faith antidiscrimination claim require a plaintiff to demonstrate: the existence of relevant stereotype(s) that have attached to the plaintiff; how those attached stereotypes negatively impact work performance; and that the employer took some negative employment action against the plaintiff; and causation.

A. Proving the Existence of Stereotypes, or Demonstrating One's Working Identity

In its most current form, the first element of my proposed claim requires a plaintiff to demonstrate the existence of factually relevant racial and/or gender stereotype(s) in society generally and more specifically in the plaintiff-employee's workplace, as well as the corresponding absence of such an image repertoire for white males. Proving this element is not as onerous as it sounds. Research and scholarship on the causes and effects of stereotyping in the workplace and their impact on productivity abound in the social sciences and even in the humanities. Such findings could help prove the general pervasiveness of stereotypes relating in particular to minority groups and/or women. For example, scholarship in the fields of management science and behavioral and cognitive psychology, as well as in areas dealing with more theoretical representational issues such as cultural studies, would be particularly helpful.

While proving the existence of those stereotypes would be onerous to the plaintiffs and lawyers bringing the first generation of such good faith antidiscrimination claims, the benefits of this work would outweigh its initial costs, as future generations of lawyers could rely on evidence

introduced in successful “test” cases, needing only to update that evidence and research as necessary. In addition, bringing such evidence to the attention of judges, defense lawyers, and juries would have educative benefits that also might impact socio-cultural understandings of discrimination and racial and gender scripting. Lastly, in response to legitimate concerns relating to the overly theoretical direction of scholarly work on race and gender equality issues (and at the risk of sounding like a self-interested academic), the employment of such evidence would bring the work of practitioners and critical scholars closer together in their service to the common goal of a just and equal society.

In its defense against the establishment by the plaintiff of this first element of the *prima facie* claim, a defendant-employer would have the opportunity to introduce contradictory social science research on societal stereotyping. However, an employer most likely would concentrate its efforts on proving that the relevant stereotype did not exist or function discursively at its workplace. Thus, for example, the employer could attempt to show that its workplace was meaningfully integrated, and that a “critical mass”⁴³ of women and/or people of color were present there. The employer also could demonstrate its attempts to combat these kinds of stereotypes through existing policies and/or programs.

⁴³ The term “critical mass” is fast-becoming a legal term of art, based on its use in affirmative action discourse. The Supreme Court in *Grutter v. Bollinger* (the University of Michigan Law School affirmative action case) stated:

The Law School does not premise its need for critical mass on ‘any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.’ To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. . . .

[T]he Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment [T]he Law School affords this individualized consideration to applicants of all races.

Grutter v. Bollinger, 539 U.S. 306, 309, 333 (2003) (citation omitted); see also Brief for Respondent at 40-43, *Grutter*, 539 U.S. 306 (No. 02-241) (discussing why University of Michigan does not employ “quota” in admitting “critical mass” of students of color).

B. The Impact of Attached Stereotypes on Work Performance

Having alleged the existence of particular social stereotypes in the workplace, the plaintiff would next allege how her working identity impacted her work performance. The specifics of her allegations would of course depend on the nature of the stereotype her employer allegedly manifested. Did she feel compelled to counter-perform her working identity because of negative (or positive) stereotypes that attached to her? For example, did she speak out against the imposed stereotypes or perform against script? If so, what kinds of risks did she incur in counter-performing? On the other hand, did she feel that she had to perform to a certain "positive" stereotype for fear that her failure to do so would result in negative action against her? If so, what kinds of conduct did she engage in and/or risks did she incur in response to that pressure?

C. Negative Employment Action, Expanded

The third element of the claim requires the plaintiff to allege that her employer took some negative or adverse employment action against her. Although Title VII jurisprudence also requires a showing of adverse employment action, this element, for purposes of the proposed claim, would employ a much broader definition of "adverse employment action." The proposed claim would give more primacy to the material impact on the plaintiff, based on the types of risks she incurred and the extent to which those risks manifested.

D. Causation — A Rebuttable Presumption

Predictably, the element of causation, which links racial and gender scripting to adverse action and impact on the plaintiff, is the most difficult element to develop, particularly because conventional antidiscrimination discourse has taught us that the *intent* to discriminate is the linchpin of causation. How, then, should causation be theorized, given that one explicit goal of my proposed claim is to deconstruct the dominant intent analysis? Courts can and should presume a correlation between stereotypes that have attached in the workplace, and the burdensome expectations imposed on the plaintiff as a result of her failure to perform and/or counterperform her working identity. Thus, the presumption that the plaintiff's counter-performance of her scripted working identity caused the alleged adverse employment action arises when the adverse action and/or impact follows the counter-performance. The court may then find that there has been a breach of

good faith in that the employer has deprived the employee of her reasonable expectation of *not* having to perform to or against a stereotype. On the flipside, the court may find that the employer has imposed unreasonable expectations on the plaintiff by requiring her to perform according to a scripted identity.⁴⁴

It is certainly possible that an employer might take adverse action against an employee simply because she is a bad employee. Under the good faith antidiscrimination claim, the defendant could still defend itself by demonstrating a "legitimate business purpose," but the defendant would have to assert and prove its "legitimate business purpose" as an *affirmative defense*, rather than as part of a burden-shifting framework such as the one imposed by *McDonnell-Douglas* in statutory cases.⁴⁵ Doing so would also eliminate the pretext analysis, which is consistent with the dual goal of de-emphasizing and deconstructing discriminatory intent as the keystone of legally cognizable discrimination. Further, this scheme makes relevant the plaintiff's perspective on the circumstances of the alleged adverse action.

