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Off-White: Al-Khazraji and Shaare Tefila's Potential to De-Essentialize Antidiscrimination Law

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OFF-WHITE: AL-KHAZRAJI AND SHAARE TEFILA'S POTENTIAL TO DE-ESSENTIALIZE ANTIDISCRIMINATION LAW

Gabriella Kamran[1]

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INTRODUCTION

The figure of the Arab Jew has historically occupied a space at the margins of Jewish life, rendered peripheral or even invisible by a lens trained on the experiences of Jews of European descent.[2] Drawing in part from the academic lineage of Kimberlé Kimberle Crenshaw's theory of intersectionality, American Jews of Arab and Middle Eastern descent ("Mizrahi Jews") are increasingly joining their Israeli counterparts and Jews of color in the United States in challenging the naturalization of Jewish whiteness in the popular imagination.[3] In a

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1. Gabriella Kamran, J. D., University of California Los Angeles College of Law, 2022. The author would like to thank Sophie Levy, Evan Mateen, and the rest of Zaman's founding members for their contributions to Iranian Jewish culture and for being exceptionally cool people. She would also like to thank Professor Cheryl Harris for being a once-in-a-lifetime educator who teaches with wisdom, humor, and vital purpose.

2. *See generally* ELLA SHOHAT, ON THE ARAB-JEW, PALESTINE, AND OTHER DISPLACEMENTS (2017) (interrogating the supposed dichotomy between Arab and Jewish identity that figures in Jewish, Arab-Muslim, and Zionist discourse and exploring the possibilities of anti-colonial solidarity engendered by the experiences of Arab Jews)*; see also* Leeor Ohayon, *Focusing a New Lens on Mizrahiut*, ZAMAN (Mar. 29, 2020), https://www.zamancollective.com/all-posts/leeorohayonmizrahiut ("When I asked my interviewees to point me towards what they considered as Mizrahi [Middle Eastern Judaism], I was told repeatedly to 'go to the periphery.'").

3. The author is a member of one such media collective dedicated to centering the history and culture of Mizrahi Jews. *See, e.g.*, *What is Zaman?,* ZAMAN, https://www.zamancollective.com/whatiszaman; *Introducing The Jews of Color and Sephardi/Mizrahi Caucus Working In Partnership with JVP,* JOCSM (Aug. 4, 2016), http://jocsm.org/introducing-the-jews-of-color-caucus-working-in-partnership-with-jvp; Code Switch, *Mem-*

striking parallel between this groundswell of community theorizing and legal strategy,[4] the Supreme Court in 1987 decided as companion cases *Saint Francis College v. Al-Khazraji* and *Shaare Tefila Congregation v. Cobb*, which held that Arab and Jewish plaintiffs can bring race discrimination claims under the Civil Rights Act of 1866 despite both groups' contemporary status as "Caucasian."[5] *Al-Khazraji* and *Shaare Tefila*, seminal cases in the judicial construction of race in the United States, present a singular opportunity for an intersectional critique of the law's role in constructing Jewish and Arab identities specifically, as well as the implications of this construction for race discrimination jurisprudence generally. In this Article, I argue that the act of reading these companion cases as a synthesis, rather than discrete cases asking similar questions—an intersection, rather than parallel axes—and centering the figure of the Arab Jew reveals the cases' potential to unsettle racial essentialism by way of an intersectional critique of juridical whiteness.

I. *Al-Khazraji* and *Shaare Tefila* on the Construction of Race

Al-Khazraji is an employment discrimination case interpreting Section?1981 of the Civil Rights Act of 1866, which prohibits racial discrimination in the making of private and public contracts.[6] Majid Al-Khazraji, an Iraqi professor, alleged that his employer Saint Francis College denied him tenure on the basis of his "Arabian" race.[7] In *Shaare Tefila*, the plaintiff congregation responded to anti-Semitic vandalism of its synagogue by suing the perpetrators for discrimination against Jews under Section 1982 of the same Act, which prohibits racially discriminatory interference with property rights.[8] Despite their disparate factual scenarios and statutory causes of action, the two cases posed the same question to the Court: can a group considered

bers of Whose Tribe?, NPR (Apr. 18, 2018), https://www.npr.org/2018/04/18/602678381/members-of-whose-tribe.

