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"We Do Not Live Single-Issue Lives":[1] *Bostock v. Clayton County* Mainstreaming Title VII Intersectional Discrimination Claims

Sharon Beck†

Introduction

"I need to do this for myself and for my own peace of mind and to end the agony in my soul."

-Aimee Stephens[2]

In late 2017, Monique Hicks, known by her stage name "Mo'Nique," was recruited by Netflix to join the ranks of other comedians[3] to perform a stand up special.[4] Mo'Nique, a Black woman, is an Oscar-winning actress[5] with an incredibly successful entertainment and comedy career.[6] Yet Netflix's initial offer for her performance was only $500,000, while Amy Schumer, a White female comedian, was paid $13 million for her special.[7] Mo'Nique's

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1. Audre Lorde, *Learning from the 60s*, *Sister Outsider*, *in* ZAMI, SISTER OUTSIDER, UNDERSONG 138 (Book-of-the-Month-Club, Inc., 1993) (1984) ("There is no such thing as a single-issue struggle because we do not live single-issue lives.").

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2. Brief for Respondent Aimee Stephens at 8, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission, 139 S. Ct. 1599 (2019) (No. 18-107), https://www.aclu.org/sites/default/files/field_document/075_aimee_stephens_brief.pdf [https://perma.cc/7YA4-CDVL].

3. Hicks v. Netflix, Inc., 472 F. Supp. 3d 763, 767 (C.D. Cal. 2020) (listing other comedians who have performed Netflix stand-up programs, including Jerry Seinfeld, Eddie Murphy, Dave Chapelle, Chris Rock, Ellen DeGeneres, Jeff Dunham, Ricky Gervais, and Amy Schumer).

4. *Id.*

5. *Id.* (elaborating that Mo'Nique has also won, among other awards, the Screen Actors Guild, Sundance Film Festival, BET, and NAACP awards).

6. *Id.* at 768.

7. *Id.* (noting that Mo'Nique's offer was an initial negotiation starting point

Black male counterparts, such as Dave Chapelle, were paid close to $20 million for their programs.[8] After negotiation talks broke down between Mo'Nique's and Netflix's representatives, Mo'Nique sued Netflix for discriminating against her in their negotiations.[9] Mo'Nique specifically alleged that Netflix discriminated against her because she is a Black woman.[10]

In July 2020, a California district court rejected Netflix's motion to dismiss Mo'Nique's retaliation claims.[11] While the court discussed in detail the facts Mo'Nique plead regarding both her discrimination and retaliation claims, it was bound only to rule on the challenged retaliation counts.[12] It remains to be seen whether the court will take the path less followed by analyzing Mo'Nique's discrimination claims as a Black woman, rather than the traditional analysis which would bifurcate Mo'Nique's suit into separate race and gender claims.[13] As this Note explains, the strength of Mo'Nique's claims will likely hinge on an intersectional analysis: she has a much stronger case if she can show the comedians who are not Black women, such as Schumer or Chapelle, were paid substantially more than Netflix was willing to pay Mo'Nique.

The success of Mo'Nique's claims may be impacted by a summer 2020 decision from the U.S. Supreme Court. In the landmark case *Bostock v. Clayton County, Georgia*, the Court held that Title VII's definition of "sex" includes discrimination based on sexual orientation and gender identity.[14] By holding that LBGTQ+ plaintiffs have standing for Title VII claims, *Bostock* creates a new opportunity for intersectional claims brought by LGBTQ+ individuals with multiple identities protected by Title VII. In addition to *Bostock*'s holding, the opinion's textualist approach to

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while the other comedians' pay were final, post-negotiation payments).

8. *Id.*

9. *Id.* at 769.

10. *Id.* at 767–68 ("Overall, [Mo'Nique] alleges that Netflix made offers to other comedic talent to perform in similar stand-up shows, but, when the talent was not a Black woman, Netflix paid astronomically more than it did to Black women like her.").

11. *Id.* at 779.

12. *Cf. id.* at 771 ("Netflix moves to dismiss all of Mo'Nique's retaliation-based claims, specifically her Fifth Claim asserting retaliation under FEHA, the portion of the Sixth Claim asserting failure to prevent retaliation under FEHA, and the Eighth Claim asserting retaliation under 42 U.S.C. § 1981." (footnote omitted)).

13. *See* Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)history,* 95 B.U. L. REV. 713, 727 (2015) ("Despite the integral role of intersectional experiences in informing the origins and early development of Title VII, court opinions that acknowledged, much less discussed, intersectionality were few and far between.").

14. Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).

Title VII may be used to advance intersectional discrimination claims, as further discussed in this Note. This broader, more robust interpretation of Title VII has the potential to revolutionize how courts manage discrimination claims based on multiple protected characteristics.[15]

Part I of this Note explains that intersectional discrimination claims are consistent with existing Title VII interpretation. Part II asserts that modern mainstreaming of intersectionality and *Bostock* have created a new opportunity for intersectional analysis to be used in discrimination suits. This Note concludes with the recommendation that plaintiffs should continue to pursue intersectional discrimination claims and that courts should adopt a more progressive and accurate analysis of the ways in which discrimination operates.

Background

A. Intersectionality has developed beyond the boundaries of legal academia.

In the late 1980s, Kimberlé Crenshaw penned a groundbreaking article that critiqued the very foundations of discrimination legal theory.[16] Crenshaw argued that legal analysis marginalizes the unique forms of discrimination faced by people—especially Black women—with intersecting identities.[17] Crenshaw explained that Black women are discriminated against because they are Black, because they are women, *and* because they are Black women.[18] Crenshaw described this discrimination as traffic in an intersection:

> Consider an analogy to traffic in an intersection, coming and

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15. This Note uses "intersectional discrimination" and its variants in the same ways as "multiple protected characteristics" and its variants. The latter distinguishes from "single protected characteristics," or those suits in which a plaintiff alleges discrimination on the basis of one protected characteristic (*e.g.*, national origin discrimination).

16. *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 (1989).

17. *See id.*

18. *Id.* at 149 ("Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men."); Jane Coaston, *The Intersectionality Wars*, VOX (May 28, 2019), https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination [https://perma.cc/2MU4-DCM8] ("[T]he law seemed to forget that black women are both black and female, and thus subject to discrimination on the basis of both race, gender, and often, a combination of the two.").

> going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.[19]

Before it became a well-known term, intersectionality was a framework that many scholars employed in their interdisciplinary work.[20] Black feminists such as bell hooks,[21] Barbara Smith,[22] Patricia Hill Collins,[23] Audre Lorde,[24] and others added to the growing body of intersectional literature. Importantly, intersectionality as a theory owes a significant amount to Black LGBTQ+ people, who were among the first to question how racism and heterosexism are interconnected.[25] As Hill Collins notes, "assuming that all Black people are heterosexual and that all LGBT people are White distorts the experiences of LGBT Black people."[26] The work of these scholars and activists has paved the way for the mainstreaming of intersectionality as a way of discussing lived experiences, even outside of academic confines.[27]

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19. Crenshaw, *supra* note 16, at 149.

20. *Word We're Watching: Intersectionality*, MERRIAM-WEBSTER, https://www.merriam-webster.com/words-at-play/intersectionality-meaning [https://perma.cc/AYR5-AN9M].

21. BELL HOOKS, AIN'T I A WOMAN 13 (Routledge, 2015) (1981) ("To both groups I voiced my conviction that the struggle to end racism and the struggle to end sexism were naturally intertwined, that to make them separate was to deny a basic truth of our existence, that race and sex are both immutable facets of human identity.").

22. The Combahee River Collective, *The Combahee River Collective Statement* (Apr. 1977), https://americanstudies.yale.edu/sites/default/files/files/Keyword%20Coalition_Readings.pdf [https://perma.cc/2YXD-H5N2] ("[W]e are actively committed to struggling against racial, sexual, heterosexual, and class oppression, and see as our particular task the development of integrated analysis and practice based upon the fact that the major systems of oppression are interlocking.").

23. PATRICIA HILL COLLINS, BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM 11 (Routledge, 2004) ("Intersectional paradigms view race, class, gender, sexuality, ethnicity, and age, among others, as mutually constructing systems of power. Because these systems permeate all social relations, untangling their effects in any given situation or for any given population remains difficult.").

24. Audre Lorde, *Sexism: An American Disease in Blackface*, *Sister Outsider*, *in* ZAMI, SISTER OUTSIDER, UNDERSONG 60 (Book-of-the-Month-Club, Inc., 1993) (1984) ("Black feminism is not white feminism in blackface. Black women have particular and legitimate issues which affect our lives as Black women, and addressing those issues does not make us any less Black.").

25. HILL COLLINS, *supra* note 23, at 88.

26. *Id.*

27. *E.g.*, ADP, *What is Intersectionality and Why is it Important?*, YOUTUBE (Feb. 5, 2020), https://www.youtube.com/watch?v=3qhadch9oDo [https://perma.cc/TRV5-Y5RS] (explaining intersectionality in the workplace for a general employment

The use of "intersectionality" has grown far beyond its origins. As Crenshaw puts it, "'the thing that's kind of ironic about intersectionality is that it had to leave town' — the world of the law — 'in order to get famous.'"[28] After years of use by academics, the mainstream zeitgeist caught on to the term. The word "intersectionality" was added to Merriam Webster Dictionary in 2017,[29] nearly 30 years after Crenshaw published her article. It has inspired a generation of activists, as well as sparked debate and controversy.[30]

While Crenshaw's argument has received mainstream attention outside the legal field, it cannot be forgotten in discrimination analysis. Antidiscrimination law is fundamentally less potent when it fails to assess claims intersectionally.[31] Judicial reluctance or outright refusal to incorporate intersectional analysis is "analogous to a doctor's decision at the scene of an accident to treat an accident victim only if the injury is recognized by medical insurance."[32] The ethical underpinnings behind treating all injured patients, regardless of their insurance coverage, are the same that support remedying all injured plaintiffs, regardless of their discriminated identity. The social implications of ignoring intersectional claims impact real lives.[33] When courts fail to analyze discrimination claims through an intersectional lens, marginalized people's "issues 'slip through the cracks' of legal protection, and the

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audience); Arica L. Coleman, *What's Intersectionality? Let These Scholars Explain the Theory and Its History*, TIME (Mar. 29, 2019), https://time.com/5560575/intersectionality-theory/ [https://perma.cc/4B7M-TK3A].

