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## Comment: Understanding Xenophobia as Intersectional Discrimination

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# Comment: Understanding Xenophobia as Intersectional Discrimination

Shreya Atrey\*

## *Abstract*

*This Comment examines the nature of xenophobia and why it seems to fall through the cracks of international human rights law, especially as a form of racial discrimination under the International Convention on the Elimination of All Forms of Racial Discrimination. It considers an understanding of xenophobia as a sui generis case of intersectional discrimination because it has to do with racial grounds but also perhaps other grounds (such as nationality, religion, language, culture, and class), which makes it difficult to disentangle the basis of xenophobic discrimination as based on strictly racial grounds alone.*

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## INTRODUCTION

Xenophobia as a category of discrimination remains elusive in international human rights law. Colloquially understood as the fear of or hatred of “the outsider,”<sup>1</sup> xenophobia escapes legal recognition and, ultimately, redressal because it does not map onto a protected “ground” easily. It is legally recognized only when it is based on traditional grounds such as color or ethnic origin; that is, when it is shown that an instance of xenophobic discrimination is not simply about treatment based on outsider status but based on racial grounds *per se*.<sup>2</sup> But the move to make xenophobia “fit” the mold of racial discrimination belies what is significant about xenophobia: that although it often comes entangled with racial grounds such as ethnicity, color, descent, or national origin, it also comes entangled with other grounds such as religion, culture, language, class, etc.; and that racial and non-racial grounds cannot be disentangled from one another.

This Comment argues that xenophobia can be addressed as discrimination, especially racial discrimination, only when its *sui generis* nature is understood in these intersectional terms. Further, the impact of xenophobia can be understood as pushing its victims to the margins of a political community, thus creating an underclass or group defined by an admixture of grounds, including racial grounds. Appreciating the nature of xenophobic discrimination in this way holds the key to addressing it in international law.

## I. XENOPHOBIA AS DISCRIMINATION AGAINST NOBODY

In 2001, members of the Progressive Party of Denmark made certain remarks at their annual conference.<sup>3</sup> Someone

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1. OFF. U.N. HIGH COMM’N FOR HUM. RTS. ET AL., INTERNATIONAL MIGRATION, RACISM, DISCRIMINATION, AND XENOPHOBIA 2 (2001), <https://perma.cc/78EM-MFPD> (PDF) (describing xenophobia as “behaviour specifically based on the perspective that the other is foreign to or originates from outside the community or nation”).

2. See *infra* Part I.

3. See Comm. on the Elimination of Racial Discrimination, Kamal Quereshi v. Denmark, ¶ 2.5, Opinion of the Committee on the Elimination of Racial Discrimination Under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Doc.

compared “Mohammedans and rats,” another recommended genocide of “Mohammedans,” and yet another suggested that “Mohammedans will exterminate populations of the countries to which they have advanced.”<sup>4</sup> Others spoke more generally. One Mr. Andreasen remarked, “The State has given the foreigners work. They work in our slaughterhouses where they can easily poison our food and endanger the agricultural exports.”<sup>5</sup> While other speakers were prosecuted for their remarks, Mr. Andreasen was not.<sup>6</sup> The Regional Public Prosecutor could not determine who, if anyone, Mr. Andreasen’s statement injured, since it did not refer to “a specific group of people characterized by race, color, national or ethnic origin to constitute race discrimination.”<sup>7</sup> The United Nations Committee on the Elimination of Racial Discrimination (“the Committee”) agreed. It held that “a general reference to foreigners does not at present single out a group of persons . . . on the basis of a specific race, ethnicity, color, descent[,] or national or ethnic origin,” and therefore Mr. Andreasen’s statement did not constitute racial discrimination for the purposes of the International Convention on the Elimination of All Forms of Racial Discrimination<sup>8</sup> (CERD).<sup>9</sup>

In 2007, the Committee reiterated this position, this time to declare that even specific (Islamophobic) references to Muslims, the Quran, and Arabs were insufficient to single out a group of persons that fell within the scope of CERD.<sup>10</sup> Instead, the Committee observed that

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CERD/C/66/D/33/2003 (Mar. 10, 2004) [hereinafter *Quereshi v. Denmark*] (describing the remarks made at the annual meeting).

4. *Id.*

5. *Id.*

6. *See id.* ¶ 2.13 (describing the decision to withdraw charges).

7. *Id.* ¶ 4.7

8. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, T.I.A.S. No. 94-1120, 660 U.N.T.S. 195 [hereinafter CERD].

