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Title VII's Failures: A History of Overlooked Indifference

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NOTE

TITLE VII'S FAILURES: A HISTORY OF OVERLOOKED INDIFFERENCE

*Elena S. Meth**

Nearly sixty years after the adoption of Title VII and over thirty since intersectionality theory was brought into legal discourse by Professor Kimberlé Crenshaw, the U.S. Supreme Court has consistently failed to meaningfully implement intersectionality into its decisionmaking. While there is certainly no shortage of scholarship on intersectionality and the Court's failure to recognize it, this remains an overlooked failure by the Supreme Court. This Note proceeds in three parts. Part I provides an overview of Title VII and intersectional discrimination theory. I then explain how the EEOC and the Supreme Court have historically handled intersectional discrimination cases. Part II compares and contrasts some of the most influential feminist, political, and legal theories on sex discrimination with intersectionality. Though these theories might seem incompatible, I then offer a brief discussion of how they can be understood in concert. I also explain how the Court can improve its Title VII decisionmaking. Part III provides a framework for courts, plaintiffs, and defendants in Title VII discrimination cases to incorporate intersectional theory and, most importantly, to recognize the unique harms experienced by plaintiffs bringing Title VII claims.

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INTRODUCTION

Two decades ago, Professor Devon Carbado introduced the academic world to Mary, a Black woman working at an elite corporate law firm.¹ Mary is a seventh-year associate who is up for partnership—the only Black woman being considered. Mary and one white man are denied the promotion, and Mary subsequently brings a disparate treatment discrimination suit under Title VII of the Civil Rights Act of 1964. She presents three claims: race discrimination, sex discrimination, and race and sex discrimination. The court rejects all three, finding that because other candidates sharing aspects of Mary’s identity were promoted, there could be no explicit discrimination against her on the basis of her race or gender. Carbado’s point was that, as the only Black woman in the mix, Mary falls through an “anti-discrimination gap.”² By only pointing to the way the firm treats Black men and white women, the court implicitly creates a third, lesser category for Black women on the basis of the intersection of Mary’s identities.

Mary’s experience is not unique. Instead, Mary is ubiquitous. She is the Dalit Indian man marginalized by his coworkers based on his caste.³ She is the incarcerated person experiencing sexual violence for defying “gender normative expressions of masculinity.”⁴ She is the immigrant Latina worker scared

1. Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 710–11 (2001).

2. *Id.* at 712.

3. Guha Krishnamurthi & Charanya Krishnaswami, *Title VII and Caste Discrimination*, 134 HARV. L. REV. F. 456 (2021).

4. J.S. Welsh, Note, *Sex Discrimination in Prison: Title VII Protections for America’s Incarcerated Workers*, 42 HARV. J.L. & GENDER 477, 478 (2019).

to report sexual and racial slurs for fear of jeopardizing her immigration status.⁵ All of these people have the same thing in common: Title VII, as currently interpreted by the courts, though perhaps not as originally enacted in 1964, does not provide a remedy for the harm they experience on the basis of their intersectional identities. This, as Professor Kimberlé Crenshaw posited over thirty years ago, is the crux of intersectional discrimination.⁶

This Note compiles and compares a myriad of perspectives that scholars and practitioners have articulated but never considered together, until now. Building upon prior scholarship, this Note demonstrates that, although Title VII was not necessarily passed with intersectionality in mind,⁷ both the Supreme Court and leading gender discrimination scholars have left intersectionality out of the discussion. As a result, the safeguards provided by employment discrimination laws and, more broadly, all other discrimination laws under Title VII⁸ are weaker, and we are all worse off for it. There are a few reasons why this scholarship is urgently needed. Intersectional discrimination is not disappearing—or even improving, for that matter. Complete data on exactly who experiences discrimination on the basis of multiple identities is difficult to find, not only because the law fails to provide space for these incidents but also because many polling sources define discrimination along single axes. For example, a 2018 Harvard study found that 57% of Black Americans report pay and promotion discrimination, while 31% of women report gender discrimination in job hiring.⁹ Discrimination along axes of race, gender identity, sexual orientation, and disability is also a crisis in public health, housing, and safety.¹⁰ If we fail to even define discrimination accurately, how can we adequately remedy its effects?

This Note proceeds in three parts. Part I provides an overview of Title VII and intersectionality. I then explain how the Equal Employment Opportunity Commission (EEOC) and the Supreme Court have historically handled intersectional discrimination cases. In Part II, I compare and contrast major feminist, political, and legal thought on dominance theory, gender essentialism,

5. Leticia M. Saucedo, *Intersectionality, Multidimensionality, Latino Immigrant Workers, and Title VII*, 67 SMU L. REV. 257 (2014).

6. 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.

7. Or, at least, this is one view of Title VII—for further explanation of an originalist, intersectional lens on Title VII, see *infra* note 22.

8. Title VII is effectively an umbrella act encompassing multiple types of discrimination, which I detail in Part I. For example, Title VII encompasses the Pregnancy Discrimination Act, which was enacted in 1978. See *infra* note 17.

9. Amy Roeder, *Discrimination in America*, HARV. PUB. HEALTH MAG. (Spring 2018), https://www.hsph.harvard.edu/magazine/magazine_article/discrimination-in-america/ [<https://perma.cc/ZB92-4TQH>].

10. See Brigette A. Davis, *Discrimination: A Social Determinant of Health Inequities*, HEALTH AFFS.: FOREFRONT (Feb. 25, 2020), <https://www.healthaffairs.org/doi/10.1377/forefront.20200220.518458/full/> [<https://perma.cc/J2Q8-RAZ9>].

and antiessentialist theory with intersectional discrimination theory. In Part III, I offer considerations and a framework to incorporate intersectional discrimination theory into the remedies phase of Title VII lawsuits.

I. A HISTORY OF TITLE VII

In this Part, I first lay out a basic history of Title VII and a handful of major cases interpreting that provision. I then discuss how the EEOC and the Supreme Court have handled Title VII claims. Although Title VII covers several categories of identity, my analysis focuses on race, color, and sex discrimination claims.¹¹

Title VII of the Civil Rights Act of 1964 protects job applicants and employees from employment discrimination based on their “race, color, religion, sex, or national origin.”¹² Title VII cases are handled by federal courts and the EEOC. Title VII claims must first be filed as charges with the EEOC, but may then proceed to federal court in certain circumstances.¹³ The EEOC and federal courts do not, however, adjudicate Title VII cases in the same ways. Since 1997, the EEOC has handled well over a million charges.¹⁴ Of those, the EEOC estimates that nearly 4,700 resulted in litigation.¹⁵

As interpreted by the EEOC and the courts, Title VII covers intentional forms of discrimination that result in disparate impact and disparate treatment, including pretext, mixed motives, hostile work environments, and affirmative action.¹⁶ Pregnancy discrimination is also covered by Title VII,

11. As well as gender identity, which the Court recognized as protected by Title VII in *Bostock*. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). See *infra* Section I.B.