4. While a deliberate theory of the intersection between Jewish and Arab identities was absent in the plaintiffs' legal strategy in these cases, Arab and Jewish community organizations did join forces and file legal briefs on one another's behalf in a relatively rare showing of inter-communal cooperation. *See* Al Kamen, *Seeking to Expand 1866 Rights Act, Jewish and Arab Groups Join Hands*, Wash. Post (Nov. 20, 1986), https://www.washingtonpost.com/archive/politics/1986/11/20/seeking-to-expand-1866-rights-act-jewish-and-arab-groups-join-hands/60ba685a-4e28-4f79-8018-6c4b7a321c60.

5. Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 107 (1987). *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987).

6. *Al-Khazraji*, 481 U.S. 604.

7. *Id.* at 604.

8. *Shaare Tefila*, 481 U.S. 615.

"Caucasian" in modern understanding bring a racial discrimination claim against a defendant who is also Caucasian?[9] The answer depended on the Court's definition of Caucasian, and its formulation is among the Court's most forthright articulations of race as a legal construct.

The Court took an originalist approach to statutory interpretation, parsing dictionaries and the Act's legislative history to arrive at a definition of race as it was understood in 1866.[10] The Court held that Congress intended the protection of Section 1981 and Section 1982 to extend to those subject to intentional discrimination "solely because of their ancestry or ethnic characteristics."[11] Drawing from nineteenth-century encyclopedic sources, the Court concluded that both Arabs and Jews, whom we might consider distinct ethnic groups today, were indeed considered distinct races at the time of the Act's passing.[12] The Court distinguished its adopted ancestry-or-ethnicity formulation of race from the physiognomy-forward "modern scientific theory" of race contemporaneous to the decision, which, according to the Court and several of the parties,[13] classified Arabs and Jews as Caucasians.[14] In conclusion, the Court held that the plaintiffs in both *Al-Khazraji* and *Shaare Tefila* were entitled to bring their race discrimination claims against a Caucasian defendant if they could show that they faced discrimination because of their ancestry or ethnic characteristics, and not solely on the basis of national origin or religion.[15]

9. The Al-Khazraji Court sidestepped the fraught question of whether "same-race" or "intra-racial" discrimination is actionable under §?1981 by determining that Arabs are not actually Caucasian for the purpose of a §?1981 claim. *Al-Khazraji*, 481 U.S. at 609-10 ("[P]etitioner submits that the section does not encompass claims of discrimination by one Caucasian against another. We are quite sure that the Court of Appeals properly rejected this position. Petitioner's submission rests on the assumption that all those who might be deemed Caucasians today were thought to be of the same race when § 1981 became law in the 19th century. . ."). *See generally* Enrique Schaerer, *Intragroup Discrimination in the Workplace: The Case for "Race Plus"*, 45 HARV. C.R.-C.L. L. REV. 57 (2010) (observing that courts lack a coherent or consistent doctrinal approach to racial discrimination cases between members of the same racial group and arguing for a "race-plus" doctrine parallel to existing sex-plus doctrine).

10. *Al-Khazraji*, 481 U.S. at 613.

11. *Id.*

12. *Id.* at 618-19.

13. The legal theory advanced by the plaintiffs in Shaare Tefila was that even though Jews are not racially distinct from Caucasians, the fact that the white-supremacist defendants perceived them as racially distinct was sufficient to bring the claim within the scope of § 1982. *Shaare Tefila*, 481 U.S. at 616-17.

14. *Al-Khazraji*, 481 U.S. at 607; *Shaare Tefila*, 481 U.S. at 617.

15. *Al-Khazraji*, 481 U.S. at 613; *Shaare Tefila*, 481 U.S. at 615.