E. *A Work in Progress, but Moving Toward Praxis*

I am acutely aware of the many doctrinal and theoretical questions that my good faith claim raises and I emphasize that it is a work in progress. Most significantly, I myself wonder as a practical matter whether courts and juries should and could be trusted to engage in the type of analyses my claim contemplates. The optimist in me believes that as we continue to train good critical race lawyers, the availability of such a claim would have potentially valuable expressive and educative value. In transferring the lessons of critical race and feminist legal theory to plaintiffs, defendants, their lawyers, judges, and jurors through the elements of the claim, the law might alter the rhetoric of discrimination and colorblindness that now dominates civil rights law. It might also impact popular cultural understanding of how racial

⁴⁴ Elsewhere, I have discussed at length precedent in the area of corporate securities law for accepting such a presumption of causation. In particular, the "fraud on the market" theory, adopted by the Supreme Court in a landmark decision on securities fraud. In short, the fraud on the market theory presumes that material misrepresentations, once proven, cause investors to trade on stock because of the investor's presumptive reliance on those misrepresentations in so trading. *Basic Inc. v. Levinson*, 485 U.S. 224, 241-50 (1988); see also Houh, *Critical Race Realism*, *supra* note 1, at 502-05.

⁴⁵ See *supra* note 7 (discussing burden shifting framework established by *McDonnell Douglas*).

subordination exists and persists as a historical and socially contextualized phenomenon.

On a more general level, making available a non-statutory, non-civil rights claim would express a radically different and more profound commitment to racial, gender, and sex equality. Fashioning the claim as a breach of good faith claim would place the equality principle, which currently plays a lesser role in contract law,⁴⁶ on the same level as the principle of free and individual will in contracting, a value prioritized in both classical and modern contract law. Thus, the good faith discrimination claim would allow two purportedly competing values, equality and freedom to contract (or *not* to contract), to more pro-actively and equally co-exist. Moreover, theoretically and doctrinally, my proposed claim incorporates critical race values into the contractual doctrine of good faith, thereby enacting a doctrinal response to Carbado and Gulati's theoretical assertion that "the 'working identity' phenomenon is a form of employment discrimination."⁴⁷

III. POTENTIAL IMPLICATIONS FOR CRITICAL RACE FEMINISM

As just mentioned, my good faith antidiscrimination claim was developed with the operationalization of Carbado and Gulati's working identity theory in mind. Could it be used to similarly concretize some basic tenets of CRF? I argue that the claim can be so used, specifically with respect to the related fem crit concepts of anti-essentialism and intersectionality. In so arguing, I analyze how the good faith claim might be used to remedy discrimination — in the form of sexual harassment — based on intersectional categories of identity when statutory antidiscrimination claims fail to do so. I use an involved hypothetical to help make my case.

A. *Anti-Essentialism and Intersectionality Defined, and Some Responses to Critiques Thereof*

Although it is quite likely that the targeted audience of this symposium has a good sense of what the terms anti-essentialism and intersectionality mean, I want to take a brief moment to specifically define those terms as I use them. In her foundational piece, *Race and Essentialism in Feminist Legal Theory*, Angela Harris defines gender

⁴⁶ Inequality of bargaining occupies an important role in contract law vis-à-vis the doctrines of, for example, unconscionability, undue influence, duress, incapacity, and misrepresentation.

⁴⁷ Carbado & Gulati, *Working Identity*, *supra* note 9, at 1262.

essentialism as “the notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.”⁴⁸ Harris further critiques the use of gender essentialism in (feminist) legal theory:

The result of this tendency toward gender essentialism . . . is not only that some voices are silenced in order to privilege others (for this is an inevitable result of categorization, which is necessary both for human communication and political movement), but that the voices that are silenced turn out to be the same voices silenced by the mainstream legal voice of “We the People” — among them, the voices of black women.