12. 42 U.S.C. § 2000e-2; *Title VII of the Civil Rights Act of 1964*, EEOC, <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964> [https://perma.cc/A2WU-HUNQ].

13. For all the ways a Title VII case can be brought to federal court, see *Filing a Lawsuit in Federal Court*, EEOC, <https://www.eeoc.gov/federal-sector/filing-lawsuit-federal-court> [https://perma.cc/T7MF-R2F5].

14. 1997 is when the EEOC initiated its modernized data-gathering platform. See *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2021*, EEOC, <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021> [https://perma.cc/AG5J-DZDW]. Some data is available from 1992–1996, which shows that the agency handled an average of 83,390 cases per year. See *Charge Statistics FY 1992 Through FY 1996*, EEOC, <https://www.eeoc.gov/statistics/charge-statistics-fy-1992-through-fy-1996> [https://perma.cc/R8MM-9CYU]. The EEOC began enforcing the American Disabilities Act in 1992, leading to a spike in charges in 1993. *Id.* In 2013 alone, “[t]he EEOC handled nearly 94,000 charges under Title VII and other laws.” Tamara Lytle, *Title VII Changed the Face of the American Workplace*, SHRM (May 21, 2014), <https://www.shrm.org/hr-today/news/hr-magazine/pages/title-vii-changed-the-face-of-the-american-workplace.aspx> [https://perma.cc/39BP-JS82].

15. Specifically, 4,649 cases were litigated as Title VII claims between 1997 and 2021. See *EEOC Litigation Statistics, FY 1997 through FY 2021*, EEOC, <https://www.eeoc.gov/statistics/eeoc-litigation-statistics-fy-1997-through-fy-2021> [https://perma.cc/Z5XT-8KL8].

16. See *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (disparate treatment); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509 (3d Cir. 1992) (disparate treatment); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (mixed motives); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (sufficiently severe hostile work environments are disparate treatment); *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993) (hostile work environment must be

through the Pregnancy Discrimination Act of 1978 (PDA).¹⁷ There are narrow exceptions that exempt employers from the requirements of Title VII. These include “bona fide occupational qualifications” (BFOQs),¹⁸ demonstrations of reasonable care to prevent and correct the discrimination, and demonstrations of the complaining party’s unreasonable failure to report the harassment.¹⁹

At its inception, sex discrimination was not the primary focus of Title VII.²⁰ In her historical analysis of the adoption of Title VII, Professor Serena Mayeri discusses the way sex discrimination was seen as, at best, an afterthought, and, at worst, a joke by racist male senators intended to “defeat Title VII’s prohibition on racial discrimination.”²¹ It wasn’t until Pauli Murray delivered a persuasive memo to Congress in April of 1964 arguing that the sex amendment was an integral component of Title VII and not something “anti-theoretical” to its purported goal that the “sex amendment” was solidified as part of Title VII.²²

objectively and subjectively severe); *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) (affirmative action).

17. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e-(k) (1976 & Supp. 1 1978)). Pregnancy discrimination was encompassed under Title VII upon recognition that discrimination on the basis of pregnancy is the functional equivalent of discrimination on the basis of sex. Note that not all pregnant people are women, and thus are not necessarily discriminated against on the basis of sex (although *Bostock’s* reductive holding complicates what is and is not discrimination on the basis of sex). See *infra* text accompanying notes 55–61. Although transgender men can and do become pregnant, the EEOC has yet to take up a transgender pregnancy discrimination case. In 2020, a transgender pregnancy discrimination case was brought against Amazon in New Jersey state court, but it was dismissed with prejudice. See Complaint, *Simmons v. Amazon.com Servs. Inc.*, No. 3:20-CV-13865 (N.J. Super. Ct. 2020).

18. For example, courts have construed the BFOQ exception as exempting religious organizations from federal interference in their decisions to hire and fire ministers. See, e.g., *Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1578 (1st Cir. 1989); *Rweyemamu v. Cote*, 520 F.3d 198, 204–09 (2d Cir. 2008); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303–07 (3d Cir. 2006); *EEOC v. Roman Cath. Diocese*, 213 F.3d 795, 800–01 (4th Cir. 2000); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). For examples of other BFOQs, see *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Wilson v. Sw. Airlines, Inc.*, 517 F. Supp. 292 (N.D. Tex. 1981).

19. See, e.g., *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001); *Meritor Sav.*, 477 U.S. at 57; *Harris*, 510 U.S. at 26.

20. Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713, 716–18 (2015).

21. See *id.* at 717.

22. Memorandum from Pauli Murray, Yale L. Sch. (Apr. 14, 1964) (on file with the Schlesinger Library, Harvard University). Murray’s memo, and the ultimate adoption of Title VII (which was in no small part because of her work), supports the idea that Title VII not only has the capacity to be an intersectional statute but also that it was actually designed as such. See Mayeri, *supra* note 20, at 718.

Still, as written, Title VII notably uses “or” rather than “and” to describe the identities claimants might hold.²³ The problem with this textual framework is twofold. First, it forces plaintiffs to separate and choose among their many identities. This is often an impossible task. People do not think of themselves as different, discrete pieces—we are all the parts of ourselves. Second, forcing victims of discrimination to slot their experiences into discrete buckets fails to account for the fact that discrimination happens *on the basis of* multiple aspects of their identities. As Crenshaw denotes, “any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.”²⁴ By failing to interpret Title VII to encompass intersectional discrimination, the Supreme Court has also failed to acknowledge the experiences of the most marginalized populations.

While the Supreme Court generally extends some deference to other agencies’ administrative decisions, it has neglected to define the level of deference the EEOC is owed in Title VII appeals.²⁵ In Section I.A, I discuss how the EEOC has interpreted Title VII compared to the federal judiciary. I then conclude this Part by showing that the EEOC has done a superior job of recognizing intersectional discrimination claims, and accordingly, federal courts should give it increased deference to ensure these claims receive the analysis they deserve.

