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Introduction

In *DeGraffenreid v. General Motors Assembly Division*, a group of black female employees sued General Motors ("GM") under Title VII of the 1964 Civil Rights Act, claiming that GM's seniority system was discriminatory towards black women. The court stated these women were attempting to "combine statutory remedies" and "create a new 'super-remedy' that would give them relief beyond what the drafters intended." Accordingly, the court held that the allegations should be examined for "race discrimination, sex discrimination, or alternatively either, but not a combination of both." While the court simply dismissed the race-based claim, its treatment of the sex-based claim illuminates potential intersectional claim-
ants’ precarious legal position. The evidence adduced at trial indicated that GM had only begun hiring black women after 1964, the year of Title VII’s passage. Later, due to a recession and GM’s seniority-based system, all of the black women were laid off. The court reasoned that sex-based discrimination had not taken place since GM hired white women prior to 1964.

*DeGraffenreid* showcased a court’s refusal to “combine two causes of action into a new special sub-category”—choosing instead to address each claim separately by applying Title VII’s singular approach to identity. Title VII protects individuals from discriminatory practices based on the following categories: race, color, religion, sex, or national origin. The *DeGraffenreid* decision pinpoints the dilemma that individuals face when they are forced to bring their suit under only one protected characteristic. In this case, the court interpreted evidence that GM had hired white women as evidence that GM had not discriminated against black women; in essence, the employer disproved the claim of discrimination with evidence that did not correspond to the nature of the claim. And even if the *DeGraffenreid* court had heard the race-based claim by these black women, the employer could have disproved it by showing a lack of discrimination.

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7 Although this point is unclear from the opinion, Kimberlé Crenshaw notes that it came up in trial. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 141.

8 See *DeGraffenreid*, 413 F. Supp. at 144. Seniority systems, such as this one, only received this degree of Title VII scrutiny prior to 1977. Up until this point, Title VII broadly extended to seniority systems that perpetuated past discrimination. In 1977, however, the Supreme Court dramatically changed directions with *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). In *Teamsters*, the Court decided that “an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination.” *Id.* at 353–54. This helps to account for the conclusion of *DeGraffenreid* on appeal. The Eighth Circuit noted that after *DeGraffenreid*’s submission, the Supreme Court issued the *Teamsters* opinion, requiring the court of appeals to sustain the district court’s judgment on the plaintiff’s Title VII claims. *DeGraffenreid v. Gen. Motors Assembly Div.,* 558 F.2d 480, 484 (8th Cir. 1977).

10 “Or” is the operative word here. As later noted, Title VII does not facially exclude intersectional claimants. Yet courts have been slow to expand their understanding and analysis of identity to include anything more than one legally-protected category. The result has been confusion and general lack of unanimity among the courts.

12 See *DeGraffenreid*, 413 F. Supp. at 144.
against black men. The predicament is a Catch-22. Under this view, black women are only protected to the extent that their experiences coincide with those of white women or black men. Moreover, this one-dimensional view of discrimination makes it easier for defendants to prevail over claimants while constraining black women’s and others’ self-identification.

In stark contrast to the reasoning in DeGraffenreid, the principle of intersectionality allows legal theorists and practitioners to assess identity more sensibly and exactly. Intersectionality provides a theoretical framework through which those who suffer “multiple” forms of discrimination can identify and seek remedies for each of those forms, instead of forcing them to distill their discrimination into one singular claim. Although intersectionality may seem overly theoretical, DeGraffenreid illuminates the highly practical approach that intersectionality brings to the dilemma of multi-faceted discrimination. In that case, the legal void for recognizing intersectional complications in identity allowed GM to skirt the spirit of Title VII by feigning good faith. Judicial validation of an intersectional framework would have potentially averted this dilemma by allowing the DeGraffenreid plaintiffs to use evidence of race discrimination, sex discrimination, and the combination of both in support of their claims.

This Article defends the theoretical and practical underpinnings of intersectionality—a theory that surfaced nearly two decades ago, but has largely been ignored by the courts since—and advocates for an amendment to Title VII that would cohere with its original legisla-

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13 Crenshaw, supra note 7, at 143.

14 The current one-dimensional approach obfuscates the sense of solidarity that comes from being able to talk about oneself holistically. It is certainly legally relevant if one is black and/or a woman, but it is also relevant for the social validation of that identity.


17 The combination of racial and sexual discrimination strikes at the claim these plaintiffs attempted to make—that GM had not merely discriminated against women or blacks, but black women.
tive intent. Part I situates intersectionality among feminist and critical
scholarship, specifically noting the theory’s natural emergence from
developments in the realm of civil rights. Part II traces the develop-
ment of intersectionality within the courts by examining the types of
cases in which the theory has arisen and the confusion over how inter-
sectional plaintiffs’ claims may be reconciled with existing law.
Finally, Part III advocates that Congress amend Title VII to clarify the
statute and explicitly authorize claimants to proceed under more than
one legally-protected category.

As a general matter, the theory of intersectionality “is not being
offered here as some new, totalizing theory of identity.” Limitations in
scope are inevitable. Accordingly, this Article primarily examines
the situation of black women, largely because they introduced and
popularized intersectionality. Additionally, most court cases that
have dealt with intersectionality have involved black women. This
focus on black women is not intended to be exclusionary, but illustra-
tive, “highlight[ing] the need to account for multiple grounds of iden-
tity when considering how the social world is constructed.” Indeed,
the emphasis on the interconnectedness of race and sex neither dis-
counts the relevance of other intersections and the efforts made to
examine them, nor does it provide a limiting function for self-

I. SITUATING INTERSECTIONALITY IN CIVIL RIGHTS MOVEMENTS

Almost immediately following the inception of civil rights move-
ments, black women found themselves in a sociopolitical lurch. Afri-

\footnote{18} Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Vi-


\footnote{20} See, e.g., Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronorma-

\footnote{21} tivity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999) (arguing that the

work of Critical Race Theory scholars who do not perform a “multidimensional” analysis per-

petuates heterosexism and the marginalization of gay, lesbian, bisexual, and transgender people

do color).

This Article focuses on race and sex due to the historical significance of these two
descriptors in America in locating identity in time and space. Specifically, black women have a
distinct legacy of oppression in America. From their experience as slaves, (which was “harsher,
more brutal than that of the black male slave”) to black male sexism, to the racism within the
recent women’s movement, black women have experienced an unending tide of mistreatment.

Bell Hooks, *Ain’t I a Woman: Black Women and Feminism* 43 (1981). Though beyond the
scope of this Article, there is a very legitimate need to push for additional statutory protection,
particularly in the area of sexual orientation.
can-American forums and feminist movements provided the most seemingly accessible options for voicing their demands. Unfortunately, the conditions upon which full group membership to these movements were based—“[w]hiteness for feminist thought, maleness for [b]lack social and political thought”—systematically excluded black women from gaining a voice in groups intended to achieve equality.22 Both feminists and those seeking racial equality feared that advancing the cause of black women would compromise the focus of their own respective messages.23

For feminist movements, resistance to the cause of black women took form in the 1960s with the general tendency to defend a unitary female subject.24 This wave of feminism encompassed equality theory, difference theory, and dominance theory.25 Each of these theories presented a singular conception of what it meant to be a woman.26 Moreover, some of the theorists from this time period presented their messages as the singular and correct conception of the female condition.27 Accordingly, feminist movements downplayed complexity and contradiction to emphasize their messages.28

Feminist movements also frequently compared the plight of “women” to that of “blacks,” further underscoring a “sexist-racist attitude” that perpetuated the exclusion of women of color.29 These sex-race comparisons were well established in American feminism by the early 1960s30 and adherents continued to employ them as part of a general feminist legal strategy.31 This type of analogy—stressing the parallel, rather than intersectional or overlapping nature of discrimi-

23 Id.
24 Kathryn Abrams, Title VII and the Complex Female Subject, 92 MICH. L. REV. 2479, 2482 (1994).
25 Id. at 2482–83.
26 Id. Abrams observed these theorists’ opposition to “the construction of a complex subjectivity.” Id. at 2483.
27 Id. at 2482–83.
28 Id. at 2482.
30 Mayeri, supra note 29, at 1052 (“Since the genesis of the antebellum woman’s movement in Garrisonian abolitionism, parallels between racial and sexual subordination appeared intermittently in the service of feminist legal causes from marriage reform to suffrage.”).
31 Id. at 1055–56, 1081–86.
nation—obscured the experiences of individuals who were both female and black. 32 By failing to acknowledge the overlapping nature of identity in the case of black women, such feminist reasoning suggested that by “women” they meant “white women” and by “blacks” they meant “black men.” 33

Consequently, the feminist strategies employed in the 1960s excluded women of color. 34 Similarly, many members of the contemporary feminist movement have refused to appropriate black women’s claims to ensure their ability to project themselves as victims of sex discrimination. 35 Implicit in this strategy is the idea that drawing attention to race displaces the focus on sexism. As a result, the feminist movement has dialogued for decades in a distinctively “white” fashion. 36

Anti-racism movements also left black women disappointed. The basic assumption that black men should lead these movements entrenched sexism amidst black men and black women. 37 Just as feminist movements were reluctant to acknowledge any oppression other than sexism, anti-racism groups were “unwilling to acknowledge black male sexist oppression of black women because they [did] not want to acknowledge that racism [was] not the only oppressive force.” 38 Consequently, these movements positively impacted the struggle against racism, but failed to examine the workings of sexist oppression. 39

From the foregoing, it is clear that anti-racism and feminist groups each advanced discrete goals. These groups’ discourses depicted men of color as the quintessential targets of race discrimination, while portraying white women as the classic sex discrimination victims. 40 Moreover, by failing to recognize commonality where it

