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DIVERSITY AND THE VIRTUAL WORKPLACE:
PERFORMANCE IDENTITY AND SHIFTING BOUNDARIES OF
WORKPLACE ENGAGEMENT

by
Natasha T. Martin*

This Article explores the meaning of workplace discrimination where reality meets the imaginary world in virtual work settings. Using a more recent development in the realm of virtual work—workplace avatars—the Article considers the impact on law of virtual performance identity by workers where appearances can be altered in virtual reality. Current protected-class approaches to antidiscrimination law have not served as the antidote to workplace bias and exclusion. Thus, the Article investigates whether avatar technology holds promise for facilitating greater inclusion of marginalized workers in the contemporary workplace. Does this mode of virtual work serve as a platform for diversity or simply create more confusion regarding our fundamental understandings of discrimination?

The author's premise is that the mechanics of online identity and the social and behavioral dynamics of virtual engagement produce a new locus for bias to flourish. While the virtual workplace holds some appeal for promoting broader acceptance within organizations, the Article claims that avatar-based virtual work environments do not constitute unconditional and neutral spaces. Overall, the Article takes an optimistic stance toward immersive environments in the employment context. However, it cautions that avatars create interpersonal dynamics that are just as dangerous to notions of belonging in the contemporary workplace as their physical counterparts. The author posits that the multidimensionality of identity in this context illuminates the limitations of the categorical approach to antidiscrimination law and concludes that the avatar makes the case for intersectionality theory in workplace law.

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| | | |
|------|---|-----|
| I. | INTRODUCTION..... | 606 |
| II. | THE TECHNOLOGY OF WORK—MODERN WORKERS AND VIRTUAL IMMERSIVE ENVIRONMENTS..... | 610 |
| | A. <i>Puppets on a String—Mechanics of Identity in Virtual Environments</i> | 613 |
| | 1. <i>The Virtual Platform (Setting the Stage)</i> | 614 |
| | 2. <i>The Virtual Body (Designing Virtual Identity)</i> | 617 |
| | a. <i>Avatar Creation and Customization</i> | 617 |
| | b. <i>Emotional Connection and Socialization</i> | 619 |
| | 3. <i>The Virtual Performance (Projecting Credibility)</i> | 622 |
| III. | WHY VIRTUAL APPEARANCES MATTER: PERFORMANCE IDENTITY AND SOCIAL INTERACTION | 625 |
| | A. <i>Virtual Performance Identity and Notions of Belonging</i> | 626 |
| | B. <i>Virtual Culture and Social Interaction</i> | 628 |
| | C. <i>Virtual Acceptance and the Challenge to Diversity</i> | 631 |
| IV. | EMBRACING THE VIRTUAL WORKPLACE..... | 634 |
| | A. <i>The Appeal of Virtual Work Environments</i> | 635 |
| | B. <i>Integrating the Virtual Worker—Creating “Flow” and Preventing Discrimination</i> | 638 |
| | 1. <i>Appearance Regulation</i> | 638 |
| | 2. <i>Fostering Social Intelligence</i> | 639 |
| | C. <i>Implications for Antidiscrimination Law and Future Direction</i> | 641 |
| | 1. <i>The Paradox of Presence in Virtual Work and Limitations of the Categorical Approach</i> | 641 |
| | 2. <i>Elusive Nature of Discrimination and Future Direction</i> | 644 |
| V. | CONCLUSION..... | 645 |

I. INTRODUCTION

More than ten years ago, Bill Gates pondered:

What do people do at work? They go to meetings. How do we deal with meetings? What is it about sitting face to face that we need to capture? We need software that makes it possible to hold a meeting with distributed participants—a meeting with interactivity and feeling, such that, in the future, people will prefer being *telepresent*.¹

What likely appeared as the fantastical vision of a technology icon now represents the reality in the contemporary workplace as employees engage each other using futuristic humanoids called avatars. The 3-D virtual representations allow employees to achieve the telepresence that Bill Gates contemplated.² These “mini-me” self-representations allow

¹ Gary Bente et al., *Avatar-Mediated Networking: Increasing Social Presence and Interpersonal Trust in Net-Based Collaborations*, 34 HUM. COMM. RES. 287, 287–88 (2008) (emphasis added).

² Several variations of the definition of an avatar emerge from disciplines from the information sciences to social media cultural studies. An avatar’s essential nature is a visual, on-screen 3-D self-representation of the user. See, e.g., MARK STEPHEN MEADOWS,

employees to brainstorm with colleagues, to negotiate deals, and to collaborate with divisions of the organization around the world. The greatest strengths and weaknesses of these digital bodies lie in the ability of workers to customize the avatar by changing its appearance, including personality, attire, size, gender, and race. Additionally, employees control the avatar's movements and demeanor.³ The avatar becomes a conduit for self-expression as well as a tool for engaging with the corresponding avatars of co-workers and other constituents in immersive virtual environments.

Within these co-constructed virtual spaces, employees have the opportunity not only to pursue work tasks differently, but also to create social environments that combine elements of play and fantasy. By any measure, the platforms driving the multi-user virtual work space enable a complex social environment of behavioral, psychological, and sociological forces. The interplay of these various dimensions presents interesting and difficult questions about performance identity, workplace dynamics, and the meaning of discrimination.

This Article premises that the online culture increases the potential for social error by blurring the lines between the virtual work environment and the physical one, and by pushing the boundaries of acceptable professional conduct. For sure, combining work with elements of play stimulates engagement and productivity.⁴ Just as significant, however, this form of workplace interaction presents conundrums for employers due to the fluidity of identity and the complex workplace dynamics that ensue. Hence, this Article argues that the phenomenon carries profound implications for the management of workers and notions of belonging in the modern work setting.

This project seeks to understand the emerging sub-culture of the contemporary workplace—the collaborative virtual environment in which workers engage using digital identities in the form of avatars. What is the impact of this realm of virtual work, particularly given the malleability of identity through avataring? Does the virtual workplace hold promise for increasing diversity or simply create more confusion in the quest to understand discrimination? Notwithstanding the pursuit of such novel issues, an important contribution begins with understanding the nature

I, AVATAR: THE CULTURE AND CONSEQUENCES OF HAVING A SECOND LIFE 13 (2008); Bela Bonita Chatterjee, *The Lady Vanishes: Gender, Law and the (Virtual) Body*, AUSTL. FEMINIST L.J., Dec. 2008, at 13, 19 n.33 ("An avatar is a picture or a three dimensional graphic model that represents the self online.").

³ MEADOWS, *supra* note 2, at 13 (highlighting the interactivity of the avatar as a main feature).

⁴ A growing body of literature in the social and computer sciences bears out this phenomenon of the artificial dividing line between the seriousness of work and the casualness of play. See, e.g., PAMELA MEYER, FROM WORKPLACE TO PLAYSPACE: INNOVATING, LEARNING, AND CHANGING THROUGH DYNAMIC ENGAGEMENT 1-4 (2010); BYRON REEVES & J. LEIGHTON READ, TOTAL ENGAGEMENT: USING GAMES AND VIRTUAL WORLDS TO CHANGE THE WAY PEOPLE WORK AND BUSINESSES COMPETE 173-90 (2009).

of this emerging technology of work and its impact on workplace engagement, as well as to begin theorizing the scope of employers' ability to regulate appearance and professional expectations in virtual workspaces. This Article seeks to mine that territory.

Building on the performance identity literature in law, this Article not only pursues the complexity of identity, but also demonstrates how the avatar becomes a new avenue either for agency or social exclusion within the contemporary workplace. This Article argues that the mechanics of virtual identity affect workplace interactions, but more broadly, workplace culture, and create a new locus for discriminatory bias to flourish.⁵ These forces bear on human motivation, including biased decision-making, and thus provide new opportunities for discussions on what it means to discriminate in the contemporary realm. Drawing on insights from interdisciplinary sources including organizational behavior, information science, cognitive psychological research, and critical race theory, this Article argues that the multidimensionality of identity in this context illuminates the limitations of the law's current approach.

Title VII of the Civil Rights Act of 1964 proscribes discrimination "because of" race, color, sex, national origin, and religion, the meanings of which Congress left up to judicial interpretation.⁶ The manner in which the jurisprudence evolved has resulted in a cabined view of each of these categories.⁷ Scholars committed to the antidiscrimination project have

⁵ The essential nature of corporate culture establishes norms within organizations, setting expectations, influencing organizational learning, and informing attitudes and behaviors. Edgar H. Schein captures the abstract yet powerful quality of corporate culture, which is an inevitable byproduct of collaboration in organizations. EDGAR H. SCHEIN, *ORGANIZATIONAL CULTURE AND LEADERSHIP* (4th ed. 2010).

⁶ Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006).

⁷ See Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 *BERKELEY J. EMP. & LAB. L.* 49, 99 (2006) (concluding that plaintiffs in racial harassment litigation are more likely to lose their case than defendants either in summary judgment proceedings or at trial primarily because of conscious or unconscious judge or juror bias); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 *YALE L.J.* 2009 (1995) (arguing that race plaintiffs cannot win under current judicial interpretations of Title VII and calling for a framework that takes into account "transparently white subjective decisionmaking"); Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 *FORDHAM L. REV.* 37 (2009); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 *NOTRE DAME L. REV.* 889, 896-919 (2006) (surveying 659 race discrimination cases and observing the lack of success of plaintiffs in racialized groups); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 *RUTGERS L. REV.* 705 (2007) (exploring how courts evaluate cases involving female plaintiffs in civil litigation and arguing that the current summary judgment framework promotes gender discrimination in federal courts); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 *LA. L. REV.* 555 (2001) (asserting that discrimination plaintiffs struggle due to a combination of judicial bias and manipulation of substantive law); Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 *U. COLO. L. REV.* 1243 (2008).

argued for years about the shortcomings of employment discrimination law and its categorical approach to defining illegal discrimination. Important contributions include efforts to contextualize and deepen understandings of the nature of identity characteristics in order to demonstrate that discrimination based on a protected category under Title VII embeds a complex array of experiences, cultural assumptions, and perceptions.⁸ Other notable efforts focus attention on the unconscious nature of bias.⁹ Additionally, the project toward equity has realized advances in appreciating the structural dynamics and relational forces that affect organizational justice.¹⁰ This scholarship centers on

⁸ See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 21–22 (2006) (asserting that discrimination is less dependent on how white one looks, but how white one acts); Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. CHI. LEGAL F. 139; Trina Jones, *Shades of Brown: the Law of Skin Color*, 49 DUKE L.J. 1487 (2000); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1324–25 (2005) (asserting the ineffectiveness of Title VII to eradicate racial discrimination in a labor market saturated with the use of race-based proxies invoking negative imaging).

⁹ See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). For other important contributions by legal scholars, see generally PREJUDICE, DISCRIMINATION, AND RACISM (John F. Dovidio & Samuel L. Gaertner eds., 1986); Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357 (Daniel T. Gilbert et al. eds., 4th ed. 1998); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Ann C. McGinley, ¡Viva La Evolución!: *Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL’Y 415 (2000); see also *Symposium on Behavioral Realism*, 94 CALIF. L. REV. 945 (2006) (compilation of articles discussing behavioral realism and implicit bias).

¹⁰ See Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003) [hereinafter Green, *Workplace Dynamics*] (arguing that workplace discrimination must be conceptualized in terms of workplace dynamics as opposed to existing solely in an actor’s state of mind); Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 645 (1998) [hereinafter Sturm, *Preliminary Observations*] (rethinking approaches to regulation of discrimination in the workplace in response to changes in organizational structure and demographics). See generally Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623 (2005) [hereinafter Green, *Work Culture*] (proposing reforms based on legal incentives to employers instead of dependence on court-articulated rules); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) [hereinafter Sturm, *Structural Approach*] (proposing a “structural regulatory solution” to the more “subtle and complex forms” of workplace discrimination). Some have argued that diversity has not had the watershed effect on workplace equality that employers intended and equality advocates desired. See, e.g.,

unearthing the inherent flaws of the “intent” doctrine, including the failure of the courts’ interpretive rulemaking to comport with the realities of bias in contemporary workplace settings.¹¹ Thus, victims of employment discrimination continue to swim upstream as the law fails to recognize the subtleties of discrimination, obscured by structural features as well as the unconscious nature of bias.

This Article seeks to situate workplace bias in its cultural and social context by investigating another wave that further illuminates not only the limitations of the law’s categorical approach, but also the elusive nature of defining employment discrimination in modern terms. Technology, and in particular the use of digital representations in active virtual work communities, provides a platform to conceptualize workplace harm where the physical and virtual identities blend.

Part II sets the stage with an overview of the modern workplace fueled by technology, situating the use of avatars in this evolution. Next, Part II explains the concept of a workplace avatar, including the mechanics of creating a digital representation, and then discusses the performative aspects of avatar-based identity in relation to virtual collaboration.

Using emerging computer information science literature and other interdisciplinary sources, Part III investigates whether avatar-based virtual work environments mirror the complex social environments of traditional physical work settings and, more to the point, whether they foster inclusion. Part III concludes that new forms of discrimination may emerge from these futuristic virtual work arrangements, such as appearance discrimination and other types of disparate treatment.

Part IV analyzes the benefits and risks of the avatar in contemporary work, including the influence of virtual professional avatars on notions of belonging. Answering the question of whether avatars in the workplace present a platform for diversity, Part IV begins to theorize new forms of discrimination that may emerge from this hybrid space. Finally, the Article concludes with some ideas for minimizing the potential for social errors that might create the conditions for bias to flourish.

II. THE TECHNOLOGY OF WORK—MODERN WORKERS AND VIRTUAL IMMERSIVE ENVIRONMENTS

Technological advances have profoundly transformed the way in which employees coordinate, communicate, and accomplish work goals

Cheryl L. Wade, “We Are an Equal Opportunity Employer”: *Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541 (2004).