A. EEOC’s Handling of Title VII Discrimination Claims

Since at least 2016, the EEOC has recognized intersectional discrimination as prohibited by Title VII.²⁶ The agency specifically defines intersectional discrimination as “discrimination[] which occurs when someone is discriminated against because of the combination of two or more protected bases.”²⁷ The EEOC goes on to note that “[s]ome characteristics . . . fuse inextricably . . . [and] Title VII prohibits employment discrimination based on any of the named characteristics, whether individually or in combination.”²⁸ In response

23. 42 U.S.C. § 2000e-2(a)(1); Yvette N.A. Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff*, 22 U. PA. J.L. & SOC. CHANGE 1, 7–8 (2019).

24. Crenshaw, *supra* note 6, at 140.

25. *See infra* note 67.

26. *EEOC Enforcement Guidance on National Origin Discrimination*, EEOC (Nov. 2016), <https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination> [<https://perma.cc/L5E8-F5W6>] (navigate to II(C)(2) Intersectional Discrimination). This newfound focus on intersectionality comes after internal reflection and public comment on the need for recognition of intersectionality. *See EEOC Considers Past, Looks Toward Future*, EEOC (July 1, 2015), <https://www.eeoc.gov/newsroom/eeoc-considers-past-looks-toward-future> [<https://perma.cc/EL4P-X8VV>].

27. *EEOC Enforcement Guidance on National Origin Discrimination*, *supra* note 26.

28. *Id.*

to the Supreme Court's unpopular 2013 decision in *Vance v. Ball State University*,²⁹ the EEOC issued a notice containing comprehensive information about its policies on discrimination under Title VII.³⁰ In one section of this notice, the EEOC cited favorably to two U.S. court of appeals decisions that recognized intersectionality as integral to Title VII discrimination cases.³¹

In addition to its favorable recognition of intersectional discrimination decisions from the courts, the EEOC has made efforts to adjudicate cases in a manner that is mindful of claimants' intersectional identities. In 2008, the EEOC adopted "E-RACE," an initiative designed to "improve EEOC's efforts to ensure workplaces are free of race and color discrimination."³² As part of the initiative, the EEOC sought to keep better records of its notable cases, including intersectional discrimination claims, so the public could more easily learn about Title VII and workplace discrimination.³³ The agency's website lists forty-one cases that it has adjudicated since 2004 along several axes of discrimination.³⁴ Of these, a handful were later heard by federal courts.³⁵

Based on the EEOC's list of significant cases, it seems to define intersectional discrimination as *demographic* and not *claim* intersectionality, even though its own definition of intersectional discrimination suggests it recognizes claim discrimination.³⁶ "Demographic intersectionality," or single-axis intersectional discrimination, is best described as a plaintiff who has multiple

29. 133 S. Ct. 2434 (2013) (holding in relevant part that a coworker cannot be considered a supervisor for the purpose of establishing Title VII employer liability). The Supreme Court's decision in *Vance* did not itself ignore intersectionality, but the EEOC saw the major decision as an opportunity to update its guidance on what is covered under Title VII. See *Section 15 Race and Color Discrimination: Notice Concerning the Supreme Court's Decision in Vance v. Ball State University*, 133 S. Ct. 2434 (2013), EEOC (guidance originally issued Apr. 19, 2006) [hereinafter *EEOC Section 15 Post-Vance Notice*], <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination> [<https://perma.cc/Z9ZU-W5L7>].

30. See *EEOC Section 15 Post-Vance Notice*, *supra* note 29.

31. See *id.* at nn.32–33; *Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025, 1034 (5th Cir. 1980) ("[W]e 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 . . ."); *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994) (holding that "when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors").

32. *The E-RACE Initiative (Eradicating Racism and Colorism from Employment)*, EEOC (2008), <https://www.eeoc.gov/initiatives/e-race/e-race-initiativeeradicating-racism-and-colorism-employment> [<https://perma.cc/9NS8-3PE3>].

33. *Id.*

34. *Significant EEOC Race/Color Cases (Covering Private and Federal Sectors)*, EEOC, <https://www.eeoc.gov/initiatives/e-race/significant-eeoc-racecolor-casescovering-private-and-federal-sectors#intersectional> [<https://perma.cc/NMU2-CP8X>] (last visited May 22, 2022). Although this page just provides a list of some of the EEOC's significant cases, it is not obvious exactly how many intersectional discrimination cases the agency has adjudicated.

35. See, e.g., *AutoZone, Inc. v. EEOC*, Nos. 09-16860, 10-15059, 2011 WL 883658 (9th Cir. Mar. 15, 2011).

36. See *EEOC Enforcement Guidance on National Origin Discrimination*, *supra* note 26; *Significant EEOC Race/Color Cases*, *supra* note 34.

protected class identities but brings a claim on the basis of one of those identities. In contrast, “claim intersectionality,” or multiple-axis intersectional discrimination, encompasses claims brought on the basis of a unique harm affecting the plaintiff’s multiple identities.³⁷

Even the federal cases the EEOC cites as examples of the judiciary recognizing intersectional discrimination center around claim discrimination.³⁸ For example, in 2011, the EEOC and the Ninth Circuit found that a store manager violated Title VII when he sexually harassed his Black female employee by telling customers she “had AIDS ‘because it was proven that 83 percent of African American women had AIDS.’”³⁹ This is an example of demographic discrimination and not claim discrimination, because the action in question is not dependent on how the plaintiff was treated relative to her peers. Put differently, nothing suggests that the plaintiff was treated worse compared to her similarly situated Black male or white female peers on the basis of her identity as a Black woman. Instead, her mistreatment was rooted in her harasser’s sexist, racist views. Although demographic discrimination is important for courts to recognize, it is not the type of intersectionality that critical race theorists like Professors Crenshaw and Carbedo have been calling for over several decades. Instead, they critically call for recognition of claim intersectionality.⁴⁰

Moreover, the EEOC has failed to offer guidance to the judiciary on how to properly address intersectional discrimination claims—perhaps a reflection of its own inability to consistently adjudicate intersectional discrimination claims.⁴¹ Still, comparatively, the EEOC has done a far better job of accommodating intersectionality, albeit primarily demographic intersectionality, than the Supreme Court.

B. Federal Courts’ Handling of Title VII Discrimination Claims

The federal judiciary did not even recognize sex stereotyping as sex discrimination until the last quarter of the twentieth century.⁴² In 1989, the Supreme Court recognized that sex stereotyping is actionable as sex

37. Rachel Kahn Best, Lauren B. Edelman, Linda Hamilton Krieger & Scott R. Eliason, *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & SOC’Y REV. 991, 994–95 (2011); see also *infra* Section I.B; *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543–44 (1971); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1743 (2020). I focus on claim intersectionality throughout this Note.