9. *Quereshi v. Denmark*, *supra* note 3, ¶ 7.3.

10. *See* Comm. on the Elimination of Racial Discrimination, A.W.R.A.P. v. Denmark, ¶ 6.4, Opinion of the Committee on the Elimination of Racial Discrimination Under Article 14 of the International Convention on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/71/D/37/2006 (Aug. 8, 2007) [hereinafter *A.W.R.A.P. v. Denmark*] (concluding that “general

no specific national or ethnic groups were directly targeted as such by these [references]. In fact, the Committee notes that the Muslims currently living in [Denmark] are of heterogeneous origin. They originate from at least 15 different countries, are of diverse national and ethnic origins, and consist of non-citizens, and Danish citizens, including Danish converts.<sup>11</sup>

In 2009, the Committee again declined to find any discrimination in a statement referring to persons from “Somali clubs” as having been behind an attack, since the statement “did not make any disparaging or degrading remarks about persons of Somali origin.”<sup>12</sup>

More recently, in 2017, the Committee upheld the decision of a municipal assembly in Switzerland to deny naturalization to a resident due to the lack of evidence of “integration.”<sup>13</sup> On record were statements made by members of the assembly that “Kosovo-Albanians left a bitter taste in the mouth,”<sup>14</sup> and that the resident was only “applying for naturalization to abuse the social security system.”<sup>15</sup> The Committee was unconvinced that the statements were based on race, color, descent, or national or ethnic origin, and thus reaffirmed the assembly’s assessment that the resident simply “had not been integrated locally” and was still an outsider attempting to access naturalization in Switzerland.<sup>16</sup>

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references to Muslims” do not “single out a particular group of persons” and referencing its prior decision in *Quereshi v. Denmark*).

11. *Id.* ¶ 6.2.

12. Comm. on the Elimination of Racial Discrimination, Ahmed Farah Jama v. Denmark, ¶ 7.4, Opinion of the Committee on the Elimination of Racial Discrimination Under Article 14 of the International Convention on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/75/D/41/2008 (Aug. 21, 2009).

13. *See* Comm. on the Elimination of Racial Discrimination, Benon Pjetri v. Switzerland, ¶ 7.6, Opinion Adopted by the Committee Under Article 14 of the Convention, Concerning Communication No. 53/2013, U.N. Doc. CERD/C/91/D/53/2013 (Jan. 23, 2017) (“[T]he Committee considers that the information provided by the parties does not demonstrate that the rejection of the petitioner’s application for naturalization was based on discriminatory criteria linked to his national or ethnic origin.”).

14. *Id.* ¶ 2.4.

15. *Id.* ¶ 3.3.

16. *Id.* ¶ 7.6; *see also* Comm. on the Elimination of Racial Discrimination, A.M.M. v. Switzerland, ¶¶ 8.6, 9–11, Opinion of the Committee on the

In the Committee's view, none of these instances were instances of discrimination based on racial grounds. "General" references to migrants, foreigners and non-citizens, or even Arabs, Somalis and Kosovo-Albanians, were not considered to "single out a group of persons, contrary to Article 1 of the Convention, on the basis of a specific race, ethnicity, color, descent or national or ethnic origin."<sup>17</sup> According to the Committee, migrants or foreigners could be of any nationality, color, ethnicity and religion; but importantly, the discriminator could have the same nationality, color, ethnicity, and religion as those they were discriminating against.<sup>18</sup> With too many differences within the group of actual or perceived foreigners, and with too little difference between the discriminator and those facing discrimination, any distinction between the two groups was thus considered fictitious, and in any case not one based on racial grounds—namely, race, ethnicity, color, descent, or national or ethnic origin.<sup>19</sup> And in the absence of such a distinction based on racial grounds, no racial discrimination could be found.<sup>20</sup>

## II. XENOPHOBIA AS RACIAL DISCRIMINATION

There is no doubt that the instances described in Part I are instances of xenophobia, understood as the dislike of or prejudice against actual or perceived foreigners.<sup>21</sup> A strong link exists between the treatment of foreigners (refugees, asylum-seekers, displaced persons, and other migrants) and the violation of their human rights, whether in the form of overt hostility or violence, or in the form of discrimination in accessing

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Elimination of Racial Discrimination Under Article 14 of the International Convention on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/84/D/50/2012 (Mar. 11, 2014) (noting that, while the Committee encouraged Switzerland to reexamine its "temporary admission" status program, the program itself did not constitute discrimination).

17. *Quershi v. Denmark*, *supra* note 3, ¶ 7.3 n.1.