This troubles me for two reasons. First, the obvious one: As a black woman, in my opinion the experience of black women is too often ignored both in feminist theory and legal theory. . . . A second and less obvious reason for my criticism of gender essentialism is that, in my view, contemporary legal theory needs less abstraction and not simply a different sort of abstraction. To be fully subversive, the methodology of feminist legal theory should challenge not only law’s content but its tendency to privilege the abstract and unitary voice, and this gender essentialism also fails to do.⁴⁹

Several feminist legal scholars, some of whom Harris explicitly criticized in her famous article, have responded negatively to Harris’ critique of gender essentialism. They claim that anti-essentialist theory is, simply put, too post-modern to be of any use in the elimination of legally sanctioned and institutionalized forms of gender subordination. Specifically, they have argued that the deconstruction of the socially constructed category of women (as representative of the falsely universal white, American, middle-class woman) elides the oppressive power of patriarchy, which is still so entrenched in our cultural, economic, and sociopolitical realities.⁵⁰ Similarly, others (including some race and fem

⁴⁸ Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

⁴⁹ *Id.*

⁵⁰ See, e.g., Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 693 (2000) (arguing that: “Postmodernism . . . derealizes social reality by ignoring it, by refusing to be accountable to it, and, in a somewhat new move, by openly repudiating any connection with an ‘it’ by claiming ‘it’ is not there.”); Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 59 (arguing that “the four central ideas of critical social theory proven to be of most interest to critical legal theorists — ideas that center around the nature of power, of knowledge, of morality and of the self — will not be

crits) have argued that anti-essentialist theory, applied to its logical extreme, potentially devolves into neoliberal notions of the atomistic, individual self. In traditional antidiscrimination and equality discourse, the application of this dominant notion of individuality has already resulted in the law's emphasis on intentionality and the "perpetrator perspectives."⁵¹ This has further resulted in the law's disregard for the harm caused to victims of material and ideological conditions of subordination.⁵² Ironically, the law's continual move toward wholesale adoption of such conceptions of individuality, self, and free will have been at the center of critical race critique since its inception in the early 1980s.

These critiques of anti-essentialism are compelling, especially when considered in light of the way critical studies in the humanities (of French and American origins) since the 1980s has shifted toward a hyper-formalistic and depoliticized expertise. These studies are comprehensible only to the very small community of scholars and students completely devoted to its rhetoric and study.⁵³ The late Edward Said, one of our most important critical and literary scholars, criticized this trend as "virtually abandon[ing] any attempt at reaching a large, if not a mass, audience."⁵⁴ Said persuasively argued that this development in critical studies does not embody the political and "radically anti-institutional bias" that gave rise to Franco-American critical studies. In response to critics of fem crits who employ (some) postmodern theory and methodology, I add that this development likewise does *not* embody the spirit and goals of CRF.⁵⁵ Thus, I assert that these critiques are misguided to the extent that they suggest that anti-essentialist theory should be de-prioritized or even excised as part of critical race and/or feminist legal methodology because of its connection to formalistic critical studies in the humanities. In particular, they are misguided because they seem to assume that anti-essentialism's proponents advocate a limitless and depoliticized application of the theory that ignores the central issue of power. This is simply not the case.

helpful even to our understanding of patriarchy, and will frustrate rather than further our attempts to end it").

⁵¹ See Freeman, *supra* note 3, at 1052-57.

⁵² Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Movements that Performed the Theory*, 33 U.C. DAVIS L. REV. 1377, 1413-16 (2000) (critiquing postmodern "sublimation" of critical race concepts such as anti-essentialism).

⁵³ See Edward W. Said, *Opponents, Audiences, Constituencies, and Community*, in REFLECTIONS ON EXILE AND OTHER ESSAYS 118, 121-24 (2000).

⁵⁴ *Id.* at 124.

⁵⁵ *Id.* at 122-24.

Moreover, such critiques by implication wrongly characterize fem crits as uncommitted to the political project that inspires most, if not all, fem crit scholars, teachers, and activists: the elimination of forms of subordination based on interlocking identity based categories such as race, gender, and sex, and the elimination of material conditions resulting from that subordination.

Kimberlé Crenshaw's intersectionality theory, which is closely related to anti-essentialism theory, further exemplifies the antisubordination commitments of fem crits, as well as the contextualized and complex nature of these theories.⁵⁶ In another article foundational to Critical Race Feminism, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, Crenshaw critiques the structural inadequacies of existing antidiscrimination discourse:

With Black women as the starting point, it becomes more apparent how dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis. . . . In . . . race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race-and class-privileged women.

This focus on the most privileged group members marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination. I suggest further that this focus on otherwise-privileged group members creates a distorted analysis of racism and sexism because the operative conceptions of race and sex become grounded in experiences that actually represent only a subset of a much more complex phenomenon.⁵⁷

Crenshaw's call to incorporate intersectionality analyses into antidiscrimination discourse as well as Harris' call to likewise incorporate anti-essentialist analyses exemplify the consciously political employment of critical concepts. Fem crits are, in fact, ideally situated to

⁵⁶ See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1993) (critiquing "single-axis" framework of antidiscrimination law in contexts of feminist legal theory and domestic violence).