38. *EEOC Enforcement Guidance on National Origin Discrimination*, *supra* note 26; see, e.g., *Jefferies v. Harris Cnty. Cmty. Action Ass’n*, 615 F.2d 1025, 1034 (5th Cir. 1980); *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994); *Shazor v. Pro. Transit Mgmt.*, 744 F.3d 948, 957–58 (6th Cir. 2014).

39. *Significant EEOC Race/Color Cases*, *supra* note 34.

40. See, e.g., *Carbato & Guliati*, *supra* note 1; *Crenshaw*, *supra* note 6.

41. For a more detailed discussion of the EEOC’s failure to advise the courts on intersectional discrimination and how the agency might better do so, see *Pappoe*, *supra* note 23, at 17–19.

42. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The federal judiciary did not even recognize sex discrimination until the 1970s. See *id.*; *Phillips*, 400 U.S. 542.

discrimination in *Price Waterhouse v. Hopkins*.⁴³ Since then, the Supreme Court has only heard seventeen gender discrimination cases under Title VII.⁴⁴ As far as intersectional discrimination precedent is concerned, scholars agree that a 1994 case is the “high-water mark” of intersectionality doctrine.⁴⁵

Before *Price Waterhouse* established the modern standard for sex discrimination under Title VII, *Phillips v. Martin Marietta* provided a rudimentary framework for claim intersectionality discrimination.⁴⁶ On a motion for summary judgment, the Court held that there was a genuine issue of material fact as to whether the family obligations of women with preschool-age children were demonstrably more relevant to their job performance than they are to men.⁴⁷ In doing so, the Court also recognized a question about whether Martin Marietta Corporation’s prohibition on hiring female job applicants with preschool-age children was a BFOQ reasonably necessary to the normal operation of the employer’s business.⁴⁸ Ida Phillips applied for a job with Martin Marietta but was denied the position.⁴⁹ Martin Marietta claimed to deny Phillips employment because it was not accepting applications from women with preschool-age children.⁵⁰ Phillips filed a Title VII suit claiming unlawful discrimination on the basis of sex because the company routinely hired men with preschool-age children.⁵¹ The district court found that there was no sex discrimination because 75–80% of the applicants hired for the position to which Phillips applied were women—in other words, discrimination based on caregiver status was not invidious or unlawful under Title VII.⁵²

The Supreme Court provided almost no reasoning for its holding—the entire opinion is only a few paragraphs. The majority briefly acknowledged that mothers could have family obligations because of their preschool-age children that would interfere with their work and, as such, it was reasonable for Martin Marietta to be treated as a BFOQ, thereby allowing the discrimination.⁵³ Though it has not been treated as such, *Phillips* is the first instance where the Court recognized that individuals can have multiple identities that interact in some way that Title VII law must recognize. Here, those identities

43. 490 U.S. 228.

44. *Cases – Sex Discrimination*, OYEZ, <https://www.oyez.org/issues/194> [<https://perma.cc/2CSS-V7TS>].

45. See *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994) (holding that “when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors”); *Mayeri*, *supra* note 20, at 730 n.106.

46. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543–44 (1971).

47. *Id.* at 544.

48. *Id.*

49. *Id.* at 543.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

were being a woman and being a mother. Unfortunately, the Court decided that being a mother is not an identity worthy of protection.⁵⁴

In the latest Supreme Court case on Title VII, *Bostock v. Clayton County*, the majority opinion entirely quashed any opportunity to recognize sexual orientation discrimination along multiple axes.⁵⁵ *Phillips* provides an interesting point of contrast to *Bostock*. Justice Neil Gorsuch used the notably lacking “reasoning” from *Phillips* to set the threshold in *Bostock* for discrimination on the basis of sex as distinct from “sex-plus”⁵⁶ classifications such as sexual identity and parental status:

Three leading precedents confirm what the statute’s plain terms suggest. In *Phillips v. Martin Marietta Corp.*, a company was held to have violated Title VII by refusing to hire women with young children, despite the fact that the discrimination also depended on being a parent of young children and the fact that the company favored hiring women over men That an employer discriminates intentionally against an individual only in part because of sex supplies no defense to Title VII.⁵⁷

Before heading in the now-predominant direction of sex stereotyping, the Court had an opportunity to use *Phillips* as a framework for other cases brought by plaintiffs with multiple identities. This is evidenced by the fact that the handful of lower courts acknowledging intersectionality used *Phillips* as justification.⁵⁸ Instead, the Court reasoned that the discrimination in *Phillips* was actionable because of sex, not because of motherhood. Thus, the addi-

54. See *id.* The case was decided in 1971, before *Price Waterhouse* held that sex stereotyping is discrimination on the basis of sex. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 237 (1989). Today, parental discrimination is unlawful on the basis of sex stereotyping. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601.

55. See 140 S. Ct. 1731, 1746–47 (2020) (holding that firing an individual for their sexual orientation or gender identity is discrimination on the basis of sex in violation of Title VII); see also Alexander M. Nourafshan, *The New Employment Discrimination: Intra-LGBT Intersectional Invisibility and the Marginalization of Minority Subclasses in Antidiscrimination Law*, 24 DUKE J. GENDER L. & POL’Y 107 (2017).

56. “Sex-plus” discrimination can be defined as discrimination on the basis of sex and some other factor such as religion, sexual-orientation, or age. The “other” factor could be one that is federally protected through a statute such as Title VII, or an unprotected status such as hairstyle. Eric Bachman, *What Is “Sex-Plus” Discrimination And Why Are These Employment Claims On The Rise?*, FORBES (Jul. 30, 2020), <https://www.forbes.com/sites/ericbachman/2020/07/30/what-is-sex-plus-discrimination--and-why-are-these-employment-claims-on-the-rise/?sh=6a43d3877357> [<https://perma.cc/V55S-3NQ3>].

57. See *Bostock*, 140 S. Ct. at 1743.

58. See *e.g.*, *Jefferies v. Harris Cnty. Cmty. Action Ass’n*, 615 F.2d 1025, 1033 (5th Cir. 1980) (recognizing that *Martin Marietta* set the precedent of “sex-plus” discrimination violating Title VII); *Shazor v. Pro. Transit Mgmt.*, 744 F.3d 948, 957 (6th Cir. 2014) (“The Supreme Court has acknowledged . . . that a plaintiff can maintain a claim for discrimination on the basis of a protected classification considered in combination with another factor.”).

tional factor of being a mother, and that the policy at issue was based on motherhood, was irrelevant to the Title VII question.⁵⁹ Justice Gorsuch went on to explain:

[P]laintiff's sex need not be the sole or primary cause of the employer's adverse action So, too, it has no significance here if another factor—such as the sex the plaintiff is attracted to or presents as—might also be at work, or even play a more important role in the employer's decision.⁶⁰

In this explanation, Justice Gorsuch established that although plaintiffs may have multiple identities or factors which have been discriminated against, because Title VII says “on the basis of sex,” a finding of discrimination on the basis of sex is all that is needed to find a violation. His reasoning suggests that applying intersectionality is not necessary to find a Title VII violation, so courts need not and should not look any further.⁶¹ As a result, *Bostock* was the nail in the coffin for the Court's acknowledgment of intersectional discrimination theory.