28. Coaston, *supra* note 18 (internal quotes omitted) (quoting Kimberlé Crenshaw).

29. *Word We're Watching: Intersectionality*, MERRIAM-WEBSTER, https://www.merriam-webster.com/words-at-play/intersectionality-meaning [https://perma.cc/9BFV-YR3P].

30. *Id.*

31. Crenshaw, *supra* note 16, at 145 ("*Moore* [*v. Hughes Helicopters, Inc.*, 708 F.2d. 475, 480 (9th Cir. 1983)] illustrates one of the limitations of antidiscrimination law's remedial scope and normative vision. The refusal to allow a multiply-disadvantaged class to represent others who may be singularly-disadvantaged defeats efforts to restructure the distribution of opportunity and limits remedial relief to minor adjustments within an established hierarchy.").

32. *Id.* at 149.

33. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 374 (1991) ("Problems arise in the development of legal theory and social policy when the possibility of other relationships between race and gender, such as intersection, are not considered."); *e.g.*, HILL COLLINS, *supra* note 23, at 10 (explaining, as an example, that cancer rates between African American men and women are different because of their genders, and thus, any organizing around medical rights must acknowledge gender in order to be successful).

gender components of racism and the race components of sexism remain hidden."[34]

B. Title VII has multiple frameworks to analyze employment discrimination claims.

Crenshaw's article fundamentally challenged the traditional analysis that courts apply to Title VII of the Civil Rights Act.[35] Title VII prohibits employers from taking adverse employment actions against its employees because of their "race, color, religion, sex, or national origin."[36] Title VII's purpose was to create a cause of action for employment discrimination based on race.[37] Specifically, the statute was "intended to address blatant forms of excluding African Americans from the workplace."[38]

To provide the protection granted by Title VII, courts have developed two main types of claims: disparate impact and disparate treatment.[39] Under the disparate treatment model, plaintiffs may offer circumstantial evidence to show discrimination.[40] Alternatively, in disparate impact cases, plaintiffs allege that an employer's facially neutral policy, in practice, discriminatorily affects a protected group of employees. [41] This Note focuses only on

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34. Caldwell, *supra* note 33, at 374 (footnote omitted) (quoting MARGARET SIMMS, SLIPPING THROUGH THE CRACKS: THE STATUS OF BLACK WOMEN (J. Malveaux & M. Simms eds., 1987)).

35. *See, e.g.*, Crenshaw, *supra* note 16, at 141 ("I . . . believe that the way courts interpret claims made by Black women is itself part of Black women's experience and, consequently, a cursory review of cases involving Black female plaintiffs is quite revealing. To illustrate the difficulties inherent in judicial treatment of intersectionality, I will consider three Title VII cases . . . ." (footnote omitted)).

36. 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to 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 . . . .").

37. Emma Reece Denny, *Mo' Claims Mo' Problems: How Courts Ignore Multiple Claimants in Employment Discrimination Litigation*, 30 LAW & INEQ. 339, 341 (2012) (referencing United Steelworkers of Am. v. Weber, 443 U.S. 193, 202 (1979)).

38. *Id.*

39. *Id.* at 342.

40. *Id.*

41. See generally Griggs v. Duke Power Co., 401 U.S. 424 (1971) (discussing disparate impact claim related to employment requirements); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII,* 98 GEO. L.J. 1079, 1120 (2010) ("In applying disparate impact theory, 'statistical significance establishes that the challenged practice likely caused the disparity, and the four-fifths rule establishes that the disparity is large enough to matter.' Under the four-fifths rule, a disparity is actionable when one group's pass (non-impacted) rate is less than four-fifths (80%) of another group's pass (non-impacted) rate.") (footnote omitted); Denny, *supra* note 37, at 342 (noting that disparate impact claims

disparate treatment for two reasons: disparate treatment claims are more common than disparate impact claims, and circumstantial evidence is more applicable in intersectional discrimination cases than disparate impact claims, which rely on direct evidence.

At the time Title VII was enacted, it was far more common for employers to refuse to hire groups of individuals from the same class.[42] It was also common for employers not to promote whole categories of a protected class, such as women, or to only promote members of that class in small numbers.[43] Today, however, the primary method of proving disparate treatment claims is through circumstantial, rather than direct, [44] evidence.[45] Very few employers categorically refuse to hire entire groups of people based on a shared protected characteristic.[46] Instead, employers' hiring practices—conscious or subconscious—often more covertly favor or disfavor certain classes.[47] As overt discrimination has diminished and covert bias has increased, circumstantial evidence has become even more important for Title VII cases.[48]

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require a showing of intentional discrimination), for information on disparate impact cases.

42. Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 731 (2011) ("Some decades ago, when identity-based differentiation was relatively open and notorious . . . individuals claiming discrimination could often point to counterparts who were treated better. Courts could then deduce, with some confidence, that the protected trait was the reason for the adverse treatment at issue." (footnote omitted)); *e.g.*, *Griggs*, 401 U.S. at 426–27 ("The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant."). See generally *Sex, Discrimination, and the Constitution*, 2 STAN. L. REV. 691, 718 (1950) ("[D]espite the great progress that has been made toward narrowing the common-law gap between the sexes, there is no full legal equality for women in present-day America."), for an overview of the state of women's rights, including worker rights, in 1950.

43. *E.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 233 (1989) ("Of the 662 partners at the firm at that time, 7 were women.").

44. Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 751 (2005) (explaining that direct evidence claims are rare).

45. *Id.*

46. *See generally* Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485, 1490 (2004) ("Unconscious racism is today's enemy.").

47. *See* Ashleigh Shelby Rosette, Modupe Akinola & Anyi Ma, *Subtle Discrimination in the Workplace: Individual Level Factors and Processes*, *in* THE OXFORD HANDBOOK OF WORKPLACE DISCRIMINATION 14 (Adrienne J. Colella & Eden B. King eds., 2016), https://static1.squarespace.com/static/596665f6099c01d2441c897c/t/59b92659be42d6051941b451/1505306201931/subtle-discrimination-in-the-workplace.pdf [https://perma.cc/V7SK-DXAM].

48. Hart, *supra* note 44 ("It is an exceedingly rare case in which a plaintiff has true direct evidence of discriminatory intent, such as a statement from the employer that 'we don't hire Mexicans, so you can't have this job.' Most Title VII cases are therefore proved through circumstantial evidence.").

To meet their *prima facie* burden in circumstantial cases, the plaintiff must prove that they 1) are a member of a protected class, 2) are qualified for their position, 3) suffered an adverse employment action, and 4) were treated differently than similarly-situated employees/applicants who are not part of their protected class.[49] The burden then shifts to the employer to provide a "legitimate, nondiscriminatory reason" for the adverse action.[50] If the employer provides such a reason, the burden shifts back to the plaintiff to show that the employer's reason is actually pretext for discrimination.[51]

If the plaintiff proves pretext, the court may require the employer to pay the plaintiff monetary damages.[52] Courts may award backpay,[53] which is intended to both make the plaintiff "whole" *and* penalize the employer.[54] Thus, Title VII uses financial damage both to remedy specific instances of discrimination and to deter future discriminatory practices.[55]

C. American courts have not robustly developed intersectional cases.

Courts applying Title VII have failed to adequately address the claims of plaintiffs with multiple intersecting identities.[56]

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49. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *see, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) ("[Plaintiff showed] (1) that he is black, (2) that he was qualified for the position of shift commander, (3) that he was demoted from that position and ultimately discharged, and (4) that the position remained open and was ultimately filled by a white man.").

50. *McDonnell*, 411 U.S. at 802.

51. Denny, s*upra* note 37, at 344.

52. U.S. EQUAL EMP. OPPORTUNITY COMM'N, REMEDIES FOR EMPLOYMENT DISCRIMINATION, https://www.eeoc.gov/remedies-employment-discrimination [https://perma.cc/8H2J-EZK8].

53. *See* Denny, *supra* note 37, at 341 n.13 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975)) (explaining that backpay, or the amount the plaintiff would have made absent the adverse action, is routinely awarded).

54. Hannah Nicholes, *Making the Case for Interns: How the Federal Courts' Refusal to Protect Interns Means the Failure of Title VII*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 81, 85 (2014) ("The 'make whole' purpose of Title VII, done in part through the award of back-pay, serves two purposes: (1) to make the victim a whole; and (2) to penalize the employer in such a way as to deter further discriminatory actions.").

55. *Id.* ("In passing Title VII, Congress intended to both eliminate discrimination on a case-by-case basis, and deter employers who may discriminate in the future.").

56. Rachel Kahn Best, Lauren B. Edelman, Linda Hamilton Krieger & Scott R. Eliason, *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991, 992 (2011) ("Using a representative sample of judicial opinions over 35 years of federal employment discrimination litigation, we show that non-white women are less likely to win their cases than is any other demographic group.").