⁵⁷ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140.

engage in this kind of work because we interpret and analyze legal texts and contexts and because we understand how law constructs and reifies existing distributions of power in a complex, material, and discursive way. We must continue to engage critical methodologies in our interpretations and analyses of legal texts and contexts so that we may, in Said's words, continue as feminist, critical, and legal scholars to "connect . . . these more politically vigilant forms of interpretation to an ongoing political and social praxis."⁵⁸

B. *A Further Move Toward Praxis: Critical Race Feminism, Sexual Harassment, and the Good Faith Antidiscrimination Claim*

How might my good faith claim be used to connect the "politically vigilant forms" of interpretation and analysis initiated by fem crits to an "ongoing political and social praxis?" More particularly, how might it be used to connect anti-essentialism and intersectionality theory with an ongoing sociopolitical praxis that involves the incorporation of private law with critical race equality norms (what I have called elsewhere "critical race realism")?⁵⁹ Although I think that the claim could be used in many different ways to connect such theory with what I'll refer to as critical race realism praxis,⁶⁰ I again focus my attention on contractual relationships in the workplace, and more specifically on how sexual harassment in the workplace impacts those contractual relationships. I do so, first, because, as many feminist legal scholars and fem crits have demonstrated, existing sexual harassment jurisprudence, like most conventional antidiscrimination jurisprudence, has proven to be so inadequate in addressing gender subordination. Second, I focus on sexual harassment because women of color who endure it in the workplace face a peculiarly intersectional type of harassment, or as Sumi

⁵⁸ Said, *supra* note 53, at 147.

⁵⁹ Houh, *Critical Race Realism*, *supra* note 1 *passim*.

⁶⁰ For example, I could argue that my good faith claim be used in cases involving well-documented discrimination against black women in retail car sale negotiations. See generally IAN AYRES, PERVERSIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION (2001) (presenting evidence of (unintentional) race and gender discrimination in various retail markets); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991) (presenting evidence of discrimination against, in particular, black women in context the of retail car negotiations); Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109 (1995) (same). In this regard, I would also have to argue as a matter of contract doctrine that the good faith obligation should apply to contract formation as well as performance and enforcement, which is against the weight of authority in American contract law. See Houh, *Empty Vessel*, *supra* note 16; *supra* text accompanying notes 370-74.

Cho has named it, a type of "racialized sexual harassment."⁶¹

As is well known, Title VII prohibits two types of sexual harassment: quid pro quo harassment and hostile environment harassment.⁶² Quid pro quo harassment, recognized as economic in its nature, involves demands for sexual favors or sexual contact in exchange for "concrete employment benefits."⁶³ Hostile environment harassment, recognized on the other hand as non-economic or less economic in nature, arises when "sexual misconduct . . . has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."⁶⁴

Of the two types of harassment claims, quid pro quo claims are "easiest" for courts to recognize, at least definitionally and theoretically. Hostile environment claims are harder in light of how "hostile environment" has been defined by the courts. What does "unreasonabl[e] interfer[ence] with an individual's work performance" look like? What is an "intimidating, hostile, or offensive working environment?" Writing for the majority in *Harris v. Forklift Systems, Inc.*, Justice O'Connor defined the hostile work environment standard as having both objective and subjective components.⁶⁵ Actionable sexual misconduct must be "severe and pervasive enough to create an objectively hostile or abusive work environment."⁶⁶ Additionally, "if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, [and] there is no Title VII violation."⁶⁷ Justice O'Connor added that one need not suffer a "nervous breakdown" in order to bring an actionable hostile environment claim. She also conceded that even environments that do "not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."⁶⁸ Notwithstanding these concessions, it is safe to say that the standard set forth in *Harris* is problematic from feminist and fem crit perspectives. It is of little to no comfort that

⁶¹ Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 182-95 (1997).

⁶² *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

⁶³ *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1413 (10th Cir. 1987).

⁶⁴ *Meritor*, 477 U.S. at 2404-05 (quoting EEOC Guidelines, 29 C.F.R. § 1604.11(a)(3) (1985)).

⁶⁵ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

⁶⁶ *Id.*

⁶⁷ *Id.* at 21-22.

⁶⁸ *Id.* at 22.

women need not be driven to mental and emotional breakdown or be *seriously* psychologically damaged in order for them to bring cognizable hostile environment claims. Most women who face harassment at work occupy the vast middle terrain created by the *Harris* standard, and Title VII does not necessarily recognize the discriminatory nature of their experiences as deserving of remedy.⁶⁹

I argue that my good faith claim could be used to remedy the harm that these women incur from sexual misconduct in the workplace. Further, my claim would be especially well-suited for this purpose when we consider the *economic*, as well as psychological injury caused by sexual harassment, irrespective of how such harassment is categorized by Title VII. Gillian Hadfield's insights in this regard are invaluable. She writes:

The dichotomy [between economic effects of quid pro quo harassment and the non-economic effects of hostile environment harassment] is false because even if the *harasser* does not threaten to inflict direct economic injury, the *victim's response* to a harassing environment may have an economic effect. This may be true even if the harassment has no negative psychological impact on the victim; indeed, it may be true even if the harassment is not [subjectively] "offensive" to the recipient. Even women who are equipped with nerves and countenances of steel may nonetheless take action to their detriment in response to harassment.