¹¹ See, e.g., Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117 (2008) [hereinafter Martin, *Immunity*]; Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313 (2010) and responses including Ann C. McGinley, *Discrimination Redefined*, 75 MO. L. REV. 443 (2010). See also *supra* notes 8 and 10.

in the contemporary workplace.¹² Structural enhancements require team-based collaboration through formalized work design and evaluative models.¹³ Hierarchical and vertical processing has given way to more horizontal and collective work structures.¹⁴ A byproduct of this collective responsibility and interconnectedness is the salience of workplace culture, a phenomenon that employers intentionally leverage to captivate and to command workers.¹⁵

Innovations in digital media, communication, and gaming have converged and push the boundaries even further.¹⁶ Groundbreaking interdisciplinary research argues that gaming technology holds promise for igniting employee engagement and stimulating measurable productivity gains.¹⁷ This reimagining of the use of human capital strikes a familiar chord. In the 1970s and '80s employers sought to increase global competitiveness and motivate disenchanted workers by experimenting with new business models like work teams and flattened structures.¹⁸ Similarly, the growing interest in immersive virtual platforms

¹² See generally Terri L. Griffith et al., *Virtualness and Knowledge in Teams: Managing the Love Triangle of Organizations, Individuals, and Information Technology*, 27 MIS Q. 265 (2003) (discussing the effect of technology on the transfer of knowledge in organizational settings); Raymond F. Zammuto et al., *Information Technology and the Changing Fabric of Organization*, 18 ORG. SCI. 749 (2007) (exploring the technological revolution on organizational practices such as employee collaboration).

¹³ See, e.g., Yves L. Doz & Mikko Kosonen, *The New Deal at the Top*, HARV. BUS. REV., June 2007, at 98 (discussing how companies transform from the top down by altering business strategies and employing business models that stress collective responsibility and collaboration); Rosabeth Moss Kanter, *Transforming Giants*, HARV. BUS. REV., Jan. 2008, at 43 (demonstrating the effect of global corporations' use of "internal guidance systems" that promote autonomy of workers on the front lines). For a well-documented account of the rise in group-based work and collaborative processes, see JACK D. ORSBURN ET AL., SELF-DIRECTED WORK TEAMS: THE NEW AMERICAN CHALLENGE 13–14 (1990).

¹⁴ The author has explored extensively the use of workplace structures and corporate culture and its relationship to inclusion and discrimination in the contemporary workplace. See Martin, *Immunity*, *supra* note 11, at 1137–47.

¹⁵ See JAMES HESKETT, THE CULTURE CYCLE: HOW TO SHAPE THE UNSEEN FORCE THAT TRANSFORMS PERFORMANCE 18 (2012); Marion Crain, *Managing Identity: Buying into the Brand at Work*, 95 IOWA L. REV. 1179 (2010); see also Green, *Workplace Dynamics*, *supra* note 10 (arguing that workplace discrimination must be conceptualized in terms of workplace dynamics as opposed to existing solely in an actor's state of mind). See generally Green, *Work Culture*, *supra* note 10; Sturm, *Preliminary Observations*, *supra* note 10.

¹⁶ See REEVES & READ, *supra* note 4.

¹⁷ *Id.*; see SERIOSITY (2010), <http://www.seriosity.com/>.

¹⁸ Historically, the industrial revolution marked a period of reinvestment in and consideration of the human capital of organizations. See THOMAS W. MALONE, THE FUTURE OF WORK: HOW THE NEW ORDER OF BUSINESS WILL SHAPE YOUR ORGANIZATION, YOUR MANAGEMENT STYLE, AND YOUR LIFE 31–34, 47–48 (2004). Then, our focus centered on the connection between the factory worker and the plant. Workers were considered part of the larger machinery of the organization, and more emphasis was placed on utility rather than consideration of the worker as a person. The desire for efficiency drove enhancements to processing. In the 1970s and 80s, however,

reflects challenges employers currently face to remain globally relevant and to strengthen ties with employees.¹⁹

Technological advancements, coupled with demographic shifts in available labor pools, present complex dilemmas for managing workers and fostering productivity. The American workplace now confronts a new kind of human dilemma shaped by a growing and younger workforce that expects engagement, feedback, and fun.²⁰ Thus, the American legacy of corporate bureaucracy, hierarchal work structures, and rigid operations must give way to the rapidity of information flow, spontaneity of ideas, and the desire for a level of social engagement that mirrors larger societal norms. Work is no longer a solo endeavor, but a collaborative enterprise in which workers are connecting outside of traditional office hours via social networks like Facebook and Twitter with astounding regularity, using multiple technological devices and for longer periods of time.²¹

The use of technology has facilitated enhancements in production, supply chains, and communication. A parallel development is reflected in entertainment through gaming, cinema, and other media. From email to text messages, from Skype to Xbox, from World of Warcraft to Second Life, the manner in which we interact has shifted forever in modern society.²² The contemporary workplace is no exception. Employers now use email to expedite communication and video conferencing to enhance collaboration.²³ With the advent of electronic communications, employees are “wired” with capacity to engage with their co-workers anytime and from anywhere.

Organizational behaviorists and social science scholars attest to the growing influence of the active worker and the emergence of virtual environments.²⁴ Current research theorizes that the interplay of online gaming and social interaction holds transformative power for the future of work.²⁵ This literature contains two main strands: (i) the computer

employers found themselves at a crossroads—faced with growing global actors and overworked and undervalued workforce. *See id.*

¹⁹ *See* ORSBURN ET AL., *supra* note 13, at 13–14 (1990); Martin, *Immunity*, *supra* note 11, at 1128–29.

²⁰ *See* REEVES & READ, *supra* note 4, at 92–93.

²¹ *See* Douglas Baker et al., *Social Networking and Its Effects on Companies and Their Employees*, NEUMANN BUS. REV., Spring 2011, at 1, 1–3.

²² *See generally* Zammuto et al., *supra* note 12.

²³ *See* Matthew E. Swaya & Stacey R. Eisenstein, *Emerging Technology in the Workplace*, 21 LAB. LAW. 1, 1–8 (2005) (chronicling the evolution of the use of technology in the workplace).

²⁴ *See* MALONE, *supra* note 18, at 31–34. *See also infra* Part IV.

²⁵ In *Total Engagement*, two leaders in the virtual work movement advance a persuasive evaluation of the psychology of games and technology, and the relevance of the intersection of the two to various aspects of work, from virtual work’s broader social function to ideas for organizational management and productivity. REEVES & READ, *supra* note 4, at 4–6. Their work includes case studies and incorporates the recent literature to argue that “game sensibilities will revolutionize work.” *Id.* at 6–13.

information science mechanisms, and (ii) the psychological impact of avataring in virtual environments. Beyond electronic communication, lawyers now face clients who desire to engage workers in dynamic, immersive virtual spaces where they interact through the use of avatars. In fact, innovative study and anticipation has led lawyers to counsel their clients about the advent of and risks involved in computer mediated communications including virtual work and the use of professional avatars by employees.²⁶ Thus, the legal realm encompasses more than content regulation of email and text messages, for example, and includes consideration of avatar appearance and behavior as well as the changing nature of workplace cultures. With increasing regularity, lawyers are advising corporate clients to remain aware that “cyberspace is not a law-free zone.”²⁷

Virtual workplace encounters produce complex psychological dynamics and social interactions. Just as physical work spaces are complex social environments, so are virtual ones.²⁸ Extending workplace cultural analysis to immersive virtual work spaces, specifically the avatar interface, is particularly relevant in light of projected changes in not only the conception of work, but also its execution around the world.²⁹

A. *Puppets on a String—Mechanics of Identity in Virtual Environments*

Imagine that a person of color is told by her manager that she is “geographically, racially, culturally, and socially out of place.”³⁰

See also MEADOWS, *supra* note 2, at 25 (positing that Second Life’s reign as a cultural phenomenon is secure).

²⁶ Increasingly, law firm newsletters address the use of social media in the workplace, including employee avatar use. See, e.g., *The New Frontier of Employee Avatar Appearance Codes*, SOCIALLY AWARE: SOC. MEDIA L. UPDATE (Morrison & Foerster LLP, S.F., Cal.), Oct. 2010, at 4.

²⁷ Ed Finkel, *Dress for Virtual Success*, A.B.A. J., Feb. 2011, at 13, 13.

²⁸ Scholars including Susan Sturm and Tristin Green have theorized that work cultures are loci for discrimination. See *supra* note 10. This Article extends previous work of this author and builds on the important contributions of Sturm, Green and others to embrace a more nuanced conception of discriminatory character within contemporary work settings.

²⁹ See generally REEVES & READ, *supra* note 4.

³⁰ *Natay v. Murray Sch. Dist.*, 119 F. App’x 259, 260 (10th Cir. 2005) (emphasis added). I use this case as a study for my investigation of whether virtual work environments hold promise for breaking down stereotypes and promoting inclusion in the workplace, and whether a worker’s avatar allows her to avoid the kind of disabling typecasting this statement reflects. The case involved a Native American woman who was the sole Native American person on her faculty at a Utah school. *Id.* The employer declined to renew her contract, the only one out of the 47 provisional teachers hired. *Id.* at 260–61. She filed suit alleging race discrimination. The court granted the employer’s motion for summary judgment, and the Tenth Circuit Court of Appeals affirmed. *Id.* at 261–62. Plaintiff’s evidence of discrimination included racially derogatory statements of bias, including this one made by the principal of the school under whose supervision she served. *Id.* at 260–61. Plaintiff also claimed that she was discriminated against *almost immediately after she was hired* as evidenced by

The statement exemplifies in stark terms how stereotypes operate in the contemporary workplace, and magnify a worker's outsider status. What can this employee do to overcome such a disabling perception? A worker disaffected by such a damning perception by managers and co-workers becomes a super-outsider. Importantly, an employee's perceived differences affect upward mobility and overall acceptability in employment settings.³¹

In a virtual work environment filled with professional avatar engagement among employees, might this individual have the capacity to avoid the discriminatory effects of stereotyping? Could the worker change her appearance with an avatar so much that the perception of difference diminishes? Does digital transformation affect notions of belonging to such a degree that cultural forces actually create the conditions for this worker's acceptance rather than her exclusion? Significantly, can the use of workplace avatars in virtual environments enhance workplace relations, dispel discrimination, and enhance diversity?

1. *The Virtual Platform (Setting the Stage)*

Much of the research on virtual technology, virtual environments, and multi-user dimensions resides in computer science literature.³² The study of virtual environments, particularly the shared enterprise of multi-user dimensions, also centers on a growing body of social science literature.³³ A fair amount of this work serves a definitional function and lays the foundation for theorizing about expansive immersive virtual engagement. A few definitions would be helpful here.

Shared virtual environments are facilitated by sophisticated computer systems and enhanced with a range of graphics and other

such actions as the principal snubbing her at the first faculty meeting and disciplining her, but not others, for returning late from lunch. *Id.* at 260. The matter resulted in unfavorable evaluations and escalated to the district's superintendent who conducted an "independent investigation," which the employee claimed was inadequate. *Id.* at 260-61. Plaintiff's evidence also included racially derogatory statements allegedly made on the plaintiff's last day of work. She was ultimately fired.

³¹ See Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 707, 719-20 (2001); see also Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 304-05 (2008) (exploring contemporary bias and stigmatization through a study of criminal cases reflecting unconscious association of Blacks with apes and positing that the dehumanizing effect of these historical references influences perception and judgment).

³² Much of this emerging work comes from computer scientists and includes work on virtual technology, collaboration and cooperativeness in virtual spaces, and the human dimensions. For an overview of various methodologies and threads of analysis, see Ralph Schroeder, *Social Interaction in Virtual Environments: Key Issues, Common Themes, and a Framework for Research*, in *THE SOCIAL LIFE OF AVATARS: PRESENCE AND INTERACTION IN SHARED VIRTUAL ENVIRONMENTS* 1, 3 (Ralph Schroeder ed., 2002).

³³ *Id.* Sociologists and communications theorists contribute to this angle of the discourse.

software.³⁴ Virtual reality technology enables the user to interface with other users through the computer and internet interface. Multi-user dimensions (MUDs) layer the capacity to “link many users simultaneously,” creating a co-constructed shared online community of users who engage and experience one another in the absence of physical presence.³⁵ These active virtual environments draw on early massively multiplayer online games and massively multiplayer online role-playing games (MMORPGs), where users enter virtual spaces to compete and collaborate all in real time.³⁶ Examples of this type of activity include World of Warcraft and Entropia Universe, but there are many popular online games.³⁷

Beyond the gaming interface, 3-D enhanced virtual environments provide avenues for social interaction. Less than ten years ago, for example, Linden Research Inc.’s computer-generated system Second Life tapped into the powerful psychology of engagement within imaginary worlds. Based on its initial conception, Second Life creators marketed an open space where users, equipped with interactive tools, could build a parallel virtual world. And it worked, capturing the imagination of millions of people in an online virtual habitat.³⁸ In Second Life, users called “residents” live in virtual homes, shop at virtual malls, vacation on virtual beaches, and conduct business using virtual money through the use of avatars—“digital alter egos that users create.”³⁹ The avatar becomes the vehicle for engagement in spaces like Second Life, allowing

³⁴ *Id.*

³⁵ *Id.* at 1–2.

³⁶ For a review of gaming and its expansion beyond the gaming context, see REEVES & READ, *supra* note 4, at 4–6. See also Paul Wallace & James Maryott, *The Impact of Avatar Self-Representation on Collaboration in Virtual Worlds*, INNOVATE, (June/July 2009), http://innovateonline.info/pdf/vol5_issue5/The_Impact_of_Avatar_Self-Representation_on_Collaboration_in_Virtual_Worlds.pdf. Some of the dynamic research in this area demonstrates not only the appeal of this technology, but also its applicability to serious functions like work. Stanford University is at the helm of this work, which is substantially buttressed through partnerships with innovative startups (entrepreneurs). For a concise and interesting distinction between virtual environments and multiplayer games, see REEVES & READ, *supra* note 4, at 26–27.

³⁷ See MEADOWS, *supra* note 2, at 24–25 (explaining the science-fiction roots of MMORPGs).

³⁸ One report highlights that Second Life hosts more than ten million registered avatars. MEADOWS, *supra* note 2, at 24. The large following comprises an estimated one million monthly users. See Scott Morrison, *A Second Chance for Second Life: Northrop, IBM Use Virtual World as Setting for Training, Employee Meetings*, WALL ST. J., Aug. 19, 2009, at B-5.