Plaintiffs alleging intersectional discrimination claims succeed in court only half as often as those making claims of discrimination based on only one characteristic.[57] Professor Serena Mayeri uses the term "intersectionality anti-canon" to describe the body of Title VII case law that does not recognize multiple-characteristic discrimination claims.[58] Some decisions within the anti-canon, such as *Rogers v. Am. Airlines, Inc.*, blatantly refused to recognize Black women's cultural identities and practices.[59] Other cases, such as *DeGraffenreid v. General Motors Assembly Division*[60] and *Moore v. Hughes Helicopters, Inc.*,[61] denied plaintiff's claims on grounds that there was not a group against which to compare the Black women plaintiffs: neither white women employees nor Black men employees had faced discrimination.[62]

Moreover, even opinions that seem to signal approval of intersectional analysis cabined the effectiveness or power of this framework.[63] One Fifth Circuit decision employed an "awkward sex-plus analysis" to a race/sex discrimination claim, dampening its otherwise encouraging dictum.[64] An Eighth Circuit opinion

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57. *Id.*

58. Mayeri, *supra* note 13, at 727.

59. *Id.* at 728–29 (referencing Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981)).

60. DeGraffenreid v. Gen. Motors Assembly Div., 413 F. Supp. 142, 143 (E.D. Mo. 1976), *aff'd in part*, *rev'd in part*, 558 F.2d 480 (8th Cir. 1977) (rejecting plaintiffs' analysis as Black women and only analyzing their claims as either Black employees or as women employees). *But see* DeGraffenreid v. Gen. Motors Assembly Div., St. Louis, 558 F.2d 480, 484 (8th Cir. 1977) ("We do not subscribe entirely to the district court's reasoning in rejecting appellants' claims of race and sex discrimination under Title VII. However, . . . we must sustain the district court's judgment on the appellants' Title VII claims, because [of recent Supreme Court holdings on seniority systems].").

61. Moore v. Hughes Helicopters, Inc., 708 F.2d. 475, 480 (9th Cir. 1983) (denying a Black female plaintiff's representation of a class that contained white women).

62. *Id.*

63. *See* Mayeri, *supra* note 13, at 729.

64. *Id.* (referencing Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1032–34 (5th Cir. 1980) ("Recognition of black females as a distinct protected subgroup for purposes of the prima facie case and proof of pretext is the only way to identify and remedy discrimination directed toward black females. Therefore, we hold that when a Title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding that the employer did not discriminate against the black female plaintiff.")); *see also Jefferies*, 615 F.2d at 1033 (describing "sex plus" cases as those dealing with discrimination against a subcategory of women, such as women with children); *see also* Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1046 (10th Cir. 2020) (quoting Chadwick v. WellPoint, Inc., 561 F.3d 38, 43 (1st Cir. 2009)) ("[T]he 'plus' does not mean that more than simple sex discrimination must be alleged; rather, it describes the case where not all members of a disfavored class are

recognized that a Black pregnant plaintiff had standing to bring her claim, but ultimately found her termination was permissible because of the employer's preference for nonpregnant employees as "role models" for their young clientele, calling this a "business necessity."[65] This decision frustrated intersectional claims by allowing employers to argue that placating their customers' perceptions of employees with intersecting identities could be considered fundamental to business operations. Finally, the Tenth Circuit permitted Black women plaintiffs to "aggregate" sexual and racial harassment evidence but suggested that such discrimination was "'additive' rather than inextricably intertwined, mutually reinforcing, and manifest in particular stereotypes, epithets, and abuses directed toward female employees of color."[66]

Intersectional legal scholars have consistently praised a few Title VII opinions. *Lam v. Univ. of Hawai'i*[67] represents the "high water mark" of intersectionality cases.[68] The court in *Lam* reasoned, "where two bases for discrimination exist, they cannot be neatly reduced to distinct components."[69] In *Jeffers v. Thompson*, the District Court for the District of Maryland reached similar conclusions on the role of intersectionality in discrimination claims, noting that "[s]ome characteristics, such as race, color, and national origin, often fuse inextricably."[70] The *Jeffers* court noted that Title VII undoubtedly protects against intersectional discrimination; because it prohibits each type of discrimination separately, it must prohibit any combination or intersectional discrimination as well.[71]

While *Bostock v. Clayton County*'s issue did not relate to intersectional discrimination, it touches on employment discrimination more broadly. In *Bostock*, the Supreme Court

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discriminated against.").

65. *Id.* (describing the decision in Chambers v. Omaha Girls Club, 834 F.2d 697, 703 (8th Cir. 1987)).

66. *Id.* (critiquing Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416–17 (10th Cir. 1987)).

67. *See* Lam v. Univ. of Hawai'i, 40 F.3d 1551 (9th Cir. 1994), *as amended* (Nov. 21, 1994), *as amended* (Dec. 14, 1994).

68. Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1475 (2009).

69. *Lam*, 40 F.3d at 1562 (9th Cir. 1994).

70. Jeffers v. Thompson, 264 F. Supp. 2d 314, 326 (D. Md. 2003) (citing *Lam*, 40 F.3d at 1562 (9th Cir. 1994)) ("Made flesh in a person, [these characteristics] indivisibly intermingle. The meaning of the statute is plain and unambiguous. Title VII prohibits employment discrimination based on any of the named characteristics, whether individually or in combination.").

71. *Id.* ("Discrimination against African–American women necessarily combines (even if it cannot be dichotomized into) discrimination against African–Americans and discrimination against women—neither of which Title VII permits.").

recently clarified that discrimination on the basis of "sex" in Title VII includes sexual orientation or transgender status discrimination.[72] The majority opinion, written by Justice Gorsuch,[73] is grounded in strict textualism.[74] Gorsuch held that in sexual orientation and transgender discrimination cases, a plaintiff succeeds if they prove their employer took an adverse action against them because of their sexual orientation or transgender status.[75] He applied the "but-for causation" test[76] to expand Title VII's "sex" protected characteristic to include sexual orientation and transgender status.[77] Furthermore, the decision incorporates Title VII mixed-motive analysis, in which an employer is still liable for violating the statute even if it had additional, nondiscriminatory reasons for taking the adverse action at issue.[78] As this Note further explains, *Bostock*'s modernizing of Title VII analysis to more accurately reflect patterns of discrimination in employment is an encouraging sign for intersectional claims.

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72. *See* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

73. Michael D. Shear, *Gorsuch, Conservative Favorite Appointed by Trump, Leads Way on Landmark Decision*, N.Y. TIMES (June 15, 2020), https://www.nytimes.com/2020/06/15/us/politics/gorsuch-supreme-court-gay-transgender-rights.html [https://perma.cc/9C4R-967M] (noting that Gorsuch is a conservative justice and appointed by a Republican president, Donald Trump).

74. Hunter Poindexter, *A Textualist's Dream: Reviewing Justice Gorsuch's Opinion in Bostock v. Clayton County*, UNIV. OF CIN. L.R. (June 23, 2020), https://uclawreview.org/2020/06/23/a-textualists-dream-reviewing-justice-gorsuchs-opinion-in-bostock-v-clayton-county/ [https://perma.cc/8AVF-ECF8].

75. *Id.*

76. *Bostock*, 140 S. Ct. at 1739 ("[A] but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.").

77. *Id.* at 9 ("[H]omosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.").

78. *Id.* ("Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.").

Part I: Intersectional Analysis is Consistent with Title VII Precedent

In 2022, thirty-three years after Crenshaw introduced intersectionality, the analysis is no longer a radical framework.[79] By definition, it fits into existing discrimination law because intersectional discrimination *is* discrimination.[80] This section addresses some of the most significant hurdles that intersectional claims face, concluding that intersectional discrimination claims are entirely consistent with Title VII doctrine. It explains that *Bostock* refreshed the mandate that courts focus on individual circumstances in Title VII cases, which is especially important when analyzing the nuances of intersectional discrimination. This section also argues that plaintiffs may still overcome the comparator *prima facie* element for Title VII claims. Finally, this section explains how intersectional discrimination claims accord with the broader theory and policy in Title VII case law.

A. Intersectional analysis is consistent with the mandate of an individual focus.

Title VII prohibits employers from discriminating against "individual" employees.[81] In Title VII discrimination cases, a general statute is being applied to specific, unique facts, including the manner and mode of reported discrimination, as well as the employee's situation and other relevant factors.[82] For that reason, it is imperative that courts focus on the circumstances of the individual plaintiffs before it.[83]

In *Connecticut v. Teal*, the Supreme Court explained that "[Title VII] prohibits practices that would deprive or tend to deprive

79. *See* Crenshaw, *supra* note 16, at 139.

80. *Cf.* Caldwell, *supra* note 33, at 372 ("Progress against racism and sexism requires in addition, therefore, not only an eradication of negative stereotypes about black womanhood and their associated behavioral consequences, but also a recognition that theories of legal protection that affect the material circumstances of black women are not marginal to theories regarding race or gender, but rather are central to both."). *See also* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 342 (2013) ("Title VII is central to the federal policy of prohibiting wrongful discrimination in the Nation's workplaces and in all sectors of economic endeavor.").

81. 42 U.S.C. § 2000e-(f) ("The term 'employee' means an individual employed by an employer . . . .").

82. *E.g.*, City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 716 (1978) (holding that the employer violated Title VII by requiring women to pay more into a pension fund because while women, as a class, on average live longer than men, each individual woman would be discriminated against if she did not reach the average life expectancy).