These brief opinions are notable in the canon of race discrimination cases because, among other things, they represent a relatively high watermark in the Court's recognition of the socially constructed nature of race. The Court's repudiation of a static, essentialized notion of race is twofold, apparent both in its attention to the historical evolution of racial categories and its specific rejection of a "physiognomic" or otherwise biological criterion for racial identity.[16] Not only did the Court sketch the shifting contours of the ways in which the United States has delineated groups of people along racial lines over the centuries, but it also made an explicit finding that the contemporary understanding of "race as involving divisions of mankind based upon different physical characteristics" is a modern invention, a figment of epistemological history.[17] The *Al-Khazraji* opinion's citation to a definition of race as "a family, tribe, people or nation," goes further to evoke an understanding of race that is based in affinity and kinship with a particular community.[18]

Notably, Justice Brennan wrote a concurrence in *Al-Khazraji* to underscore the indefinite and overlapping boundary between one's ancestry or ethnicity (race, per the majority opinion) and national origin; he noted that in the realm of Title VII, ancestry and ethnicity are sometimes considered synonymous or at least co-constitutive of national origin.[19]

In the aforementioned respects, *Al-Khazraji* and *Shaare Tefila* mirror the legal philosophy underlying certain district and appellate decisions that grapple with the boundaries of actionable racial discrimination in employment under Title VII.[20] Although Title VII is a separate statute from Section 1981 and Section 1982 and does not

16. *Al-Khazraji*, 481 U.S at 613.

17. *Id.*at 611.

18. *Id.*

19. *Id.* at 614 (reasoning that one's ancestry or ethnicity and national origin are often "identical as a factual matter: one was born in the nation whose primary stock is one's own ethnic group"); *see also* Sarah Khanghahi, *Thirty Years After al-Khazraji: Revisiting Employment Discrimination Under Section 1981*, 64 UCLA L. REV. 794 (2017) (arguing that that § 1981's outdated notion of race creates a theoretical distinction between categories such as race, color, ancestry, ethnicity, and national origin in situations where no such distinction exists and advocating for the inclusion of national origin discrimination in § 1981's scope).

20. *See, e.g.,* Sasannejad v. Univ. of Rochester, 329 F. Supp. 2d 385, 391 (W.D.N.Y. 2004) ("A claim based on national origin discrimination is theoretically different from a claim based on religious or racial discrimination. Nevertheless, in certain circumstances, the two claims may be so interrelated as to be indistinguishable"); *but see* Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1027 (11th Cir. 2016) (holding that Title VII's prohibition on racial discrimination extends only to immutable characteristics, i.e. "matter[s] of birth, and not culture").

share the legislative history from which the *Al-Khazraji* Court derived its definition of race, some courts have engaged the same historical and sociological analysis of the socially constructed nature of race in determining the parameters of a cause of action under Title VII.[21]

A notable example is the Ohio district court case *Perkins v. Lake County Department of Utilities*, in which a defendant employer accused of disparate treatment on the basis of race (Native American) attempted to evade the charge by contesting the plaintiff's Native American identity.[22] After a survey of the various evidence before it purporting to prove or disprove the plaintiff's "genetic/hereditary" classification as a Native American, the *Perkins* court all but abandoned the task, emphasizing the near impossibility of accurate or objective racial categorization given the discontinuous, arguably illusory nature of race itself.[23] The *Perkins* court concluded, similar to the *Al-Khazraji* and *Shaare Tefila* Court, that "'race' is not a static concept. It lives and changes according to popular beliefs."[24] In particular, the court described attempts to make a principled distinction between race and national origin as an exercise in "mental gymnastics."[25] Although *Perkins* is somewhat of an outlier in the collection of Title VII cases interpreting the parameters of viable race discrimination claims,[26] it is

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21. *See, e.g.*, Walker v. Sec'y of Treasury, I.R.S., 713 F. Supp. 403, 405 (N.D. Ga. 1989) ("The historical predecessor to Title VII is the Civil Rights Act of 1866 and therefore 42 U.S.C. § 1981. In fact, in a suit such as this one, the legal elements and facts necessary to support a claim for relief under Title VII are identical to the facts which support a claim under § 1981"); Vill. of Freeport v. Barrella, 814 F.3d 594, 598 (2d Cir. 2016) ("Based on longstanding Supreme Court and Second Circuit precedent, we reiterate that "race" includes ethnicity for purposes of § 1981, so that discrimination based on Hispanic ancestry or lack thereof constitutes racial discrimination under that statute. We also hold that "race" should be defined the same way for purposes of Title VII").

22. Perkins v. Lake Cty. Dep't of Utils., 860 F. Supp. 1262, 1262 (N.D. Ohio 1994).

23. Perkins, 860 F. Supp. at 1271 ("The traditional racial categorizations of Negroid, Caucasoid, and Mongoloid have been narrowed, expanded, and/or reconfigured by various social scientists and other disciplines over the years to the point that the very notion of 'race' may be deemed illusory.") (citing STANLEY M. GARN, HUMAN RACES 15 (3rd ed. 1971); ASHLEY MONTAGU, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE 38 (1964)).