18. *A.W.R.A.P. v. Denmark*, *supra* note 10, ¶ 6.2 n.5.

19. *See supra* note 11 and accompanying text.

20. *See supra* note 9 and accompanying text.

21. For a general discussion of the link between migrant or foreigner status and xenophobia and racial discrimination, see OFF. U.N. HIGH COMM'N FOR HUM. RTS. ET AL., *supra* note 1.

housing, employment, or healthcare.<sup>22</sup> But there is doubt as to whether these are instances of racial discrimination, especially under CERD. For example, the Committee did not identify them as racial discrimination because, in each case, it determined that the petitioners did not show that a distinction was made that mapped onto a distinction identified in Article 1 of CERD as based on race, color, descent, or national or ethnic origin.<sup>23</sup> According to the Committee, whatever these instances were, they were not instances of racial discrimination prohibited by CERD.<sup>24</sup>

This is despite the fact that it is agreed, not least by the Committee itself,<sup>25</sup> that cases of xenophobia can be cases of racial discrimination.<sup>26</sup> According to the Durban Declaration, “xenophobia against non-nationals, particularly migrants, refugees[,] and asylum-seekers, constitutes one of the main sources of contemporary racism.”<sup>27</sup> Xenophobia has since been

22. JONATHAN CRUSH & SUJATA RAMACHANDRAN, U.N. DEV. PROGRAMME, XENOPHOBIA, INTERNATIONAL MIGRATION AND HUMAN DEVELOPMENT 3–6 (2009), <https://perma.cc/9JBL-S5NL> (PDF).

23. See *supra* notes 3–16 and accompanying text.

24. See *supra* notes 3–16 and accompanying text.

25. See Comm. on the Elimination of Racial Discrimination, Gen. Recommendation No. 30 on Discrimination Against Non-Citizens 1, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004) (acknowledging that “xenophobia against non-nationals, particularly migrants, refugees[,] and asylum-seekers, constitutes one of the main sources of contemporary racism”).

26. See E. Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance), *Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, Follow-Up to and Implementation of the Durban Declaration and Programme of Action*, ¶ 14, U.N. Doc. A/HRC/38/52 (Apr. 25, 2018) [hereinafter *Follow-Up to the Durban Declaration*] (noting that “achieving racial equality requires robust action” addressing “explicit racism and xenophobia”); E. Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 28, U.N. Doc. A/HRC/32/50 (May 3, 2016) (noting that “[x]enophobia intersects with racism in so far as the (racialized) other is also seen as an outsider or foreign and is feared or is perceived to be a threat”); World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Durban Declaration and Programme of Action*, ¶ 16, U.N. Doc. A/CONF189/12 (Sept. 8, 2001) [hereinafter *Durban Declaration and Programme of Action*] (recognizing xenophobia as one of the main sources of contemporary racism).

27. *Durban Declaration and Programme of Action*, *supra* note 26, ¶ 16.

progressively understood as overlapping with or similar to racial discrimination,<sup>28</sup> indicating a clear link between the two.<sup>29</sup> What exactly is this link between xenophobia and racial discrimination?

In and of itself, xenophobia is a broad category of discrimination which “otherizes” people on the basis of membership in a political community.<sup>30</sup> At its heart is the notion of belongingness to a political community such that, as Tendayi Achiume helpfully describes, “the relevant membership unit is typically though not exclusively the nation-state.”<sup>31</sup> Actual or perceived foreigners are understood in reference to the political idea of who belongs within the borders of a nation-state or a political community and who does not.<sup>32</sup> Different combinations of characteristics such as race, color, descent, national or ethnic origin, religion, culture, class, and language contribute to the idea of belongingness.<sup>33</sup> The idea is thus intersectionally constituted. In fact, intersecting characteristics such as race, culture, religion, or language are brought up only in the service of the idea of belongingness to a political community, such that the idea assumes categorical significance of its own in

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28. PATRICK THORNBERRY, *THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY* 155 (2016).

29. For a discussion of the historical roots of the link between xenophobia and racism, see Robert Bernasconi, *Where Is Xenophobia in the Fight against Racism?*, 2 *CRITICAL PHIL. RACE* 5 (2014).

30. See *supra* note 1 and accompanying text.

31. E. Tendayi Achiume, *Governing Xenophobia*, 51 *VAND. J. TRANSNAT'L L.* 333, 353 (2018); see also E. Tendayi Achiume, *Beyond Prejudice: Structural Xenophobic Discrimination Against Refugees*, 45 *GEO J. INT'L L.* 323, 329 (2014) [hereinafter *Beyond Prejudice*] (noting that the U.N. High Commissioner for Refugees has added nationality to the list of grounds on which xenophobic harm can be based).