32 Id. at 1049.
33 Hooks, supra note 21, at 8.
34 More than exclusion, these strategies marginalized women of color. “[T]he unity that characterized accounts of women as a group had been achieved through the erasure or marginalization of the lives of less privileged women.” Abrams, supra note 24, at 2486.
35 Hooks, supra note 21, at 145.
36 Id. at 149; Abrams, supra note 24, at 2486 (observing how mainstream feminist theorists “characterized the perspectives of a privileged subset of women—those who were white, straight, and middle class—as the vantage point of women”).
37 Hooks, supra note 21, at 88–89.
38 Id. at 88.
39 Id. at 117.
40 Mayeri, supra note 29, at 1050. See generally Regina Austin, Sapphire Bound!, 1989 Wis. L. REV. 539; Crenshaw, supra note 7; Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581 (1990).
existed, these groups unwittingly stymied alliances to resist together a social and legal system that enshrines white male privilege.41 Both groups helped shape a civil rights landscape in which the unique concerns of black women were ignored.42

Around 1980, early critical legal theorists began to interrogate law by focusing on equality and specific facets of identity that traditional legal analysis disregarded. These scholars focused on subjects such as race, class, and sexuality.43 Derrick Bell criticized traditional legal scholars’ tendency to ignore race, permitting social justice only when African-Americans’ interests converged with the interests of a white majority.44 Bernadette Chachere highlighted class as a significant barrier to reaching the civil rights ideals embodied in the Constitution, its preamble, and the Bill of Rights.45 Rhonda Rivera emphasized the need to focus on sexuality to address the treatment of homosexuality in America’s judicial system.46 Each of these theorists focused on a single characteristic for understanding identity. It was not until the emergence of anti-essentialist47 theorists—most notably, intersectional scholars—that these singular conceptions of identity were shattered.

Intersectionality emerged largely as a response to “the concrete and conceptual omissions of equality theories advanced in the

41 See infra Part II.C (explaining how Title VII tacitly affirms the status of the American white Anglo-Saxon Protestant male and provides recourse that is of the greatest benefit to those who most closely resemble this norm).
42 Abrams, supra note 24, at 2488.
45 See Bernadette Chachere, Welfare and Poverty as Roadblocks to the Civil Rights Goals of the 1980’s, 37 Rutgers L. Rev. 789, 789–90 (1985) (concluding that aspirations for civil rights advances will continue to be significantly impaired by socioeconomic disadvantage).
47 “Essentialism” assumes that the experience of being a particular member of a particular group is stable—“one with a clear meaning, a meaning constant through time, space, and historical, social, political, and personal contexts.” Trino Grillo, Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House, 10 Berkeley Women’s L.J. 16, 19 (1995); Katharine T. Bartlett, Gender and Law: Theory, Doctrine, Commentary 871–72 (1993) (addressing the issue of essentialism as one of false universalism, “overgeneralizations or unstated reference points [that] implicitly attribute to all members of a group the characteristics of individuals who are dominant in that group”). Anti-essentialist theorists challenged traditional feminist theory and its unitary characterizations of women.
1980s.” 48 By concentrating on specific facets of identity—such as race, class, and sexuality—many of these equality theorists neglected the overall complexity of human identity. 49 Kimberlé Crenshaw and other early intersectional theorists sought to reformulate the self as both “constituted and fragmented” by the intersections of various identity categories. 50 In this context, a person’s identity was comprised of much more than simply a race, class, or sex. Indeed, thinking of these facets of identity as discrete and separable had been artificially limiting; rightly considered, a person’s identity includes characteristics of sex, race, and socioeconomic standing. In addition, there are many other alternative and salient ways of identifying oneself. Armed with the recognition that “we all stand at multiple intersections of our fragmented legal selves,” 51 intersectional theorists revolutionized legal identity and how it ought to be understood and discussed.

Central to its revolutionary nature, intersectionality represented a clear departure from feminist and anti-racism movements. In addition, intersectionality went further than equality theorists’ focus on particular facets of identity that legal analysis previously neglected. These prior attempts to understand identity failed to differentiate carefully enough among the myriad prejudices that individuals face. To analogize, feminist and equality theorists metaphorically envisioned the “self” as a tennis ball; it had a uniform shape and contours, with very minor depressions and lines. In contrast, the intersectional conception of the self is like a Koosh ball:

The Koosh ball is a popular children’s toy. Although it is called a ball and that category leads one to imagine a firm, round surface used for


49 See Levit, supra note 43, at 227 (noting concerns that equality theorists inadvertently reduced “identity group members to monolithic essences”). See also supra notes 43–46 and accompanying text.

50 Powell, supra note 48, at 1483.

51 Grillo, supra note 47, at 18. This naturally leads to the further recognition of “hybrid intersectionality,” where an individual will play the role of oppressor (drawing on their dominant identity status) in some contexts and the oppressed (via membership in a subordinate group) in others. Nancy Ehrenreich, Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems, 71 UMKC L. REV. 251, 275 (2002). For example, a black female, despite encountering sexual and racial subordination, may well find herself in a dominant position because of her heterosexuality or high income.
catching and throwing, the Koosh ball is neither hard nor firm. Picture hundreds of rubber bands, tied in the center. Mentally cut the end of each band. The wriggling, unfirm mass in your hand is a Koosh ball, still usable for throwing and catching, but changing shape as it sails through the air or as the wind blows through its rubbery limbs when it is at rest. It is a dynamic ball.\textsuperscript{52}

Bringing feminists and equality theorists into the analogy, they identified a particular strand of the Koosh ball, saying in essence, “See this strand, this is defining and central. It matters.”\textsuperscript{53} In contrast, intersectional theorists conceded the importance of these individual strands, but disputed the claim that one strand can or should be seen as defining and central. For example, it mattered that a person was black, but it also mattered that she was a woman, from Nigeria, and a lesbian.

II. \textbf{Title VII andIntersectionality}

Intersectionality has particular salience for antidiscrimination law where individuals are forced to self-identify using established legal categories to situate their claim. In particular, Title VII protects individuals from discriminatory employment practices based on “race, color, religion, sex, or national origin.”\textsuperscript{54} A successful Title VII claim requires that the plaintiff satisfy the four-part test articulated in \textit{McDonnell Douglas Corp. v. Green}.\textsuperscript{55} In \textit{McDonnell Douglas}, the Supreme Court held that a plaintiff’s prima facie case for employment discrimination consists of showing: 1) the plaintiff belongs to one of the protected classes; 2) the plaintiff was qualified and applied for a job for which the employer sought applicants; 3) the plaintiff was rejected despite being qualified; and 4) the position remained open and the employer continued to seek other applicants with the plaintiff’s qualifications after the plaintiff’s rejection.\textsuperscript{56} Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment

\begin{footnotesize}
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\item \textsuperscript{53} Id.
\item \textsuperscript{54} 42 U.S.C. § 2000e–2(a) (2000). This bar against discrimination extends to the compensation, terms, conditions, or privileges of employment. § 2000e–2(a)(1).
\item \textsuperscript{55} 411 U.S. 792 (1973).
\item \textsuperscript{56} Id. at 802.
\end{itemize}
\end{footnotesize}
At this point, an employer may submit affirmative evidence of nondiscrimination—in the form of statistics, for example. The plaintiff may then show that the employer’s proffered legitimate, nondiscriminatory reason is a pretext for a discriminatory motive based on one of the protected classes.

A. Legislative History

Much of the confusion for intersectionality centers around Congress’s use of the word “or” in the text of Title VII, which protects against discrimination based on race, color, religion, sex, or national origin. Some courts have argued the term is additive, enabling a plaintiff to bring a Title VII suit under more than one protected category. Other courts have read the term exclusively, meaning that a plaintiff must choose only one of the listed, protected traits. As a result, many commentators have noted that the problem with Title VII is its emphasis on singular identity and the difficulty it presents for plaintiffs with multiple or overlapping claims. Although it is not expressly prohibited in the statute, courts have been reluctant to allow plaintiffs to aggregate evidence of discrimination when it encompasses more than one legally-protected category.

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57 Id.
58 As noted later, this type of evidence is often not meaningful for intersectional plaintiffs. See infra notes 74–75 and accompanying text.
61 See, e.g., Jefferies v. Harris County Cmty. Action Ass’n, 615 F.2d 1025, 1032 (5th Cir. 1980) (arguing “[t]he use of the word ‘or’ evidences Congress’s intent to prohibit employment discrimination based on any or all of the listed characteristics”).
62 See, e.g., DeGraffenreid v. Gen. Motors Assembly Div., 413 F. Supp. 142, 143 (E.D. Mo. 1976) (holding that “this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both”).
63 See Rosalio Castro & Lucia Corral, Comment, Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims, 6 LA RAZA L.J. 159 (1993) (noting that Title VII’s problem is the rigidly categorical framework within which individuals must work to advance their claims); Grillo, supra note 47, at 16–17 (noting that in legal analysis, each of the categories or characteristics are thought of separately, as though they exist suspended in time and space); Virginia W. Wei, Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender, and National Origin, 37 B.C. L. Rev. 771, 776 (1996).
64 See DeGraffenreid, 413 F. Supp. at 143; Chaddah v. Harris Bank Glencoe-Northbrook, N.A., 1994 U.S. Dist. LEXIS 2693, at *17 (N.D. Ill. Mar. 4, 1994), aff’d, 42 F.3d 1391 (7th Cir. 1994) (bifurcating plaintiff’s claims of discrimination to disprove them); Clay v. BPS Guard Servs., 1993 U.S. Dist. LEXIS 8399, at *9 (N.D. Ill. June 18, 1993) (disaggregating plaintiff’s evidence of race and sex discrimination, opining that such evidence is contradictory, and dis-
When arguing about Title VII’s legislative intent, intersectional advocates have emphasized that an amendment to add the word “solely”—thereby proscribing discrimination based solely on race, color, religion, sex or national origin—actually came up during the debates. Representative John Dowdy introduced this amendment, noting “[s]urely this is what is intended and it is only reasonable that the matter be clearly stated in the language of the bill.” Significantly, Congress did not incorporate the “solely” language into the final statute. Some courts have read this legislative history as validation for a “sex-plus” rationale, whereby an individual’s claim is considered under the protected category of sex, “plus” one other (subsidiary) protected trait. Other courts have viewed the result more broadly, positing it as evidence for Congress’s intention that Title VII not merely proscribe discrimination based on one of the protected traits. In short, Title VII’s legislative history does not provide an established policy for dealing with intersectional claimants.