24. *Id.* at 1274 (the *Perkins* court, like the *Al-Khazraji* and *Shaare Tefila* Court, invokes an understanding of race constituted of a mutual affinity between an individual and a community).

25. *Id.* at 1272.

26. *See* D. Wendy Greene, *Categorically Black, White, or Wrong: Misperception Discrimination and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 91, 131 (2013) (describing a trend in which courts require Title VII discrimination plaintiffs to prove their actual membership in the protected class upon which their claim of discrimination is based, and arguing that this gloss on Title VII reflects "courts' longstanding treatment of 'race and ethnicity as biological, morphological concepts and discrimination as a reaction to a set of biologically fixed traits."); *see also* D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in EEOC v. Catastrophe*

illustrative of the broad legal implications of the Court's rejection of racial essentialism in *Al-Khazraji* and *Shaare Tefila* for the field of antidiscrimination jurisprudence generally.

II. Intersectionality, Whiteness, and the Arab Jew

While the Supreme Court's destabilization of racial essentialism in *Al-Khazraji* and *Shaare Tefila* is most obvious in its explicit repudiation of a historically consistent or physiologically-grounded definition of race, there is another basis for critical racial analysis implicit in the holdings: the particular identities at issue in the cases—Arab and Jew—are both located at the margins of whiteness and at the intersection of race, national origin, and religion. This paper argues that the Arab and Jewish identities of the plaintiffs are not coincidental; rather, they demanded the Court's attention because they exist at a jagged, unruly seam of the sociological and legal construction of race. Through the lens of intersectionality theory, the Court's construction of race specific to Arabs and Jews provides fertile ground for the examination and potential disruption of the essentialized, single-axis framework of antidiscrimination law.

The concept of intersectionality was introduced to the legal field by Kimberle Crenshaw, who analyzed Title VII cases involving Black female plaintiffs to illustrate what is lost in the traditional single-axis formulation of antidiscrimination law.[27] For Crenshaw, the problem had two dimensions. First, the insistence in antidiscrimination jurisprudence of limiting claims to discrete, single-axis theories—in her example, race discrimination and gender discrimination—erases the experience of people at the intersection of those axes, who experience discrimination not as the sum of its protected class parts but as a qualitatively distinct mode of oppression.[28] Beyond this elision, Crenshaw argues that the single-axis framework warps our understanding of the content of protected class categories in favor of its most privileged members.[29] This approach generates a legal construction of discrimination in which, for example, gender discrimination jurisprudence is

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Management Solutions, 71 U. Miami L. Rev. 987, 1026-27 (2016) (identifying the strict immutability doctrine, or the understanding of race as a "static, biological identity. . .marked by immutable physical characteristics," is an entrenched and central feature of anti-discrimination jurisprudence).

27. *See* Kimberle Crenshaw, *Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics*, 1989 U. Chi. Legal F. 139 (1989).

28. *Id.* at 140.

29. *Id.* at 149.

modeled on the experiences of White women, and racial discrimination is constructed in the doctrine on the basis of the experiences of Black men, yielding a monolithic and universalized doctrinal understanding of class-based discrimination.[30]

A significant analytic component of Crenshaw's theory is that these class representatives' privileges go unmarked, in that White women's whiteness or Black men's maleness is naturalized as a juridical baseline rather than named as an axis of intersectional identity.[31] Devon Carbado has termed this absence of demarcation "colorblind intersectionality," calling attention to the way in which removing whiteness from the intersectional calculus "legitimizes a broader epistemic universe in which the racial presence, racial difference, and racial particularity of [W]hite people travel invisibly and undisturbed as race-neutral phenomena over and against the racial presence, racial difference, and racial particularity of people of color."[32]

The application of intersectionality theory to *Al-Khazraji* and *Shaare Tefila* may begin with an acknowledgement that the racial classes in question—Arab and Jewish—were held out for all intents and purposes as discrete, arguably monolithic universes of experience; nowhere was there any indication in the companion opinions that these classes may overlap. To center, the figure of the Arab Jew is therefore, the first task of an intersectional analysis of the two cases.[33] In the pathbreaking article, *White Jews: An Intersectional Approach*, David Schraub explains that Jewishness and whiteness—in the sense of European ancestry and white physiognomy—are conflated in the public imaginary, thereby erasing the history and experiences of non-white Jews.[34] That this racial construction of Jewishness as white is produced both within and without the Jewish community is evident in the legal dynamics of *Shaare Tefila*, in which both the Jewish plaintiffs and the Court maintained a universalized definition of Jews as ostensi-

30. *Id.* at 140.