83. Connecticut v. Teal, 457 U.S. 440, 453–54 (1982).

'any individual of employment opportunities.'"[84] The Court further explained that "[t]he principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole."[85] *Teal* laid the groundwork for courts to analyze plaintiffs' experiences as individuals. Furthermore, as societal and scholarly understanding of identity develops, so does the legal view of how to apply discrimination analysis.[86] Courts are recognizing that it is more accurate to analyze plaintiffs' experiences individually than by comparing groups of employees or applicants with different identities.[87]

Justice Gorsuch's majority opinion in *Bostock* includes notable language supporting an intersectional approach to Title VII cases.[88] He emphasized the need for an individualized approach to the plaintiff's situation in discrimination cases.[89] In fact, Gorsuch points out that Title VII contains three different mandates to focus on "individuals, not groups."[90] Employers may not "fail or refuse to hire or . . . 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* . . . sex."[91]

Similarly, a court should consider a plaintiff's position by analyzing the specific and unique forms of discrimination they may experience as a result of intersecting identities.[92] Thus, the type of analysis done in intersectional discrimination cases—which requires the court to assess whether the plaintiff experienced

84. *Id.*

85. *Id.*

86. Goldberg, *supra* note 42, at 731–32 ("[I]n a mobile, knowledge-based economy, actual comparators are hard to come by, even for run-of-the-mill discrimination claims. For the complex forms of discrimination made legible by second-generation theories, the difficulties in locating a comparator amplify exponentially.").

87. *E.g.*, Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1047 (10th Cir. 2020) ("In light of *Bostock*, we conclude that a sex-plus plaintiff does not need to show discrimination against a subclass of men or women . . . . She need not show her employer discriminated against her entire subclass.").

88. *See generally* Bostock, 140 S. Ct. 1731 (2020). This Note does not argue that there is any indication that Gorsuch wrote *Bostock* to approve of intersectional discrimination claims; instead, the decision has language that can be used to support such claims.

89. *Bostock*, 140 S. Ct. at 1740–41.

90. *Id.*

91. *Id.* (emphasis in original).

92. Lam v. Univ. of Hawai'i, 40 F.3d 1551, 1562 (9th Cir. 1994), *as amended* (Nov. 21, 1994), *as amended* (Dec. 14, 1994) ("[An] attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences.").

discrimination because of their specific identity—reinforces the more general requirement that courts only focus on "individuals, not groups" when considering discrimination.

Consider the following situation: an employee sues his employer for not promoting him based on the fact that he is a gay immigrant. Perhaps the employer believes that having a gay person with an accent or other noticeable markers of immigrant status would not be the "best face" of their management team. The company then promotes someone else who is not a gay immigrant. *Bostock* instructs the courts that it need not decide whether the company discriminates against gay people or immigrants more generally or even whether it discriminates against gay immigrants as a group.[93] Rather, *Teal* and *Bostock* inform us that the court only has to decide whether the employer discriminated against the *individual* plaintiff *because* he is a gay immigrant.

Decisions embracing the "intersectionality anti-canon"[94] fail to see the plaintiffs as individuals. For example, the *DeGraffenreid* court feared that an intersectional approach would open a "hackneyed Pandora's box" of different classes of protected individual, "governed only by the mathematical principles of permutation and combination."[95] *DeGraffenreid*'s fears are misplaced, however, because when a court analyzes a plaintiff's claim on an individual level, it need not worry about creating a multitude of classes based on combinations of traits that are not connected to the plaintiff.

The individual analysis dictum in the *Bostock* majority opinion has already influenced lower level courts. In *Frappied v. Affinity Gaming Black Hawk, LLC*, the Tenth Circuit considered the plaintiffs' claim that they were terminated because of their sex and age.[96] The court overturned precedent that would have required the plaintiffs to prove that they were treated worse than their male counterparts over forty.[97] Based on *Bostock*, the court held that a plaintiff with multiple identities is not required to prove that their employer discriminated against either their entire class or

93. If there were evidence of systemic discrimination against gay immigrants, that would certainly bolster the plaintiff's case.

94. *See* Mayeri, *supra* note 13, at 727.

95. DeGraffenreid v. Gen. Motors Assembly Div., St. Louis, 413 F. Supp. 142, 145 (E.D. Mo. 1976), *aff'd in part, rev'd in part,* 558 F.2d 480 (8th Cir. 1977).

96. Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1044–45 (10th Cir. 2020) (noting that age discrimination is covered by the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634, not Title VII).

97. *Id.* at 1046 (citing Coleman v. B-G Maint. Mgmt. of Colorado, Inc., 108 F.3d 1199, 1204 (10th Cir. 1997)).

subclass.[98] Instead, such a plaintiff is only required to show that "but for" their protected identity or identities, they would not have been terminated.[99]

Under *Frappied*, for example, a Black transgender man alleging unlawful termination on the basis of his identity as a Black transgender man would not have to prove that Black cisgender men as a group were treated better than Black transgender men as a group. Similarly, he would not have to show that white transgender men as a class were treated more favorably than Black transgender men as a class. Instead, he would have to show that but for being a Black transgender man, he would still be employed.

Frappied underscores *Bostock*'s importance. In the changing arena of Title VII interpretation, more courts may clarify case law to ensure compliance with *Bostock*'s emphasis on individualized analysis. Such analysis can provide an avenue for intersectional discrimination plaintiffs, such as the women in *Frappied*, who report disparate treatment because of their identity.

B. Intersectional analysis still allows plaintiffs to meet their prima facie burden.

To meet their *prima facie* burden, the plaintiff must show, among other elements,[100] that the employer treated them differently than another similarly-situated employee of a different class.[101] Appropriate comparators must be similarly situated to the plaintiff in all "material respects."[102] For example, the plaintiff can compare their treatment with the treatment of someone who had "similar job responsibilities, the same supervisor, [or] similar performance."[103] The comparator element sometimes inhibits plaintiffs arguing multi-characteristic discrimination. Some courts have been reluctant to find that the plaintiff's proposed comparator

98. *Id.* at 1047.

99. *Id.* (noting that its holding broadened the class of claims that may be brought under Title VII).

100. *See infra* note 49 for other elements.

101. Barron v. Univ. of Notre Dame Du Lac, 93 F. Supp. 3d 906, 912 (N.D. Ind. 2015) ("Under the *McDonnell Douglas* indirect method of proof, a plaintiff always bears the burden of persuasion, but the burden of production shifts to the defendant if plaintiff establishes a *prima facie* case of discrimination. Plaintiff must show that: (1) she is a member of a protected class; (2) she was qualified for tenure; (3) she was denied tenure; and (4) a similarly situated applicant not in the protected class was granted tenure.").

102. Kimble v. Wisconsin Dep't of Workforce Dev., 690 F. Supp. 2d 765, 771 (E.D. Wis. 2010).

103. *Id.*

is appropriate if they share one, but not all, of the plaintiff's protected characteristics.[104]

Other courts, however, have had no problem finding that the plaintiff provided evidence that an appropriate comparator was differently treated.[105] The *Kimble* court simply agreed with the plaintiff that the three proffered comparators were similarly situated.[106] The court did not even mention what the three comparators' racial or gender identities were, meaning we must assume that the plaintiff's three coworkers were simply *not* Black men like the plaintiff.[107] *Kimble* illustrates that other courts do not have to feel as constrained as *DeGraffenreid*. Instead, intersectional discrimination plaintiffs may successfully argue the same standard as plaintiffs with only one protected characteristic: that a coworker serves as a comparator as long as they are similarly situated and *not* a member of the same identity.

Plaintiffs may also have success in meeting their prima facie burden by providing evidence of the employer's discrimination against other employees with the same or similar identities.[108] The *Jeffers* plaintiff alleged sex and race discrimination, separately and in the alternative, as a combined claim.[109] *Jeffers* notes that while "not dispositive," evidence of a "race-and-gender" claim "includes evidence of discrimination against African–Americans (regardless of gender) and evidence of discrimination against females (regardless of race)."[110] The plaintiff met her prima facie burden by showing that the employer selected a white man and a white woman

104. Goldberg, *supra* note 42, at 764–66; *see, e.g.*, DeGraffenreid v. Gen. Motors Assembly Div., St. Louis, 413 F. Supp. 142, 144 (E.D. Mo. 1976), *aff'd in part*, *rev'd in part*, 558 F.2d 480 (8th Cir. 1977) (finding that no discrimination occurred against Black women because the employer had hired women and Black men); Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980) (explaining that the lower court rejected the plaintiff's claim of race and sex discrimination because the employer had promoted members of her same racial class and had promoted women).

105. *See Jefferies*, 615 F.2d at 1032 ("The essence of Jefferies' argument is that an employer should not escape from liability for discrimination against black females by a showing that it does not discriminate against blacks and that it does not discriminate against females. We agree that discrimination against black females can exist even in the absence of discrimination against black men or white women."); *Kimble*, 690 F. Supp. 2d at 771–72.

106. *Kimble*, 690 F. Supp. 2d at 771–72.

107. *Id.* at 770. The court considered the plaintiff's claim to be intersectional, although he was only asserting one protected characteristic, because there are specific stereotypes about Black men.

108. Jeffers v. Thompson, 264 F. Supp. 2d 314, 326 (D. Md. 2003).

109. *Id.* at 322.

110. *Id.* at 327.

instead of her, a Black woman.[111] Interestingly, the court noted that the plaintiff failed her gender-only claim because a woman was selected for the position;[112] thus, it appears that some plaintiffs may actually have *more* success with an intersectional claim.