In addition to the Supreme Court deciding *Price Waterhouse*, Professor Crenshaw came out with her seminal work on the theory of intersectional discrimination in 1989.⁶² Since then, hundreds of scholars have applied her theory to various identities, creating a new world of commonly pursued multiple-axis intersectional discrimination claims. As Crenshaw and others have highlighted over the years, the problem is not that claimants do not bring intersectional claims, but rather, that courts are unwilling to recognize these claims through Title VII. A 2011 study found that plaintiffs who bring intersectional discrimination claims under Title VII are “only half as likely to win their cases as plaintiffs who allege a single basis of discrimination.”⁶³ By evaluating both demographic and claim intersectionality discrimination claims between 1965 and 1999,⁶⁴ the study found that plaintiffs who brought claim intersectionality discrimination suits won only 15% of the time, while those who brought single-axis nonintersectional discrimination claims won 30% of the time.⁶⁵ With

59. *Bostock*, 140 S. Ct. at 1744.

60. *Id.*

61. See Ann C. McGinley et al., *Feminist Perspectives on Bostock v. Clayton County*, 53 CONN. L. REV. ONLINE, Dec. 2020, at 1, 7–10.

62. Crenshaw, *supra* note 6.

63. Kahn Best et al., *supra* note 37, at 991.

64. Demographic intersectionality is best described as a plaintiff who has multiple protected-class identities but brings a claim on the basis of one of those identities, whereas claim intersectionality, the type I primarily focus on, encompasses claims brought on the basis of a unique harm affecting the plaintiff's multiple identities. *Id.* at 994–95.

65. *Id.* at 1009. Methodology: the authors of this study retrieved all federal employment opinions from U.S. district and circuit courts between 1965 and 1999, which yielded over 50,000 opinions. Of these opinions, the authors selected a “2 percent random sample, yielding 328 circuit court opinions and 686 district court opinions.” The authors ran bivariate analyses of several demographic factors, including the race and sex of the plaintiff, the mechanism for bringing the claim (i.e., Title VII or Section 1981), and whether the claims brought were intersectional or nonintersectional. The authors found statistical significance (at a ≤ 0.05 threshold p-value) with

only a 13% success rate, nonwhite women won their claims the least, while white men had the highest success rate of 36%.⁶⁶ Although this is the only empirical study conducted on the differences in success between intersectional and nonintersectional lawsuits, qualitative, scholarly writing presents further proof that intersectional claims rarely win, and when they do, it is not on the basis of the plaintiff's intersectional identity.

Part of why intersectional discrimination claimants may have such low success rates in federal courts could be because the Supreme Court has neglected to define its own relationship with the EEOC. The Supreme Court has failed to establish the level of deference that the EEOC is entitled to—something it has done in other areas of administrative law.⁶⁷

Scholars have offered theories as to why the Supreme Court treats the EEOC differently than other agencies. For example, then-Professor Melissa Hart proposed one explanation: discrimination is a subject of “common knowledge,” and not one that requires specialized expertise to adjudicate.⁶⁸ As Hart explains, the Court's reluctance to treat the EEOC the same as other federal agencies, in some ways, contradicts the very purpose of the EEOC. The fact that the legislature believed this country needed an expert body to preside over discrimination claims (evidenced by both the initial enactment of the 1964 Civil Rights Act and the 1972 amendments, which significantly expanded the powers of the EEOC) should demonstrate that discrimination is more than just a subject of “common knowledge.”⁶⁹

The Court's differing treatment of the EEOC and Title VII claims from other areas of administrative law supports my theory that the Court has, if not intentionally, at least carelessly (and perhaps callously) failed to recognize intersectional discrimination. Although the EEOC's recognition of intersectional discrimination has been inconsistent at best, it has still issued decisions that consider it, which the Court could use to influence its decisions. However, *Bostock* serves to indicate that the Court still has no desire to adhere to the EEOC's record when hearing discrimination cases.

II. THEORETICAL DISCORD

In this Part, I compare major feminist, political, and legal theory on sex discrimination with intersectional discrimination theory. There is substantial scholarship on discrimination theory, so I highlight only some of the most

the following factors placed as independent variables: intersectional discrimination claims under Title VII and Section 1981, female plaintiffs, and missing sex. *Id.* at 999, 1009–16.

66. *Id.* at 1009.

67. See John S. Moot, Comment, *An Analysis of Judicial Deference to EEOC Interpretative Guidelines*, 1 ADMIN. L.J. 213 (1987); Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1938 (2006) (“[The Court has] consistently refused to define what level of deference the agency's regulations are owed.”).

68. Hart, *supra* note 67, at 1951.

69. *Id.* at 1951–52.

prominent and influential theories. I begin by describing Professor Crenshaw's theory of intersectional discrimination, which provides the foundation and gold standard for intersectionality theory today. I then discuss Professor Catharine MacKinnon's work on antisubordination theory, which has become the bedrock of Title VII claims. I next offer a brief comparison of intersectionality and antisubordination theory through the work of Professor Angela P. Davis. I conclude with a recent work by Professors Devon Carbado and Cheryl Harris, highlighting the ways that intersectionality and antiessentialism have been conflated. Using their work, I argue that for Title VII to meaningfully work for a broader class of plaintiffs, courts and the EEOC must pay attention to theories of discrimination beyond gender subordination.