B. Loopholes

One consequence of forcing a plaintiff to choose only one claim under Title VII is that it provides employers with a loophole through which they can avoid the law. One case that is illustrative—in addition to DeGraffenreid—is Moore v. Hughes Helicopter, Inc. In Moore, the Ninth Circuit upheld a decision not to certify the black female plaintiff as the class representative in a sex discrimination complaint on behalf of all women at Hughes. The Moore court failed to see the similarity between a black woman and other women, observing that “Moore had never claimed before the [Equal Employment


65 Cathy Scarborough, Conceptualizing Black Women’s Employment Experiences, 98 YALE L.J. 1457, 1466–67 (1989) (citing 110 CONG. REC. 2721, 2728 (1964) and discussing aspects of the congressional debate over Title VII that are pertinent to the intersectional claimant).

66 110 CONG. REC. 2728 (1964).


68 See, e.g., Jeffries v. Harris County Cnty. Action Ass’n, 615 F.2d 1025, 1032 (5th Cir. 1980) (citing 110 CONG. REC. 2728 (1964)).

69 Scarborough, supra note 65, at 1467.

70 708 F.2d 475 (9th Cir. 1983).

71 Id. at 480.
Opportunity Commission] that she was discriminated against as a female, but only as a black female.”72 Accordingly, the court refused to certify the plaintiff as the class action representative, even though the class included black women.73

Presumably on the basis of Moore claiming discrimination as a black woman, the court left her to support her claim with statistical evidence of discrimination against black women.74 The court found Moore to be the only qualified black woman employee in her particular unit,75 thereby leaving her with no statistically significant evidence to prove a claim of discrimination against black women. Thus, the Moore court placed black women—a group already “multiply-burdened”76 by their race and sex—at a further disadvantage for remediating their claims. Disaggregating the race and sex claims would have posed its own problems as Hughes could have shown that no discrimination took place against women by identifying white females who worked for the plant. Similarly, Hughes could have rebutted racial discrimination by pointing to the presence of black men. This intersectional loophole often exists in employment discrimination cases.77

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72 Id. (emphasis added).
73 The issue of whether courts ought to certify a black woman in a class constituted predominantly by white women is beyond the scope of this Article. Though at least one scholar has criticized courts for failing to certify black women in such class actions, see Crenshaw, supra note 7, at 144–48, it appears to the author that class actions raise unique concerns of efficiency and—with regard to selecting a class representative—homogeneity.
74 See id. at 484–86 (tracing the plaintiff’s unsuccessful attempts to produce statistically significant evidence of discrimination toward black women). Moore was brought under a disparate impact theory, which requires that plaintiffs show statistically significant evidence of discrimination. Id. at 478. The disparate impact theory of recovery under Title VII is used to attack employment practices that are “fair in form, but discriminatory in operation.” Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). According to Moore, as long as the employer had not overtly discriminated against black women (and the plaintiffs were forced to look at the effects of neutral policies under a disparate impact theory), it was “home free” since there were no statistically significant numbers of qualified, black women at Hughes. Moore, 708 F.2d at 484. The disparate impact dilemma is especially salient for intersectionality since its claimants are, by definition, less represented than other groups. For example, women are by definition a larger class than black women or Asian women. Thus, for these potential intersectional claimants it will necessarily be more difficult to have the statistically significant numbers needed to prove a disparate impact claim.
75 Moore, 708 F.2d at 484.
76 Multiply-burdened is purposefully used here, rather than “doubly-burdened,” since the latter designation obscures the oppression groups at a particular intersection face as merely additive. See infra notes 171–77 and accompanying text.
77 As further example, see discussion of Lee v. Walters, infra notes 106–10 and accompanying text.
The court concluded that “Moore [was] relying on little more than an inference of discrimination from the bare absence of black female employees.”

C. Privilege

When courts interpret Title VII as only allowing suits brought under solely race, color, religion, sex, or national origin, the statute tacitly affirms the privilege of the American white Anglo-Saxon Protestant male by providing a remedy only for those claimants who deviate from this prototype in one respect. Crenshaw depicts this point visually with her metaphor of a basement that contains all people who are discriminated against on the basis of race, sex, class, sexual preference, age and/or physical ability. The people in this basement are stacked—one person’s feet on top of another’s shoulders—from the bottom to the top. Those at the bottom of the basement are individuals fully disadvantaged by the broad array of factors, while those at the top (near the ceiling) are disadvantaged by only a single factor. She notes that this ceiling is also a floor, above which all those who are not disadvantaged by any factor reside.

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78 Moore, 708 F.2d at 484.
79 John Powell, in the context of discrimination law, similarly describes the need to consider “the marks of privilege” which he lists off as “male, White, Christian, able-bodied, heterosexual, and middle class.” Powell, supra note 48, at 1512. See also Elvia R. Arriola, Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory, 9 BERKELEY WOMEN’S L.J. 103, 107 (1994); Crenshaw, supra note 7, at 151 (arguing that “the paradigm of sex discrimination tends to be based on the experiences of white women [and that] the model of race discrimination tends to be based on the experiences of the most privileged Blacks”). A body of knowledge that is relevant to this phenomenon is Critical White Studies. Barbara Flagg has contributed greatly to this movement by arguing that a critical feature of white identity is transparency: “the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific.” Barbara J. Flagg, “Was Blind But Now I See”: White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 957 (1993).
80 Title VII protects whites even though they were not the intended beneficiaries of the Civil Rights Act of 1964. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 (1976). However, these claims are not usually as persuasive. Moreover, it is typically unnecessary for a person possessing the privileged white race status to specify race in a discrimination claim because race will not usually play a role in the discrimination this person experienced. Crenshaw, supra note 7, at 144–45. This same line of reasoning has similar applicability to the male sex, the Christian religion, and the European-American national origin.
81 Crenshaw, supra note 7, at 151.
82 Id.
83 Id.
84 Id.
A hatch is now developed through which those whose heads are touching the ceiling can quickly crawl.\(^85\) One might aptly consider Title VII as the hatch. The dilemma is that the hatch is only available to those directly below it.\(^86\) The multiply-removed persons\(^87\) at the bottom of the basement remain in the basement unless they can pull themselves into one of the singly-burdened groups above that are permitted to squeeze through the hatch.\(^88\)

Continuing the metaphor, the American black Protestant male and the American white Protestant female are standing near the top of the ceiling. They are able to bring their claims under a singular departure from the legally-established norm of the American white Anglo-Saxon Protestant male.\(^89\) However, imagine the African black Hindu female who experiences discrimination in her employment. She deviates from the privileged norm in every way possible. Is it fair to essentialize her discrimination as only race- or sex-based? Is it reasonable to assume that her oppression was only because of her national origin or religion? Such inclinations to singularly identify bias fail to address the complexity of identity and concomitant subordination. As Crenshaw explains:

\[\text{[P]roviding legal relief only when Black women show that their claims are based on race or on sex is analogous to calling an ambulance for the victim only after the driver responsible for the injuries is identified. But it is not always easy to reconstruct an accident: Sometimes the skid marks and the injuries simply indicate that they occurred simultaneously, frustrating efforts to determine which driver caused the harm. In these cases the tendency seems to be that no driver is held responsible, no treatment is administered, and the involved parties simply get back in their cars and zoom away.}\] \(^90\)

\(^85\) Id. at 151–52.

\(^86\) Id. at 152.

\(^87\) That is, those who are multiply-removed from the American white Anglo-Saxon Protestant male norm.

\(^88\) Crenshaw, supra note 7, at 152.

\(^89\) Powell has argued that much of the language in intersectionality analysis subtly contributes to “normalizing . . . the white male, the unstated marker of the dominant discourse.” Powell, supra note 48, at 1493. However, the law’s dependence on a single-axis approach to antidiscrimination is more aptly seen as enshrining the white male as the standard from which deviation is measured.

\(^90\) Crenshaw, supra note 7, at 149.
This metaphor illuminates the extreme difficulty of disaggregating identity for the purpose of bringing a legal claim. Yet according to Crenshaw’s metaphor and a number of court decisions, the only way for a multiply-burdened person to obtain legal relief is to isolate and disaggregate the legally-protected characteristics that form the basis of her claim.

Another way of discussing Title VII’s emphasis on privilege is via the observation that courts and commentators have usually limited the examination of race and sex discrimination to the experiences of the otherwise-privileged members of the group. This means that “in race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged blacks; in sex discrimination cases, the focus is on race- and class-privileged women.” The implication is that racism and sexism become obfuscated by focusing on a group that is actually only “a subset of a much more complex phenomenon.”