Therefore, the *Hicks v. Netflix* court may be willing to compare Mo'Nique to other comedians, as long as the comparators are not Black women.[113] At the prima facie stage, Mo'Nique can show that she is a member of protected classes, who was qualified to be a Netflix comedian, suffered an adverse employment action when Netflix did not engage in its normal negotiation practice,[114] and was treated differently than similarly situated comedians who are not Black women.[115] At that point, Netflix would assert any nondiscriminatory reasons for its decisions in negotiation. Mo'Nique would then have to prove that Netflix's reasons were pretext for unlawful discrimination on the basis of her being a Black woman.[116]

Because not all plaintiffs have comparator options like Mo'Nique, there are a few catch-all arguments that allow plaintiffs in this situation to succeed. Some courts have noted that the plaintiff can meet their prima facie burden even if there are no potential comparators.[117] For example, the *Westmoreland* court asked "whether a reasonable juror could conclude that the [employer] filled [the plaintiff]'s position with similarly qualified applicants outside her protected class."[118] The plaintiff in *Westmoreland* succeeded by presenting evidence that after she was transferred, her position was filled by two white men.[119]

Another avenue is to persuade a court that the prima facie case has been met, even if a comparator cannot be provided. Courts

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111. *Id.*

112. *Id.*

113. *See* Hicks v. Netflix Inc., 472 F. Supp. 3d 763, 767 (listing other well-known comedians who contracted with Netflix for a comedy program, including Jerry Seinfeld, Eddie Murphy, Dave Chapelle, Chris Rock, Ellen DeGeneres, Jeff Dunham, Ricky Gervais, and Amy Schumer).

114. *See id.* at 777 ("Accordingly, Plaintiff has sufficiently alleged that Netflix's alleged failure to negotiate and increase her opening offer by straying from its standard practice are employment actions that are *reasonably likely* to adversely and materially affect an employee's . . . opportunity for advancement in . . . her career." (internal quotes omitted)).

115. *See infra* note 49.

116. *See infra* p. 8.

117. Westmoreland v. Prince George's Cnty., Md., 876 F. Supp. 2d 594, 606 (D. Md. 2012) ("[T]here is no strict requirement that plaintiffs prove the existence of one or more similarly situated comparators to satisfy the fourth element.").

118. *Id.*

119. *Id.*

wrestling with the issue of how to apply the prima facie elements to intersectional discrimination cases often note that prima facie cases should not be an unmanageable hurdle for the plaintiff.[120] The tradeoff for this lower burden on the plaintiff proving their prima facie case is that the ultimate burden of the case still rests on the plaintiff to show their employer's proffered legitimate reason was actually pretext.[121] Therefore, plaintiffs' prima facie burden can be met even when they cannot proffer an appropriate comparator, which may be more difficult due to the nature of intersecting claims.[122]

C. Intersectional analysis is consistent with Title VII's themes and policy.

Title VII offers multiple tools to hold employers broadly accountable. The statute proscribes against firing an employee for membership to a protected class, even if the employer had other legitimate reasons to terminate them.[123] Under Title VII, if an employer fires an employee for many reasons, including both legitimate and discriminatory reasons, it has still violated Title VII.[124] These types of "mixed-motive" cases and the statute's treatment of them indicate Title VII's broader, not narrower, scope. Plaintiffs arguing intersectional discrimination cases may be more successful reminding the court that Title VII has several mechanisms, including its treatment of mixed-motive cases, that evidence its proscription of *all* discrimination based on the listed characteristics, not just *some* types of such treatment.

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120. Jeffers v. Thompson, 264 F. Supp. 2d 314, 326 (D. Md. 2003) (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253) ("A *prima facie* case is not supposed to be difficult to establish."); *see also* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous.").

121. *Id.* (citing Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 143 (2000) ("The ultimate burden of persuasion remains always on the plaintiff.").

122. *See generally* Goldberg, *supra* note 42, at 731 (explaining that the comparator model is becoming less adaptable to modern day understandings of identity and qualification).

123. 42 U.S.C. § 2000e-2(m) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."); *see also* Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003) (explaining Title VII was amended to include § 2000e-2(m) to set forth the standards in mixed-motive cases). *See generally* Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227, 1236–37 (11th Cir. 2016) (highlighting the legal developments in mixed-motive case law).

124. *Bostock*, 140 S. Ct. 1731, 1739 (2020).

Bostock explains that an employment decision is unlawful when a protected characteristic is the but-for factor for the decision.[125] The Court has employed the but-for analysis to hold that employers violated Title VII in a wide variety of situations. For example, the Court found that sex discrimination includes making employment decisions based on sex stereotypes,[126] requiring women to pay more into the pension fund (rejecting the employer's defense that the policy could not be discriminatory because it was based on the statistical evidence that, on average, women live longer than men),[127] and now, terminating an employee because they are LGBTQ+.[128]

But-for analysis illustrates Title VII's breadth.[129] All possible discrimination claims should be considered, not just those that exclusively adhere to *only* sex, *only* race, or *only* other protected characteristics. Rather, this analysis supports that an individual discriminated against because of their status as a queer person of color should also be able to assert this discrimination in court. Justice Gorsuch's opinion incidentally echoes Crenshaw's analogy of an intersection when explaining but-for causation: "Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision."[130]

Bostock's framing of but-for causation applies to intersectional claims. For example, to prevail on her argument that Netflix discriminated against her in their initial offer, Mo'Nique would

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125. *Id.* at 1742 ("If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach."); *see also* Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013) (explaining that the "but-for" framework originated in the common law of torts).

126. Price Waterhouse v. Hopkins, 490 U.S. 228, 256 (1989) ("It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.'").

127. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 717 (1978).

128. *Bostock*, 140 S. Ct. at 1737 ("An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.").

129. *Contra* Crenshaw, *supra* note 16, at 151 ("[T]he dominant message of antidiscrimination law is that it will regulate only the limited extent to which race or sex interferes with the process of determining outcomes. This narrow objective is facilitated by the top-down strategy of using a singular "but for" analysis to ascertain the effects of race or sex. Because the scope of antidiscrimination law is so limited, sex and race discrimination have come to be defined in terms of the experiences of those who are privileged *but for* their racial or sexual characteristics.").

130. *Bostock*, 140 S. Ct. at 1739; *see* Crenshaw analogy, *supra* note 19.

need to show that but-for her status as a Black woman, Netflix would have offered her more money at the start of their negotiations.[131] Under *Bostock*, Mo'Nique could show that there may have been multiple but-for causes (*e.g.*, racism and sexism), the combination of which resulted in Netflix's discrimination.

Similarly, *Bostock*'s but-for causation test extends to people with other intersecting identities. Imagine instead that another comedian reports that she was discriminated against in negotiations because she is a transgender Latina woman.[132] Her but-for argument is just as straightforward as any plaintiff claiming single-identity discrimination (*e.g.*, a woman suing because of sex discrimination): she argues that but-for being a transgender Latina woman, she would not have been terminated. On its face, it may be difficult to see a court understanding this application of the but-for causation test. There may not be the same stereotypes or other sociological views of transgender Latina women as of cisgender Latina women,[133] Latino men,[134] or transgender women.[135] However, the hypothetical plaintiff can assert that her employer discriminated against her because it held the same stereotypes against her as against cisgender Latina women (after all, both categories of individuals are still Latina women, regardless of their gender identity).[136] Furthermore, the hypothetical plaintiff could argue that it is precisely because of the overlapping and

131. Considering there is public access to how much non-Black female comedians were compensated, this is not an unreasonable pathway to success.

132. *Cf.* Dani Heffernan, *New Report on Discrimination Against Latina Transgender Women by Law Enforcement*, GLAAD (Apr. 18, 2012), https://www.glaad.org/blog/new-report-discrimination-against-latina-transgender-women-law-enforcement [https://perma.cc/3W5W-VEGZ] (acknowledging, anecdotally, that transgender Latina women experience much higher rates of discrimination in another area of life, with interactions with law enforcement).

133. *See generally* Waleska Suero, "*We Don't Think of It as Sexual Harassment": The Intersection of Gender & Ethnicity on Latinas' Workplace Sexual Harassment Claims*, 33 CHICANA/O-LATINA/O L. REV. 129 (2015) (describing in depth the nature and nuances of sexual harassment reported by Latina women in their workplaces).

134. *See generally* Christina Iturralde, *Rhetoric and Violence: Understanding Incidents of Hate Against Latinos*, 12 N.Y.C. L. REV. 417 (2009) (explaining that there has been a rise in attacks against Latinos due to racial or ethnic bias and antimigration sentiments stemming from negative depictions of Latinos in the media).

135. Robyn B. Gigl, *Gender Identity and the Law*, 2018 N.J. LAW. 16, 17 ("In other words, a transgender woman does not conform to the stereotype of how someone who was assigned male at birth should behave.").

136. *See* Suero, *supra* note 133, at 129–30 ("Challenging the pervasive stereotype of the overly sexual, desirable, and hot-blooded Latina, this paper seeks to analyze how widely held beliefs about Latina sexuality influence Latinas' definition of what constitutes workplace sexual harassment and, in turn, how those beliefs influence how others view the harassment of Latinas.").

interlocking facets of her identities that she is discriminated against, when a cisgender Latina woman or a Latino man or a transgender person would not have been.