31. *Id.* at 146.

32. Devon W. Carbado, *Colorblind Intersectionality*, 38 SIGNS 823, 823-24 (2013).

33. I am deliberately refusing the Court's categorization of both Arab and Jewish identity as unproblematically white in the contemporary racial order. I therefore conceptualize the Arab Jew as a figure at the intersection of multiple axes of oppression, more than one deviation away from the Court's white baseline.

34. David Schraub, *White Jews: An Intersectional Approach*, 43 AJS REVIEW 379, 381 (2019). Many use the term "Ashkenormativity" to refer to the centering of Ashkenazi Jews—Jews of European descent—in Jewish institutions and cultural productions. *See, e.g.*, Jonathan Katz, *Learning to Undo 'Ashkenormativity'*, THE FORWARD (Nov. 5, 2014), https://forward.com/opinion/208473/learning-to-undo-ashkenormativity/.

bly Caucasian in the contemporary racial paradigm.[35] Even the ultimate classification of Jews as ethnically and ancestrally distinct[36] presumes a coherence that belies the pluralistic ethnic composition of the Jewish community. This construction is an example of colorblind intersectionality, in which racial discrimination against Jews is defined by the experiences of those who exist one deviation away from an unmarked white baseline—white but-for their Jewishness. Similar to Crenshaw's theory of the erasure of Black women's experiences, the Arab Jew is excluded from judicial racial reckoning.[37]

Just as Crenshaw's theory of intersectionality[38] reveals both the literal and epistemological exclusion of intersectional identities in legal constructions of race, bringing the Arab Jew from margin to center further produces a richer understanding of the social and legal phenomenon of whiteness. Both Arab and Jewish identity exist in uneasy tension with whiteness, straddling a liminal space of white privilege—both in the structural and physiognomic senses—and abjection under white supremacy.[39] As the Court's historical analysis in *Al-Khazraji* demonstrates, both the Arab and Jewish communities have been subject to a process of whitening since the nineteenth century, folding the groups into the unmarked universal.[40] That this assimilation is incomplete is evidenced by the *Al-Khazraji* and *Shaare Tefila* cases themselves, in which the plaintiffs had to establish themselves as sufficiently marked to bring a discrimination claim.[41] Jewish writ-

35. *See* Brief for the Petitioners, Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (No. 85-2156); Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987). *See also* Naomi W. Cohen, *Shaare Tefila Congregation v. Cobb: A New Departure in American Jewish Defense?*, 3 JEWISH HISTORY 95 (1988) (demonstrating that publications by Jewish community organizations during the same time period shared the same universalized construction of Jews).

36. *Shaare Tefila*, 481 U.S. at 617-18.

37. *See generally* Kimberle Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 Conn. L. Rev. 1253, 1343 (2011)

38. See Kimberle Crenshaw, *Post Script: Reflections on a Twenty Year Old Concept, in Framing Intersectionality* 221 (Helma Lutz et al. eds., 2011).

39. Perhaps the best example of the jagged edges of Jews' assimilation into whiteness is the insistence of white supremacist and neo-Nazi groups that Jews are non-white predators of the white race. *See, e.g.*, Eric K. Ward, *Skin in the Game: How Antisemitism Animates White Nationalism*, PUB. EYE MAG., Summer 2017, at 9. The ostensible whiteness of Arabs has been particularly troubled post-9/11. *See, e.g.*, Loubna Qutami, *Censusless: Arab/Muslim Interpolation into Whiteness and the War on Terror*, 23 J. ASIAN AM. STUDIES 161 (2020)

40. *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 605 (1987); *see also* Schraub, *supra* note 34, at 379 ("The concept of the Jew as even being potentially White is of relatively recent vintage.").