Wilson v. Bailey exemplifies how privilege constricts the analysis of identity. In Wilson, two deputy sheriffs, both white males, brought suit under Title VII claiming reverse discrimination at the hands of the Birmingham, Alabama affirmative action program. They claimed “a higher proportion of minorities and women were promoted than white men.” Despite the fact that this claim was intersectional in nature—these white men were not claiming discrimination had occurred on the sole basis of being either white or male—the court did not require the claim be brought under only race or sex. Instead, the Eleventh Circuit considered the claim holistically, allowing statistics of any male or white candidates to be utilized as evidence in support of their claim. One would suppose that this treatment is a privilege of being part of the white male norm. As Crenshaw noted in her groundbreaking article on intersectionality in 1989, she was unable to discover any case in which courts had pre-

91 See supra note 64.
92 Crenshaw, supra note 7, at 140.
93 Id.
94 Id.
95 Wilson v. Bailey, 934 F.2d 301 (11th Cir. 1991).
96 Id. at 303.
97 Id. at 304 (emphasis added).
98 See id.
99 To be fair, this type of treatment is also likely because white men are usually a more statistically significant and common sub-group. Accordingly, proxies for measuring this type of discrimination are not usually necessary.
vented white men from bringing a reverse discrimination claim merely
because of the claim’s intersectional nature.100 This point is significant
because a reverse discrimination claim by white males clearly lies at
the intersection of race and sex. A double standard appears to exist,
whereby white male (intersectional) litigants enjoy additional legal
protections which do not extend to non-white male intersectional
claimants. This is a repugnant and unacceptable reality.

D. Intersectional Discrimination

Though DeGraffenreid first addressed intersectional experiences
over thirty years ago, concerns over intersectional claims remain perti-
nent and timely.101 Despite a number of court decisions that have vali-
dated intersectional claims,102 none of these decisions have generated
enough publicity or been handed down by a court with sufficient
authority to set a genuine precedent in an area lacking clear gui-
dance.103 The closest the U.S. Supreme Court has come to addressing
the intersectional dilemma is its approving citation to Jefferies v. Har-
ris County Community Action Ass’n.104 Unfortunately, the reference
was made in passing and lacked any analysis.105

Despite some recent intersectional successes, many courts have
refused to abandon a single-factor analysis with respect to intersec-
tional claims. In Lee v. Walters,106 the plaintiff, an Asian-American

100 Crenshaw, supra note 7, at 142 n.12.
101 While the court of appeals affirmed the district court’s decision, they did so on different
grounds and noted that they did “not subscribe entirely to the district court’s reasoning in
rejecting appellants’ claims of race and sex discrimination under Title VII.” DeGraffenreid v.
Gen. Motors Assembly Div., 558 F.2d 480, 484 (8th Cir. 1977).
102 Nagar v. Found. Health Sys., 57 Fed. App’x 304 (9th Cir. 2003); Lam v. Univ. of Haw.,
40 F.3d 1551 (9th Cir. 1994); Core-Boykin v. Boston Edison Co., 2004 Mass. Super. LEXIS 128
103 There remains a lack of consensus among courts on how to decide cases with multiple
claims. See Robert S. Chang & Jerome McCristal Culp, Jr., Commentary: After Intersectionality,
71 UMKC L. Rev. 485, 485 (2002) (“putting [intersectionality] to work in law . . . has proven to
be quite difficult”); Abrams, supra note 24, at 2496 (observing that intersectional cases have not
produced a durable precedent that would secure judicial recognition of intersectional claims);
Hutchinson, supra note 16, at 302–03. Finally, no cases have offered a framework that would
allow more than two claims to be brought. See Levit, supra note 43, at 229 (“no decisions have
acknowledged the intersection of more than two bases for discrimination”).
104 615 F.2d 1025 (5th Cir. 1980).
105 See Olmstead v. L.C., 527 U.S. 581, 598 n.10 (1999) (citing Jefferies, 615 F.2d at 1032)
(“[d]iscrimination against black females can exist even in the absence of discrimination against
black men or white women”).
female doctor, claimed that discrimination accounted for 1) her failure to obtain a promotion and 2) an unfair work-related reprimand.\textsuperscript{107} In particular, she claimed the discrimination she encountered was based on race, sex, and national origin.\textsuperscript{108} The court’s comments in a footnote addressing the claims of race and sex discrimination are telling: “There is no direct evidence of anti-female or anti-[A]sian animus. Moreover, there were [white] females and [A]sian [men] in chief grade positions and on the Professional Standards Board.”\textsuperscript{109} Just like \textit{DeGraffenreid}, the \textit{Lee} court refused to accept a woman of color’s claims of race and sex discrimination by separately construing successful white women and men of color as disproof.\textsuperscript{110}

The U.S. District Court for the Northern District of Illinois took a similar approach in \textit{Chaddah v. Harris Bank Glencoe-Northbrook, N.A.}\textsuperscript{111} In that case, the plaintiff, an Asian woman, alleged that she was constructively discharged and denied opportunities for promotion at her bank.\textsuperscript{112} In her amended complaint, Chaddah claimed she experienced discrimination based on her age and race and that it was the “pattern and practice” of the business.\textsuperscript{113} Once again, the court bifurcated the claims so that they became irrelevant for proving discrimination against an older Asian woman. The court noted that the plaintiff failed to present any evidence that the younger, white women promoted ahead of her were less qualified or that “there were few or no Asian or older bank officers.”\textsuperscript{114}

\textsuperscript{107} Id. at *1, *5, *9.
\textsuperscript{108} Id. at *1.
\textsuperscript{109} Id. at *21 n.7.
\textsuperscript{110} Although the court found for the plaintiff on her lack of promotion claim (on the basis of national origin), the court refused to find that the reprimand was a pretext for unlawful discrimination on the basis of race and sex. \textit{Id.} at *20–21, *24. \textit{But see} Graham v. Bendix Corp., 585 F. Supp. 1036, 1047 (N.D. Ind. 1984) (“Under Title VII, the plaintiff as a black woman is protected against discrimination on the double grounds of race and sex, and an employer who singles out black females for less favorable treatment does not defeat plaintiff’s case by showing that white females or black males are not so unfavorably treated.”); Chambers v. Omaha Girls Club, 629 F. Supp. 925, 946 n.34 (D. Neb. 1986).
\textsuperscript{111} 1994 U.S. Dist. LEXIS 2693 (N.D. Ill. Mar. 8, 1994), aff’d, 42 F.3d 1391 (7th Cir. 1994).
\textsuperscript{112} Id. at *4–*7.
\textsuperscript{113} Id. at *4–*7 (citing Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977)) (noting that a plaintiff must prove “more than the mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts” for a pattern and practice claim of discrimination). The \textit{Teamsters} Court observed that the plaintiff must prove the “discrimination was the company’s standard operating procedure—the regular rather than the unusual practice.” \textit{Teamsters}, 431 U.S. at 336.
\textsuperscript{114} \textit{Chaddah}, 1994 U.S. Dist. LEXIS 2693, at *17.
Lee and Chaddah each illustrate the dilemma an intersectional claimant faces. Such a plaintiff will often be compelled to identify the treatment of other groups that are statistically significant for the purposes of proving her claim, such as “women” or “older individuals.” In the case of black women, this process might involve looking at how black men and white women are treated. Yet, in considering evidence of such groups, the intersectional plaintiff utilizes proof that may not capture the essence of her claim. For example, in Chaddah, the issue was not that the bank discriminated against women or Asians or older individuals. The issue was that the bank discriminated against Chaddah, an older Asian woman.

These cases are examples of courts failing to provide redress through rough proxies. However, evidence regarding the treatment of groups that share only one trait with the intersectional claimant is pertinent only as evidence of discrimination—and not pertinent as evidence of nondiscrimination. In other words, evidence regarding the treatment of such groups is only helpful for identifying discriminatory animus and not helpful for illuminating the defendant’s good motives; the evidence does not work both ways. For example, in Jefferies, the Fifth Circuit held that evidence of nondiscriminatory treatment of black males and white females was wholly unrelated to the question of discriminatory treatment toward a black woman claiming bias on both racial and sexual grounds. Conversely, evidence of discriminatory treatment (by the defendant) of a black male is clearly relevant to the discrimination claim of a black woman. Accordingly, evidence of nondiscriminatory treatment toward a group that shares only one trait with the intersectional claimant does not exculpate the defendant. However, evidence of discrimination toward such a group may well be evidence that rightfully indicts a defendant’s motives. The distinction is critical.

Another federal circuit court case that provides much of the analysis needed for intersectional claimants is Lam v. University of

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115 But see supra Part II.B. (explaining how this evidentiary method should not, but may, provide the employer with a loophole for avoiding Title VII regulation).
116 Jefferies v. Harris County Cmty. Action Ass’n, 615 F.2d 1025 (5th Cir. 1980).
117 Id. at 1034; See Graham v. Bendix Corp., 585 F. Supp. 1036, 1047 (N.D. Ind. 1984). At a minimum, it is clear that favorable treatment of one member of a protected class does not preclude the possibility that another member of the same class suffered discrimination. Lam v. Univ. of Haw., 40 F.3d 1551, 1561 (9th Cir. 1994).
118 Lam, 40 F.3d at 1562 n.18 (citing EEOC v. Beverage Canners, Inc., 897 F.2d 1067, 1072 (11th Cir. 1990)).
Hawaii. In Lam, a Vietnamese woman applied for a position as Director of the Pacific Asian Legal Studies Program at the University of Hawaii Law School. The school completed two separate searches for applicants, but rejected Lam each time. Lam filed suit, asserting the university had discriminated against her on the bases of race, sex, and national origin. The district court granted summary judgment to the defendant regarding both searches and posited two principal rationales. First, it found no direct evidence of faculty prejudice on the hiring committee. Second, the court identified indirect evidence of nondiscrimination by noting the defendant’s favorable consideration of two other candidates for the position: an Asian man and a white woman. The Ninth Circuit Court of Appeal’s opinion is worth quoting at length:

In assessing the significance of these candidates, the [district] court seemed to view racism and sexism as separate and distinct elements amenable to almost mathematical treatment, so that evaluating discrimination against an Asian woman became a simple matter of performing two separate tasks: looking for racism “alone” and looking for sexism “alone,” with Asian men and white women as the corresponding model victims. The court questioned Lam’s claim of racism in light of the fact that the Dean had been interested in the late application of an Asian male. Similarly, it concluded that the faculty’s subsequent offer of employment to a white woman indicated a lack of gender bias. We conclude that in relying on these facts as a basis for its summary judgment decision, the district court misconceived important legal principles. . . . [W]here two bases for discrimination exist, they cannot be neatly reduced to distinct components. Rather than aiding the decisional process, the attempt to bisect a person’s identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences.