³⁹ Morrison, *supra* note 38; see also REEVES & READ, *supra* note 4, at 26. For an exploration of Second Life, see <http://www.secondlife.com>. These types of virtual environments are growing in popularity for younger users like children and teens. For example, virtual environments allow kids to shed the responsibility of live pets by adopting virtual ones instead. See, e.g., CLUB PENGUIN, <http://www.clubpenguin.com>; HABBO, <http://www.habbo.com>; *Touch Pets Dogs 2*, iTUNES, <http://itunes.apple.com/us/app/touch-pets-dogs-2/id400502029?mt=8>; WEBKINZ, <http://www.webkinz.com>.

participants to engage in movie-like settings. These collaborative virtual environments promote dynamic shared virtual escapes that combine the aesthetic of digital entertainment and the immediacy of face-to-face contact. Thus, the avatar serves as the protagonist in a narrative the users “create . . . from the ground up.”⁴⁰

The emergence of the use of virtual engagement in the workplace is due in large part to virtual platforms like Second Life. In fact, many organizations have embraced 3-D virtual worlds to expand the reach of their operations and efficiency by hosting virtual meetings with employees, customers, and the general public.⁴¹ Significantly, many organizations have moved beyond the experimentation phase to integrate ongoing virtual communities in the workplace.⁴² Virtual events with clients and collaboration among employees provide recession-friendly avenues for conducting business.⁴³ Such virtual engagement proves most effective when it mirrors its physical counterpart as closely as possible, including compatible levels of interactivity and visual correlatives such as landmarks.⁴⁴ Illustrative of this physical-virtual consonance is an IBM virtual meeting that included an appealing “welcome area, with comfortable looking chairs (and business like avatars),” along with the availability of company experts to engage with participants.⁴⁵ Thus, a host of options are available to organizations with the funds and fortitude to pursue virtual work. In virtual settings, organizations reap benefits beyond economic savings, most notably the increased employee participation and engagement.⁴⁶

Once the stage has been set on a virtual platform like Second Life or within an employer’s customized, computer-mediated work environment,

⁴⁰ MEADOWS, *supra* note 2, at 23, 25.

⁴¹ For an overview of how businesses have set up shop in Second Life and used the platform to enhance business operations, see John Brandon, *The Top 8 Second Life Virtual Businesses*, PC ADVISOR (May 4, 2007), <http://www.pcadvisor.co.uk/news/internet/9279/the-top-8-second-life-virtual-businesses/>.

⁴² See, e.g., Elizabeth Olson, *Growth in Virtual Gatherings Offers Marketing Opportunities*, N.Y. TIMES, Dec. 2, 2010, at B2 (describing how various industry players including healthcare, energy technology, and hotel services conduct “virtual events” with customers to sell and to market, and employees to train and to collaborate).

⁴³ See *id.*; see also Morrison, *supra* note 38 (reporting that IBM saved approximately \$350,000 by hosting a virtual conference in Second Life).

⁴⁴ For a bird’s eye view of a corporate presence in Second Life, see Yuping Liu-Thompkins, *Corporate Presence in Second Life*, PING! (June 29, 2009), <http://yupingliu.com/wordpress/2009/06/29/corporate-presence-in-second-life/>.

⁴⁵ Olson, *supra* note 42. An organization can conduct a virtual conference for a fraction of the price. For example, a 75-person two-day in person event would cost upwards of \$150,000 compared to its virtual counterpart for around \$7,000. Morrison, *supra* note 38.

⁴⁶ See Olson, *supra*, note 42. According to virtual event organizers, user companies report increased participation of registrants than they see in the physical setting. This could be due to fewer distractions, as when people travel to a new city for a conference and juggle work and play time, for example. *Id.*

the virtual performance begins with the adoption of a digital representative—the avatar.⁴⁷ This visual on-screen 3-D self-representation becomes the worker’s alter ego of sorts, the virtual agent deployed by and controlled by the employee. As one author described the avatar experience in Second Life: “It’s a 3-D dollhouse world, and we have little puppets we drive to entertain each other. They’re called ‘avatars.’”⁴⁸

2. *The Virtual Body (Designing Virtual Identity)*

a. *Avatar Creation and Customization*⁴⁹

Participating in the immersive virtual environment begins with “character development.”⁵⁰ An avatar creation interface facilitates an individual’s process of naming the digital image and defining the contours of the self-representation.⁵¹ In Second Life, for example, the user develops a profile by choosing a starting image from a series of default options, most of which reflect white identities.⁵² From there, the user can customize the avatar using appearance editors. These enhancement tools are quite sophisticated and detailed, with numerous permutations allowing users to appoint various features. In fact, the user can substitute a non-human image such as an animal for the human likeness defaults. Personalization of the avatar begins the complex role-playing endeavor.⁵³ This is where the avatar comes alive.

⁴⁷ The employee chooses a representative to play her role on the immersive virtual stage. This “interactive character” allows the employee to be an active participant in the work life story line. The worker can “affect, choose, or change the plot of the story.” MEADOWS, *supra* note 2, at 15.

⁴⁸ *Id.* at 27.

⁴⁹ For purposes of this discussion, I will use Second Life’s platform as the prototype. As the research reflects, it was one of the first multi-user virtual platforms that organizations began using with employees. It is representative of the type of virtual reality technology platform that organizations use.

⁵⁰ *Id.* at 23.

⁵¹ Notwithstanding the malleability of avatar appearance, the name remains static. *Editing Your Appearance*, SECOND LIFE, <http://community.secondlife.com/t5/English-Knowledge-Base/Editing-your-appearance/ta-p/700709>. Once the user chooses a name for the avatar, it cannot be changed. *Username and Display Names*, SECOND LIFE, <http://community.secondlife.com/t5/English-Knowledge-Base/Username-and-display-names/ta-p/700173>.

⁵² See MEADOWS, *supra* note 2, at 29 (noting that in the early days of Second Life, the typical default characters were plastic, “bland, Caucasian, and brunette”). For an interesting discussion of avatar creation, including images of avatar choices and customization features, see Victoria McArthur, *Professional Second Lives: An Analysis of Virtual World Professionals and Avatar Appearance Codes 24–40* (Aug. 2010) (unpublished M.A. thesis, York University) (on file with York University Libraries, York University). To view the default avatars in Second Life, see *Join*, SECOND LIFE, <https://join.secondlife.com/?lang=en-US>.

⁵³ Many studies highlight the expansiveness of the avatar morphology including representations that comprise complex blends of human and non-human characteristics. See, e.g., Kristine L. Nowak & Christian Rauh, *The Influence of the Avatar on Online Perceptions of Anthropomorphism, Androgyny, Credibility, Homophily, and Attraction*, 11 J. COMPUTER-MEDIATED COMM. 153(2005).

Personalization rises as the key feature of avatar use—the ability to create and manipulate online identity.⁵⁴ Using sophisticated appearance editors labeled as “stores,” for example, users can “buy” a different hair style and color, eye and skin color, height, weight, proportions, build, or facial features, including the shape of the nose.⁵⁵ With near precision, users can change aspects of appearance that are considered immutable in the real world.⁵⁶ If a user prefers a different shape of the nose, she can adjust its size, thickness, and perhaps even ethnic characteristics (by manipulating nostril width and choosing between the various bridges and tips) of her avatar’s nose.⁵⁷ Online, individuals can make themselves as interesting or outlandish as they would like. And, on platforms like Second Life, the possibilities for enhancements are nearly endless.⁵⁸ Anyone can be as wonderful as the imagination can envision.

People tend to select and to customize avatars that enhance their physical identity, often adopting a digital representation that does not closely resemble their physical appearance.⁵⁹ Thus, in virtual environments, people can escape their real-world physical bodies to become idealized versions of themselves. A short person can become taller, an obese one can become thin, and a blond can become brunette. Black people might select white avatars, persons living with disabilities may adopt athletic depictions of themselves, women might select male avatars, and so forth.⁶⁰ The autonomy to shape one’s virtual identity accounts for the attraction to and level of engagement within the virtual workplace, as discussed in Part IV.

The avatar interface allows an individual to cut an identity out of whole cloth, uninhibited by the constraints of one’s physical attributes.

⁵⁴ See REEVES & READ, *supra* note 4, at 94.

⁵⁵ SECOND LIFE MARKETPLACE, <https://marketplace.secondlife.com>.

⁵⁶ Critical legal scholars Devon Carbado and Mitu Gulati have explored performance identity, and in particular, contingency of identity with respect to phenotype and biological characteristics. See Carbado & Gulati, *supra* note 8, at 1297–98.

⁵⁷ McArthur, *supra* note 52, at 39.

⁵⁸ See REEVES & READ, *supra* note 4, at 95. Through advanced computer interfaces, users can take on innumerable attributes and become whoever they choose to be.

⁵⁹ Research reflects that people desire to project a different persona online. See, e.g., McArthur, *supra* note 52, at 62, 64; REEVES & READ, *supra* note 4, at 95. In a study on the relationship between the user and the chosen avatar, authors conclude that the users perceive the avatar as a reflection; it is not an extension of the self. See Marc Conrad et al., *This Is My Body: The Uses and Effects of the Avatar in the Virtual World*, 3 INT’L J. INFONOMICS 360, 366 (2010). The study showed that the majority of the surveyed subjects chose avatars that mirrored their physical identity. *Id.* Most often, subjects chose human avatars that matched their gender or ethnicity. *Id.* The researchers point out, however, that choice of avatar appearance may be limited by Second Life appearance editors and even limited customization choices that normalize “ideologized ideal of physical appearance.” *Id.* This suggests that virtual environments may embed socially constructed norms of acceptability, mirroring societal norms of beauty and belonging.

⁶⁰ In fact, gender swapping is quite common in virtual environments. See McArthur, *supra* note 52, at 14.

The delineation of appearance is merely the tip of the iceberg when it comes to avatar creation. Users can personalize the avatar to project a particular demeanor or personality trait with the animation capabilities embedded in many of the interfaces, which include movement and other emotive capacities. For example, animation features allow the user to control the movement of the avatar—including how it walks, moves, and gestures—to perform such acts as tapping a foot or folding arms.⁶¹ The user's embodiment of the avatar appears limited largely by the user's knowledge of and capacity to use the editorial interface.⁶² Thus, depending on the sophistication of the user, an avatar can wink, dance, clap, or wag a finger.⁶³

These expressive cues become an important aspect of social interaction in the virtual space. Thus, "shy people can be socially competent and powerful. [And] a poor self-image can be turned into physical attractiveness."⁶⁴ The geek who aspired to be an elegant dancer now possesses the power to manifest that dream; the dowdy one can don designer clothing and advance a supermodel image.⁶⁵ It is this sense of corporal escapism, fantasy, and fun that captures avatar users. Moreover, this malleability leads to the multiplicity and fluidity of identity in virtual worlds.⁶⁶

b. Emotional Connection and Socialization

Beyond the seemingly narcissistic, self-indulgent exercise of the experimentation, why do avatar users care so much about the online

⁶¹ MEADOWS, *supra* note 2, at 30–31.

⁶² Research reflects that a learning curve exists for new users who often retain the default avatar features due to lack of proficiency with the technical aspects of the computer program. Chris Inman et al., *Use of Second Life in K-12 and Higher Education: A Review of Research*, 9 J. INTERACTIVE ONLINE LEARNING 44, 53, 56 (2010), available at <http://www.ncolr.org/jiol/issues/pdf/9.1.3.pdf>. For example, making the avatar walk may be as simple as pressing the up or down arrow key. However, more sophisticated animation requires more. MEADOWS, *supra* note 2, at 30–31.

⁶³ MEADOWS, *supra* note 2, at 30–31.

⁶⁴ REEVES & READ, *supra* note 4, at 95.

⁶⁵ In the gaming context, it has been shown that people select avatars that reflect their "ideal" selves, particularly where they may suffer from depression or experience low self-esteem. See Katherine Bessière et al., *Acquiring a Professional "Second Life": Problems and Prospects for the Use of Virtual Worlds in Business*, 2009 CHI PROC. 27TH INT'L CONF. EXTENDED ABSTRACTS ON HUM. FACTORS COMPUTING SYS. 2883, 2892.

⁶⁶ Notwithstanding the numerous appearance choices, it appears that often avatar users default to human avatars rather than non-human avatars like animals, symbols and the like. See Conrad et al., *supra* note 59, at 364. Again, it bears mentioning that users' ability to create avatars that comport with their physical world identities may be constrained by the capacity of the virtual world. That is, the designers of these virtual avatar interfaces decide the default choices and the range of customization possibilities. It is important to note, however, that specifications for avatar appointment may "project societal expectations as to how people should present themselves." Carman Neustaedter & Elena Fedorovskaya, *Presenting Identity in a Virtual World through Avatar Appearances*, 2009 PROC. GRAPHICS INTERFACE CONF. 183, 184.

representation? Research reflects a deep psychology involved with the use of avatars.⁶⁷ Because they are interactive self-representations, the avatar derives meaning from social stimulation within the virtual environment. "Sociability" becomes the "air an avatar needs to breathe."⁶⁸ Research on self-representation using avatars declares that the power lies in the ability of a user to "take on different appearances or enact different selves."⁶⁹ This freedom to rescript identity by encoding onto the blank canvas of the digital image gives the avatar cultural and social significance.⁷⁰ Without the interactivity of the virtual environment, however, perhaps the avatar demotes to merely an artistic expression—a digital self-portrait. It is precisely this blending of visual and social presence that captivates avatar users. In this way, the avatar becomes a tool for engagement through the social construction of identity that integrates an individual's corporeal and virtual qualities.⁷¹

Researchers at the forefront of the immersive technology movement compare the emotional intensity of avatars in virtual spaces to online gaming concepts.⁷² When immersed in digital play such as video games, for example, the player realizes that the assumed image or character is a fiction, but nonetheless identifies with it precisely because of the performance feedback and identification with the in-game character. Thus, the avatar becomes compelling because the individual projects a mini-me characterization, enhanced and controlled like a puppet. The person becomes invested, and the way she thinks and feels in the real

⁶⁷ See REEVES & READ, *supra* note 4, at 95–96.