41. *See Al-Khazraji*, 481 U.S. 604, 605 (1987) (permitting § 1982 claim by person of Arabian ancestry only where he "can prove that he was subjected to intentional discrimina-

ers have adopted terms such as "conditionally white," "functionally white," or "off-white" to describe the uneven incorporation of Jews into whiteness;[42] the same terms might be ascribed to Arabs in the public imaginary, particularly in the aftermath of 9/11.[43]

From this particular vantage point at the margins of whiteness, what can the Arab Jew tell us about what it means to be white under the law? Schraub notes that Crenshaw's and Carbado's project of naming whiteness as a distinct axis of intersectional identity so to denaturalize it as an invisible baseline for antidiscrimination law is the foundation of the field of critical whiteness studies.[44] This scholarly pursuit directly counters the law's tendency to render whiteness opaque by exposing the constituent parts of power and privilege bestowed by the legal and social classification of whiteness.[45] *Al-Khazraji* and *Shaare Tefila*'s process of documenting the pluralistic construction of whiteness over the centuries maps well onto the rubric of critical whiteness studies. It is the indeterminacy of the racial identity of the Arab Jew—a racial amorphousness of such magnitude that it propelled not one but two cases to the nation's highest Court—that forced the Court to lay down a definitive reification of the boundaries of whiteness. In focusing the microscope on whiteness, the Court makes the momentous observation that the emperor of whiteness has no clothes—the parameters of what it means to be white, like any other racial category the law tends to recognize as marked and distinct, lives in the eye (and the legislative power) of the beholder.[46] And, perhaps more importantly, the Court's demonstration of the incomplete assimilation of

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tion based on the fact that he was born an Arab, rather than solely on the place or nation of his origin"); *Shaare Tefila*, 481 U.S. at 617 (requiring § 1982 claim by Jewish Caucasian Congregation to allege not only that defendants were motivated by racial animus, but also that the animus was directed at the type of group that Congress intended to protect).

42. Schraub, *supra* note 34, at 379 (citing Nylah Burton, *"White Jews: Stop Calling Yourselves "White-Passing"*, JEWISH DAILY FORWARD (July 2, 2018), https://forward.com/opinion/404482/white-jews-stop-calling-yourselves-white-passing/; Tema Smith, *"Are Jews White? American History Says It's Complicated"*, JEWISH DAILY FORWARD (Jan. 9, 2019), https://forward.com/opinion/417274/are-jews-white-american-history-says-its-complicated/).

43. *See generally* AMANEY JAMAL & NADINE NABER, RACE AND ARAB AMERICANS BEFORE AND AFTER 9/11: FROM INVISIBLE CITIZENS TO VISIBLE SUBJECTS (2008) (essay collection exploring whether and how American racial formations—such as the U.S. census categorization of Arabs as white—can explain the experiences and identities of Arab Americans, including insofar as Arabs and Muslims were demonized as a threat to national security post-9/11).

44. Schraub, *supra* note 34, at 386-87.

45. Schraub, *supra* note 34, at 387 ("By fleshing out Whiteness as a cohesive analytical category in its own right, Whiteness can be thought of in a textured and variegated way. . . .").

46. *See Al-Khazraji*, 481 U.S. at 610.

Jews and Arabs into whiteness and the possibility of discrimination within modern racial categories explodes the doctrine's traditional presumption, identified by Crenshaw, that "a discriminator treats all people within a race or sex category similarly."[47] Triangulating Arab, Jew, and white in this way, the structure collapses on itself.

An intersectional analysis of *Al-Khazraji* and *Shaare Tefila* would be incomplete without an acknowledgement that Arab and Jewish identities which, in addition to residing at the margins of whiteness, exist at the intersection of race, national origin, and religion, as they are commonly deployed in the United States. Schraub writes that Jewishness is "simultaneously national, racial, ethnic, and religious in character, but not reducible to any of these[,]"[48] confounding the attempts of less intersectional-inclined theorists to keep these axes of discrimination separate. The figure of the Arab, too, carries racial, national, and religious baggage;[49] the conflation of these categories accelerated post-9/11 and reached a feverish apex with Donald Trump's executive orders limiting travel and immigration to the United States from Muslim-majority, mostly Arab countries.[50] The awkward juridical attempt to shoehorn Jewish and Arab experiences of discrimination into one box,[51] or one axis—critiqued by Justice Brennan in his *Al-Khazraji* concurrence as a frequently futile exercise[52]—exposes the frayed thread at the seams of racial identity in antidiscrimination law.