119 40 F.3d 1551 (9th Cir. 1994).
120 Id. at 1554.
121 Id.
122 Id.
123 Id.
124 Lam, 40 F.3d at 1560.
125 Id. at 1561.
126 Id. at 1561–62 (emphasis added). The court of appeals shrewdly noted that Lam and the Asian male candidate were of different national origins, thereby making the racial similarity irrelevant. Id. at 1516 n.16. Regarding the female candidate who received an offer, the court
The Ninth Circuit lucidly demonstrated that mathematical treatment of discrimination may yield nonsensical results. It noted that the district court’s approach equated discrimination against Asian women to discrimination against Asian men + discrimination against white women.\footnote{Id. at 1562 n.19.} As an example of the inherent fallacy in this type of formulaic treatment, the court noted that discrimination against white men could be analyzed using the following similar mathematical model: Asian men + white women.\footnote{Id.}

Other recent decisions have followed Lam’s holding.\footnote{See Nagar v. Found. Health Sys., 57 Fed. App’x 304, 306 (9th Cir. 2003) (affirming that discrimination on a combination of factors is impermissible); Core-Boykin v. Boston Edison Co., 2004 Mass. Super. LEXIS 128, *1, *24 (Mass. Super. Ct. Apr. 13, 2004) (affirming combination discrimination); Fucci v. Graduate Hosp., 969 F. Supp. 310, 316 n.9 (E.D. Pa. 1997) (observing that a Title VII claim may be premised on alleged discrimination based on a combination of impermissible factors). \textit{See also} Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364, 374 (5th Cir. 1998) (affirming intersectional standing tacitly for the black female plaintiff by comparing the case to \textit{Jeffers}).} In \textit{Jeffers v. Thompson},\footnote{264 F. Supp. 2d 314 (D. Md. 2003).} the plaintiff sued on the basis of more than one legally-protected category under Title VII.\footnote{Id. at 325.} The court affirmed the plaintiff’s ability to do so, noting that “[s]ome characteristics, such as race, color, and national origin, often fuse inextricably. Made flesh in a person, they indivisibly intermingle.”\footnote{Id. at 326.} The \textit{Jeffers} court acknowledged that intersectional claimants have often been the victims of distinct stereotypes and “that discrimination against African-American women necessarily combines (even if it cannot be dichotomized into) discrimination against African-Americans and discrimination against women.”\footnote{Id.}

\subsection*{E. Sex-Plus Cases}

Some courts have recognized a “sex-plus” rationale, whereby a characteristic in addition to sex is given consideration as a subsidiary...
trait. The dissent in *Phillips v. Martin Marietta Corp.*\(^{134}\) established this theory. In *Phillips*, a female plaintiff filed a sex discrimination action after she was told the employer was not accepting applications from women with pre-school age children.\(^{135}\) The same employer had hired men with pre-school age children.\(^{136}\) Yet because Martin Marietta’s workforce contained a strong proportion of women—withstanding the consideration of children—the district court determined that no question of bias was presented, and the Fifth Circuit affirmed.\(^{137}\)

In his dissent, Judge Brown vehemently disagreed with the court’s refusal to examine the “coalescence” of sex and motherhood.\(^{138}\) Judge Brown argued that the employer in *Phillips* discriminated on the basis of sex because motherhood is a condition intrinsically related to women.\(^{139}\) He reasoned that if discrimination were permitted in cases where it is conspicuously tied to a sex-related factor (such as motherhood), the Civil Rights Act of 1964 would be dead.\(^{140}\) On review, the Supreme Court agreed and remanded the case to determine whether refusing applications from women with pre-school age children was a bona fide occupational qualification necessary to the defendant’s enterprise.\(^{141}\)

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\(^{134}\) *Phillips v. Martin Marietta Corp.*, 416 F.2d 1257, 1258–59 (5th Cir. 1969) (Brown, J., dissenting). Judge Brown found motherhood was a ruse for discrimination on the basis of sex. *Id.* at 1259.

\(^{135}\) *Id.*

\(^{136}\) *Id.*

\(^{137}\) *Id.* at 1260.

\(^{138}\) *Id.*

\(^{139}\) Judge Brown explained:

> The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman. *Id.* at 1259.

\(^{140}\) *Phillips*, 416 F.2d at 1260. Judge Brown noted that if the court were free to discriminate as to non-statutory factors that correlated strongly with sex, “the rankest sort of discrimination against women [could] be worked by employers.” *Id.* He noted this discrimination could be directed at all kinds of physical characteristics that have a correlation with sex—such as minimum weight, minimum shoulder width, and minimum lifting capacity. *Id.* This claim occurred before the doctrine of disparate impact emerged from Title VII, under which employers are prohibited from instituting facially neutral hiring, promotion, and firing policies that have a disparate impact on any protected class. *See generally Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Since Phillips, intersectionality has occasionally found solace through the sex-plus rationale. In 1980, the Fifth Circuit weighed in shortly after DeGraffenreid with an unflinching opinion in Jefferies v. Harris County Community Action Ass’n. The court held that black women constituted a protected sub-class under Title VII and acknowledged “[d]iscrimination against black females can exist even in the absence of discrimination against black men or white women.” The court adopted a sex-plus approach and, similar to Phillips, argued that Title VII should not be diluted even though the discrimination in question affected only a portion of women. To neglect the unique posture of black women, the court reasoned, would leave them without a viable Title VII remedy.

The Fifth Circuit initially addressed Jefferies’ race and sex discrimination claims separately. Ultimately, however, the court examined her claim as that of a woman who, due to a secondary/subsidiary, protected trait, encountered discrimination. The court framed its decision in terms of the validity of sex-plus cases and their efficacy in preventing a group of women from being singled out and discriminated against. Yet in holding that black women were protected under sex-plus reasoning, the Fifth Circuit seemed to imply that black women’s claims did not constitute “standard” sex discrimination.

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142 615 F.2d 1025, 1032 (5th Cir. 1980). As briefly noted earlier, the court’s careful attention to the legislative record helped direct its decision. The Fifth Circuit reasoned that Congress’s use of the word or in the language of Title VII (protecting on the basis of “race, color, religion, sex or national origin”) demonstrated Congress’s intent to prohibit employment discrimination on the basis of any or all of these protected characteristics. Id. The court also noted that the House of Representatives refused an amendment that would have added the word “solely” to clarify that a plaintiff could only bring her case under one protected characteristic. Id. (citing 110 Cong. Rec. 2728 (1964)).

143 Id.

144 Scarborough, supra note 65, at 1471 (noting “Jefferies has had an impact on other courts, which have subsequently adopted the sex-plus rational [sic] as a framework for understanding Black women”). One scholar believes that the Jefferies court analyzed discrimination against black women through this lens because it was able to rationalize its decision by applying an already established theory. Id. at 1470. Accordingly, the Jefferies court noted its decision was “mandated by the holdings of the Supreme Court and this court in the ‘sex plus’ cases.” Jefferies, 615 F.2d at 1033.

145 Jefferies, 615 F.2d at 1034 (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir.), cert. denied, 404 U.S. 991 (1971)).

146 Id. at 1032–33.

147 See id. at 1033–34.

148 Crenshaw, supra note 7, at 143 n.13. The implication is that “standard” sex discrimination is discrimination against white women. See supra notes 92–94 (noting how sex discrimina-
A few years later, the U.S. District Court for the District of Columbia in *Judge v. Marsh*\(^\text{149}\) criticized the Jefferies decision as too far-reaching.\(^\text{150}\) The court noted that the Jefferies rationale of extending sex-plus analysis to protect on the basis of race turned employment discrimination into a many-headed Hydra since Title VII already protected race.\(^\text{151}\) The *Marsh* court worried that “[f]ollowing the Jefferies [sic] rationale to its extreme, protected subgroups would exist for every possible combination of race, color, sex, national origin and religion.”\(^\text{152}\) In response to this fear, the court restricted the Jefferies analysis to employment decisions based on one protected, immutable trait, directed against individuals sharing a second protected, immutable characteristic\(^\text{153}\)—essentially a “just pick two” rule.\(^\text{154}\) Thus, the *Marsh* court allowed the plaintiff to maintain a sex-plus discrimination claim as a woman who possessed a second immutable trait (her race) that contributed to discrimination against her. Although the plaintiff was not seeking to include any factors in addition to race and sex, the court preempted this possibility altogether by holding that a Title VII plaintiff could claim only one “plus.”\(^\text{155}\)

The next year, the Tenth Circuit Court of Appeals relied on Jefferies to aggregate racial and sexual hostility evidence.\(^\text{156}\) In *Hicks v. Gates Rubber Co.*,\(^\text{157}\) the court used a form of sex-plus analysis to remand a case for determination on the role of racial discrimination in a sexually harassing environment.\(^\text{158}\) The plaintiff, a black woman, had been subject to sexual harassment and a flurry of racial slurs and jokes.\(^\text{159}\) On appeal, the *Hicks* court held that Title VII prohibits racial harassment and that the plaintiff should be permitted to use evidence of racial *and* sexual harassment to prove a hostile work envi-

\(^\text{150}\) Id. at 780.
\(^\text{151}\) Id.
\(^\text{152}\) Id.
\(^\text{153}\) Id.
\(^\text{154}\) Levit, *supra* note 43, at 229.
\(^\text{155}\) *Marsh*, 649 F. Supp. at 780.
\(^\text{156}\) Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416–17 (10th Cir. 1987), *aff’d on reh’g*, 928 F.2d 966 (10th Cir. 1991).
\(^\text{157}\) 833 F.2d 1406 (10th Cir. 1987).
\(^\text{158}\) Id. at 1416, 1419.
\(^\text{159}\) See id. at 1409–10.
Citing Jefferies, the court held that disparate treatment of a sub-class of women constitutes a violation of Title VII.161 While sex-plus analysis is somewhat helpful in the intersectional context, it still often relegates a Title VII-protected category to the level of a plus factor. In this context, sex-plus analysis is a more sophisticated version of articulating identity, but ultimately still a facade for discrimination that is structured around one factor.162 Accordingly, sex-plus analysis ignores a central tenet of intersectionality—that where discrimination is based on two statutorily-protected traits, each deserves equal consideration.163