⁶⁸ MEADOWS, *supra* note 2, at 13.

⁶⁹ Bessière et al., *supra* note 65, at 2892.

⁷⁰ Judith Butler's notion of the "culturally intelligible body" resonates because cultural and social inscription facilitates a person's ability to give meaning to the physical body. See generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 16 (1990). Butler's notion of the "fabrication" of identity, this sense that the performative aspects of inscription, suggests a path to "destabliz[ing] the naturalized categories of identity and desire." *Id.* at 136, 139. I see a parallel process of embossing taking place upon the virtual body or avatar mediated by technology. Perhaps herein lies the promise of virtual identity because, "[t]he culturally constructed body will then be liberated . . . to an open future of cultural possibilities;" no longer beholden to historical and situational constraints *Id.* at 93, 139.

⁷¹ REEVES & READ, *supra* note 4, at 92. The potency of the use of avatars in psychological and social terms makes their creation, personalization and utilization quite significant, "corporately and personally." For example, workers may not have as strong a need for bifurcating professional and personal identities in the same way.

⁷² This is largely the premise of the work of Stanford professor Byron Reeves and numerous venture capitalists in the computer science field with whom he is affiliated. Avatar interface becomes the natural progression in the social media realm. For example, these innovators compare the entertainment influence of gaming technology on smart phones and the like. *Id.* at 7. See also Chapters 2 and 3 wherein the authors lay out the nature of gaming and its entertainment and interactive qualities, and then apply these characteristics to current work-related issues. This analysis attempts to map gaming onto work generally, and the virtuality of work in particular. *Id.* at 17–60.

world tracks the emotional conditioning in the virtual world.⁷³ People “attribute a degree of sentience” to virtual bodies that give them prominence and power, notwithstanding the paucity of expressive cues available online and the invisibility of the user behind the avatar. That said, regardless of how authentic or similar a worker’s avatar matches real-world appearance, the avatar represents an embellishment of who the person really is. Users invest a considerable amount of time and energy in constructing avatar identity.⁷⁴ Participants in virtual communities take seriously the personalization of the avatar, and they expect others to do so as well.⁷⁵

The emotional tie between the individual and the avatar is further demonstrated by research on the stimulation of brain activity when one is immersed in alternative realities using representations like avatars.⁷⁶ An often cited Stanford University study reflected that subjects’ hearts beat faster, and their brains and emotions were more engaged when playing online games with personally customized avatars versus stock avatars.⁷⁷ Due to the investment in and the connection to the avatar, the user develops concern for the digital identity. From the user’s perspective, “I am my avatar.” Thus, when the avatar experiences joyful engagement, the person feels happy. The avatar user can experience the full range of emotional responses in virtual space as in the real world.⁷⁸

In analogizing “work” to “play,” emerging literature explores how incorporating “entertainment values” into the workplace yields productivity benefits. Additionally, by embracing these recreational qualities, employers satisfy workers’ desires for greater social connection without a corresponding demand for physical contact.⁷⁹ Although counterintuitive, this explains, in part, the deep emotional connection users have with their avatars.⁸⁰ Significantly, it explains the complexity of the projected identity by the user. This plasticity and multiplicity of the

⁷³ *Id.* at 95–97.

⁷⁴ *See* Neustaedter & Fedorovskaya, *supra* note 66, at 185.

⁷⁵ *See id.* at 183–86.

⁷⁶ While the arousal may be unconscious, there is a correlation between arousal and how one experiences a given situation. Arousal enhances experiences and memories of those experiences. *See, e.g.,* Margaret M. Bradley et al., *Remembering Pictures: Pleasure and Arousal in Memory*, 18 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 379, 383 (1992).

⁷⁷ REEVES & READ, *supra* note 4, at 65. *Total Engagement* researchers declared that the activation of mirror neurons in the brain explains in part the level of emotional attachment experienced by avatar users. *Id.* at 96–97.

⁷⁸ The emotional intensity has been described this way: “If another character cuts my (virtual) arm, at some level I feel the pain; if my character steps on a sharp (virtual) object . . . the pain moves to my foot; and if I’m insulted by a character from an opposing team, the pain moves to brain centers active during social insults.” *Id.* at 97.

⁷⁹ *Id.* at 93–94.

⁸⁰ “People have a primitive and unconscious response to their avatars. When an avatar is involved in action, so is the person who creates and controls it.” *Id.* at 65.

projected self through the avatar presents a type of ‘tridentity’ of sorts that influences social interactions.⁸¹ In an immersive virtual space, the avatar is a “hybrid of technology and flesh.”⁸²

3. *The Virtual Performance (Projecting Credibility)*

Avatar is derived from a Sanskrit word “avatara,” and means incarnation.⁸³ A combination of artistry and performance, the avatar comes alive on the virtual stage. The self-determinative nature of creating and customizing the avatar empowers users to control their roles in the social environment. After the user creates an avatar, it comes alive as it joins with others in a social forum. And, within the social sphere of virtual environments, avatar choices accord behavioral and interactive consequences.⁸⁴

As in the physical workplace, individuals in virtual work settings are particularly attentive to how they present themselves and how their coworkers and others respond to the social signals. Eliciting emotional responses factors into how one chooses and customizes an avatar as well.

Studies show that avatar appearance can affect the level of engagement and contribute to the emotional connection among users.⁸⁵ In the context of the virtual workplace, this research suggests that employees will remain responsive to social stigma when they customize their workplace avatars. Through animation, an employee actually communicates something about herself through the representation of the avatar. Thus, the digital surrogate is more than symbolic; it reflects the individual’s “values and intentions of embodiment, the expression of feeling, emotion and emplacement.”⁸⁶ How one performs identity and establishes credibility in the virtual workplace involves social and cultural signaling. Accordingly, immersive virtual workplaces present the prototypical laboratory for demonstrating how identity fails to comport with the court’s cabined views of the protected categories, and why

⁸¹ James Paul Gee’s work illuminates the complexity of identity and the communicative effects of the interactivity. Gee declares that the avatar comprises three identity variables—the virtual identity (the avatar encompassing the user’s personality), the real identity (the person driving the avatar in the virtual space), and the projected identity (the interface that allows the embodiment of values). JAMES PAUL GEE, WHAT VIDEO GAMES HAVE TO TEACH US ABOUT LEARNING AND LITERACY 48–50 (rev. & updated ed. 2007).

⁸² TORILL ELVIRA MORTENSEN, PERCEIVING PLAY: THE ART AND STUDY OF COMPUTER GAMES 128 (2009).

⁸³ 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 145 (1971).

⁸⁴ See Mikael Jakobsson, *Rest in Peace, Bill the Bot: Death and Life in Virtual Worlds*, in THE SOCIAL LIFE OF AVATARS: PRESENCE AND INTERACTION IN SHARED VIRTUAL ENVIRONMENTS 63, 74–75 (Ralph Schroeder ed., 2002) (asserting that the behavioral tendencies in virtual worlds are similar to physical settings, but that the “technology that mediates our interaction has a great impact on the forms of interaction”).

⁸⁵ See REEVES & READ, *supra* note 4, at 96–97; sources cited *infra*, notes 103, 105, 115.

⁸⁶ Chatterjee, *supra* note 2, at 20.

employees may intentionally choose avatars that project images that do not resemble their real-world identities at all.⁸⁷

The work of critical legal scholars is instructive here because it illuminates the extent to which workers may choose avatar customization that bears on credibility. Much of this work seeks to demonstrate that identity categories like race and gender are dynamic rather than static.⁸⁸ For example, Devon Carbado and Mitu Gulati's working identity theory sheds light on how the performative aspects of identity bear on inclusion and acceptance in the workplace.⁸⁹ According to Carbado and Gulati, deeper understanding of workplace discrimination must be informed by how an employee signals ethnic salience.⁹⁰ The point is that in order to gain acceptance, people of color and other outsiders adopt assimilationist behavior or mask negative identity related stereotypes to avoid eliciting discriminatory responses from their co-workers and superiors, for example. Performance identity in this respect becomes a strategic choice that has psychological consequences because it overburdens outsiders as they negotiate various workplace interactions.⁹¹ Yet it may have direct implications for the employee's success in the workplace.⁹² Research on virtual appearances strongly suggests that the virtual equivalent of Carbado's and Gulati's working identity theory may inform how a worker projects virtual image.⁹³

Moreover, sociological research confirms that people construct virtual identity in a manner similar to their approach to self-representation in real life.⁹⁴ An individual's projection of a particular identity is shaped by not only internal preferences and ideals of oneself, but also external pressures within the online immersive community. Thus, the identity formation and performance constitutes a "social act" where shifting notions of perception become responsive to and dependent upon interactions with others.⁹⁵ Accordingly, avatar appearance bears on credibility and perception, influencing social interactions. For example, avatar acceptance may affect one's status vis-à-vis others in the immersive community, as well as favorability.⁹⁶ Since avatar appearances influence social interactions, it follows that users will

⁸⁷ Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951, 972–78 (2011).

⁸⁸ See sources cited *supra* notes 8, 9.

⁸⁹ Carbado & Gulati, *supra* note 8, at 1262.

⁹⁰ See *id.* at 1262–63.

⁹¹ See *id.*

⁹² *Id.* at 1269–70. "A positive relationship increases workplace standing and advancement opportunities" for those who sufficiently utilize the positive aspects of their difference. *Id.*

⁹³ See *infra* Part IV.B.1. See also *infra* Part III.

⁹⁴ See, e.g., Neustaedter & Fedorovskaya, *supra* note 66, at 183.

⁹⁵ *Id.* at 183–185.

⁹⁶ *Id.* at 185; see also, e.g., Nick Yee et al., *A Meta-Analysis of the Impact of the Inclusion and Realism of Human-Like Faces on User Experience in Interfaces*, 2007 CHI PROC. FACES & BODIES INTERACTION 1, 5.

adorn their avatar with the markers of acceptability.⁹⁷ It comes as no surprise that people will choose female avatars over male ones, white ones over brown ones, and younger ones over older ones.⁹⁸

In the case of appearance-based prejudices, a user's choice of avatar can shape social interaction in virtual worlds because visual cues matter. Although the 3-D image provides a vehicle for self-expression, a worker's choice of avatar may engender negative feelings and result in that person being isolated or ostracized, particularly those that embody caricatures or exaggerated accessories like gaudy gold medallions deemed representative of hip-hop culture or exaggerated gender characteristics.⁹⁹ A well-known study examined whether gendered avatars lead people to perceive the avatar in a stereotypically gendered manner. The study revealed that male avatars receive greater credibility, particularly when the dialogue concerns sports, for example.¹⁰⁰ Moreover, just as appearance has been shown to affect perceptions of a worker's abilities, such appearance advantages accrue in immersive virtual spaces as well.¹⁰¹ This may explain why virtual environments like Second Life appear to be the land of beautiful people with elongated bodies, chiseled bone structures, curvy physiques and the like as users make empowering

⁹⁷ Although avatar users more often select representations that match their physical features, there are users that choose avatars that do not align with their real-life features. For example, one study reflected that some users purposefully defy this cultural norm in Second Life. See Neustaedter & Fedorovskaya, *supra* note 66, at 186. A study found avatar users dressed as "raccoon-like humans with furry bodies and tails protruding from trousers," a "spaceship," or other non-human motifs because they believed this image best represented them. The use of these avatars represented some form of social media rebellion. *Id.*

⁹⁸ See Nowak & Rauh, *supra* note 53, at 153–78. The study revealed that masculinity and femininity significantly influenced perceptions of avatars: "A gendered avatar (whether masculine or feminine) was more credible than an androgynous avatar and more likely to be selected." *Id.* at 173. See also Jong-Eun Roselyn Lee & Sung Gwan Park, "Whose Second Life Is This?" *How Avatar-Based Racial Cues Shape Ethno-Racial Minorities' Perception of Virtual Worlds*, 14 CYBERPSYCHOL. BEHAV. & SOC. NETWORKING 637 (2011) (investigating white dominance in virtual spaces and its impact on racial and ethnic diversity in virtual worlds).

⁹⁹ In fact, studies reflect that "avatar similarity" affects levels of engagement, collegiality, and courtesy. REEVES & READ, *supra* note 4, at 107. Affiliative tendency matters to avatar users and is deemed to correlate with acceptance. Paul Wallace, *Avoidance and Attraction in Virtual Worlds: The Impact of Affiliative Tendency on Collaboration*, 5 INT'L J. TECH. KNOWLEDGE & SOC'Y 119 (2009).

¹⁰⁰ Zaheer Hussain & Mark D. Griffiths, *Gender Swapping and Socializing in Cyberspace: An Exploratory Study*, 11 CYBERPSYCHOL. & BEHAV. 47, 52 (2008). This was so even where the participants were made aware of that the gender of the avatar did not match the gender of the avatar user. This seems to demonstrate how hard-coded stereotypes function in the virtual world. This mirrors much of the behavioral realism and legal work on unconscious bias and Dovidio and Gaertner's theory of aversive racism. Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM 61, 61–62 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

¹⁰¹ See REEVES & READ, *supra* note 4, at 107. .

customization choices.¹⁰² While this aspect of digital agency appears ideal, as the interdisciplinary sources suggest, the potential for social error is heightened by blurring the lines between the virtual work space and the physical one.

Avatar appearance influences not only the response elicited from others, but also the self-perception of the particular avatar user. For example, users who adopt a tall avatar have been shown to exude more confidence.¹⁰³ People who adopt attractive avatars engage and share more freely.¹⁰⁴ Avatars that appear more human experience greater positive interactions.¹⁰⁵ This symmetry of avatar identity and user behavior bears on aspects that could very well affect a person's work performance, employability, and sense of belonging within a work setting.¹⁰⁶

With the theoretical framing of performance identity and the cognitive psychological explanations, we can understand virtual workplaces as complex environments in which social interaction affects the appearance choices avatar users make.¹⁰⁷ Significantly, it points to the contingency of identity with respect to relational forces that bear on perception, image, and acceptance. People realize that appearances matter and respond accordingly. How one establishes credibility in the virtual spaces depends on the communicative nature of the identity that an individual's avatar projects. Notwithstanding the intrinsic motivation of avatar personalization, this research demonstrates that the social environment of professional virtual worlds will impact social norms, as well as the manner in which employees may advance themselves in these co-constructed spaces.