By analyzing the hostile environment case as one of discrimination in the intangible psychological benefits of employment, courts have missed the essential violation of Title VII that harassment perpetuates — the introduction of a discriminatory factor into women's economic choices.⁷⁰

Hadfield's feminist and law and economics work in the context of sexual harassment and contract law exemplifies how economic analyses of the law might be brought to bear on critical analyses of the law, and vice versa.⁷¹

⁶⁹ In their excellent casebook, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY*, Katharine Bartlett, Angela Harris, and Deborah Rhode collected a number of resources demonstrating the pervasive, if not legally actionable, presence of sexual harassment in the workplace. KATHARINE T. BARTLETT ET AL., *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 18-44, 137-249 (3d ed. 2002).

⁷⁰ Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151, 1168 (1995).

⁷¹ See, e.g., Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas*

In this regard, if we understand that the law of contract, in its most traditional sense, is concerned with the private ordering (and performance) of obligations and choices mutually assented to by contracting parties, and further understand the ways in which women's choices within their contractual relationships are constrained because of sexual harassment, then we can see how my proposed good faith claim might be used to restore and preserve women's economic choices — their expectations under the contract — in the face of such harassment. Moreover, using the good faith claim to combat the economic deprivation caused by sexual harassment incorporates notions of antistatutory equality theory that the law of sexual harassment was originally designed to operationalize.⁷² And finally, to the extent my good faith claim could be used to combat particularly racialized forms of sexual harassment, it can help alleviate the broader economic inequalities suffered by working women of color.⁷³

1. A Law Firm Hypothetical: Christina

So, what kind of case am I contemplating? I am thinking of a hostile environment situation that would not be actionable under current Title VII sexual harassment law because either the objective or subjective prong of the claim would not be satisfied under *Harris*. Imagine Christina, a young Korean American law graduate, has just commenced working as an associate at a mid-sized law firm in a large city in the Midwest. She is one of only two Asian Americans at the firm, the other being an older male partner. During the first week at her firm, she, like all new employees, was required to sit through a "diversity program" with a message consisting primarily of two maxims: "This is a color-blind firm" and "We value diversity."

to a Reconceptualization of Rational Choice in Contract Law, 146 U. PA. L. REV. 1235 (1998) (applying feminist economist conceptions of "rational choice" theory to legal reasoning in contract law).

⁷² Of course, Catharine MacKinnon first argued that sexual harassment is a form of sex discrimination, and not many years later, it became actionable under Title VII. See CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 143-48 (1st ed. 1979).

⁷³ For example, a June 2004 report issued by the National Women's Law Center reports that women of color still face significant economic inequities in the workplace: "Women working full-time year-round still suffer a pay gap, and earn only about 77 cents for every dollar earned by men. Women of color fare even worse, with African-American women earning only 66 cents, and Hispanic women 54 cents, to each dollar earned by a white man." Press Release, National Women's Law Center, NWLC Celebrates 40th Anniversary of Title VII (June 28, 2004), available at <http://www.nwlc.org/details.cfm?id=1920§ion=newsroom>.

Dave, a white male who has recently been made a partner at the firm, assigns her to a complex and important case on which he is the lead partner. This requires Dave and Christina to spend a lot of time together, with Christina spending roughly half of her billable hours on Dave's big case.

One night as Christina is eating dinner over boxes of documents in a conference room at the firm, Dave decides to "check in" on her. He addresses her family history, asking, "Where are you *originally* from?" She tells him Cleveland. Dave looks perplexed and asks, "Is that where your parents are from?" "No," Christina replies, inwardly exasperated with the tired line of questions, "My parents immigrated from Korea." With that, Dave begins to tell her about his own personal history and background. He states that in college he exclusively dated Asian women. He adds, "I still think Asian women make the best girlfriends but, for me, it was just a phase." Christina is very quiet; she is quite offended by Dave's comments and knows that if she doesn't keep her mouth shut, she will say things that she might later regret. Given how new she is to the firm and her lowly status as a first-year associate, she does not want to make waves.

Dave finally decides it's time to go, leaving Christina alone to continue her work. However, Christina finds that she is having trouble concentrating. She makes a call to her best friend Tammy, a classmate of hers from law school who is also Asian American, and tells her about what just happened. Trying to make the best of her situation and give Dave the benefit of the doubt, Christina wonders whether Dave was somehow trying to connect with or impress her by so forthrightly sharing certain aspects of his personal life. She wonders if he was aware of how uncomfortable his comments made her feel. She and Tammy discuss whether Christina should have been more forthcoming and assertive about Christina's discomfort, but decide that not responding was the best thing to do at this point in time. They hope that Dave does not attempt to engage Christina again in this type of conversation and agree that Christina will avoid discussing personal issues with Dave. Christina sees that it is now late and decides to leave for the night. She has lost at least a couple of billable hours talking with Tammy about her interaction with Dave and knows she'll have to make up the time later in the week.