Transgender women of color can and do face higher rates of discrimination compared to all of their counterparts. Moreover, this discrimination is especially violent.[137] There are many reasons for this higher rate of violence (which is still underreported),[138] but a looming theme is clear: people with intersecting identities are more vulnerable to discrimination than others.[139] The law needs to be part of their remedy, if not also perpetrators' deterrent.[140]

Those decisions that make up the "intersectionality anti-canon"[141] do not interpret Title VII as protecting classes of people with multiple protected identities.[142] The court in *DeGraffenreid* found that Title VII's legislative history did not "indicate that the goal of the statute was to create a new classification of 'black women' who would have greater standing than, for example, a black male."[143] Part of *DeGraffenreid*'s error is assuming that a Black woman's standing would automatically be "greater" than a Black man's standing. Rather, a court allowing a Black female plaintiff to proceed with her discrimination case on the theory that she was

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137. *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2020*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020 [https://perma.cc/R8PV-25XF] (explaining that people of color made up the majority of murders of transgender people in 2020); Kevin Jefferson, Torsten B. Neilands & Jae Sevelius, *Transgender Women of Color: Discrimination and Depression Symptoms*, 6 ETHNICITY & INEQUALITIES IN HEALTH & SOC. CARE 121, 122 (2013) ("Trans women of color for instance are killed in epidemic numbers.").

138. Jefferson, Neilands & Sevelius, *supra* note 137, at 121–22 ("This systematic discrimination is a product of transphobia, an irrational fear or hatred of trans people, as well as cisnormativity.").

139. *Id.* at 122 ("While trans women of color share experiences of transphobia and cisnormativity with other transgender people, experiences of sexism with other women, and experiences of racism with other people of color, these experiences interact and cannot be separated: trans women of color experience discrimination uniquely as trans women of color.").

140. *Cf.* Crenshaw, *supra* note 16, at 149 ("But it is not always easy to reconstruct an accident [Crenshaw's analogy to discrimination]: 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.").

141. *See* Mayeri, *supra* note 13, at 727.

142. DeGraffenreid v. Gen. Motors Assembly Div., St. Louis, 413 F. Supp. 142, 145 (E.D. Mo. 1976), *aff'd in part, rev'd in part,* 558 F.2d 480 (8th Cir. 1977).

143. *Id. But see* Mayeri, *supra* note 13, at 728 (noting the "relative paucity" of legislative history regarding whether Title VII was intended to cover multiple characteristic discrimination claims).

discriminated against because of her race and her sex only grants her the *same* standing that a Black male plaintiff would have if he were to assert a race discrimination claim. An intersectional legal approach, thus, levels the field.

Further, a court's decision to *not* allow intersectional discrimination claims may result in plaintiff's feeling forced to "split" their claims into categories that are mutually exclusive within the Title VII list, which is not an accurate representation of identity or lived experience.[144] This traditional application of Title VII (the "anti-canon" model) is a product of all Title VII analyses being developed from the model of sex discrimination against white women or race discrimination against Black men.[145] Crenshaw points out that the but-for analysis adopts the same narrowness of this model: "If Black women cannot conclusively say that 'but for' their race or 'but for' their gender they would be treated differently," they cannot succeed on discrimination claims.[146] Crenshaw's analysis is clearly accurate under the but-for formula used by the anti-canon cases, but it appears that more contemporary courts such as *Westmorland* have been able to escape this mold. In the three decades since Crenshaw's *Demarginalizing the Intersection of Race and Sex* was published, the law has evolved to be slightly more reflective of actual lived experiences. These cases and *Bostock* pave the way for the mainstreaming of intersectional discrimination claims, which are consistent with Title VII and its traditional analytical framework.

Part II: *Bostock* Opens the Door for the Mainstreaming of Intersectional Discrimination

This section argues that with more plaintiffs who have standing to sue employers for Title VII discrimination, the mainstreaming of intersectionality in our culture, and the renewed excitement following the *Bostock* decision, there may be a similar revitalization of intersectional discrimination cases in court.

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144. Crenshaw, *supra* note 16, at 150 ("Unable to grasp the importance of Black women's intersectional experiences, not only courts, but feminist and civil rights thinkers as well have treated Black women in ways that deny both the unique compoundedness of their situation and the centrality of their experiences to the larger classes of women and Blacks.").

145. *Id.* at 151 ("Put differently, the paradigm of sex discrimination tends to be based on the experiences of white women; the model of race discrimination tends to be based on the experiences of the most privileged Blacks.").

146. *Id.* at 152.

A. There is an increased number of plaintiffs with standing under Title VII.

As a result of the *Bostock* decision, millions of people gained standing to sue employers who may have discriminated against them on the basis of their sexual orientation or gender identity.[147] LGBTQ+ people also have other intersecting racial, ethnic, religious, gender, and national origin identities.[148] This group is more vulnerable to employment discrimination than its white counterparts: LGBTQ+ people of color are twice as likely to report discrimination in the workplace and general community than white LGBTQ+ people.[149] LBGTQ+ people of color experience lower employment opportunities than the rest of the population.[150] Compared to their peers, LGBTQ+ people, people of color, and women report higher rates of discrimination at work.[151] Moreover,

147. *See* Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx [https://perma.cc/M87H-LMSR] (reporting that more than 11 million people self-identify as LGBT); *see also Counting LGBT Communities: SAGE and the 2020 Census*, SAGE (Feb. 14, 2020), https://www.sageusa.org/counting-lgbt-communities-sage-and-the-2020-census/ [https://perma.cc/EZY5-P47W] (explaining that LGBT self-reporting is low, in part due to mistrust in the community about the consequences of disclosure).

148. *See People of Color*, FUNDERS FOR LGBTQ ISSUES, https://lgbtfunders.org/resources/issues/people-of-color/ [https://perma.cc/V3KW-59ZJ] ("Forty-two percent of LGBTQ adults identify as people of color, including 21 percent who identify as Latino/a, 12 percent as Black, two percent as Asian, and one percent as American Indian and Alaska Native."); *LGBT Demographic Data Interactive*, WILLIAMS INST., UCLA SCH. L. (Jan. 2019), https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT&characteristic=white#density [https://perma.cc/DDE8-784W] (containing an interactive webpage with data representations of LGBTQ people's ethnic and racial makeups); *LGBT People in the Workplace: Demographics, Experiences and Pathways to Equity*, NAT'L LGBTQ WORKERS CTR, 1, https://www.lgbtmap.org/file/LGBT-Workers-3-Pager-FINAL.pdf [https://perma.cc/LC62-GLU9] ("There are approximately 1 million LGBT immigrants in the U.S.—and 30% are undocumented.").

149. NPR, ROBERT WOOD JOHNSON FOUND. & HARVARD T.H. CHAN SCH. OF PUB. HEALTH, DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF LGBTQ AMERICANS, 1 (2017) ("LGBTQ people of color are at least twice as likely as white LGBTQ people [sic] say they have been personally discriminated against because they are LGBTQ when applying for jobs and when interacting with police, and six times more likely to say they have avoided calling the police (30%) due to concern for anti-LGBTQ discrimination, compared to white LGBTQ people (5%).").

150. FUNDERS FOR LGBTQ ISSUES, *supra* note 148 ("15 percent of African American LGBT adults are unemployed, as are 14 percent of Latinx LGBT adults and 11 percent of API LGBT adults—compared to 8 percent unemployment for the general population.").

151. NPR, ROBERT WOOD JOHNSON FOUND. & HARVARD T.H. CHAN SCH. OF PUB. HEALTH, DISCRIMINATION IN AMERICA: FINAL SUMMARY 5–7 (2018).

these groups report that workplace discrimination is the most prevalent type of discrimination they face.[152]

The data demonstrates the real need for legal protections for LGBTQ+ people, especially those with intersecting identities that can be an additional source of discrimination. At the time most of the data were published, *Bostock* had not been decided yet. While advocates argued that sex discrimination includes sexual orientation and gender identity discrimination, before June 2020, there was no federal policy enforcing this interpretation.[153] Now, *Bostock* and the new executive administration are paving a way forward for LGBTQ+ people to claim their federal protections.[154]

B. There has been a cultural shift regarding understanding identity.

1. There is more mainstream awareness of intersectionality as a theory and reality.

When I saw Kimberlé Crenshaw speak at my undergraduate university in 2019, it had been exactly 30 years since *Demarginalizing the Intersection of Race and Sex* had been published.[155] By then, Crenshaw had become a feminist scholar and cultural icon.[156] She has a podcast on Intersectionality.[157] On Google

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152. *Id.*

153. *See, e.g.*, NAT'L LGBTQ WORKERS CTR., *supra* note 148 (explaining that establishing federal protections against discrimination was an important step towards equality).

154. HRC Staff, *The Real-Life Implications of Biden's Bostock Executive Order*, HUM. RTS. CAMPAIGN (Jan. 21, 2021), https://www.hrc.org/press-releases/the-real-life-implications-of-bidens-bostock-executive-order [https://perma.cc/6QU7-B29U].

155. *See An Evening with Kimberlé Crenshaw*, GONZ. U. (Feb. 28, 2019), https://www.gonzaga.edu/news-events/events/2019/2/28/kimberle-crenshaw [https://perma.cc/472X-MNAS].

156. *See* Bim Adewunmi, *Kimberlé Crenshaw on Intersectionality*, NEW STATESMAN (Apr. 2, 2014), https://www.newstatesman.com/lifestyle/2014/04/kimberl-crenshaw-intersectionality-i-wanted-come-everyday-metaphor-anyone-could [https://perma.cc/FMW2-ZGH8] ("In recent times, intersectionality theory . . . has enjoyed a resurgence in popular and academic feminism. Her name and her work has become an introductory point for feminists of all stripes."); *e.g.*, Ilyse Liffreing, *Lady Gaga, Selena Gomez and Shawn Mendes Hand Over Instagram Accounts to Black Activists and Organizations*, ADAGE (June 8, 2020), https://adage.com/article/digital/lady-gaga-selena-gomez-and-shawn-mendes-hand-over-instagram-accounts-black-activists-and/2261116 [https://perma.cc/C7RN-TG2N] ("Selena Gomez [is] one of the most-followed people on Instagram with a following of 179 million . . . . [L]eaders such as . . . Kimberlé Crenshaw, co-founder of the African American Policy Forum, have taken over Gomez' account . . . .").