III. WHY VIRTUAL APPEARANCES MATTER: PERFORMANCE IDENTITY AND SOCIAL INTERACTION

This evolution in the technology of work yields a contemporary work paradigm where physicality surrenders to computer mediated connections. The worker's dual presence in immersive virtual work environments—online avatar representations that are controlled by the

¹⁰² *Id.* at 109; *see also* MEADOWS, *supra* note 2, at 7 (“Sun-bronzed, broad-shouldered, rock-jawed Adonises walk the landscape, people who appear to be in perfect health . . .”).

¹⁰³ *See* Nick Yee & Jeremy Bailenson, *The Proteus Effect: The Effect of Transformed Self-Representation on Behavior*, 33 HUM. COMM. RES. 271, 285 (2007).

¹⁰⁴ *Id.* at 281–85.

¹⁰⁵ Yee et al., *supra* note 96, at 5, *see also*, Conrad et. al., *supra* note 59, at 364–65 (highlighting that the vast majority of users chose avatars that were both human and similar to their associated identity, including that nearly 90% of subjects' avatars matched their gender); Nowak & Rauh, *supra* note 53, at 172 (concluding that subjects “strongly preferred avatars that were both human and matched their own gender”).

¹⁰⁶ *See infra* Part III.

¹⁰⁷ Green, *Workplace Dynamics*, *supra* note 10, at 92–93.

involvement of the worker's physical body—disrupts traditional conceptions of workplace identity. This shifting telepresence turns the social construction of identity on its head.

The inscription of the virtual body and engagement in the online world could have consequences for inclusion in the contemporary workplace. A discussion follows of these two strands that, in my view, produce complex dynamics in virtual spaces.

A. *Virtual Performance Identity and Notions of Belonging*

Cyberspace was designed and marketed as a world blind to differences, a space that upholds the expressive value and transformative power of one's self-determination and freedom to define self-image.¹⁰⁸ In this regard, a black male employee who adopts a white male avatar may reap the benefits of the choice to project a different identity. If race, gender, and other differences are less salient in a virtual workplace, in part because they are more fluid, then perhaps the black male worker, for example, no longer has to engage in negotiating physical identity to counteract negative stereotypes because the avatar interface provides a tool to cover, to convert, or to pass in a manner that allows co-workers, managers, and clients to respond more favorably. In the context of team meetings, for example, coworkers and managers may be more receptive to this employee's input in virtual meeting spaces unlike in face-to-face encounters. The avatar makes this kind of identity transcendence possible?¹⁰⁹

Since the corporal features of an employee's identity remain invisible at least in the context of the active virtual territory, do identity differences lose their divisive force? If so, might the virtual workplace hold promise for leveling the playing field if stereotypes do not manifest in the same negative ways as they have been shown to do in physical work environment? The preceding questions provide an interesting lens

¹⁰⁸ See generally Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224 (2011) (reviewing the evolution of the internet and cyber-culture as reflected in the 1996 Telecommunications Act).

¹⁰⁹ Another important question is whether this kind of transcendence is desirable. Arguably, this effect is not ideal because it encourages "covering" or what this Article terms "virtual passing"—a phenomenon that overburdens minority workers, perpetuates negative stereotypes, and likely disadvantages employees, as Carbado and Gulati posit. See Carbado & Gulati, *supra* note 8, at 1299–1307; Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 771–72 (2002). Significantly, a virtual space that encourages or requires workers to assume an identity in this manner is antithetical to the ideals of diversity, and harms, rather than promotes, inclusion. Moreover, because virtual workplaces are co-constructed and avatar appearance requires action by the user, these effects complicate definitions of discrimination. This framing further delegitimizes the experiences of the oppressed worker, diminishing its relevance in the analysis of workplace dynamics, and hence, understandings of discrimination. This is destructive to the quest to unearth the elusive nature of discrimination and to locate the nature of the harm due to discrimination in the workplace.

through which to envision the virtual workplace as the preeminent equal employment opportunity environment.

In the important article *A Taxonomy of Virtual Work*,¹¹⁰ Miriam Cherry highlights numerous challenges of virtual work including the complexity of defining employment discrimination under Title VII. Professor Cherry offers that the “virtual world might force employers to question why certain assumptions exist at all that would make someone’s identity relevant to the job.”¹¹¹ Recent studies on avatar perception, however, reveal that those interacting with the avatar do care.¹¹² A growing body of literature on virtual work environments includes ethnographic studies that offer a typology of virtual world identities and the effect of avatar appearance on behavior and perceptions.¹¹³ The point of much of this literature is to understand the role-playing or performative aspects of identity in virtual spaces and its impact on shaping behavioral dynamics. This work has profound implications for workplace cultures and identity performance in contemporary workplace settings.

An oft cited study of Dutch users reflected that collaborative distance was magnified when users approached avatars with Moroccan ethnic features versus those with Northern European features. Because avatars are often mini-me replications, the social interactions between users will be influenced by similar attitudes, beliefs, assumptions, and stereotypes.¹¹⁴ Another study that focused on perceptions of avatar appearance in multiethnic groups of undergraduate students in Guam (Filipino and Chamorro) revealed that people prefer to collaborate and engage in virtual spaces with those that look like them.¹¹⁵ This research highlights that “virtual environments . . . are governed by the same social norms as

¹¹⁰ See generally Cherry, *supra* note 87.

¹¹¹ *Id.* at 977–78.

¹¹² See Nowak & Rauh, *supra* note 53, at 171–74; Ron Dotsch & Daniël H.J. Wigboldus, *Virtual Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1194, 1195–97 (2008); Wallace, *supra* note 99, at 119.

¹¹³ See, e.g., Jeremy N. Bailenson et al., *Transformed Social Interaction: Decoupling Representation from Behavior and Form in Collaborative Virtual Environments*, 13 PRESENCE 428 (2004); Sherry Turkle, *Constructions and Reconstructions of Self in Virtual Reality: Playing in the MUDs*, 1 MIND CULTURE & ACTIVITY 158 (1994); Yee & Bailenson, *supra* note 103, at 271–90.

¹¹⁴ Dotsch & Wigboldus, *supra* note 112.

¹¹⁵ Paul R. Wallace & James Maryott, *Designing Multicultural Cooperative Learning Groups in Computer-Mediated and Online Classrooms: Implications of Avatar Selection and Preferences*, ACADEMIA.EDU (June 2008), <http://appstate.academia.edu/PaulWallace/Papers/91327>. This study focused on colleges and universities in Micronesia experimenting with virtual platforms to provide educational access to islanders spread across great distances. The idea was that such virtuality would promote cross-cultural and cross-ethnic collaboration. What the study revealed, however, was that social interaction in multiethnic groups was influenced by avatar appearance.

social interactions in the physical world.”¹¹⁶ Virtual bias seems to mirror real-world prejudice, but with a unique cultural overlay.

Avatar appearances matter not only to the worker projecting a certain image, but also to those engaging with it within the immersive virtual space. Importantly, negative social attitudes like prejudice and stereotyping pervade online communities.¹¹⁷ Specifically, race and gender stereotypes appear to be hard-coded in virtual environments.¹¹⁸ Therefore, ultimately, the black worker who adopts a white male avatar may suffer discrimination if he is “found out” by his co-workers because his virtual identity performance failed to match the expectations decision-makers have of him outside of the virtual work environment. Under a *Price Waterhouse* theory,¹¹⁹ for example, the exclusionary effect results in a form of stereotyping discrimination, what this Article refers to as “cybertyping.”¹²⁰

B. Virtual Culture and Social Interaction

Workplace culture has been identified in law as a social relations force encompassing human and structural elements that become the locus of discrimination.¹²¹ It encompasses the shared values and norms that evolve in group settings, shaping identity.¹²² Relational demography literature confirms that culture does more than boost morale, “it directs how employees perceive, think, and feel about work-related matters, including their co-workers.”¹²³ Notwithstanding the empowering aspects

¹¹⁶ Nick Yee et al., *The Unbearable Likeness of Being Digital: The Persistence of Nonverbal Social Norms in Online Virtual Environments*, 10 CYBERPSYCHOL. & BEHAV. 115, 119 (2007).

¹¹⁷ See Wallace & Maryott, *supra* note 115.

¹¹⁸ See *id.*

¹¹⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

¹²⁰ I offer cybertyping as a variant of stereotyping, but distinct in the sense that the identity is fluid in a virtual workplace. Moreover, with live identity performance, the options are far more limited and entail more psychic energy precisely because it is born out of necessity. Virtual performance identity, on the other hand, becomes a voluntary social act, part play, which accounts for much of the appeal of avataring to begin with. For example, live identity performance is limited by the real-world options. A person may opt for “better make-up, a new suit, counseling sessions, or workouts at the gym,” to enhance physical appearance. See REEVES & READ, *supra* note 4, at 95. However, the fantastical, fun nature of avataring enables the worker to experience a near instant virtual makeover with options unimaginable in the real world.

¹²¹ See Green, *Work Culture*, *supra* note 10 at 629–33. For a discussion of how employers seek to leverage loyalty benefits by investing in organizational culture, see Jennifer A. Charman & Sandra Eunyoung Cha, *Leading by Leveraging Culture*, CAL. MGMT. REV., Summer 2003, at 20.

¹²² SCHEIN, *supra* note 5, at 7. There is renewed interest in the cultural overlay and its capacity to shape and translate shared knowledge. See, Paul Adler et al., *Building a Collaborative Enterprise: Four Keys to Creating a Culture of Trust and Teamwork*, HARV. BUS. REV., July–Aug. 2011, at 95, 95–97.

¹²³ Martin, *Immunity*, *supra* note 11, at 1157.

of workplace culture, it manifests complex relational and psychological dynamics, thus producing oppressive effects including in-group favoritism, stereotyping, and related dysfunction.¹²⁴

Many of these cultural forces map onto the virtual environment quite seamlessly, producing similar effects.¹²⁵ For example, virtual workplace cultures present similar challenges with respect to addressing collaboration, teamwork, and integrated dynamics. Immersive virtual realities arguably are more dynamic environments than physical spaces due to the infrastructure of the underlying technology. Therefore, virtual workplace cultures possess unique characteristics that bear particular relevance to notions of belonging and inclusion.

The avatar in virtual environments serves as the connective tissue that binds the participant emotionally to the enterprise. It is the springboard to identity transformation of participants and produces a subculture within an organization. This virtual subculture presents the promise and challenge for social relations within immersive virtual spaces.¹²⁶ What emerges on the virtual stage is social presence that produces a new kind of cultural overlay—one that is far less formal, more playful, and embeds social and behavioral norms that are antithetical to traditional notions of professionalism and interpersonal interactions.

Significantly, the avatar becomes the defining feature in virtual scapes, one that produces what is known as “transformed social interaction,” a byproduct that affects the nature of emotional and relational connection of and among its members.¹²⁷ The avatar interface is a psychological tool that, like games, is so powerful that it can become dangerous, with the potential to “drive unhealthy behavior,” like the barnyard antics that often derive from real-world collaboration.¹²⁸ The

¹²⁴ See, e.g., Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, 48 AM. PSYCHOLOGIST 621, 623–24, 627 (1993). For a discussion mapping the power and influence of organizational culture onto collaboration and interpersonal relations in work settings, see Martin, *Immunity*, *supra* note 11, at 1138–61.

¹²⁵ See REEVES & READ, *supra* note 4, at 134. Additionally, Victoria McArthur wrote a master’s thesis exploring professionals within virtual worlds and avatar appearance. McArthur, *supra* note 52.

¹²⁶ See SCHEIN, *supra* note 5, at 55–68 (acknowledging the existence of cultures within a culture and the danger of this layered armor within organizations).

¹²⁷ Transformed social interaction is a phenomenon that “involves novel techniques that permit changing the nature of social interaction by providing interactants with methods to enhance or degrade interpersonal communication.” Jeremy N. Bailenson & Andrew C. Beall, *Transformed Social Interaction: Exploring the Digital Plasticity of Avatars*, in AVATARS AT WORK AND PLAY: COLLABORATION AND INTERACTION IN SHARED VIRTUAL ENVIRONMENTS 1, 2 (Ralph Schroeder & Ann-Sofie Axelsson eds., 2006). It is a phenomenon that addresses three dimensions that affect connection in virtual communities—sensory abilities, situational context, and self-representation. *Id.* at 2–3. For a detailed exploration of virtual culture and its import for collaboration and engagement, see generally *id.*

¹²⁸ REEVES & READ, *supra* note 4, at 6 (highlighting the destructive potential of gaming).

masking and costuming qualities of avatar use could easily foster negative behavior because of a perception of invincibility. The literature reveals that in virtual spaces, people may engage in “flaming” which can be as equally degrading to a corporate culture as face-to-face conflict.¹²⁹ With anonymity or the illusion of it, a worker can use the avatar as a surrogate to lodge offenses or to engage in bullying. Thus, as dynamic physical environments can manifest unprofessional behavior, so too can online work environments if employers do not pay attention to virtual office design and the potential for isolation.¹³⁰

While workplace engagement using avatars mirrors face-to-face interpersonal behavior in the real world, the norms and boundaries of physical workplaces do not translate seamlessly to virtual collaboration. Recent observations demonstrate the existence of different social norms including a completely different corporate decorum.¹³¹ A study revealed conduct that highlights the potential for social errors in interpersonal engagement, including dressing inappropriately, performing handstands to express excitement, passing out champagne glasses to team members to celebrate, and dancing with each other, to name a few.¹³² Importantly, a virtual platform like Second Life lends itself to this type of boundary crossing due to the playful, casual, and experimental ethos of virtual spaces.