Sex-plus analysis presents a second problem in that courts often do not know what weight to assign the plus. This difficulty occurs when the plus is an ostensibly neutral consideration, and becomes more significant when the plus is a statutorily-protected trait.164 For example, in Hicks the Tenth Circuit instructed the lower court to evaluate the racial slurs and jokes as part of the sexually harassing hostile environment claim, but did not provide any guidance as to the relative weight of the racial comments.165 This ambiguity over what weight to assign the plus trait seems to track with the general confusion in courts regarding how to evaluate the components of an intersectional claim.166

The Marsh court’s “just pick two” rule167 exemplifies a third problem with the sex-plus doctrine because an intersectional claimant’s “plus” is often immediately exhausted. This is especially true for women of color who, in order to make a claim that involves both race

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160 Id. at 1416–17.
161 Id. at 1416.
162 Castro & Corral, supra note 63, at 168–69.
163 As one commentator has stated:
Had the Jefferies court viewed Black women as a distinct class under Title VII, who should be given protection because sex and race are both prohibited categories, the issue of sex-plus and what constitutes a “plus” could have been avoided. Instead, the issue would have been whether persons of ‘like qualities [are] given employment opportunities irrespective of their sex and race, rather than allowing the focus to shift to arbitrary sex-plus limits.
Scarborough, supra note 65, at 1472 (emphasis in original).
164 In this context, giving the plus trait any less weight than the primary protected characteristic (i.e., sex) seems to fall short of the protection Congress intended individuals to have under Title VII. See Ghassomians v. Ashland Indep. Sch. Dist., 55 F. Supp. 2d 675, 687–88 (E.D. Ky. 1998).
165 Wei, supra note 63, at 780.
166 See infra notes 220–24, 232–35 and accompanying text.
and sex, must use their race as the plus factor.\textsuperscript{168} They are then left without the protection they may potentially need under the pluses of being pregnant, married, or single with children.\textsuperscript{169} Conversely, a white woman will not need to identify her race as a plus (to make a claim that involves both her sex and race), given society’s tendency to consider “white” the norm.\textsuperscript{170}

Most fundamentally, the oppression a black woman encounters is more than merely the addition of the racism black men experience and the sexism white women face.\textsuperscript{171} Consider the following scenario:

Assume that a corporation requires its applicant to sit for oral interviews in which they are subjectively rated on qualities such as “fits the corporate profile,” “leadership potential” or “ability to project a commanding presence.” Also assume that African American women disproportionately fail the interview while African American men and white women score exceptionally well. In such a case, it would seem that stereotypes of African American women have disadvantaged them as a distinct group. Understood in this manner, compound discrimination claims are not reducible to either of the contributing factors (e.g., race or sex) but are instead attributable to the combined effects of both.\textsuperscript{172}

Intersectional scholars have vehemently rejected the oversimplification that, for instance, a black woman is simply the sum of “woman” + “black.”\textsuperscript{173} In this context, the whole is clearly greater than the sum of its parts. Whereas antidiscrimination doctrine, at best, treats multiplicity as a combination of yellow and blue tennis balls in a bucket,

\begin{itemize}
\item \textsuperscript{168} Scarborough, supra note 65, at 1472.
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id. (observing that a white woman’s race, unlike that of a black woman, is generally not considered a plus factor because of society’s tendency to normalize whiteness).
\item \textsuperscript{171} This type of additive analysis has been criticized as a site of erasure. See Crenshaw, supra note 18, at 1252; Spelman, supra note 29, at 115.
\item \textsuperscript{173} See generally Crenshaw, supra note 7; Grillo, supra note 47; Harris, supra note 40; Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 14 WOMEN’S RTS. L. REV. 297 (1992); Spelman, supra note 29. See also Adrien Katherine Wing, Reno v. Am.-Aide Anti-Discrimination Committee: A Critical Race Perspective, 31 COLUM. HUM. RTS. L. REV. 561, 573 (2000) (arguing the multiplicity of experience “cannot be reduced to an addition problem: ‘racism + sexism = straight black woman’s experience’”).
\end{itemize}
intersectionality aspires to treat identity more like paint. In mixing yellow and blue paint, one is left with something altogether new—a shade of green. In the context of identity, the result of “mixing” different traits is that an entirely unique set of “concerns and characteristics” emerges. For black women, this means that race and sex discrimination “come together to reinforce and, by particularizing, reshape each other.” This particular synergy is illustrated by the array of stereotypes black women have encountered historically. These stereotypes—such as “nigger bitch” or “buffalo butt”—embody a unique merger of racism and sexism that black men or white women will probably never face.

To be clear, sex-plus analysis does have an important role in employment discrimination: to protect against discrimination on the basis of non-statutorily-protected categories used as proxies to discriminate on the basis of sex. As one commentator has noted, sexual harassment or discrimination is no less actionable or typical when it takes on a more particularized focus. Rather, “the stigmatization of attractive women or blue-collar women or assertive women or pregnant women is in many cases simply animus toward women expressing—and often camouflaging—itself by conforming to the characteristics of a particular target.” Accordingly, if courts decide to limit the number of pluses a plaintiff may utilize—as the court did—statutorily-protected categories should not count toward this number. Courts should only use the “plus” concept to consider discrimination based upon factors that are not expressly protected by Title VII.

F. Hostile Work Environments

Intersectionality has also arisen in cases dealing with claims of hostile work environments. For example, in Brooms v. Regal Tube

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174 Ehrenreich, supra note 51, at 265–66.
175 Id.
176 Abrams, supra note 24, at 2532.
177 Id. at 2501.
178 Id. at 2538.
179 Id.
181 Scarborough, supra note 65, at 1475–76.
182 Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment. 42 U.S.C. § 2000e–2(a)(1) (2000). The Supreme Court has determined that this
the Seventh Circuit affirmed a Title VII violation for sexual harassment, but refused to hear the plaintiff’s racial harassment claim. The plaintiff was a thirty-six year old industrial nurse who repeatedly experienced sexual and racial harassment. This exploitation culminated when her supervisor showed her a picture of black women performing acts of bestiality and told her this was how she “was going to end up.” Her supervisor then grabbed her arm and threatened to kill her. Ms. Brooms threw her coffee on him and ran away, shrieking and falling down a flight of stairs. Although the Seventh Circuit declined to hear the racial harassment claim under an unrelated rationale, the court should have at least commented on it in its discussion of the Title VII claim—especially since the harassment was extremely racial.

Some courts have not viewed the sexual harassment of black women so narrowly. As discussed earlier, the Hicks court aggregated racial and sexual harassment evidence. Although the black female plaintiff lost her claims at the trial court level, the Tenth Circuit declared that she should have the option to “aggregate evidence of racial hostility with evidence of sexual hostility.” Of course, this implicit affirmation of the plaintiff’s intersectional claim may be partly attributable to the plaintiff’s greater emphasis on the intersectional nature of her claim.

prohibition’s scope is not limited to economic or tangible discrimination. Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993). Rather, discrimination that is so “severe or pervasive” as to “alter the conditions of [the victim’s] employment and create an abusive working environment” violates Title VII. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). The Court observed that ever “[s]ince the [Equal Employment Opportunity Commission] Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.” Id. at 66.

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183 881 F.2d 412 (7th Cir. 1989).
184 Id. at 416–17.
185 Id. at 417.
186 Id.
187 Id.
188 The evidence includes her repeated subjection to racial slurs and exposure to racist pornography that depicted black women in demeaning positions. Id. at 416–17.
189 833 F.2d 1406 (10th Cir. 1987), aff’d, 928 F.2d 966 (10th Cir. 1991).
190 See id. at 1416; supra notes 156–60 and accompanying text.
191 Hicks, 833 F.2d at 1416.
192 In fact, emphasis by the plaintiff seems to be critical for courts to give an intersectional claim of discrimination the amount of attention it deserves. See Abrams, supra note 24, at 2500 (noting that Hicks is an example of a case where “black women plaintiffs have placed more emphasis on the intersectional character of their claims”).
On the whole, *Hicks* has produced unpredictable progeny.\(^{193}\) Most courts use *Hicks* for the proposition that a plaintiff may aggregate all evidence of illegal discrimination to support a hostile work environment claim—even if the evidence, disaggregated, would not support an outright claim of discrimination. For example, in *Hafford v. Seidner*,\(^{194}\) the plaintiff was an African-American Muslim, who alleged a hostile work environment on the basis of race and religion.\(^{195}\) Although the Sixth Circuit found the evidence for his religious discrimination claim insufficient, it allowed him to use the evidence to support his racial hostile work environment claim.\(^{196}\) The court noted that the essential element of a hostile work environment is that the cumulative effect of ongoing harassment is abusive.\(^{197}\) The *Hafford* court cited *Hicks* to reason that denying judgment for a plaintiff where the total harassment experienced is abusive would be unfair even though the separate bases for the harassment claim, standing alone, would not amount to severe or pervasive harassment.\(^{198}\) Other courts have not only allowed, but insisted, that plaintiffs receive intersectional evaluation with regard to hostile work environment claims.\(^{199}\)

More recently, in *Domb v. Metropolitan Life Insurance Co.*, the plaintiff’s hostile work environment claim included allegations of discrimination on the bases of religion, gender, and national origin.\(^{200}\) The defendant treated each type of discrimination as separate hostile work environment claims, under the assumption that separate proof for each type was required.\(^{201}\) The court cited *Lam*\(^{202}\) and *Jefferies*\(^{203}\) as proof that multiple bases for discrimination often “cannot be neatly

\(^{193}\) *Id.* at 2500.