Over the course of the next several weeks, Dave attempts a few more times to engage Christina on the topic of interracial dating (specifically between white men and Asian women). Christina does her best to stick

to her general strategy of non-responsiveness. However, in her attempts to put off conversation without sounding “overly sensitive” she has at times said things to Dave like, “Well, I understand your interest in all of this and appreciate that you’ve thought about it, but I’m not an expert on interracial dating.” Moreover, these conversations invariably occur while Christina is hard at work and she finds that on days when these incidents occur, her efficiency and productivity decline because she becomes preoccupied with how to deal effectively with these situations. For Christina, this simply means that she works later on those days or during the weekends to make up for lost time. There is no noticeable decline in her monthly billable hours, which are comparatively high, but there is some inconsistency in her week-to-week performance. Fortunately, after several weeks, Christina’s strategy of general non-responsiveness seems to work, and Dave stops talking to her so much about his personal interest in Asian women.

Then one night at a cocktail hour, during a conversation with Christina and the Asian American partner, Jim, Dave comments on how much work Christina has done on his big case, and refers jokingly to Christina as his “hard-working geisha.” He quickly follows this with, “I’m just kidding, of course, but she *is* doing great work for me.” Christina is stunned and is sure her face is giving her away. To her surprise, Jim simply laughs and says, “Well, Christina is of course a hard worker. Christina, keep up the good work.” Jim then walks away. Christina says to Dave, “I really object to your use of the term ‘geisha’ and” Before she can finish, Dave simply says, “Can’t you take a joke? Anyway, I meant it as a compliment — even Jim got that.” Dave then walks away.

Christina tries to mingle a bit more before leaving the cocktail hour, as she doesn’t want to be seen “storming off” early. Afterwards, she calls Tammy to talk with her about the incident. Christina concedes, “I’m worried about coming off like I can’t take a joke or like I’m too sensitive. Jim didn’t seem to be offended by it.” Tammy asks, “Do you think Jim was just trying to change the subject? Do you think you should talk with him about it?” Christina is unsure, “I don’t know. He seemed fine with all of it, and I don’t want *him* to not give me assignments because I seem like a whiner. He’s a partner, after all. And before me, he was the only Asian American at the firm. He probably had to put up with a lot of stuff, so how would I look if I started complaining when I’m not even through my first year here?” Ultimately, Christina decides not to talk to Jim because she doesn’t want to be tagged as a troublemaker at this early stage in her career at the firm. But, she is not entirely satisfied with this

because she feels that by remaining quiet about it, she is playing into the stereotype that Dave certainly has of Asian women as being passive, compliant, and obedient. She is also concerned that this stereotype has been indirectly reinforced by Jim.

The following few weeks pass without incident. Then, one day, Dave tells Christina to pick up at their shared printer a draft brief that the two have been working on so that she can read and comment on it. Christina does so and finds that the last two pages he has printed are hardcopies of an internet personal ad. It includes a photo of a scantily clad Asian with long hair that reads: "Hot, tiny Asian woman looking to serve and submit." Christina is mortified. She sees Dave as she returns to her office. He is laughing and she says to him, "This is disgusting." He glances at the internet ad and says, "God, Christina, lighten up," and walks laughing into his office. Christina goes to her desk to continue her work and decides that aside from the case she is currently working on with Dave, she will decline to take any further assignments from him. She decides that if necessary, she will solicit work from other partners in order to avoid having to work further with Dave. She recognizes that doing so will bring certain risks in terms of her reputation with other partners and whether they will want to work with her, but that this risk is worth incurring given how strongly she now feels about not working with Dave. She also decides to start keeping a journal of these incidents for her own self-protection.

In this somewhat involved hypothetical, it is (hopefully) clear to those of us who consider ourselves feminists and fem crits that Christina has suffered from racialized sexual harassment. But given the (in)frequency of the objectionable incidents, these facts probably do not give rise to an actionable Title VII hostile environment claim. Dave's comments about interracial dating and his one-time use of the term "geisha" would probably be construed not as "physically threatening or humiliating" but as "mere offensive utterance[s]."⁷⁴ Moreover, it is unclear whether Christina, on a subjective level, found the environment "abusive" and/or whether her "psychological well-being" was significantly affected.⁷⁵ Although she had a difficult time deciding how to handle Dave, it seems that she actually dealt with the situation(s) with minimal psychological turmoil. Moreover, it is unclear whether the environment "detract[ed] from [Christina's] job performance" and/or kept her from

⁷⁴ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (discussing types of circumstances that determine whether environment is "hostile" or "abusive").

⁷⁵ *Id.*

advancing in her career at the firm. Although Christina would get temporarily distracted from her work in the aftermath of each incident, she was still able to maintain her billable hours, continue to be productive and do "great work."