This new culture that emerges in virtual environments changes the nature of professionalism in the context of work. Because virtual workplace cultures tolerate (and even expect) a certain level of casualness and frivolity, it is dangerous precisely due to the capriciousness of interactions among employees. Who knows when an employee or manager will show up as an offensive or distracting avatar and engage in inappropriate conduct?¹³³ Behavioral psychology further

¹²⁹ “Flaming” refers to communication errors such as rude outbursts and other confrontational interaction. Oftentimes such conduct can escalate depending upon the circumstances. See M.L. Markus, *Finding a Happy Medium: Explaining the Negative Effects of Electronic Communication on Social Life at Work*, 12 ACM TRANSACTIONS ON INFO. SYS. 119, 121 (1994). For a comparison of confrontational aspects in other social media contexts (e-mail), see Raymond A. Friedman & Steven C. Currall, *Conflict Escalation: Dispute Exacerbating Elements of E-mail Communication*, 56 HUM. REL. 1325 (2003).

¹³⁰ See REEVES & READ, *supra* note 4, at 6. Reeves and Reed also note that virtual workspaces could be dangerous precisely because the avatar serves as a “stand-in” and “does the dirty work for [the participant.]” *Id.* at 102. In a work setting, this illusion of anonymity could result in workers hiding their real motives or not controlling their impulses in ways they might do more readily in person.

¹³¹ See Bessière et al., *supra* note 65, at 2892–93.

¹³² *Id.* at 2891. The limits to these types of interpersonal engagements are unpredictable and varied, which is suggested by the fact that advanced users can include sound effects (e.g., “WOOOOOO HOOOOO HOOOOO,” accompanied by music and a dance). *Id.*

¹³³ REEVES & READ, *supra* note 4, at 100 (relaying an experience in a virtual world where, during a meeting, a penguin “hop[ped] up to the podium, [stood] right next to [a colleague], and [lit itself] on fire”).

explains how an employee might experience virtual touching as real touching.¹³⁴ The person sitting at the desk mentally experiences the virtual episode, creating real-world impressions and feelings. Such antics can prove counterproductive, and depending upon the avatar choice, risk offending others.¹³⁵

The convergence of physical and virtual worlds, and existences between worlds, promotes a more relaxed cultural milieu. Boundaries remain looser than in the physical world, non-existent or simply different. Normal interpersonal interaction in the immersive virtual environment would constitute unprofessional conduct in the physical world. The escapism involved in pretending to be someone else online, for example, lowers inhibitions, encourages risk-taking, and prizes levity. Although the social character is relaxed, immersive virtual environments promote a strong sense of emotional involvement.¹³⁶ Hence, virtual worlds embed a new social order, one not as amenable to traditional workplace behavioral norms and employer demands for formality and regulation.¹³⁷ In fact, some studies suggest that employees may resist attempts to over-police virtual workplace settings.¹³⁸ This presents a conundrum for employers who seek to find the sweet spot of productivity and engagement of its workforce by leveraging innovative immersive technology.

C. *Virtual Acceptance and the Challenge to Diversity*

The avatar, the element that animates the virtual space, adds complexity precisely because the online arena is filled with obscurities and idiosyncrasies absent in physical workplace cultures. Virtual reality in the context of work would seem to promote openness—an inclusive space with a canvass for rearticulation of identity and the potential for engaging people on the substance of their ideas, not their appearances, nor the underlying assumptions of others.¹³⁹ With a more permissive

¹³⁴ Jeremy N. Bailenson & Nick Yee, *Virtual Interpersonal Touch: Haptic Interaction and Copresence in Collaborative Virtual Environments*, 37 MULTIMEDIA TOOLS & APPLICATIONS 5, 11 (2008).

¹³⁵ In fact, research shows that the more realistic avatars receive the best response. Yee et al., *supra* note 96, at 5. Thus, it will be important for employers to ensure they are using a platform and software that mirrors interpersonal reaction as much as possible. For example, computer scientists continue to work on avatars that are realistic in gaze, head movements, and small gestures. Moreover, some virtual touching may be inadvertent. Yet, this still presents a risk for an employer if the person at the receiving end of the conduct is ultimately offended regardless of the playful nature of the exchange.

¹³⁶ REEVES & READ, *supra* note 4, at 96–97.

¹³⁷ See *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 595 (E.D. Pa. 2007).

¹³⁸ See Bill Leonard, *Managing Virtual Teams*, HR MAGAZINE, June 1, 2011, at 38.

¹³⁹ Cherry, *supra* note 87, at 977–78 (highlighting the promise of “forc[ing] employers to question why certain assumptions exist at all that would make someone’s identity relevant to the job”).

culture that empowers workers, “Jane Doe” may blossom in the virtual workplace. Literature on immersive cultures suggests that this confidence may even transcend the online world and enhance Jane Doe’s real-world demeanor, engagement, and social skills.¹⁴⁰ Could the avatar-based virtual environment create the kind of dynamic culture in which diversity values trump because the salience of differences becomes subdued in light of the accepted norm of identity-bending?

Whether cyberspace generally, and by extension immersive virtual environments, constitutes oppressive or open space remains a contested issue, however. In the gaming industry, much has been made about the lack of diversity of the virtual player. Moreover, virtual worlds of the most popular immersive platforms (including Second Life) have been seen as creating a culture of virtual whiteness.¹⁴¹ In fact, users have labeled the cyber neighborhoods of Second Life as embodying white dominance.¹⁴² This white dominance cyber theory posits that brown identities are scant and less credible in virtual environments.¹⁴³ In fact, a number of ethnographic studies in social psychological literature confirm aspects of this hypothesis.

A particularly striking example involves an ethnographic study of the psychological effects of alleged avatar white dominance in virtual worlds on ethno-racial minorities. The researchers sought to understand the impact of social identity dynamics, especially how avatar-based racial identity shapes perceptions of belonging by racial minority participants.¹⁴⁴ The study revealed that racial minorities perceived white-dominance cues as identity threatening, which increased detachment and disconnection while lowering impressions of belonging.¹⁴⁵ Additionally, complex social

¹⁴⁰ See Bessière et al., *supra* note 65, at 2892.

¹⁴¹ Lee & Park, *supra* note 98, at 637.

¹⁴² *Id.* One critique noted that “one feature struck me immediately, and hard, when I first joined the game: the *whiteness* of it all. I almost never ran into a black person. Even in the ‘urban contemporary’ and Caribbean clubs, one has to search persistently for a glimpse at a suntan.” Destiny Welles, *My Big, Fat, Lily-White Second Life: Would any Black Resident Please Stand Up?*, THE REGISTER (Jan. 30, 2007), www.theregister.co.uk/2007/01/30/lily_white_and_not_loving_it/.

¹⁴³ See, e.g., Yasmin B. Kafai et al., “Blacks Deserve Bodies Too!”: Design and Discussion About Diversity and Race in a Tween Virtual World, 5 GAMES & CULTURE 43, 44 (2010). It is quite interesting that in a space where one can architect a society like in Second Life, the dominant patterns of segregating residential and social space prevails. This seems antithetical to the defining characteristic of the internet as an inclusive environment. Yet, several scholars in the intellectual property legal literature have critically examined cyberspaces. See, e.g., Margaret Chon, *Radical Plural Democracy and the Internet*, 33 CAL. W. L. REV. 143 (1997).

¹⁴⁴ Lee & Park, *supra* note 98.

¹⁴⁵ *Id.* at 641. This study is poignant precisely because it illuminates the complex social identity dynamics alive in virtual spaces, and suggests the exclusionary effect of racial identity in online workplace cultures. The notion that social identity contingencies operate similarly in virtual worlds as they do in physical settings leads the author to conclude that the avatar-based virtual workplace presents hard questions about diversity and belonging in the contemporary workplace. *Id.* Further

identity dynamics manifest in-group and out-group stratification; this data suggests that in virtual cultures, correlations exist between race and rudeness, race and belonging, and difference and credibility.¹⁴⁶ Group-based values of homogeneity in appearance and behavior emerge in virtual collaborative settings.¹⁴⁷ Moreover, social psychological research points to the unconscious nature of biases in collaborative virtual realities, including avoidance behaviors and other manifestations of implicitly negative evaluations.¹⁴⁸

Kenji Yoshino's work on covering offers additional perspective on virtual presentation. Covering serves as an interactional strategy (or coping mechanism), whereby the worker engages in the intentional suppression of a core aspect of one's identity in order to influence others' perceptions and responses.¹⁴⁹ Thus, workers in virtual environments may feel pressure to cover or to engage in impression management, which heightens their sense of isolation.¹⁵⁰ These reactions

exploration of group-based dynamics and cultural dynamics is the focus of a forthcoming companion to this Article, *Virtual Workplace Culture*, on file with the author.

¹⁴⁶ See, e.g., Kori Inkpen & Mara Sedlins, *Me and My Avatar: Exploring Users' Comfort with Avatars for Workplace Communication*, 2011 PROC. ACM CONF. ON COMPUTER SUPPORTED COOPERATIVE WORK 383, 385–86.

¹⁴⁷ Looking like the in-group matters in virtual immersive environments. In fact, in-group avatars experience “preferential” treatment. See REEVES & READ, *supra* note 4, at 107. The fact that people respond better to avatars that look like them explains the ethnographic studies that show psychological impact and the exclusionary effects of avatar-based racial cues. See Wallace, *supra* note 99, at 123–25 (discussing studies revealing that appearance-based prejudice based on ethnicity exists in virtual collaborative settings).

¹⁴⁸ Implicit biased associations may engender automatic and impulsive discriminatory responses. The often-cited “Dutch study” shows how affective processing of emotions like fear and anxiety elicit impulsive discriminatory responses in virtual spaces. See Dotsch & Wigboldus, *supra* note 112, at 1197. Building on the substantial body of recent implicit bias work, this study proves significantly important in its pursuit and application of the social cognition research to the avatar-based virtual environment. For more details about the study including methodology, see *id.* at 1195. The study isolated avatar ethnicity to determine its effect on avatar behavior. The idea was to test whether cognitive implicit bias translated into implicitly biased conduct. *Id.* The immersive virtual setting exposed participants to white and Moroccan male avatar images near a bus stop. *Id.* The avatars were given typical native Dutch and Moroccan names as well. *Id.* On average, the participants “kept more distance towards avatars with a Moroccan appearance compared to avatars with a White appearance.” *Id.* at 1197.

¹⁴⁹ Interestingly, however, some studies reflect that avatars generally match the gender, race and ethnicity of the user, despite the negative social attitudes that such appearance attributes may engender. See Nowak & Rauh, *supra* note 53, at 172; see also Wallace, *supra* note 99, at 119 (highlighting the fact that avatar selection can evoke negative social attitudes “toward avatars that differ in ethnicity or other properties of appearance”).

¹⁵⁰ “The discourse on workplace culture suggests that such ‘impression management’ falls more harshly on . . . outsiders within an organization or group, due to the well documented predisposition to categorize and stereotype along

make gendered and racialized differences and associations in avatar appearance deficits to success in virtual work scenarios.¹⁵¹ Users still differentiate, distort and judge in immersive virtual spaces, notwithstanding the fact that they are engaging a digital representation rather than the actual individual. The lack of options for customization as well as the manner in which otherness (particularly skin color) is perceived in online territories suggests that virtual workplaces may present challenges to diversity similar to those in the real world, yet enhanced due to the hidden quality of the avatar user.¹⁵²

In sum, while there is plausibility in the notion that employees can mask their true identity in “fantastical” work spaces, these advances add a level of complexity to virtual work environments. The virtual sub-culture mirrors some of the problematic aspects of physical work settings. Thus, new forms of discrimination may emerge from virtual work. Interdisciplinary sources including behavioral and cognitive social psychology, information science, and management theory all lend insight to the immense paradigm shift and dynamism of avataring in virtual workspaces. What is known about the complex social dynamics of traditional work settings and what the emerging research on immersive virtual environments reveals, suggests that virtual workplaces can embody similar oppressive effects as their physical counterparts. And in fact, new and cutting-edge studies reflect that active virtual workplaces may hold less promise for increased inclusion in the contemporary workplace.¹⁵³

IV. EMBRACING THE VIRTUAL WORKPLACE

Why would an organization want its employees to engage in cyber offices, a setting fraught with social, cultural, and relational problems? At its best, the virtual workplace may promote opportunities for innovation and growth through increased employee participation. However, the virtual office can easily become a vector for discrimination to flourish

demographic lines, in-group favoritism, similarity attraction, and other such theories.” Martin, *Immunity*, *supra* note 11, at 1157–58. For a discussion of the theoretical underpinnings of performance identity, see *supra* note 32. See also Emily M.S. Houh, *Toward Praxis*, 39 U.C. DAVIS L. REV. 905, 910 (2006) (“[M]embers 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.”).

¹⁵¹ See, e.g., Jose Eurico de Vasconcelos Filho et al., *Image, Appearance and Vanity in the Use of Media Spaces and Videoconference Systems*, 2009 PROC. ACM INT’L CONF. ON SUPPORTING GROUP WORK 253.

¹⁵² “The complex entanglement of power and stereotyping . . . affects engagement and decision-making within organizations in profound ways.” Martin, *Immunity*, *supra* note 11, at 1158. The emerging studies on the virtual workplace forecast that similar disempowering effects will permeate collaborative efforts within immersive virtual environments. See *supra* notes 97–98, 112–16 and accompanying text. Thus, the avatar interface creates another vector for bias to flourish.

¹⁵³ See *supra* notes 96–101 and accompanying text.

based on appearances, interpersonal dynamics, and enhanced potential for social error. Despite the risks avatars pose to organizations, employers are increasingly enticed by this sophisticated virtual capability. In fact, many are already engaging workers using popular platforms like Second Life, with several developing their own computer mediated virtual realities.¹⁵⁴

A. *The Appeal of Virtual Work Environments*

Employers are drawn to this technology primarily because of efficiency gains and the psychological power of avatars.¹⁵⁵ An excerpt from *Total Engagement*¹⁵⁶ highlights well the combination of forces that account for the growing appeal to organizations:

MEET JENNIFER (TAKE 2)

Jennifer puts down the baby in her family room, sits down at her computer, and logs in. Gone are the standard forms, the lists, the big data board, and the carrels. The first thing she sees on the screen is her avatar, an appealing animated character she created to represent her in a themed virtual world. Jennifer has already personalized her avatar (choosing everything from its gender and age to personality and appearance), and she begins her workday by walking (virtually) to the place in the 3D world where her team is gathering. Her twenty-person team is scattered in three different time zones, some at an office but most in their homes. They're all together now in the virtual world.