A. *Professor Kimberlé Crenshaw and Feminist Legal Theory of Intersectionality*

Crenshaw's theory of intersectional discrimination asks what our current discrimination regime looks like when we center Black women as the starting point of evaluating the impacts of discrimination.⁷⁰ She argues that the traditional framework—viewing discrimination claims as only existing on the basis of sex or race or religion or disability status—erases Black women from the narrative.⁷¹ When the inquiry is focused on what conditions women experienced in sex discrimination claims, courts automatically read in “white” women.⁷² The same is true of race discrimination claims; courts focus on the experiences of Black men, again leaving Black women out of the analysis altogether.⁷³ Consequently, Crenshaw argues, “bottom-up” approaches, which lump all discriminatees together to challenge the entire system of discrimination, are inhibited by their limited scope, leaving Black womanhood and other intersectional identities out of the challenge.⁷⁴ Because Black women are left out, they are forced to “fend for themselves,” compounding their isolation within the legal system.⁷⁵

In addition to steamrolling intersectionality theory in sex discrimination cases, courts have also rejected theories of intersectional discrimination by using white women as the baseline to prove discrimination. In doing so, courts refuse to acknowledge statistics demonstrating the disparities Black women

70. Crenshaw, *supra* note 6, at 140.

71. *Id.* Crenshaw specifically argues that the traditional model of discrimination only serves the privileged members of discrete classes because the inquiry has been limited to the experiences of those individuals. *Id.*

72. *Id.* at 144–45.

73. *See id.* at 145, 152 (“As a result, both feminist theory and antiracist politics have been organized, in part, around the equation of racism with what happens to the Black middle-class or to Black men, and the equation of sexism with what happens to white women.”).

74. *Id.* at 145.

75. *Id.*

face as a result of their multiple identities.⁷⁶ Critically, Crenshaw recognizes that this precludes all possibility for Black women to bring many claims; Black women seem like contradictions under the current discrimination regime.⁷⁷ Think of Mary. What would her options have been if she tried to file a lawsuit for her lack of promotion? Without either female or Black peers with the same experiences, a court has no way to understand Mary's claim.⁷⁸ In other words, "Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men."⁷⁹ Crenshaw not only brought intersectional discrimination to mainstream legal academic discourse, but also identified what courts have failed to acknowledge in the past twenty-five years: intersectional discrimination creates a distinct, dignitary, and political harm that Title VII jurisprudence has not yet recognized.⁸⁰

B. *Gender Subordination Doctrine and Gender Essentialism*

Antisubordination doctrine stands for the theory that society was created in the male essence, and as such, equality doctrine is deeply rooted in male standards.⁸¹ Professor Catharine MacKinnon, a prominent feminist legal

76. *Id.* at 148. As indicated earlier in this Note, though I use certain language to highlight my point that the courts have failed to recognize intersectional discrimination broadly, there are persons with numerous identities who experience this kind of discrimination beyond those I discuss. Here, I discuss Black women because they are the primary population that Crenshaw focuses on in her work, not because they are the only group that faces intersectional discrimination.

77. *Id.* at 149–50.

78. See Carbado & Gulati, *supra* note 1, at 712–13.

79. Crenshaw, *supra* note 6, at 149–50.

80. *But see* Murray, *supra* note 22. For all of Pauli Murray's efforts to ensure the sex amendment made it into Title VII, largely to ensure that Black women would be covered by the new law, Crenshaw is right that such intentions were quickly forgotten by mainstream legal discourse and judicial decisionmaking.

81. CATHERINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 32 (1987) (explaining the "difference" model of feminism as those who are alike receiving equality, and those who are different not receiving equality; critiquing the model for failing where the sexes are not the same, for instance, in gendered wrongs that men do not also experience; and advocating instead for a "dominance" theory of feminism); MACKINNON, *Sexual Harassment: Its First Decade in Court*, in FEMINISM UNMODIFIED, *supra*, at 103, 107 ("Sexual harassment . . . inhabits what I call hierarchies among men . . . some men are below other men, as in employer/employee and teacher/student . . . the reason sexual harassment was first established as an injury of the systematic abuse of power in hierarchies among men is that this is power men recognize."); Abigail Nurse, Note, *Anti-Subordination in the Equal Protection Clause: A Case Study*, 89 N.Y.U. L. REV. 293, 300, 300 n.33 (2014) (equating the dominance theory of feminism with antisubordination doctrine).

scholar and the founder of dominance theory,⁸² or unmodified feminism, describes it as a “theor[y] of the totality.”⁸³ Dominance theory conceptualizes sex discrimination as rooted in power and “unequal distribution,” by which men maintain control over women through gender structures, including heterosexuality and family norms.⁸⁴ Crenshaw criticizes prominent interpretations of Title VII as excluding the experiences of Black women, and in doing so, she explains that antistatutory doctrine focuses on policing male oppressive behavior rather than exploring ways to empower women and close the power gap.⁸⁵

Before I go further, I would be remiss if I did not note that MacKinnon remains one of the most prolific feminist legal scholars of all time. Although I highlight the ways in which her work has fallen short, I do not mean to suggest that her decades of contributions are not without worth. To put it shortly: American women would not be where they are today without MacKinnon.⁸⁶

Critics have labeled MacKinnon’s gender subordination theory “gender essentialist.”⁸⁷ Essentialism can be defined as “the set of fundamental attributes which are necessary and sufficient conditions for a thing to be [considered] a thing of that type.”⁸⁸ Another essentialist, Professor Robin West, provides a useful point of comparison to MacKinnon.⁸⁹ West’s essentialism

82. MACKINNON, *Difference and Dominance: On Sex Discrimination*, *supra* note 81, at 32; see also Andrea Mazingo, Note, *The Intersection of Dominance Feminism and Stalking Laws*, 9 NW. J.L. & SOC. POL’Y 335, 337 (2014).

83. See MACKINNON, *Desire and Power*, in FEMINISM UNMODIFIED, *supra* note 81, at 46, 49.

84. *Id.*; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 590 (1990).

85. See Crenshaw, *supra* note 6, at 154–55. For case law that exemplifies MacKinnon’s theory of antistatutory doctrine, see *American Booksellers Assoc. Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (arguing pornography that displays women in a discriminatory or hostile manner should be banned in the interest of preventing violence against women), *aff’d mem.*, 475 U.S. 1001 (1986).

86. Ginia Bellafante, *Before #MeToo, There Was Catharine A. MacKinnon and Her Book ‘Sexual Harassment of Working Women,’* N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/books/review/metoo-workplace-sexual-harassment-catharine-mackinnon.html> [<https://perma.cc/P43X-T8US>]. MacKinnon quite literally wrote the book on sexual harassment and was one of the first to theorize sexual abuse as a violation of equality rights. See *Catharine A. MacKinnon Faculty Profile*, HARVARD LAW SCHOOL, <https://hls.harvard.edu/faculty/directory/10540/MacKinnon> [<https://perma.cc/4YHW-GPJJ>].

87. MacKinnon does not describe her own work as “gender essentialist.” Rather, this is a term ascribed to her theory by various feminist scholars over the years. See, e.g., Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273, 280–85 (1999); DRUCILLA CORNELL, *BEYOND ACCOMMODATION* 4–6 (1991).