32. See Nira Yuval-Davis, *Women, Citizenship and Difference*, 57 *FEMINIST REV.* 3, 5 (1997) (defining citizenship as linked “to membership in a community rather than to the state”). For an understanding of this political idea of belongingness, see generally BRIDGET ANDERSON, *US AND THEM? THE DANGEROUS POLITICS OF IMMIGRATION CONTROL* (2013).

33. Yuval-Davis, *supra* note 32, at 16 (noting that these characteristics “are important factors in determining the relationship of people to their communities and states”).



demarcating people independently of the characteristics which constitute it.<sup>34</sup>

Seen this way, xenophobia appears uncontroversibly akin to racism, broadly defined as the preference for one class of persons based on their inherited features such as color or membership in an ethnic or cultural group. The two are similar in terms of how they are constituted by notions of color, descent, and national or ethnic origin—characteristics which are often indistinguishable from religion, culture, language, and citizenship<sup>35</sup>—and what they are constituted for: to express preference for or superiority of one class of persons over another.<sup>36</sup> Even though xenophobia is expressed more generally as against “foreigners” or “outsiders,”<sup>37</sup> while racism is defined narrowly and along the four grounds listed in CERD (color, descent, and national or ethnic origin),<sup>38</sup> it is the larger purpose behind racism and xenophobia—to effect a distinction between one group of people from “the Other” based on certain inherited characteristics—that underlies both.<sup>39</sup> Thus, although xenophobia and racism may be distinct wrongs, they share a “family resemblance”<sup>40</sup> in at least two respects: first, both xenophobia and racism seem to be related to race even though the former is based on a combination of intersecting grounds and the latter is exclusively based on racial grounds; and second, the

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34. See, e.g., *id.* at 10 (describing the collectivization of populations by their ethnic or racial identities and the attribution of “collective needs, based on their different cultures” to these populations).

35. See Patrick Thornberry, *Forms of Hate Speech and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*, 5 RELIG. & HUM. RTS. 97, 114 (2010) (“[S]ince the bases of racism may be ethnic and cultural hostility as much as ‘race’ or colour, the norms and spiritual practices integral to group identity are likely to be subjected to the same discrimination as other facts of culture.”).

36. See generally MARK BELL, RACISM AND EQUALITY IN THE EUROPEAN UNION (2009).

37. See *supra* note 1 and accompanying text.

38. CERD, *supra* note 8, art. 1.1.

39. See Sandra Fredman, *Equality: A New Generation?*, 40 INDUS. L.J. 145, 148 (2001) (describing racism as “not about objective characteristics, but . . . about hatred of the ‘Other’ in defence of ‘Self’” and suggesting the existence of “cultural racisms” in addition to “colour racism”).

40. Ali Rattansi, *Just Framing: Ethnicities and Racisms in a “Postmodern” Framework*, in SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS 253 (Linda Nicholson & Steven Seidman eds., 1995).

two seem to broadly relate to processes of othering and exclusion, demarcating who belongs to a particular society, community, or territory in a chiefly political sense.<sup>41</sup> The question that arises then is if xenophobia can be understood thus and in terms of its family resemblance with racism, why is it so hard to establish xenophobic discrimination as a matter of racial discrimination?

### III. XENOPHOBIA AS INTERSECTIONAL DISCRIMINATION

In the set of Committee views recounted above, foreigners are couched as ungrateful and threatening: Muslims and Arabs are stereotyped as wife-beaters, Somali clubs are branded as precarious spots harboring assaulters, and long-term permanent residents are dubbed outsiders and denied naturalization for not having integrated.<sup>42</sup> Essentially, these stereotypes and negative judgments push those considered foreigners or outsiders to the fringes of the life of a community, and thus have a real impact on their participation in community life, whether it is participation in the labor market as workers, the formation of meaningful relationships with others, or contribution as stakeholders in the wider civic life around them.<sup>43</sup>

But the Committee frequently fails to appreciate this impact as discrimination because it insists on mapping instances of xenophobia onto a single racial ground defined exclusively by ethnicity, color, descent, or national origin rather than appreciating their intersectional bases.<sup>44</sup> It thus tries to