\(^{194}\) 183 F.3d 506 (6th Cir. 1999).

\(^{195}\) *Id.* at 515.

\(^{196}\) *Id.* at 514–15.

\(^{197}\) *Id.*

\(^{198}\) *Id.* at 515 (claiming the district court should allow the aggregation of racial and religious discrimination evidence in considering whether a hostile work environment existed).

\(^{199}\) In *Stingley v. Arizona*, the court noted that in harassment cases, hostility is properly appraised from the plaintiff’s particularized perspective. 796 F. Supp. 424, 428 (D. Ariz. 1992). Accordingly, the court observed this requirement may take on special meaning in the case of a black woman. *Id.* at 428 n.8.


\(^{201}\) *Id.*

\(^{202}\) *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994).

\(^{203}\) *Jefferies v. Harris County Cmty. Action Ass’n*, 615 F.2d 1025, 1032 (5th Cir. 1980).
reduced to distinct components." The court then correctly explained that the defendant had a single work environment made hostile by every discriminatory remark. This explanation has analogous import for an intersectional claimant; in such a case, the intersectional plaintiff is one person who experiences discrimination by every violation of Title VII. The upshot is that a plaintiff—in either a hostile environment or disparate treatment case—ought to be able to aggregate proofs of discrimination.

Yet not all courts have accepted intersectional claims regarding hostile work environments. In *Clay v. BPS Guard Services*, the court manifested its reluctance to validate intersectional standing in a hostile work environment case. In *Clay*, the plaintiff, a black woman, sued her employer alleging discrimination on the basis of race. She later amended her complaint to include allegations of sex discrimination. Ms. Clay claimed that she endured racial slurs, received a break schedule different from white employees, and heard employees and supervisors characterize blacks as “those who liked to live off welfare because they are lazy.” Additionally, she was consistently referred to as “nigger bitch.”

The defendant argued the plaintiff’s allegations of sex discrimination should be dismissed or stricken since the plaintiff failed to file a sex discrimination claim with the Equal Employment Opportunity Commission (“EEOC”). The court noted that the standard for allowing these claims (of race and sex discrimination) to proceed was whether they were “like or reasonably related to the allegations of the charge and growing out of such allegations.” In other words, the claims of sex discrimination would be cognizable if they emanated from the original race discrimination claim. The court further noted that this “reasonably related” standard should be construed liberally.

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205 Id.
207 Id. at *2.
208 Id. at *2–*3.
209 Id. at *3.
210 Id.
211 Id. at *6.
“to effectuate the remedial purposes of Title VII, which itself depends on lay persons, often unschooled, to enforce its provisions.”

The court decided that the plaintiff’s sexual harassment and discrimination allegations must be dismissed. Even construing the EEOC’s report liberally, the court stated the sexual discrimination claims were not sufficiently “like or reasonably related to the allegations of the charge [of race discrimination] and growing out of such allegations.” The Clay court determined that the plaintiff’s proof for her race discrimination claim—that the defendant employed a white female—clearly contradicted the plaintiff’s claim of sex discrimination.

But did this observation truly contradict the plaintiff’s allegation of sex discrimination? Is sex discrimination only directed at white women? Once again, the court failed to see that evidence of nondiscriminatory treatment of white women is not exculpatory as to a black woman claiming discrimination on the basis of both race and sex. Accordingly, the court failed to appreciate the inextricable relation between race and sex for a black woman. Indeed, there are specific stereotypes associated with black women that made Ms. Clay’s sexual discrimination claim reasonably related to her claim of racial discrimination. For example, “nigger bitch” is a term unlikely to ever be assigned to a black man. Such a term exemplifies the confluence of sexual and racial discrimination. As Professor Abrams notes, “terms like nigger bitch or buffalo butt are unlikely to ever be used against either black men or white women; they convey a kind of racialized sexual hostility, or sexualized racial hostility that cannot be disaggregated into its component parts.”

Professor Abrams’ observation raises another shortcoming of courts, even of those willing to aggregate more than one type of evidence: by emphasizing aggregation of evidence, courts imply that discrimination against intersectional claimants should be understood as

\[\text{213 Id. (quoting Babrotsky v. Jewel Food Co., 773 F.2d 857, 864 (7th Cir. 1985)).}\]
\[\text{214 Id. at *9.}\]
\[\text{215 Id. at *9 (quoting Perera, 727 F. Supp. at 412–13).}\]
\[\text{216 Id.}\]
\[\text{217 Jefferies v. Harris County Cmty. Action Ass’n, 615 F.2d 1025, 1034 (5th Cir. 1980); see supra notes 116–18 and accompanying text.}\]
\[\text{218 Abrams, supra note 24, at 2538 (noting that courts resolving such a case “must specify that terms such as nigger bitch reflect both race and gender discrimination”).}\]
\[\text{219 Id. at 2501.}\]
an additive phenomenon.\(^{220}\) As discussed above, this type of analysis misses the point regarding intersectional claimants.\(^{221}\) Racial and sexual harassment should be treated as additive only insofar as either type, if proven, would support recovery.\(^{222}\) But it must be remembered that such traits are also interactive, intersectional, and often arise in situations that would have no import for white women or black men.\(^{223}\) The failure by courts to explicate these intersectional dynamics has caused not only unnecessary losses for plaintiffs, but also reluctance by many claimants to plead racial and sexual harassment.\(^{224}\)

III. A Modest Proposal

There are a few distinct reasons why intersectionality has failed to take hold, despite its logical application and obvious appeal for plaintiffs. While persons with potential intersectional claims are ubiquitous, intersectionality is the legal claim that, proverbially speaking, is hidden in plain sight. That said, there are some simple solutions that would help considerably to bring intersectionality into the open and increase its viability within the court system.

A. Why Are There Still So Few Intersectional Claims?

Although a number of recent cases seem to provide glimpses of hope for intersectional claimants, there remains a great deal of work to be done. There are at least three factors at work that are disabling wider acceptance of the intersectional approach.\(^{225}\)

First, attorneys have stymied intersectional claims by failing to recognize compound discrimination.\(^{226}\) In the domestic violence con-

\(^{220}\) Id. at 2501–02.

\(^{221}\) See supra Part II.E (explaining how additive analysis of intersectional claimants misses the unique concerns, stereotypes, and characteristics of those individuals).

\(^{222}\) Abrams, supra note 24, at 2538.

\(^{223}\) Id.

\(^{224}\) Id. at 2501–02.

\(^{225}\) The majority of circuits have not addressed intersectionality. For example, there are only two published opinions that cite Kimberlé Crenshaw’s intersectionality thesis. See B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1101 (9th Cir. 2002); Lam v. Univ. of Haw., 40 F.3d 1551, 1562 n.20 (9th Cir. 1994).

\(^{226}\) This was one of the principle findings of a major study on sex and age discrimination, which analyzed claims of older women brought over a twenty-year period. Kimberle K. Ryan, Compound Discrimination: Closing the Loop in Age and Sex Claims, 28 Colo. Law. 5, 6 (1999). Though age is protected under the Age Discrimination in Employment Act of 1967, not Title
text, Sarah Buel observes that “counsel generally ignore the significant issues implicit in the intersectionality of violence, gender, race and class.”\textsuperscript{227} She notes that they are often “unable to comprehend . . . context, nuances and complexity . . . .”\textsuperscript{228} This point is critical because one cannot expect judges to do the job of lawyers. Accordingly, lawyers must guide the courts with properly pleaded and fully explained intersectional claims.\textsuperscript{229} The Lam\textsuperscript{230} model, in particular, provides an excellent conceptual framework for articulating intersectionality.\textsuperscript{231}

Second, in those limited cases where an intersectional claim is proffered, judges and juries often struggle to appreciate the permutations and harms of an injury that is both racial and sexual.\textsuperscript{232} Consequently, courts have not achieved an adequate conceptual construct for examining discrimination on multiple grounds.\textsuperscript{233} This failure is demonstrated by the tendency of courts to default to sex-plus analysis, instead of giving equal consideration to a plaintiff’s race and sex. Given this lack of understanding and concomitant tendency by judges


\textsuperscript{228} Id.

\textsuperscript{229} Wei, supra note 63, at 807. Wei later notes: Clearly, intersectional claims will not succeed unless they are properly pleaded and well-argued. Plaintiffs’ attorneys must be sure to recognize the intersectionality of factors and must not limit the description of their clients’ reality by channeling discrimination into a single category when it most likely cannot be fully attributed to race, sex or national origin exclusively. If attorneys present claims based on a single factor they will encourage courts to evaluate their clients under standards that oversimplify their experiences. Id. at 811 (citing Hong v. Children’s Mem’l Hosp., 993 F.2d 1257, 1259 (7th Cir. 1993) (describing a Korean-American woman who experienced intersectional discrimination and filed a Title VII claim based on national origin discrimination only)).

\textsuperscript{230} Lam v. Univ. of Haw., 40 F.3d 1551, 1561–62 (9th Cir. 1994).

\textsuperscript{231} See supra notes 119–28 and accompanying text; Wei, supra note 63, at 811 (arguing that attorneys should follow the Lam model when pleading intersectional claims to place the theory within Title VII’s common jurisprudence).

\textsuperscript{232} Tanya Kateri Hernandez, Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race, 4 J. Gender Race & Just. 183, 188 n.22 (2001). This struggle is evident in numerous cases which sidestep the difficult questions surrounding intersectional claimants. See, e.g., Fang-Hui Liao v. Dean, 658 F. Supp. 1554, 1561 (N.D. Ala. 1987) (holding that “there is no need for this court to determine whether or not TVA’s decision to terminate Dr. Liao was impermissibly or directly motivated by her race and/or her sex” since the employer had violated its own affirmative action program).