Notwithstanding all this, it still remains that Christina, as an Asian American woman, is burdened by her environment in ways that other employees of the firm are not. Moreover, it is clear that even if we assume that Christina is a woman "equipped with nerves and countenances of steel," she "nonetheless [took] action to [her] detriment in response to [the] harassment" by deciding not to take further assignments from Dave.⁷⁶ That is, even if the harassment did not impact Christina's psychological well-being, it introduced a "discriminatory factor" in Christina's "economic choices."⁷⁷ As Hadfield has pointed out, this is exactly what existing Title VII law on sexual harassment misses.

2. Christina's Good Faith Antidiscrimination Claim

My proposed good faith antidiscrimination claim could be used to fill these gaps in Title VII, and to capture and remedy the economic harm caused by this type of hostile environment harassment. Also, more specific to CRF, it could be used to remedy such harm when it is based on racialized sexual harassment.⁷⁸ For example, if Christina were to bring a good faith antidiscrimination claim against her firm, that claim would be based on her reasonable expectation under the contract *not* to be subjected to stereotypes of Asian women as not only hard-working, obedient, and compliant (a racialized and gendered stereotype), but also as sexually available in a particularly racialized way. That such stereotypes exist in society generally would not be difficult to prove. Sumi Cho, a legal scholar as well as a scholar of ethnic studies, has written extensively about intersectional discrimination faced by Asian

⁷⁶ Hadfield, *supra* note 70, at 1168.

⁷⁷ *Id.*

⁷⁸ Intersectional discrimination in the form, for example, of racialized sexual harassment, is not actionable everywhere. Intersectional discrimination has been recognized, however, in a number of jurisdictions as a legally cognizable claim. *See, e.g.,* Lam v. Univ. of Hawai'i, 40 F.3d 1551, 1562 (9th Cir. 1994) (holding that when plaintiff claims race and sex bias, it is necessary to determine whether employer discriminated on basis of combination of factors, and not just on whether it discriminated against persons of same race or of same sex); Jeffries v. Harris County Cmty. Action Ass'n, 615 F.2d 1025, 1034 (5th Cir. 1980) (holding that nondiscriminatory treatment of black males and white females is irrelevant to question of discrimination against black female claiming bias on both racial and gender grounds).

American women in the workplace.⁷⁹ Significantly, she has brought into antidiscrimination and legal discourse important analyses of the historical racialized sexualization and fetishization of Asian women in Western culture. She writes:

The projection of a privately compliant and catering Asia femininity, predisposed to the assertion of white male desire, is overlaid upon a super-competent, professional public exterior. Accordingly, the converging stereotype feeds harassers' belief that Asian Pacific American women will be receptive to their aggressively heterosexual advances, that regardless of how competent or professional such women appear, they will make good victims, and will not fight back.

[T]he process of objectification that women in general experience takes on a particular virulence with the overlay of race upon gender stereotypes. Generally, objectification diminishes the contributions of all women, reducing their worth to male perceptions of female sexuality. In the workplace, objectification comes to mean that the value of women's contributions will be based not on their professional accomplishments or work performance, but on male perceptions of their vulnerability to harassment. Asian Pacific women suffer greater harassment exposure due to racialized ascriptions (for example, they are exotic, hyper-eroticized, masochistic, desirous of sexual domination, etc.) that set them up as ideal gratifiers of western neocolonial libidinal formations.⁸⁰

In the hypothetical involving Christina, that these stereotypes of Asian women existed at the firm also would be relatively easy to prove, given the nature of Dave's comments about the "hard working geisha," and especially because he connected this stereotype to Christina's work performance. Moreover, Dave's repeated attempts to discuss with Christina interracial dating between white men and Asian women, his use of the loaded representational term "geisha" in reference to her, and his leaving the internet personal ad where Christina would find it demonstrate Dave's ascribing to Christina the racialized and sexualized stereotypes of Asian women as "exotic, hyper-eroticized, masochistic, [and] desirous of sexual domination." Combined with Christina's professionalism and ultimately consistent productivity throughout, Dave's comments further demonstrate that he held a stereotype of

⁷⁹ Cho, *supra* note 61 *passim*.

⁸⁰ *Id.* at 186, 191.

Christina as “receptive” to his arguably veiled sexual advances and as a “good victim” who would “not fight back.”

The firm would have an opportunity to counter Christina’s evidence of the existence of such racially sexualized stereotypes in the workplace. However, diversity training that relies on the feel-good rhetoric of colorblindness and employer proclamations of “valuing diversity” are poor substitutes for programs, policies, and institutional norms and practices that would actually result in the hiring, retention, and promotion of critical masses of women and people of color. Moreover, the firm would have a difficult time proving the absence of relevant stereotypes, given that Christina and Jim are the only two Asian Americans employees of the firm, Jim’s reaction to Dave’s “geisha” comment at the cocktail party, and the failure of the firm’s diversity program to expose its employees to any meaningful discussion of race and gender difference in the workplace.