88. Wong, *supra* note 87, at 274.

89. It may be unfair to categorize the two together because they present different flavors of essentialism in their work. Among other differences, MacKinnon at least notes race in her work, while West’s early writing makes no mention of race impacting feminism, and she presents a firmer, more universal view of essentialism. See *infra* notes 100–101.

manifests in her view that women are “ontologically distinct from men.”⁹⁰ Therefore, she believes that the law has not failed to view men and women as equal, but rather it has failed to understand the differences between men and women, thus relegating women and their injuries to a subordinate status.⁹¹

Although MacKinnon does not view herself as a gender essentialist, her emphasis on the differences between men and women contain echoes of West’s theory and sparks the essentialist label. In addition to underscoring the importance of recognizing that men and women are different, she has on several occasions criticized women who believe otherwise. Specifically, MacKinnon’s work posits that viewing women as politically distinct is necessary to effectively counteract the power imbalances that exist between women and men.⁹² To MacKinnon, all women are united in their lesser political status to men and should embrace the bonds of womanhood over other aspects of their identities.⁹³

MacKinnon’s view of how to treat race and sex discrimination is exemplified by a case study in *Feminism Unmodified*. In the book, MacKinnon presents her reading of *Santa Clara Pueblo v. Martinez*.⁹⁴ The plaintiff in the case, Julia Martinez, was a Santa Clara Pueblo tribe member who married a non-member.⁹⁵ The tribe had an ordinance providing that children of women who married outside the tribe were not tribal citizens, while children of men who married outside the tribe were.⁹⁶ Martinez’s daughter brought an equal protection claim against the tribe, asserting that the ordinance discriminated on the basis of sex.⁹⁷ The tribe defended the ordinance by claiming “membership is a prerogative of tribal sovereignty” and thus falls beyond the scope of federal

90. Harris, *supra* note 84, at 602.

91. CORNELL, *supra* note 87, at 22–24.

92. MacKinnon is not a biological essentialist, and she has, since 1977, discussed the importance of including transgender women in narratives of discrimination and dominance. See Cristan Williams, *Sex, Gender, and Sexuality: An Interview with Catharine A. MacKinnon*, THE CONVERSATIONS PROJECT (Nov. 27, 2015), <http://radfem.transadvocate.com/sex-gender-and-sexuality-an-interview-with-catharine-a-mackinnon/> [https://perma.cc/UDS3-XE5F].

93. For a deeper critique of how this brand of essentialism excludes women of color, see *infra* Section II.C.

94. MACKINNON, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo*, in *FEMINISM UNMODIFIED*, *supra* note 81, at 63–69; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The case presented a jurisdictional issue as to whether a federal court may pass on the validity of an Indian tribe’s denial of membership to children of female tribe members whose husbands were not members of that tribe. *Santa Clara Pueblo*, 436 U.S. at 51. The respondents alleged discrimination on the basis of sex and ancestry under Title I of the Indian Civil Rights Act of 1968. *Id.* The Court ultimately held that federal courts did not have such jurisdiction and refused to review the substantive discrimination matter. *Id.* at 72.

95. *Id.* at 52.

96. Shefali Milczarek-Desai, *(Re)Locating Other/Third World Women: An Alternative Approach to Santa Clara Pueblo v. Martinez’s Construction of Gender, Culture and Identity*, 13 *UCLA WOMEN’S L.J.* 235, 236 (2005).

97. *Id.*

jurisdiction.⁹⁸ While this case is a significant landmark for tribal sovereignty, it was heavily criticized by MacKinnon because Martinez seemingly chose her tribe over her womanhood.⁹⁹

MacKinnon was troubled by the ordinance because she viewed it as requiring women to choose between their equality as women and their cultural identity.¹⁰⁰ Perhaps more importantly, MacKinnon viewed the solution to Martinez's conflict as having the federal government intervene on her behalf instead of exploring less paternalistic options that would not threaten tribal sovereignty.¹⁰¹ Professor Angela P. Harris offers a powerful discussion of the harms of MacKinnon's limited view of the case.¹⁰² Namely, she points out that asking why Santa Clara Pueblo women are forced to choose between their identities ignores that such discrimination happens *precisely because* they hold both of these identities.¹⁰³ Harris purports that "Martinez is made to choose her gender over her race" per MacKinnon's urging, "and her experience is distorted in the process."¹⁰⁴

Martinez established that it "was constitutionally permissible for the Pueblo to enforce a membership ordinance that expressly treated female members in a disabling and different way than male members."¹⁰⁵ MacKinnon highlights this case in a book reflecting on the Indian Civil Rights Act to discuss the notion of "parallel strata," the idea that various aspects of identity, such as race and gender, are separate.¹⁰⁶ She argues that Martinez "incorrectly" chose her race over her gender.¹⁰⁷ MacKinnon asserts that her initial engagement with the case "took no position on the outcome" and "pointed out that the decision won an advance in sovereignty for Native peoples on the backs of Native women."¹⁰⁸ She also argues that this perspective is not essentialist because her analysis focuses on social constructs like sexuality and cultural membership, and by definition something that is a social construct cannot be essentialist.¹⁰⁹ MacKinnon views sex equality as a collective right rather than

98. *Id.*

99. For additional examples of MacKinnon's critiques on *Martinez*, see *id.* at 269–71.

100. MACKINNON, *supra* note 94, at 67–68.

101. *Id.*

102. Harris, *supra* note 84, at 594–95.

103. *Id.*

104. *Id.*

105. Gloria Valencia-Weber, *Santa Clara Pueblo v. Martinez: Twenty-five Years of Disparate Cultural Visions: An Essay Introducing the Case for Re-argument Before the American Indian Nations Supreme Court*, 14 KANSAS J.L. & PUB. POL'Y 49, 49 (2004).

106. Catharine A. MacKinnon, *Martinez Revisited*, in *THE INDIAN CIVIL RIGHTS ACT AT FORTY 27* (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley eds., 2012).

107. *Id.* at 30; Cf. Valencia-Weber, *supra* note 105 (arguing that Martinez choosing her race was an important exercise of tribal sovereignty that should be celebrated and not chastised).

108. MacKinnon, *supra* note 106, at 28.

109. *Id.*

an individual one. In this way, she likens sex equality to indigenous rights, which she believes are also “presumed to be collective rights.”¹¹⁰

MacKinnon argues that others, including many indigenous scholars, misunderstand her theories.¹¹¹ She believes that it is a mere fact that the advancement of tribal rights came at the expense of gender equality.¹¹² If viewed through a lens of intersectionality, MacKinnon’s argument can be seen as artificially separating and pitting race and gender against each other, when in reality the two are inseparable qualities of Martinez.