\textsuperscript{233} Wei, supra note 63, at 779.
to dismiss intersectional claims, women of color have had little hope in obtaining help from the judiciary. Accordingly, such judicial ignorance and bias have engendered a general distrust regarding the legal system in would-be female litigants of color.

Third, given the small number of intersectional cases that actually make it to the pages of a court’s opinion, there is very little precedent available for comparison. Accordingly, an attorney contemplating an intersectional claim has only a small number of cases to guide her to a successful resolution for her client. Therefore, many attorneys may be unable to discern how the court will decide such an issue and may shy away from bringing the claim in the first place. Unfortunately, nothing can uncover the number of intersectional claims that never get brought in the first place.

These three factors work in concert to perpetuate each other. Attorneys fail to recognize intersectional discrimination and therefore fail to adequately present intersectional claims. This failure, in turn, undermines the prospect that judges will seize upon persuasive intersectional claims and deliver favorable rulings. Finally, without valuable precedent from appellate courts, attorneys continue to fail to perceive and advance intersectional claims for multiply-burdened plaintiffs. Hence, some practical solutions are in order.

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234 See id. (noting that empirical counts of cases brought by women of color are uncertain due to judges’ tendency to dismiss intersectional claims). Also, a recent study examining California employment discrimination concluded, in part, that women and plaintiffs of color bringing such cases have extremely low success rates in federal court. See National Partnership for Women & Families, Women at Work: Looking Behind the Numbers 40 Years After the Civil Rights Act of 1964 16 (2004) (citing David Benjamin Oppenheimer, Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities, 37 U.C. Davis L. Rev. 511 (2003)). For example, in race discrimination cases brought by non-whites, plaintiffs succeeded only 36% of the time. Id. Notably, of the race discrimination cases brought by whites, plaintiffs won 100% of the time. Id. The lowest success rates were found to lie at the intersection of race and gender, and race and age. Id. In cases brought by African-American women alleging race and/or sex discrimination, plaintiffs won only 17% of the time. Id. Such findings support the conclusion that intersectional prejudice remains among the strongest of judicial biases.

235 Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System 547 (2003), available at http://www.courts.state.pa.us/Index/Supreme/BiasCmte/FinalReport.pdf (last visited Dec. 11, 2006). Accordingly, litigants report that courts do not understand their cultural backgrounds and that this leads to misunderstandings that may compromise their cases. . . . Several judges discussed the gap in experience and understanding between middle-class Caucasian judges and poor minority litigants. One judge characterized it as judges living in an ‘ivory tower’ of upper-middle-class biases. Id. at 548.
B. Administrative Solutions

The EEOC should issue guidelines instructing judges how to deal with intersectional claimants. These guidelines should address a number of issues. First, they should emphasize that formulaic attempts to situate identity fall short. Conceptually, this includes, for example, understanding that an Asian woman’s plight cannot be reduced to the observation that she is “woman” + “Asian.” As illustrated earlier, there are often very specific stereotypes and sociocultural labels pinned to particular groups that prevent such facile equations.\(^\text{236}\)

Avoiding such equations requires courts to be sensitive to different groups’ or claimants’ historical, social, and economic experiences.\(^\text{237}\) Courts should draw upon these groups’ experiences when reaching decisions that concern them, just as the Supreme Court acknowledged the sociohistorical experiences of white women and black men in its \textit{Frontiero v. Richardson}\(^\text{238}\) opinion. This type of attention by courts and the EEOC guidelines would increase various groups’ visibility and educate others about membership in these groups.\(^\text{239}\) At the same time, courts must resist the tendency to formulaically assume that every time a woman of color, for example, brings a discrimination claim, it must have intersectional overtones. Courts must be open to intersectional claims, but must not force a plaintiff into an intersectional class when her claim is brought under only one protected category.\(^\text{240}\)

Second, the EEOC guidelines should explain that even though a black woman might utilize evidence of discrimination against blacks or women to effectively persuade a court, evidence of an employer’s nondiscrimination against the two groups that bisect an intersectional claimant’s identity is unpersuasive. As explicated earlier, the evidence does not work both ways.\(^\text{241}\)

Third, the guidelines should assure courts that intersectional standing is not infinitely regressive. A court is not obliged to recog-

\(^{236}\) See \textit{supra} notes 171–77, 218–19 and accompanying text.

\(^{237}\) Scarborough, \textit{supra} note 65, at 1474.

\(^{238}\) \textit{Id.} at 1474–75 (citing \textit{Frontiero v. Richardson}, 411 U.S. 677 (1973)).

\(^{239}\) \textit{Id.} at 1475. These groups might include Indian, Hispanic, and Asian women; women and men of color from other countries; and women of various religions—Jewish women, Muslim women, and Hindu women.


\(^{241}\) See \textit{supra} notes 116–18 and accompanying text.
nize the intersection of all the traits that comprise one’s identity. In fact, intersectionality originated as a push for courts to recognize the confluence of race and sex in the case of black women. As a guidepost, it is reasonable for courts to recognize the confluence of two or more of any of the statutorily-protected traits under Title VII. These traits—race, sex, color, religion, and national origin—prevent intersectionality from becoming the Pandora’s box that would result from attempting to recognize all traits related to one’s identity.\(^{242}\)

Finally, the EEOC guidelines should elucidate that recognizing a compound discrimination claim is not an undeserved privilege or “super-remedy.”\(^{243}\) Recognizing intersectional claims does not give Hispanic women, for instance, any greater redress than Hispanic men or white women.\(^{244}\) Nor does it make discrimination easier to prove. A plaintiff must still prove that discrimination on the basis of statutorily-protected traits accounted for the treatment she received. Recognizing an intersectional claim merely allows a plaintiff to more clearly articulate her unique experiences by using evidence from all the (statutorily-protected) groups that intersect to constitute her identity.\(^{245}\)

As one federal court noted, the plaintiff, claiming national origin and sexual harassment, could prove her claim by showing evidence that the employer would not have harassed her “but for the fact that

\(^{242}\) The DeGraffenreid court first articulated this fear with its concern that allowing black women to bring their claims as “black women” would open “the hackneyed Pandora’s box.” DeGraffenreid v. Gen. Motors Assembly Div., 413 F. Supp. 142, 145 (E.D. Mo. 1976), aff’d in part, rev’d in part on other grounds, 558 F.2d 480 (8th Cir. 1977). And indeed, some have argued for a version of intersectionality that does seem infinitely regressive. Elvia Arriola has argued that intersectionality fails to recognize that a victim of discrimination “might be not just black, but also, for example, [L]atina, aged, disabled, poor, or lesbian.” Arriola, supra note 79, at 129. Peter Kwan, a post-intersectional scholar, has articulated a similar proposition—that we must move beyond intersectionality because of its inability to deal with “the underclass single mother butch [b]lack lesbian who files a job discrimination lawsuit against her employer.” Peter Kwan, Complicity and Complexity: Cosynthesis and Praxis, 49 DePaul L. Rev. 673, 686 (2000) (emphasis added). Both authors persuasively illustrate that expanding Title VII to include unlisted traits such as sexual orientation may have real merit. However, for those who worry about infinite regress, Title VII and its list of protected traits provide express limits for the current application of intersectionality.

\(^{243}\) DeGraffenreid, 413 F. Supp. at 143.

\(^{244}\) Wei, supra note 63, at 808–09.

\(^{245}\) Id. “The duty not to discriminate is owed each minority employee, and discrimination against one of them is not excused by a showing the employer did not discriminate against all of them, or there was one he did not abuse.” Graham v. Bendix Corp., 585 F. Supp. 1036, 1047 (N.D. Ind. 1984) (quoting Furnco v. Waters, 438 U.S. 567, 579 (1978) (emphasis in original)).
she is a woman or a person of Persian national origin or both."246 It is fair to allow this breadth of evidence since the plaintiff was not only fully woman and fully Persian, but also fully a Persian woman. These evidentiary recommendations seem sensible given that the Supreme Court has claimed Title VII’s purpose is to remove all unnecessary barriers to employment “when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”247

C. Amending Title VII

Given the current confusion among courts and the EEOC’s failure to provide clarity regarding intersectional claims, one promising response to the intersectional dilemma would be a congressional amendment to Title VII. One beneficial aspect of this solution is its simplicity. Congress could clarify the “race, color, religion, sex, or national origin” language of the 1964 Civil Rights Act by adding the phrase “or any combination thereof” at the end.248 This solution would expressly allow cases that allege discrimination based upon more than one category to proceed without forcing the plaintiff to choose among the distinct categories explicit in the statute. This amendment’s lack of verbiage and consistency with legislative history would likely aid in its passage.

These aforementioned changes, if realized, would represent piecemeal progress in an area of law still clouded with confusion by 1) making express Congress’s intent to allow intersectional claimants to proceed under more than one legally-protected category, and 2) addressing how courts should enforce the aggregation of evidence of discrimination that is based on more than one statutorily-protected category.

248 Castro & Corral, supra note 63, at 172 (proposing that 42 U.S.C. § 2000e–2(a)(1) should read: “It shall be an unlawful practice for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex, or national origin or any combination thereof”); Wei, supra note 63, at 811 (observing that Asian women are left without sure means of redress for intersectional violations absent a statutory amendment rendering the factors listed in Title VII expressly inclusive).
Conclusion

The myriad ways a person’s identity is constructed and daily reconstructed is a complex phenomenon. Accordingly, the true motivation for why a person discriminates against another is often quite complicated. Intersectionality provides one means of addressing this complication by providing recourse when the basis for discrimination is a conflation of more than one legally-protected characteristic. In such a context, intersectionality illuminates the need to consider each of the protected characteristics that intersect to constitute a person’s identity. Such an approach to discrimination may help uncover intersectional groups that have been lacking full recourse to their discrimination claims for years.