157. Kimberlé Crenshaw, *Intersectionality Matters*, APPLE PODCASTS, https://podcasts.apple.com/us/podcast/intersectionality-matters/id1441348908 [https://perma.cc/G35V-7NY2].

Scholar, her groundbreaking article has been cited in 25,099 other publications.[158] Her scholarship has only grown more acknowledged, recognized, and desired.[159] The word "intersectionality" has never been more mainstream.[160]

Of course, the legal profession has never been quick to incorporate popular culture. At times, the Supreme Court has significantly resisted engaging in what it sees as controversial and partisan debates.[161] The Court's reluctance to use intersectional analysis is especially significant considering the robust and highly doctrinal legal scholarship that developed the framework.[162] Professor Mayeri notes, however, that there is hope to see intersectional discrimination acknowledged and incorporated in the mainstream legal doctrine; women of color are not giving up on engaging with law and with courts.[163] Furthermore, "Latinas, Asian-American women, LGBTQ individuals, and others have joined African American women at the forefront of intersectional advocacy as well as theory."[164]

Already, there have been recent lower-level court decisions that signal a broader acceptance of intersectional analysis in discrimination cases. The District Court for South Carolina recognized and applied what it called "intersectional discrimination theory" to its case.[165] The court's language clearly draws from the academic framework developed by Crenshaw and others: "[Title

158. *Demarginalizing the Intersection of Race and Sex* citation amount, https://scholar.google.com/ (search *Demarginalizing the Intersection of Race and Sex*; then locate Cited By indicator) (as of May 22, 2022).

159. *See* Kimberlé Crenshaw, *The Urgency of Intersectionality*, TED, https://www.youtube.com/watch?v=akOe5-UsQ2o [https://perma.cc/56JK-Z5KC].

160. *See generally* Kory Stamper, *A Brief, Convoluted History of the Word "Intersectionality"*, CUT (Mar. 9, 2018), https://www.thecut.com/2018/03/a-brief-convoluted-history-of-the-word-intersectionality.html [https://perma.cc/9RBF-EGHU] (explaining that Ashley Judd's 2018 Oscars speech, which included the use of "intersectionality," is likely the most high-profile use of the word).

161. Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (" . . . I think it no business of the courts (as opposed to the political branches) to take sides in this culture war."). *But see* Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan., 347 U.S. 483, 486 (1954) (entering the Court into an incredibly controversial and partisan topic: race relations).

162. *See* Mayeri, *supra* note 13, at 727–28 (explaining some of the foundational legal scholarship in intersectionality).

163. *Id.* at 730–31 ("The picture is not entirely bleak, however, especially if we look beyond doctrine. African American women and other women of color continue to play leading roles as plaintiffs, attorneys, policymakers, and legal strategists, and to sustain enduring and effective coalitions between civil rights and feminist organizations.").

164. *Id.* at 731.

165. Brown v. OMO Grp., Inc., No. 9:14-CV-02841-DCN, 2017 WL 1148743, at *5 (D.S.C. Mar. 28, 2017).

VII] also protects individuals against discrimination based on the combination or 'intersection' of two or more protected classifications, even in the absence of evidence showing the defendant discriminated solely on the basis of one protected classification."[166]

In a 2010 decision, the Eastern District of Wisconsin noted that like Black women, Black men can similarly face intersectional discrimination.[167] The court pointed out that it is a mistake to believe that Black men (or any person with membership to only one protected characteristic) only face a singular type of discrimination.[168] If courts are willing to recognize this reality of discrimination—that it does not manifest in the same ways for even members of the same class—that is an incredibly important development in the case law.

The *Kimble* court was impacted by EEOC guidance that allows plaintiffs to assert "Intersectional Discrimination" claims.[169] The guidance explicitly states Title VII "prohibits discrimination not just because of one protected trait (*e.g.*, race), but also because of the intersection of two or more protected bases (*e.g.*, race and sex)."[170] The nuances of intersectional theory recognized by the Eastern District of Wisconsin are profound considering the language in the anti-canon decisions of earlier decades.[171] Intersectional discrimination has also found its way into recent editions of Practice Series available to employment attorneys.[172]

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166. *Id.* (citing, without further explanation, 42 U.S.C. § 2000e-2).

167. Kimble v. Wisconsin Dep't of Workforce Dev., 690 F. Supp. 2d 765, 770 (E.D. Wis. 2010).

168. *Id.* (citing Jesse B. Semple, *Invisible Man: Black & Male Under Title VII*, 104 HARV. L. REV. 749, 751 (1990–91) ("Conceptualizing separate over-lapping black and male categories has sometimes interfered with the recognition that certain distinctive features of being black *and* male serve as the target for discrimination.").

169. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL, SECTION 15: RACE AND COLOR DISCRIMINATION (Apr. 19, 2006) https://www.eeoc.gov/policy/docs/race-color.html [https://perma.cc/HWM7-KTZC].

170. *Id.*

171. *See, e.g.*, Renee Henson, *Are My Cornrows Unprofessional?: Title VII's Narrow Application of Grooming Policies, and Its Effect on Black Women's Natural Hair in the Workplace*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 521, 528–29 (2017) (referencing Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981)) ("Thus, the court adding this caveat [that Black women can easily add or remove their braids between shifts] is revealing because it shows that judges may not have a basic understanding of what is required for black women to change their hair from one style to the next.").

172. § 13:10. Race discrimination, 20 Minn. Prac., Business Law Deskbook § 13:10 (citing the EEOC guidance; Jeffers v. Thompson, 264 F. Supp. 2d 314, 326 (D. Md. 2003); Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1992); Kimble v. Wisconsin Dep't of Workforce Dev., 690 F. Supp. 2d at 770–71).

Indeed, even the Supreme Court has issued dictum[173] that has been seen as recognizing intersectional claims.[174] In true Supreme Court fashion, the language is vague, buried in a footnote, and only in response to the dissent's argument against an intersectional-like claim. Still, the footnote provides evidence that intersectional discrimination could be on the Court's radar. And of course, footnotes have been known to change legal doctrine.[175]

Despite the progress, courts are clearly still wrestling with how to apply intersectional discrimination theory. For example, in *Brown v. OMO Grp., Inc.*, the District Court acknowledged intersectional discrimination, referencing *Westmorland*, *Kimble*, and the EEOC guidance.[176] But *Brown* also declined to analyze the plaintiff's claims of intersectional discrimination on a more procedural matter.[177] The court reasoned that it would not be appropriate to discuss the plaintiff's intersectional discrimination objection because it was not specific enough: "Brown makes no reference to any portion of the R&R that misapplied the intersectionality theory, nor does she reference any portion of the R&R that should have applied the intersectionality theory and failed to do so."[178] With that, the *Brown* court dispensed with the plaintiff's intersectional claim.[179]

Based on the court's decision, it is hard to say what the plaintiff in *Brown* should have done instead. Perhaps the court would have considered her intersectional discrimination objection if only she had, as the court says, pointed to a place where the magistrate judge should have (but did not) consider whether she was discriminated against because she was a Black pregnant woman. It is also possible that the court, while willing to

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173. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 598 n.10 (1999) (providing evidence in opposition to the dissent's argument that the court has never recognized discrimination by members of the *same* protected class as the plaintiff).

174. Westmoreland v. Prince George's Cty., Md., 876 F. Supp. 2d 594, 604 (D. Md. 2012) (reading *Olmstead* as a favorable acknowledgement of plaintiffs' ability to be discriminated against on the basis of multiple intersecting identities).

175. *See, e.g.*, United States v. Carolene Prod. Co., 304 U.S. 144, 152–53 n.4 (1938); David Schultz, *Carolene Products Footnote Four*, FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/5/carolene-products-footnote-four [https://perma.cc/4UAW-S3QY] ("Footnote four . . . presages a shift in the Supreme Court from predominately protecting property rights to protecting other individual rights, such as those found in the First Amendment. It is arguably the most important footnote in U.S. constitutional law.").

176. Brown v. OMO Grp., Inc., No. 9:14-CV-02841-DCN, 2017 WL 1148743, at *5 (D.S.C. Mar. 28, 2017).

177. *Id.*

178. *Id.*

179. *Id.*

incorporate the general doctrine of intersectional discrimination into its decision, was not as willing to apply it.

The court's decision on Mo'Nique's claim did not address the intersectional discrimination question.[180] The *Hicks* decision discusses Mo'Nique's claim of being discriminated against because she is a Black woman, but it does not even use the word "intersectionality."[181] *Hicks*, similar to *Brown*, sets itself up to discuss the race and sex discrimination claim, but instead focuses on whether Mo'Nique suffered an adverse action.[182] Again, the court in *Hicks* is able to evade any discussion of Mo'Nique's discrimination claim because of a procedural matter; Netflix was only moving to dismiss on the argument that Mo'Nique had not shown she suffered an adverse action.[183] Thus, it remains to be seen what kind of treatment the court will give Mo'Nique's claim. Considering the high profile nature of this case and the implications it could have for Netflix's brand to be seen as discriminatory, the parties, their counsel, and the court will likely be sensitive of the optics involved in the decision.[184]

180. Hicks v. Netflix, Inc., 472 F. Supp. 3d 763, 767–68 (C.D. Cal. 2020) ("Overall, [Mo'Nique] alleges that Netflix made offers to other comedic talent to perform in similar stand-up shows, but, when the talent was not a Black woman, Netflix paid astronomically more than it did to Black women like her.").