The first thing Jennifer does is check on her team's progress. . . . All of the once-familiar call center metrics are now cast as points, ranks, and virtual currency within a large and engaging multiplayer game complete with a compelling narrative, interesting 3D environment, dynamic marketplaces, leader boards, and chat channels. Most important, there are teams. Jennifer knows that her

¹⁵⁴ See Katie Benner, *I Got My Job Through Second Life*, CNN MONEY (Jan. 23, 2007), http://money.cnn.com/2007/01/22/magazines/fortune/secondlife_recruit.fortune/; Aili McConnon & Reena Jana, *Beyond Second Life*, BUSINESS WEEK (Jun. 11, 2007), http://www.businessweek.com/print/magazine/content/07_24/b4038417.htm?chan=gl; Mark Tutton, *Going to the Virtual Office in Second Life*, CNN BUSINESS (Nov. 9, 2009), <http://www.cnn.com/2009/BUSINESS/11/05/second.life.virtual.collaboration/>; see also REEVES & READ, *supra* note 4, at 92–98 (generally highlighting what is driving the interest in avatars in work life, and Fortune 100 companies' development of prototypes for virtual work). For those developing their own virtual immersive technology, this investment forecasts that this mode of engagement is not only here to stay, but represents a significant shift in future work in society.

¹⁵⁵ See REEVES & READ, *supra* note 4, at 92.

¹⁵⁶ *Id.* *Total Engagement* comprises one of the most current and persuasive explorations of the potential of transforming work using virtual realities. The authors outline various arguments, cases, and stories to guide innovation at work. The book is premised on the idea that games can help revolutionize work.

success is determined in part by how well her whole team performs, and she has a clear understanding of what she gets when they win.¹⁵⁷

This description of the virtual worker illuminates the promise of avatars in the contemporary workplace, particularly in light of the prevalence of a distributed workforce. Organizations with far-flung operations across the nation or the world seek a modality for connecting workers *and* maintaining high levels of productivity. Unforgiving time zones and inadequate telephonic options make global threading of workers especially challenging. Moreover, market conditions necessitate a new approach to address declining resources and the overhead costs of maintaining brick-and-mortar workspaces.¹⁵⁸ Many employers seek to enhance productivity, individual work performance, and collaboration.

Beyond efficiency gains, employers seek to build employee loyalty through deeper connections to the organization, to co-workers, and to the work itself. Avatars facilitate the “emotional and social” stimulation that nurtures the kind of allegiance employers seek.¹⁵⁹ Moreover, the modern worker derives a great deal of motivation from increased social and emotional connection in work life.¹⁶⁰ With the advent of technological advances, the labor market now comprises a large number of individuals for whom social media is integral to many facets of their daily lives. Research reflects that contemporary workers desire to experience emotional connections in the context of work that mirror those in their personal lives with constant feedback, minimal bureaucracy, and more input. In fact, the lines between the employees’ personal and work personas have blurred. Thus, employers seek to infuse work environments with social fiber to keep employees emotionally connected. This democratic orientation of the modern worker drives employers to find ways to *engage* rather than *command* their workforce. And herein lies the psychological power of the avatar.

The avatar binds the employee to the digital representation, as well as the organization’s goals. This emotional involvement has been shown to yield productivity gains. For example, the positive sensibilities of an

¹⁵⁷ *Id.* at 2.

¹⁵⁸ Avatar-based virtual environments have been advanced as recession friendly, significantly reducing the costs of hosting live meetings or other company events. A large organization reportedly conducted a two-day meeting of global participants with costs of \$7,000 versus the \$150,000 it would have cost to host in-person. Morrison, *supra* note 38.

¹⁵⁹ See REEVES & READ, *supra* note 4, at 64–65, 93. For quite some time, scholars have critiqued the evolution of workplace law, characterizing its development as the managerialization of antidiscrimination law. Employer deference, hostility toward plaintiffs, and ignorance of the complexity of contemporary bias are factors retarding the movement toward equality and inclusion. That is, the law facilitates employers’ ability to manage workers with minimal interference.

¹⁶⁰ See *id.* at 6–8 (posing that the modern worker desires to “know the rules, advance frequently, partner quickly, and nurture reputations in a narrative that aligns their own objectives with those of the organization that pays their salary”).

engaged worker manifest less absenteeism, attrition, and aggression.¹⁶¹ Therefore, the employee experiences more positive collaboration, better performance evaluations, and stronger relationships with co-workers.¹⁶² Research on play and productivity teaches that engaged subjects are more creative, community-minded, happy, open, and motivated.¹⁶³ Thus, scholars argue that game technology and psychology have much to offer the modern workplace.¹⁶⁴ Research shows that people immersed in virtual worlds lose track of time and experience positive cognitive and physiological attributes.¹⁶⁵ The drudgery of work involves repetitive tasks—tedious and dull aspects that 3-D imagery enlivens. The bottom line: avatars promote satisfied and happy workers.

This “convergence of work and play” places the employee in a professional narrative with others, synchronously developing the story line as in virtual game environments, but centered around the business goals of innovating, problem-solving, and sharing ideas. This benefit potentially accrues across demographic statuses including gender, age and socio-economic position.¹⁶⁶ Thus, the decentralization and democratization of the workplace may result in broader diversity as employees possess greater access to leadership through virtual connections. Hierarchical structures lose their force as even employees at lower levels of the organization are empowered to participate, and may be more inclined to do so through avatar interface. By commanding through engagement, employers can promote inclusion and break down barriers. Avatars appear to provide the antidote to the monotony of traditional work on the theory that the immersive virtual workplace can effectively blend work and play, and build social and emotional connection.

¹⁶¹ See *id.* at 174.

¹⁶² See *id.*

¹⁶³ *Id.*

¹⁶⁴ These engagement principles arguably are important for “recruitment, hiring, training, retention, leadership, teams, evaluation, collaboration, and innovation.” *Id.* at 13. Much of this work is embodied and presented in *Total Engagement*, which relies on the latest research. See generally *id.* For example, a Stanford study revealed that being immersed in the interactivity of avatars resulted in subjects’ hearts beating faster, brains being more engaged, and increased concern for the emotional well-being of the avatar. See *id.* at 65.

¹⁶⁵ See *id.* at 96–97, 181–90.

¹⁶⁶ Research of virtual multiplayer gaming reflects that players in online games range in age from 15–65, with users over the age of 40 the most intensely engaged in online gaming. See *id.* at 20–22, 29. Women are quite active in gaming scenarios as well. *Video Gaming Attracts Larger Female Audience in 2009*, THE NPD GROUP (June 29, 2009), https://www.npd.com/wps/portal/npd/us/news/pressreleases/pr_090629b. In contrast, Blacks and Latinos together comprise five percent of online gamers. *Id.* at 21.

B. Integrating the Virtual Worker—Creating “Flow” and Preventing Discrimination

What captivates users about avatars in immersive virtual environments is known in psychological terms as “flow”¹⁶⁷—a state of indulgence, concentration, and connection so intense that it produces pleasure and high productivity.¹⁶⁸ Applying this concept to contemporary work, flow characterizes the worker who is engaged, emotionally involved, and unencumbered by the self-consciousness of identity or status. To reap the benefits of flow in virtual work, employers must reconcile the tension between play and professionalism. Finding this equilibrium will be necessary particularly due to the powerful social and psychological dynamics involved in virtual worlds.

Notwithstanding the allure of the avatar to transform oppressive workplaces into engaging and inclusive fantasy lands, employers need to beware precisely because of the unique cultural dynamics that evolve in virtual environments. Employers must understand how complex social dynamics that manifest in work teams and collaborative models may replicate in virtual workspaces, and ultimately result in exclusion, biased engagement, and discriminatory decision-making. Cognitive psychological literature on virtual worlds reflects that prejudice persists in online settings. One reason for the similarity is that “participants in virtual settings tend to respond to avatars as they would respond to real people with similar characteristics.”¹⁶⁹ Since virtual environments embody many of the same behavioral dynamics as traditional office settings, employers must attend to the tensions between play and work on the one hand, and sociability and professionalism on the other hand.

To avoid what this Article identifies as cybertyping—varying forms of appearance discrimination, harassment, and other disparate treatment—employers must focus on integrating the virtual worker in a blended workplace of physical and virtual attributes. To minimize the potential effects of virtual prejudice, the employer must consider engaging in some appearance regulation and fostering the social intelligence of its workers.

1. Appearance Regulation

A report from the information technology firm Gartner reflects some of the most current comprehensive guidelines for implementing avatar-based virtual work. These best practices include extension of employer appearance and grooming codes to virtual employee avatar

¹⁶⁷ REEVES & READ, *supra* note 4, at 182.

¹⁶⁸ Psychologist Mihaly Csikszentmihalyi is credited with coining the term flow to explain the fixation and enjoyment experienced when one is trying to accomplish something difficult. *See id.*

¹⁶⁹ *See* Wallace & Maryott, *supra* note 36.

representations.¹⁷⁰ For example, the employer may institute grooming codes that focus on how a worker dresses the avatar, as well as the extent to which the employee accessorizes and animates it.¹⁷¹ This presents an interesting conundrum for employers, however, because the autonomy of shaping identity, as this Article explores in Part III, accounts for the strong appeal of virtual workplaces among workers. This visual and emotional presence, along with the entertainment attributes, engages employees on a deeper psychological level. Avatars in virtual work settings convert the dull sterile cubicle into a “sandbox,” creating a “qualitatively different experience” that allows employers to captivate workers who become extremely connected and internally motivated.¹⁷² Because of these unique attributes of avatar-based virtual work, employers must appreciate the overlap between the personal and professional, and the underlying value of sociability to the success of an immersive virtual work culture.

The “[t]ension between self-expression and norms of corporate behavior” presents challenges as employers seek to capitalize on this innovative approach.¹⁷³ Employers remain unsure where to draw the lines with respect to regulation of avatar appearance in the virtual workplace. A completely hands-off approach is likely insufficient in light of the fluidity of identity and the potential for social error. Because employees carry such affinity for the chosen avatar and representation, however, regulation must be tempered with pragmatism to allow freedom for self-determination and agency.¹⁷⁴

2. *Fostering Social Intelligence*

With the virtual platform set, the employee’s avatar is ready to take center stage in the shared enterprise of the online work environment. This complex social environment presents interesting challenges for employers. How do organizations maintain the seriousness of virtual

¹⁷⁰ Finkel, *supra* note 27, at 13; see also *Gartner Says Enterprises Must Get Control of Their Avatars*, GARTNER (Oct. 7, 2009), <http://www.gartner.com/it/page.jsp?id=1201413>.

¹⁷¹ Employers can better control the options available to workers by investing in their own customized platforms. And, as avatar appearance configuration capabilities advance, the employer should have appealing but professional options for avatar customization. See *Gartner Says Enterprises Must Get Control of Their Avatars*, *supra* note 170.

¹⁷² In a shared enterprise filled with role-play in concert with others, workers engage more deeply, openly, and candidly than in text-based engagement. See Barry Brown & Marek Bell, *Play and Sociability in There: Some Lessons from Online Games for Collaborative Virtual Environments*, in *AVATARS AT WORK AND PLAY: COLLABORATION AND INTERACTION IN SHARED VIRTUAL ENVIRONMENTS* 227, 241 (Ralph Schroeder & Ann-Sofie Axelsson eds., 2006).

¹⁷³ See Bessière et al., *supra* note 65, at 2892.

¹⁷⁴ Moreover, to the extent employers adopt such policies, they must apply them on an equal basis to avoid sanctioning particular avatar appearances that may bear on a protected category. The risk is that employers may privilege certain avatar representations over others.

work and preserve the emotional engagement and excitement fueled by avataring? Proponents of immersive virtuality acknowledge the psychological power *and* danger of applying game design principles of immersion, fast-paced feedback, asynchronous involvement, and imagination to the workplace.¹⁷⁵ It could drive aggressive and offensive behavior, and incite a workplace culture that proves unhealthy, toxic, and aggressive, leading to discrimination in the ways discussed throughout this Article.

To minimize the potential for social error, the employer may adopt virtual behavioral guidelines, or expand its various codes of conduct. Additionally, organizations must nurture the social intelligence of workers in ways that are unnecessary in physical settings. It will be important to help employees to appreciate that, although the avatar is “onstage” in the virtual office, the worker remains the responsible director at all times. Employers may communicate expectations through “style sheets for appearance, rules for behavior, and protocol for meetings.”¹⁷⁶ Such behavioral guidelines will have to be explicit about acceptable ranges of conduct to raise awareness of the potential for social error. The aim is to promote virtual interaction that avoids violating social norms of virtual communities.¹⁷⁷ The point is that virtual etiquette will play a key role in mediating the tension between working in and between the virtual and physical worlds.¹⁷⁸ Educating employees is critical to this endeavor.¹⁷⁹ If employers succeed, these efforts will solidify the company’s reputation and build brand loyalty within its workforce.¹⁸⁰

¹⁷⁵ See REEVES & READ, *supra* note 4, at 6 (asserting that “[g]ame design offers an unprecedented tool for workflow engineering, but bad stuff can (and probably will) happen”). This is precisely why this exploration is worthwhile in order to increase understandings of contemporary work bias and its impact on law, particularly as it relates to complex workplace dynamics and what motivates employment decision-making.

¹⁷⁶ *Id.* at 100–01.

¹⁷⁷ Research has shown that it matters where an avatar stands and how it moves in relation to cultural norms. Situational aspects including gender or cultural expectations may influence behavior and establish expectations as well. See Bessière et al., *supra* note 65, at 2892.

¹⁷⁸ Such terms as “netiquette” and “digital etiquette” have arisen with respect to social norms within immersive virtual environments. From an employment perspective, it may be that these guidelines will need to encompass more detail than standard antidiscrimination policies due to the electronic medium and the elements of play. See THE KNOWLEDGE TRANSLATION TOOLKIT: BRIDGING THE KNOW-DO GAP: A RESOURCE FOR RESEARCHERS 214–15 (Gavin Bennett & Nasreen Jessani eds., 2011); Larry Magid, *Digital Etiquette for the 21st Century*, CBS NEWS (Oct. 6, 2009), http://www.cbsnews.com/2102-500163_162-5347616.html?tag=contentMain;contentBody.