III. Conclusion and Implications for Antidiscrimination Law

The significance of *Al-Khazraji* and *Shaare Tefila*'s historically contingent pluralized definition of whiteness for antidiscrimination ju-

47. Crenshaw, *supra* note 27, at 150.

48. Schraub, *supra* note 34, at 389. *See also* Cohen, *supra* note 32 (identifying *Shaare Tefila* as a paradigm shift in which the organized Jewish community first entertained a legal theory of Jews as a racial rather than religious group).

49. Abdullahi v. Prada USA Corp., 520 F.3d 710, 712 (7th Cir. 2008) (distinguishing *Al-Khazraji* by explaining, meticulously, that because the plaintiff's nation of origin was Iraq, which is not an Arab country due to its location outside the Arabian Peninsula, any discrimination he faced for being Arab must necessarily have been on the basis of ethnicity).

50. See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017); Trump v. Hawaii, 138 S. Ct. 2392 (2018) (Sotomayor, J., dissenting).

51. The box is literal: Title VII and §?1981 plaintiffs generally must choose from a checklist of protected bases including race, national origin, and religion when filing a claim. *See Abdullahi*, 520 F. 3d at 711.

52. Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 618 (1987) (Brennan, J., concurring).

risprudence is hard to understate. In a legal field in which district and appellate courts are still encountering (and often recognizing) defenses that mobilize essentialized, genetic definitions of race to evade discrimination lawsuits, these cases provide a legal basis for radically expanding the opportunities for relief from racial discrimination as it is actually experienced by people of marginalized identities. Among the causes of action that may be substantively developed from this intersectional reading of *Al-Khazraji* and *Shaare Tefila* are (1) so-called misperception cases and (2) the line of Title VII cases that grapple with the validity of claims of discrimination on the basis of non-biological but arguably racially-related cultural behaviors such as hairstyles.

Misperception cases involve claims of discrimination on the basis of a protected characteristic with which the plaintiff does not identify; there exists a spate of district and appellate decisions, contra *Perkins*, that insist the plaintiff must be a true or actual member of the protected class upon which they are claiming discrimination.[53] D. Wendy Greene identifies these "actuality requirements" as indicative of judges' persistent commitment to a "stable, biological" reification of race.[54] The latter category of cases is best known as the lineage of grooming cases, in which courts, as a general matter, uphold employers' appearance policies despite their prescription of normatively gendered imperatives or prohibition on aesthetic practices generally associated with a particular racial group.[55] The recurring justification for these decisions is that Title VII's protections are limited to immutable or fixed characteristics as distinguished from cultural practices.[56]

Al-Khazraji and *Shaare Tefila*'s holdings are directly inapposite to the racial logic underlying both lines of doctrine. As this paper established in Part I, the cases both directly and implicitly undermine the illusion of physiognomically determined racial categories to which the aforementioned courts cling. At the most basic level, the ancestry-or-ethnicity definition of race opens the door to variegated claims of discrimination on the basis of racialized modes of behavior or existence, even if unmoored from a physiological racial anchor. Further, if membership of an ostensibly singular racial category as we currently understand them exists uneasily, contingently, and conditionally, straddling multiple axes of protected identity like the Arab Jew, then

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53. Greene, *supra* note 26.

54. Greene, *supra* note 26, at 88.

55. *See* D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987 (2016).

56. *Id.* at 992.

the belief in a particular experience or immutable appearance that unites class members across difference is no longer tenable. The cases heed Crenshaw's instruction to shine a blacklight on whiteness, demonstrating how it can move, shadowlike, over a body to conditionally obscure its social meaning.

The critical understanding of race endorsed by the Supreme Court in *Al-Khazraji* and *Shaare Tefila* must be read as a significant expansion of the viability of claims under Title VII and the Civil Rights Act of 1866, as well as a substantive confrontation of the body of antidiscrimination doctrine that adheres to the myth of universal, coherent categories of identity. These cases have the potential to bring the law into alignment with the lived experience of intersecting and unruly forms of discrimination and oppression.