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41. For discussions of the interconnections between racism and ideas surrounding the nation, ethnicity, culture, gender, and the state, see generally STUART HALL, *THE FATEFUL TRIANGLE: RACE, ETHNICITY, NATION* (2017); LEONORE DAVIDOFF & CATHERINE HALL, *FAMILY FORTUNES: MEN AND WOMEN OF THE ENGLISH MIDDLE CLASS 1780–1850* (3d ed. 2018); CATHERINE HALL, *CIVILISING SUBJECTS: METROPOLE AND COLONY IN THE ENGLISH IMAGINATION 1830–1867* (2002); FLOYA ANTHIAS & NIRA YUVAL-DAVIS, *RACIALIZED BOUNDARIES: RACE, NATION, GENDER, COLOUR AND CLASS AND THE ANTI-RACIST STRUGGLE* (1992).

42. See *supra* notes 3–16 and accompanying text.

43. See, e.g., Achiume, *Beyond Prejudice*, *supra* note 31, at 338 (describing the “explicitly communicated prejudice on the part of employers who, on the basis of this prejudice, refuse to employ” refugees and asylum seekers despite a labor shortage in South Africa).

44. See *supra* notes 3–16 and accompanying text.

compare those discriminated against with another group which does not share these characteristics, to judge whether they were discriminated against on racial grounds in particular.<sup>45</sup> This comparative exercise proves futile since the two groups appear to not be so neatly distinguishable on racial grounds.<sup>46</sup> Victims of xenophobia are co-constituted by a whole range of characteristics—cutting across identity categories such as indigenous peoples, naturalized persons, second- or third-generation citizens, non-citizens, migrant workers, undocumented persons, religious minorities, refugees and asylum seekers, linguistic minorities, and more, as well as racial (ethnicity, color, descent, or national origin) and non-racial (religion, language, class, or culture) grounds of discrimination. But absent a clear set of distinguishing characteristics that define victims of xenophobia in comparison with others, the Committee finds no discrimination, or at least none within the contours of CERD.<sup>47</sup>

The Committee reasons this way because that is how comparison works traditionally in discrimination law. Discrimination is established via the comparator test, which helps identify not only the “ground” of discrimination but also helps appreciate whether one group is left worse off than another on the basis of that ground.<sup>48</sup> Indeed, discrimination

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45. *Id.*

46. *Id.*

47. *See supra* note 11 and accompanying text.

48. For leading judicial statutory formulations of the comparator tests in various international contexts, see Equality Act 2010, c. 15, § 13 (UK), <https://perma.cc/BF5V-2ST9> (defining direct discrimination as “[a] person (A) discriminates against another (B) if, because of a protected characteristics, A treats B less favourably than A treats or would treat others”); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (defining disparate treatment as “[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin” and noting that “[p]roof of discriminatory motive is critical”); *Hodge v. Canada*, [2004] S.C.R. 357, 360–61 (Can.) (“Claims of discrimination . . . can only be evaluated ‘by comparison with the condition of others in the social and political setting in which the question arises.’” (quoting *Andrews v. L. Soc’y of B.C.*, [1989] 1. S.C.R. 143, 164 (Can.))); *Mem. of the Exec. Council for Educ.: KwaZulu-Natal v. Pillay* 2008 (1) SA 474 (CC) at para. 41 (S. Afr.) (defining discrimination as “any act or omission . . . which directly or indirectly imposes burdens, obligations or disadvantage on, or withholds benefits, opportunities or advantages from, any person on more or more of the prohibited grounds” (quoting Equality Act 4 of 2000 § 1 (S. Afr.))).

exists when a particular group is said to have been disadvantaged in comparison to another on the basis of a clearly identifiable personal characteristic such as race or sex.<sup>49</sup> Discrimination as an idea is thus based on determinable social groups or binaries such as white-Black or male-female such that it is mainly comparison across these cognate groups which establishes discrimination.<sup>50</sup> While discrimination law appreciates that groups can be diverse from within, such that both white people and Black people can have many religions, disabilities, ages, genders, and sexualities, they are at least not meant to be diverse or overlapping in relation to the ground in question. Thus, white people and Black people (or indeed Asian people, Brown people, and others) are distinguishable, despite the diversity of, for example, genders which constitute these groups, because they are believed to have completely different “race” or “color.” The same holds for sex—that no matter other shared characteristics between men and women, such as religion or culture, they are at least wholly distinguishable in one respect: their sex.