¹⁷⁹ Research reflects that a prime challenge to implementing sophisticated digitized work like avataring is learning to control the avatar’s movements and other interactive capabilities. See Inman et al., *supra* note 62, at 53. Inadvertent social error makes investing in education and extensive pilot programs critical to developing proficiency and comfort amongst workers to fully maximize their potential. One study described an incident where a participant “pick[ed] up an item of clothing that caused his avatar to

Because employees derive a fair amount of agency and autonomy in avatar-based immersive virtual environments, perhaps some of the risks of social error will be mediated by the employees' own self-interest. The psychology of attachment of the user to the avatar image suggests that concern for the reputation of the avatar will sensitize workers to behavioral dynamics. Unlike traditional video-conferencing, the avatar affords the employee a kind of helicopter experience while simultaneously engaged in an on-stage narrative. Thus, this duality of engagement allows the worker to not only control the avatar's interaction, but also to see how others respond to it. This unique vantage point allows the worker to project, to react, and to reflect on behavior simultaneously. This reflective quality may allow employees to understand what others take away from their behavior and encourage self-policing. Thus, managing by engaging rather than overly commanding may help to diminish the negative effects of avatar interaction because employees are internally *and* externally motivated.

C. Implications for Antidiscrimination Law and Future Direction

The infrastructure of virtual immersive environments presents interesting challenges for contemporary work. This Article presents an optimistic framing of the future of immersive virtual work and its potential for increasing inclusion and notions of belonging in the contemporary workplace. The ability to break down hierarchal barriers based on appearance judgments and stereotypical assumptions through the agency of choice appears hopeful. Additionally, broadened access through the decentralization and democratization of the modern workplace bodes well for increasing the participation of workers generally, and marginalized workers in particular.

Yet, as this Article highlights, careful consideration of the implementation of avatars in the workplace is necessary precisely due to the fluidity of identity and the deconstructive potential of socially ascribed meanings of characteristics like race, gender, and age, to name a few. Avatars disrupt traditional understandings of the protected categories under Title VII and other strands of workplace antidiscrimination law.

1. The Paradox of Presence in Virtual Work and Limitations of the Categorical Approach

The virtual body in the form of the avatar is a bit of a paradox. Notwithstanding the human qualities the avatar possesses, it is like a puppet as the user infuses and controls these sensibilities by manipulating the technology. The hybridity of the technological and

begin moving in a suggestive manner, ultimately causing embarrassment.” The other participants quickly directed him how to remove the article of clothing to stop the inappropriate gesturing. Bessière et al., *supra* note 65, at 2893.

¹⁸⁰ See Crain, *supra* note 15.

human interface makes the use of the avatar in the context of work quite powerful and promising, as well as potentially dangerous.¹⁸¹

Shannon McRae captures precisely the paradox of presence:

If boys can be girls and straights can be queers and dykes can be fags and two lesbian lovers can turn out to both be men in real life, then 'straight' or 'queer,' 'male' or 'female' become unreliable as markers of identity. . . . Gender becomes a verb, not a noun, a position to occupy rather than a fixed role.¹⁸²

Avatars further disrupt the demarcation between immutable and mutable characteristics. Discrimination law confronts identity as if it were static, and this approach has been shown to be inadequate in capturing the complexity of identity and the perceptions of employees in contemporary work settings.

The protected-class approach under Title VII has focused largely on the physical embodiment of the identity category—the immutable aspects of an individual's identity. Contextualizing the mere labels that appear in the statute constitutes the work of many critical legal scholars. How race is perceived, situated, performed, masked, and stereotyped animates the quest to understand and educate about racial classifications.¹⁸³ Professors Angela-Onwuachi Willig and Mario Barnes theorized that "race" includes socially constructed attributes that are linked to a particular racial group.¹⁸⁴ They advocate for the recognition of discrimination claims where an individual is "regarded as" black, with all of the socially ascribed negative stereotypes of the group.¹⁸⁵ Much of the theorizing regarding the contours of the various categories involves

¹⁸¹ McArthur, *supra* note 52, at 24–36.

¹⁸² Shannon McRae, *Flesh Made Word: Sex, Text, and the Virtual Body*, in *INTERNET CULTURE* 73, 79–80 (David Porter ed., 1997).

¹⁸³ See, e.g., *supra* notes 8–10 and accompanying text; see also YOSHINO, *supra* note 8, (addressing how outsiders deliberately downplay or "cover" their differences to make themselves more palatable to insiders).

¹⁸⁴ Onwuachi-Willig & Barnes, *supra* note 8. This work significantly contributes to contemporary understandings of discrimination. In 2006, the EEOC adopted guidelines that appear to reflect the essence of Onwuachi-Willig's and Barnes's contributions. The EEOC's definition of race discrimination now includes: "discrimination against a person because of cultural characteristics often linked to race or ethnicity, such as a person's name, cultural dress and grooming practices, or accent or manner of speech. For example, an employment decision based on a person having a so-called 'Black accent,' or 'sounding White,' violates Title VII if the accent or manner of speech does not materially interfere with the ability to perform job duties." EEOC COMPLIANCE MANUAL ¶ 8710, at 7204 (CCH 2011) (emphasis added).

¹⁸⁵ Onwuachi-Willig & Barnes, *supra* note 8, at 1325–1334. Similarly, Professor Wendy Greene broadens understanding of intersectionality in her exploration of racialized effects of hair color and the regulation of appearance in the workplace. See D. Wendy Greene, *Black Women Can't Have Blonde Hair . . . in the Workplace*, 14 J. GENDER RACE & JUST. 405 (2011); D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355 (2008).

engaging interdisciplinary sources, including cognitive psychological literature to make evident the elusive nature of discrimination.¹⁸⁶

Notwithstanding the considerable bodies of work offering sophisticated analyses on the essential nature of the various protected categories under workplace law, employees continue to suffer disparate treatment due to their identity status. Nevertheless, the law and its commentators agree that the physical manifestation of the immutable characteristics, such as they are, deserve attention, but where the lines should be drawn remains contested. And the distortion reflects poignantly in the exclusionary effect of the courts' narrow interpretations.

Shifting identities and associations continue to vex courts. If a male worker decides to show up at work dressed as a female and adopts socially ascribed feminine behavior and characteristics, the courts often decline to recognize this transformation as "gender" for purposes of the statute if that worker ultimately suffers some adverse employment action.¹⁸⁷ In fact, employers have wide latitude in regulating the appearance and grooming choices of their employees.¹⁸⁸ Generally, the law subordinates the worker's interests in her appearance to the employer's business judgment.¹⁸⁹ The law subscribes to the notion that employers ought to control the organizational setting with little infringement from either the whims of an individual's identity preferences or over-regulation by the courts in the name of equal employment opportunity.

¹⁸⁶ See Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009) (commenting on the invisible, deep, and pervasive nature of racial and gender bias based on social psychology research). Recently, Rachel Moran has observed the elusive nature of discrimination and the limitations of the various theoretical frameworks to adequately conceptualize modern discrimination. Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365 (2003).

¹⁸⁷ If the claim is based on sexual orientation, courts reject it because gender identity is not a protected category under Title VII. See *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979). However, plaintiffs have recently experienced more success where the claim is based on gender stereotyping. See *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864 (9th Cir. 2001).

¹⁸⁸ Courts often defer to employers' judgments about workplace appearance. See, e.g., *Webb v. City of Philadelphia*, 562 F.3d 256 (3d Cir. 2009) (Muslim female worker wearing hijab); *Jespersen v. Harrah's Operating Co. Inc.*, 444 F.3d 1104 (9th Cir. 2006) (employer's grooming policy requiring female bartender to wear make-up), *Rogers v. Am. Airlines, Inc.*, 527 F.Supp. 229 (S.D.N.Y. 1981) (African-American female employee wearing "corn rows").

¹⁸⁹ See Katherine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 Mich. L. Rev. 2541, 2543-44 (1994); Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy* 24-27 (Duke Law Faculty Scholarship Paper No. 1320, 2006), available at http://scholarship.law.duke.edu/faculty_scholarship/1320/.

2. *Elusive Nature of Discrimination and Future Direction*

This Article joins the growing interdisciplinary discussion of the changing nature of work and the impact of these realities on employment discrimination law. The goal of this Article is to illuminate the problematic nature of the protected-class approach by offering a stark contemporary example of the complex nature of identity where the physical and imaginary worlds blend. Additionally, this endeavor seeks to understand what an avatar-based virtual environment teaches about human motivation. The fluidity of identity and dynamic levels of engagement make locating the bad actor even more difficult. And, significantly, it demonstrates the immense failure of an intent-based obsession in analyzing claims of discrimination.

For sure, this exploration of avatar-based virtual work deepens our understanding of the elusive nature of discrimination, and confirms that contemporary discrimination is a complex mixture of cognitive, cultural, and structural dynamics. The meaning of discrimination becomes more uncertain once the physical manifestation of identity blends with the virtually constructed identity.¹⁹⁰ If the physical manifestation of identity no longer remains the sole embodiment for consideration, how does this destabilization of Title VII's identity categories challenge current understandings of discrimination? Does virtual presence hold promise for decreasing the racialized and gendered nature of bias such that virtual immersion can be seen as positively affecting notions of belonging in the contemporary workplace? Pivoting the identity question in the context of workplace avatars and virtual identity performance seems particularly productive in light of the pervasive use of technology in contemporary settings and the growing trend toward using avatars on platforms like Second Life or other employer-provided digital work spaces.¹⁹¹

Avatars in the workplace thicken the plot of unearthing discrimination and the role that identity plays in shaping behaviors. This hybridity of technology and flesh illuminates the need for more nuanced contextualization of identity in contemporary work. Moreover, emerging research on the cognitive and behavioral aspects of avatar use give theories of intersectionality more validity in defining the nature of discrimination against virtual subjects in immersive online work scenarios. Expanding conceptions of discrimination seems obvious in light of avatar mechanics and social and cultural meaning. Further exploration is needed, however, on the nature of culture in virtual work settings, which is the subject of forthcoming work that explores in more

¹⁹⁰ For example, if the same male worker mentioned above attends a virtual meeting as a female avatar, is this protected "gender" for purposes of Title VII?

¹⁹¹ In 2007, Gartner predicted that 80% of active internet users would have virtual world "second lives," and that major institutions would be similarly engaged. *Gartner Says 80 Percent of Active Internet Users Will Have a "Second Life" in the Virtual World by the End of 2011*, GARTNER (Apr. 24, 2007), <http://www.gartner.com/it/page.jsp?id=503861>.

depth the complex social and relational dynamics of virtual collaboration and teamwork.¹⁹²

V. CONCLUSION

Professor of Management G. Anthony Gorry at Rice University edifies the complexity of professional avataring in virtual work environments: “Avatars seem to be . . . taking the narrative imagination of fiction, the aesthetic imagination of cinema, and the self-styling power of social networks, and combining them into virtual worlds that seek to mimic real-world interaction.”¹⁹³

This statement captures precisely the blended nature of contemporary notions of work—the visual and emotional presence of the avatar. For sure, this mode of contemporary work holds some promise for enhancing productivity and fostering workplace cultures that enhance notions of belonging. A preliminary analysis of the cognitive psychological forces and behavioral consequences, however, demonstrates that avataring may provide mere surface-level diversity, and fail to create a pathway toward real inclusion.¹⁹⁴ Moreover, avatar-based work arrangements may well promote isolation and exacerbate notions of belonging, because these online environments embody similar complex social and relational dynamics present in physical workplace settings.¹⁹⁵

For the employee who has been told that she is “geographically, racially, culturally, and socially out of place,”¹⁹⁶ the virtual workplace constitutes a mixed bag. In a virtual office setting, the worker transcends geographic boundaries, but not necessarily the social and cultural scripts that shape perceptions of her in group settings. Her new virtual workspace provides an avenue for engagement in work life presumably on the same terms as any other co-worker. Notwithstanding the fact that

¹⁹² The author is pursuing this perspective in a current work-in-progress, *Virtual Workplace Culture*, which is on file with the author.

¹⁹³ G. Anthony Gorry, *Avatars in the Workplace: How Businesses are Adapting to the Virtual World*, NEW ATLANTIS, Spring 2010, at 126, 127.

¹⁹⁴ For a description of diversity that fosters real inclusion, see generally Rebecca K. Lee, *Core Diversity*, 19 TEMP. POL. & CIV. RTS. L. REV. 477 (2010).

¹⁹⁵ While this may not be surprising, the literature that reflected these dynamics proved disappointing. The optimistic view hoped that some of the negative social implications with respect to identity and engagement could be sufficiently neutralized to address access of justice issues in the modern work environment. There was also hope that the new modern worker, evolving from a generation accustomed to connecting via social media, would be less hampered by difference. These observations point to the importance of the contributions on unconscious nature of bias in work settings. See Jerry Kang, *Bits of Bias*, in IMPLICIT BIAS ACROSS THE LAW (Justin Levinson ed., 2012) (forthcoming 2012) (manuscript at 6, 12), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1968277; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995).

¹⁹⁶ See *supra* note 30.

her colleagues cannot see her physically, the virtual work arrangement may very well fail to create enough cognitive dissonance between her physical being and her virtual representation. The racial, cultural, and social exclusion may be just as salient as in the physical setting. Thus, she continues to experience discrimination, but it remains buried even more deeply in the complex social dynamics and the structural design of virtual reality. The discrimination has retreated further underground, camouflaged by the fantastical, fast-paced, energizing digital interface of the avatar.

A hyper-technical workplace significantly impacts fundamental understandings of discrimination broadly, and structural and cultural dimensions in particular. Immersive virtual workspaces embed similar social and behavioral phenomena, and thus become incubators for bias. These virtual vectors for discrimination are perhaps far more vexing precisely because of the plasticity of identity and the nature of the forum, making what constitutes discrimination more elusive. This Article's exploration demonstrates that law must take more seriously the virtual workplace and its impact in defining contemporary forms of discrimination.