181. It should be noted that courts can perform intersectional analysis without using the phrase itself, but this may stand out as less common considering courts tend to use the name of a doctrine when applying it.

182. *E.g.*, *Hicks*, 472 F. Supp. 3d at 777 ("Again, the Court notes that Mo'Nique raises a novel theory here, namely that an employer's failure to negotiate an 'opening offer' in good faith, consistent with its alleged customary practice which typically leads to increased compensation, constitutes an 'adverse employment action' for purposes of a retaliation claim.").

183. *Id.* at 770.

184. *See* Maria Puente, *Mo'Nique's Discrimination 'Lowballing' Lawsuit Against Netflix Over Pay Can Go Forward, Court Rules*, USA TODAY (July 18, 2020), https://www.usatoday.com/story/entertainment/celebrities/2020/07/16/moniques-discrimination-lawsuit-against-netflix-can-go-forward/5455386002/ [https://perma.cc/Y8JQ-KCMZ]; Elizabeth Blair, *Mo'Nique's Netflix Discrimination Case Moves Forward*, NPR (July 17, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/17/892351564/monique-s-netflix-discrimination-case-moves-forward [https://perma.cc/HJ6T-MZ2S]; Cedric Thornton, *Federal Judge Sides with Mo'nique in Pending Discrimination Lawsuit Against Netflix*, BLACK ENTER. (July 20, 2020), https://www.blackenterprise.com/federal-judge-sides-with-monique-in-pending-discrimination-lawsuit-against-netflix/ [https://perma.cc/RYF4-B9RZ].

2. *Bostock* may ignite more willingness of plaintiffs to pursue intersectional discrimination claims.

Bostock was a highly anticipated decision, in part because it was unclear how the Court would rule,[185] and in part because of the dramatic impact it would have on those 11 million LGBTQ+ people in the United States.[186] It also had surprising partisan implications. While the plaintiffs had support from businesses who employ individuals,[187] the federal government under the Trump administration filed *amicus curie* arguing against the plaintiffs' interpretation of Title VII.[188] The Court's decision was similarly widely covered[189] and elicited reactions from a wide variety of high-profile figures.[190]

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185. Bill Rankin, *U.S. Supreme Court to Hear Georgia Case on Gay, Lesbian Workplace Bias*, ATLANTA J.-CONST. (Apr. 22, 2019), https://www.ajc.com/news/local/supreme-court-decide-workplace-bias-cases-against-gays-lesbians/bb7HjtWaZ4lIodzybv08UP/ [https://perma.cc/UKG7-LYZ7] ("In what could be a landmark ruling, the high court will decide whether Title VII of the Civil Rights Act of 1964 extends workplace protections to members of the LGBT community.").

186. *See* Newport, *supra* note 147.

187. Erin Mulvaney, *Major Companies Ask High Court to Support LGBT Worker Rights*, BLOOMBERG L. (July 2, 2019), https://news.bloomberglaw.com/daily-labor-report/major-companies-tell-supreme-court-to-support-lgbt-worker-rights [https://perma.cc/KZN5-R9ZT].

188. Brooke Sopelsa, *Gay Workers Not Covered by Civil Rights Law, Trump Admin Tells Supreme Court*, NBC NEWS (Aug. 23, 2019), https://www.nbcnews.com/feature/nbc-out/gay-workers-not-covered-civil-rights-law-trump-admin-tells-n1045971 [https://perma.cc/S3P9-D7HM] ("This latest brief, submitted by Solicitor General Noel J. Francisco and other Department of Justice attorneys, argues that Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex and national origin, 'does not bar discrimination because of sexual orientation.'").

189. Nina Totenberg, *Supreme Court Delivers Major Victory To LGBTQ Employees*, NPR (June 15, 2020), https://www.npr.org/2020/06/15/863498848/supreme-court-delivers-major-victory-to-lgbtq-employees [https://perma.cc/GXC8-5Y7W]; Adam Liptak, *Civil Rights Law Protects L.G.B.T. Workers, Supreme Court Rules*, N.Y. TIMES (June 15, 2020), https://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html [https://perma.cc/UU2D-SA7H]; Julie Moreau, *Supreme Court's LGBTQ Ruling Could Have 'Broad Implications,' Legal Experts Say*, NBC (June 23, 2020), https://www.nbcnews.com/feature/nbc-out/supreme-court-s-lgbtq-ruling-could-have-broad-implications-legal-n1231779 [https://perma.cc/2WVD-H6EW].

190. Nancy Pelosi (@SpeakerPelosi), TWITTER (June 15, 2020, 8:09 PM), https://twitter.com/SpeakerPelosi/status/1272697746047336449 [https://perma.cc/YKZ4-GNHF] ("The Supreme Court's ruling today secures critical protections for LGBTQ Americans across the country . . . ."); Ted Barrett, Manu Raju & Lauren Fox, *Key GOP Senators Have No Qualms with Supreme Court's Decision to Ban LGBTQ Discrimination in the Workplace*, CNN (June 15, 2020), https://www.cnn.com/2020/06/15/politics/gop-senators-reaction-supreme-court-ruling/index.html [https://perma.cc/4CNN-FQMA]; Brett Samuels, *Trump Says 'We Live' with SCOTUS Decision On LGBTQ Worker Rights*, HILL (June 15, 2020), https://thehill.com/homenews/administration/502812-trump-says-we-live-with-

Since *Bostock* was published in June 2020, more than 500 subsequent cases have cited to it.[191] In January 2021, the Biden Administration took additional action to enforce *Bostock*, leading to the case dominating headlines yet again.[192] Not only are employment attorneys aware of the landmark decision,[193] but the whole country is as well. Most Court decisions do not receive this kind of attention, and plaintiffs should be prepared to use it to their advantage. Similarly, employers should be cognizant of discrimination pitfalls: sensitivity and bias training, diversity programing, and consulting with employment attorneys are all recommended to ensure compliance.[194] Furthermore, employers must also be compliant with Title VII in their employment decisions, taking care to terminate, hire, promote, and decide other matters based on the merits of an employee's qualifications and work, rather than their identity.

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scotus-decision-on-lgbtq-worker-rights [https://perma.cc/DFN4-SMA3] (quoting President Trump's remarks on *Bostock*, "I've read the decision, and some people were surprised . . . . But they've ruled and we live with their decision . . . .Very powerful. Very powerful decision actually.").

191. *Citing References*, Bostock v. Clayton County, WESTLAW EDGE, [https://perma.cc/GL5D-6TTA] (showing links to 557 cases on Westlaw which have cited *Bostock*) (as of May 13, 2022).

192. Mark Joseph Stern, *Biden Just Began the Biggest Expansion of LGBTQ Equality in American History*, SLATE (Jan. 21, 2021), https://slate.com/news-and-politics/2021/01/joe-biden-lgbtq-bostock-executive-order.html [https://perma.cc/44QA-WAUP]; HRC Staff, *The Real-Life Implications of Biden's Bostock Executive Order*, HUM. RTS. CAMPAIGN (Jan. 21, 2021), https://www.hrc.org/press-releases/the-real-life-implications-of-bidens-bostock-executive-order [https://perma.cc/9UDT-PFTB]; Jo Yurcaba, *Biden Issues Executive Order Expanding LGBTQ Nondiscrimination Protections*, NBC (Jan. 21, 2021), https://www.nbcnews.com/feature/nbc-out/biden-issues-executive-order-expanding-lgbtq-nondiscrimination-protections-n1255165 [https://perma.cc/2M49-UFRT].

193. *See, e.g.*, § 11:16. Title VII, 17 Minn. Prac., Employment Law & Practice § 11:16 (4th ed.).

194. *See generally* Ashley Dillon & Sara Welch, *U.S. Supreme Court Rules that Federal Law Forbidding Workplace Discrimination Protects LGBTQ+ Workers*, STINSON (June 15, 2020), https://www.stinson.com/newsroom-publications-Supreme-Court-Rules-that-Federal-Law-Forbidding-Workplace-Discrimination-Protects-LGBTQ-Workers [https://perma.cc/W8JA-PPXA] (encouraging all employers to review their discrimination policies to ensure that they provide protections for LGBTQ+ people); Laura Alaniz, Stephanie L. Holcombe & Kelly R. Ferrell, *Employment Alert: "U.S. Supreme Court Ruling in Favor of LGBTQ+ Workers Has Direct Implications for Workplace Guidelines and Policies"*, PORTER HEDGES (June 24, 2020), https://www.porterhedges.com/newsroom-publications-employment-alert-u-s-supreme-court-ruling [https://perma.cc/L56G-Q4PG] (explaining recommended actions that employers should take after *Bostock*).

Conclusion

This Note is undoubtedly optimistic. My optimism, however, is inspired by the ingenuity and passion this Note's authorities—the Black and brown feminists, the queer activists, the courageous transgender and gender nonconforming individuals simply living their lives, and the attorneys, parties, and judges changing our legal system. This Note's arguments are driven by those people who have found strength in their identities and have advocated on theirs and others' behalves.[195] We all have intersecting identities, but not all identities are seen equally. Title VII seeks to protect those most vulnerable to employment discrimination, even (perhaps especially) when the rest of society has not yet recognized this vulnerability. Even if *Bostock* is not the catalyst that brings intersectionality into case law, intersectionality as a framework is certainly here to stay, and as long as plaintiffs continue to integrate it into their advocacy, it will undoubtedly inform court opinions. Mo'Nique's suit against Netflix is likely to be another step towards this integration. All of us with intersecting identities are indebted to hers and others' advocacy both in and out of the courtroom.

195. *See* Mayeri, *supra* note 13, at 718–21 (discussing the intersectional origins of Title VII).