This traditional heuristic comparison appears to be, first and foremost, a misfit in the case of xenophobic discrimination, which is intersectional in nature—and, in any event, overstated in the case of traditional grounds and discrimination based on them. The comparator test seems to be a misfit for intersectional discrimination such as xenophobic discrimination, which implicates not one but several intersecting grounds at once.<sup>51</sup> Actual or perceived foreign status of any kind (as a refugee, asylum-seeker, displaced person, immigrant, migrant, or non-citizen) is a category constituted by grounds related to race (color, descent, ethnicity, and national origin) and other grounds (such as religion, culture, region, or language). Understanding xenophobia intersectionally entails appreciating how xenophobia is often co-constituted: not simply by the status of individuals who lack the nationality or citizenship of a state and form an amorphous category of “foreigners,” but specifically how this lack of nationality and citizenship can become bound up

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49. See *supra* note 48 and accompanying text.

50. TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 29–31 (2015).

51. See generally Shreya Atrey, *Comparison in Intersectional Discrimination*, 38 L. STUD. 379 (2018).

with racial differences in terms of perceived color, descent, ethnicity, and national origin, as well as non-racial differences of religion, culture, language, and so on.<sup>52</sup> Causally speaking, because xenophobia is co-constituted by these many grounds at once, it is difficult (if not impossible) in a specific case to determine the basis of xenophobia as embedded necessarily or mainly in one or more racial grounds; just as, for example, it is difficult to exactly ascertain the basis of ethnonationalism or right-wing populism which fuels Islamophobia or antisemitism for the purposes of racial discrimination (as opposed to discrimination based on religion).<sup>53</sup> In fact, interchangeable references to “Mohammedans” or “Somali clubs” as “the Other,” “the Foreigners,” or “Them” (in opposition to “Us”) show the co-constituted nature of these categories cutting across religion, nationality, national origin, and race, all at the same time. What appears quite unfruitful is the exercise of trying to decipher if these references are based on a single racial ground alone.

Instead, discrimination can be fruitfully proven by looking to the effects of drawing a distinction between actual or perceived foreigners and others, and understanding whether those effects have anything to do with racial grounds in a specific context. Xenophobia is ultimately about its effect of contributing to the process of othering, which pushes certain groups of people to the fringes of community life, often of a nation-state, but possibly also of a village, town, or country.<sup>54</sup> If comparison is to be used at all, it is helpful only when xenophobia is conceived as creating the diffuse but politically precise categories of “us” and “them,” separating those who belong (natives) from those who do not belong (foreigners).<sup>55</sup> Once this distinction and its impact are clear, it is easier to dig further into whether the category of “foreigners” in a specific

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52. See Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 BERKELEY WOMEN’S L.J. 16, 27 (2013) (“The lessons of anti-essentialism and intersectionality are that the oppressions cannot be dismantled separately because they mutually reinforce each other.”).

53. See generally Ramon Grosfoguel et al., ‘Racism’, *Intersectionality, and Migration Studies: Framing Some Theoretical Reflections*, 22 IDENTITIES 635 (2015).

54. See *supra* note 43 and accompanying text.

55. Shreya Atrey, *Race Discrimination in EU Law After Jyske Finans*, 55 COMMON MKT. L.R. 625, 636–37 (2018).

context is co-constituted by multiple racial (color, descent, ethnicity, and national origin) and non-racial (nationality, religion, language, culture, and class) grounds. Thus, the question to be asked is not whether foreigners comprise a single racially determined group, but whether actual or perceived foreigners are discriminated against such that the treatment meted out to them has the effect of rendering them as outcasts from a political community who are in turn defined by racial and other grounds of discrimination.<sup>56</sup>

#### CONCLUSION

Paradigmatic cases of xenophobic discrimination (expressed in statements like “go back to where you come from”) discriminate against their victims because they are not considered as “belonging to” a nation or a society.<sup>57</sup> This political idea of belongingness to a particular community is in turn co-constituted by an admixture of racial and non-racial grounds.<sup>58</sup> Yet, discrimination based on belongingness falls by the wayside of racial discrimination because it is not considered to be based primarily on racial grounds. Instead, potential cases of xenophobic discrimination may be better identified by first recognizing how xenophobic discrimination has its basis in both racial and non-racial grounds which cannot easily be disentangled, and then judging xenophobia via its impact or effect of pushing its victims to the margins of a political community.

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56. A similar logic underpins footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), which describes discrimination against discrete and insular minorities in terms of lack of access from normal political processes. *Id.* at 152 n.4 (describing this prejudice as “a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities”); see generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

57. See *supra* note 1 and accompanying text.

58. See *supra* notes 30–34 and accompanying text.