

Shades of Discrimination Brought to Light

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Nancy Leong, [Negative Identity](#), 88 **S. Cal. L. Rev.** 1357 (2015).

Justice Kennedy raised some hackles when he said in [Obergefell v. Hodges](#) that “[m]arriage responds to the universal fear that a lonely person might cry out only to find no one there.” [Some wondered](#) how Justices Ruth Bader Ginsburg, Elena Kagan and Sonia Sotomayor—one widowed, one never married, and one long-single—must have felt to sign on to an opinion grouping them together with other souls “condemned to live in loneliness.” [Others criticized the opinion’s rhetoric](#) as unnecessarily demeaning to life outside of marriage. Justice Kennedy’s disparagement of single life might have been lamentable, but it usefully highlights a common experience of those who do not participate in the social institutions—sex, partnership, organized religion, and child-rearing—that society deems fundamental. Such individuals often find themselves the targets of marginalization, animus, or unfair treatment under the law.

In her thought-provoking article, *Negative Identity*, [Nancy Leong](#) brings together several of these identities—atheist, asexual, single, and childfree—and builds a case for their protection. Identity is a complicated subject and Leong takes care to define and defend her categories. Leong uses the term “negative identity” to refer to those identities marked by indifference or antipathy to something that much of society views as fundamental. These identities are negative in terms of opposition but not in terms of absence: the childfree, for example, do not merely lack children; they have chosen not to have children based on emotional commitments, personal and professional freedom, environmentalism, or simply a desire to allocate personal resources to other causes. By defining the term in this way, Leong means to distinguish between those who have affirmatively taken on these identities from those with only passing affiliation with these identities. That is, the term is intended to distinguish between those who consciously choose to forego sex and those who are celibate because they are between intimate relationships. Likewise, “negative identity” focuses on those who have chosen to forego parenthood from those who may desire children, but who have not yet acted upon these desires or been successful in their attempts at parenthood.

Leong builds on some stellar work, much of it recent, identifying these different identities and cataloguing the ways in which members experience legal disadvantage.¹ So what is gained by bringing these identities together, especially since they are marked by significant differences as well as similarities? The answers to that question are particularly revealing and instructive in what they teach about discrimination and harm. Relying on “ingroup theory,” Leong explains that in a world of diverse preferences, people will often band together to form groups around shared identity characteristics. Positive identity groups will advocate for policies advancing their shared interests, which naturally tend to exclude people in negative identity categories. She also observes that negative identity tends to prompt questions—Is that person trying to have a child? Are they infertile?—that require constant self-justification and public explanation. The pressure to justify or downplay differences inevitably takes a toll, as does the experience of being marginalized from discourse presuming that the positive identity categories are of universal importance. Added to these harms is animus. For example, people would vote against, or disapprove of their child marrying, atheists more than other cultural or ethnic minorities. [One recent study](#) demonstrated that, in comparison to married people, single people were more likely to be labeled immature, insecure, self-centered, unhappy, lonely, and ugly.

These harms and their causes might seem exogenous to law, a misperception that Leong sets out to correct. Although few laws explicitly target negative identities for disfavored treatment, as Leong makes clear, many laws nonetheless exclude negative identities from their protections to varying degrees. Title VII, for example, does not protect single people from discrimination; the Family and Medical Leave Act's narrow coverage protects spousal or parental relationships, but few other kinship categories. These forms of exclusion impose tangible burdens on negative identities: citing [the work of Lily Kahng](#), Leong notes that single people making the same income as a couple—either married or unmarried—will usually pay more tax, and never less. And the law often remains silent in the face of private discrimination, allowing health clubs to charge people in families less for gym memberships on a per capita basis than a single person, or employers to insure family members at reduced rates. This legal landscape disadvantages negative identity groups relative to their counterparts. Moreover, laws that at first glance seem merely to benefit to a positive identity group may actually extract a cost from their negative identity counterparts. A lactation room, for example, could arguably come at the expense of the childfree, either by reallocating space that could be used by other employees or imposing a cost on the employer that may be distributed among all employees.

To resolve these competing claims, Leong distinguishes between subsidies, which would presumptively be problematic, and accommodations, which would not. A subsidy is a transfer from one group to another of a benefit that both would find equally valuable. An accommodation, on the other hand, would provide a benefit to one group that would be of substantially less value to non-group-members. Charting the course between a subsidy and accommodation can be treacherous, as scholars who have studied the ways in which accommodations extract costs from objectors have noted. Recognizing this difficulty, Leong recommends a holistic inquiry of a range of relevant factors when making the determination of what is a subsidy and what is an accommodation. A lactation room would fall on the accommodation side of the line because it would be relatively easy to implement—involving just a small space, minimal technological or engineering interventions—and because it would promote equality by addressing a historical obstacle to women's participation in the workplace. But she largely leaves for another day how the test would play out in other, more contentious, circumstances.

In this and previous work, Leong demonstrates a refreshing sensitivity to the ways in which any given identity can simultaneously benefit and harm, or constrain and liberate, the people within those categories. People in positive identity categories may suffer from forms of discrimination that those in negative identity categories can evade. And the same characteristic that is rewarded in some contexts—say, being childfree in a law firm—might be penalized in others. In this moment when a great deal of attention is being paid to the post- or non-marital family, Leong helpfully reminds us to think of groups that the law has traditionally ignored, and to consider the effect that benevolent efforts to accommodate positive identity groups might have on their interests.

1. See, e.g., Elizabeth F. Emens, [Compulsory Sexuality](#), 66 **Stan. L. Rev.** 303 (2014) (asexuals); Nelson Tebbe, [Nonbelievers](#), 97 **Va. L. Rev.** 1111 (2011) (atheists).

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