Under my proposed claim, Christina would next have to show how the stereotypes, when imposed upon her as a type of “working identity,” impacted her work performance. Christina both performed and counterperformed against this working identity. In her attempt to appear professional in the face of Dave’s misconduct by trying to be non-responsive and by *not* complaining to anyone about it for fear of being perceived as a troublemaker (and, thus, not a team player), she undertook certain risks. For example, her conduct might have had and probably would have had the undesired effect of reinforcing stereotypes about her passivity and status as a good victim who would not fight back. At the same time, Christina was acutely aware that others might attach such stereotypes to her. Thus, when pushed to her limit, she objected to being referenced as a “geisha” and to the internet personal ad left for her by Dave. In objecting and counter-performing her identity, Christina of course incurred other risks with respect to Dave, her superior. Would he tell other partners that she was uptight and oversensitive? If so, what would the reputational fallout be? Would it result in fewer opportunities to work with others at the firm? Would she then have to work twice as hard to (re-)prove her collegiality and her willingness to be a team player?

The next element of my good faith claim requires Christina to allege that the firm took an adverse employment action against her and that this action was caused by the unreasonable expectations imposed on her due to her attached working identity. The nature of the claim, however, compels me to rethink this element of the claim as I’ve thus articulated it.

I would now reframe this element more broadly, not in terms of adverse employment action, but in Hadfield's terms, that is, in terms of the restraining of, in this case, women's choices because of sex-based harassment and discrimination. Reframing the element in this way is useful not only because it enables the good faith claim to encompass harassment claims that would not otherwise be actionable under Title VII. It is also useful as a theoretical and doctrinal matter because it gets to the heart of the *contractual* nature of the good faith claim: the breach of the good faith duty and of the contract itself occurs when *economic* deprivation results from the harassing and/or discriminatory conduct. We are perhaps used to thinking of such economic deprivation as, for example, termination from employment or as a failure to promote, but, as Hadfield has argued, such deprivation also occurs when the economic and workplace choices of the non-breaching party become constrained because of discriminatory conduct. This is precisely what has happened to Christina. Her choices about whom she can work with — unlike the choices of others at the firm — have become constrained because of Dave's misconduct. And, depending on how Dave responds to her decision, her choices may become further constrained if other partners are not sympathetic to her situation.

The availability of my proposed good faith antidiscrimination claim would enable someone like Christina, who would not be able to bring a Title VII hostile environment claim because she arguably did not feel sufficiently abused, or the harassment was not sufficiently "pervasive," to pursue a remedy for the economic harm she incurred because of the harassment. The claim is even more appealing because, being contractual in nature, it could readily absorb Gillian Hadfield's compelling arguments about the *economic* harm resulting from sexual harassment and directly address those harms. Importantly, the claim continues to incorporate the important theoretical insights of critical race scholars and critical race feminists alike.

CONCLUSION

In this Essay, I have urged critical race feminists to more explicitly and actively interrogate and deconstruct the longstanding dichotomy of public and private law. Further, I have suggested that we do so by not only continuing to critique private law areas such as, *inter alia*, property law, contract law, and business law, but also by making positive interventions in those areas of law with the goal of effecting both theoretical and doctrinal change. This call to critical race feminists is no doubt motivated by my own interest and work in contract law and,

specifically, how the contractual doctrine of good faith and fair dealing might be used to infuse the private law of contract with public and critical race norms of equality.

To that end, I have outlined in this Essay a proposed common law antidiscrimination claim rooted theoretically in both critical race and contract theory, and in the contractual doctrine of good faith (rather than in traditional civil rights jurisprudence). I have been working through this project for quite some time, and this symposium has given me the great opportunity to further theorize and develop my proposed claim so that it takes into account and addresses some of the profoundly important insights and critiques critical race feminists have been making for the past twenty years. Thus, I have attempted to demonstrate in this Essay how my proposed good faith antidiscrimination claim could be used to address essentialist and intersectional critiques of employment discrimination law and to demonstrate the continued relevance and importance of these critiques.

Finally, I hope that in this Essay I have demonstrated how we might think about how to bridge the chasm between theory and praxis in our scholarly work, for critical scholars in the law have long been criticized for our failures in this regard.⁸¹ And while many of us are committed and effective teacher-activists inside and outside of the classroom, we do need to continue to suggest ways in which we might actualize our scholarly critiques within our scholarly work, so that, again in the words of Edward Said, we continue to “connect[.]... politically vigilant forms of interpretation to an ongoing political and social praxis.”⁸²

⁸¹ For example, the Honorable Harry T. Edwards, of the Court of Appeals for the District of Columbia, famously expressed his concerns over “the growing disjunction between legal education and the legal profession.” Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992). Judge Edwards criticized in particular what he then viewed as the increasingly theoretical nature of legal scholarship in the fields, for example, of law and economics, law and literature, critical legal studies, Critical Race Theory, and feminist legal theory. *Id. passim*. He further questioned this scholarship’s usefulness to practicing lawyers and to judges, and cautioned that the unmediated and continued emphasis on such theoretical scholarship in elite law schools would result in the desertion of a primary responsibility of law schools to make and train lawyers. *Id. passim*.

⁸² Said, *supra* note 53, at 147.