Critiques aside, MacKinnon’s theories directly led to the framework of sexual harassment theory that the EEOC utilizes to this day, specifically through her description of two major categories of sex discrimination: quid pro quo and hostile work environment.¹¹³ Thus, dominance theory and anti-subordination doctrine are at the core of all Title VII claims in the United States. It is no wonder, then, that Title VII fails to capture intersectional discrimination. If you ask MacKinnon, she is not likely to say that her body of work is antithetical to intersectionality. She has even gone as far as to recognize that the Court has “truly miss[ed]” the point of intersectional discrimination.¹¹⁴ However, what she fails to recognize is that Title VII forces plaintiffs to do exactly what she wanted Martinez to do: choose. Even though MacKinnon recognizes the value of intersectional discrimination as a methodology, the law has not caught up. Rooting Title VII *solely* in antisubordination theory precludes an interpretation founded on intersectional discrimination theory.

C. Professor Angela P. Harris and Critiques of Traditional Gender Subordination Doctrine

Although dominance theory and antisubordination theory are the theories best reflected in our discrimination law, scholars have been critical of

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The women’s loss is framed as individual rather than as group-based, as the Pueblo’s authority to discriminate based on sex is affirmed with no sign of concern, raising a further question about the substance of the sovereignty that indigenous peoples win in communities built on defending a right to women’s inequality within them. Who will pay or is paying the price for women’s sovereignty? When, where, and by whom is that fight being joined, if not by women like the Martinez women? Who will stand with them to share the price they pay?

Id. at 28–29, 30–31.

111. *Id.* at 28–30.

112. *Id.*

113. MACKINNON, *Sexual Harassment: Its First Decade in Court*, *supra* note 81, at 109–10; *Policy Guidance on Current Issues of Sexual Harassment*, EEOC (Mar. 19, 1990), <https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment> [<https://perma.cc/2WX4-3TFL>].

114. Catharine A. MacKinnon, *Intersectionality as Method: A Note*, 38 SIGNS: J. WOMEN CULT. & SOC. 1019, 1022 (2013).

these approaches for years. Professor Angela P. Harris emphasizes that historically favored theories of oppression, including MacKinnon's dominance theory, tend to essentialize along lines of race and gender.¹¹⁵ The resulting outcome of this essentializing reduces "the lives of people who experience multiple forms of oppression to addition problems: 'racism + sexism = straight black women's experience,' or 'racism + sexism + homophobia = black lesbian experience.'" ¹¹⁶ As Professor Leticia Saucedo specifies, antiessentialist theory warns against reducing experiences and identities into something compact and monolithic because doing so prevents the law from identifying how other class identities "interact differently to create subordination."¹¹⁷

For Harris, one of the biggest problems with antisubordination theory is that it is a nonintersectional mode of identifying discrimination. The doctrine is wholly inadequate in explaining discrimination claims that implicate both gender and race and, though MacKinnon and others have acknowledged this, they continue to "sh[y] away from its implications."¹¹⁸ MacKinnon believes that sex and race should be viewed as "parallel strata" and does not consider what dominance theory would look like if those "strata" intersected.¹¹⁹ But by trying to create a theory that speaks for "all persons," Harris notes that MacKinnon's antisubordination theory and modern Title VII jurisprudence ignore the ways in which not all people are the same—and true equity requires different treatment.¹²⁰

Harris's analysis triumphs in what MacKinnon and other antisubordination theorists overlook: a nonintersectional theory of discrimination "ensure[s] that black women's voices will be ignored."¹²¹ She explains that any successful "post-essentialist" feminist legal theory must rely on Black women's voices to recognize "a self that is multiplicitous, not unitary."¹²² In other words, Harris asks us to see and embrace the differences within ourselves, not to collapse them in search of a nonexistent, homogenous group that could somehow stand up to the present political power imbalance. There will never be a single, essential female experience, so feminist legal theory must evolve to account for the many experiences of women. Similarly, Title VII doctrine must embrace this new legal theory to properly address the fact that women experience no single, essential discriminatory harm.

115. Harris, *supra* note 84 at 585; *see supra* Section II.B.

116. Harris, *supra* note 84, at 588; *see Saucedo, supra* note 5, at 259.

117. Saucedo, *supra* note 5, at 259.

118. Harris, *supra* note 84, at 592.

119. *See id.* at 593 (citing Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 537 n.54 (1982)).

120. Here, Harris describes the differences between formal and substantive equality in the law. *See Note, Feminist Legal Analysis and Sexual Autonomy: Using Statutory Rape Laws as an Illustration*, 112 HARV. L. REV. 1065, 1065–66 (1999).

121. Harris, *supra* note 84, at 592.

122. *Id.* at 608.

D. *Intersectionality, Dominance Theory, and Antiessentialism Compared*

It would be a mistake to conflate intersectionality and antiessentialism theory. Similarly, although they may facially seem at odds with each other, it is too reductionist to argue that intersectionality and dominance theory are wholly incompatible. Professors Devon Carbado and Cheryl Harris explain that, while Angela P. Harris is quite critical of MacKinnon and dominance theory, Crenshaw has always been clear that intersectionality is a critique of white feminism, not dominance.¹²³ Instead, Carbado and Harris suggest that essentialism is a descriptive—not a normative—tool that cannot so easily be labeled as “good” or “bad.”¹²⁴ For example, Professor Diana Fuss contends that essentialism does not necessarily entail subordination, nor does antiessentialism “always function[] to dismantle or undermine subordination.”¹²⁵

Additionally, Carbado and Harris emphasize that contrary to popular belief in progressive academic circles, intersectionality and dominance theory are not incompatible.¹²⁶ Crenshaw herself has highlighted MacKinnon’s contributions and their relevance to intersectionality.¹²⁷ She describes the “sameness/difference” paradox that is central to both antidiscrimination work and dominance theory as the glue that binds the two.¹²⁸ As Crenshaw outlines, the paradox is also at the core of both antisubordination and intersectionality doctrine.¹²⁹ It is simply another way of framing antidiscrimination doctrine. Both theories describe discrimination law’s failure as the result of conditioning recovery on the basis of sameness to other groups. For Crenshaw and antidiscrimination theory, the “other” is Black men and white women; for MacKinnon, the “other” is men.¹³⁰

Presently, lawyers and judges alike think about Title VII as a statute that can only lead to successful outcomes for plaintiffs when they pinpoint their best, most winnable claim based on one discrete part of their identity. As a result, tens of thousands of plaintiffs who have multiple identities and have experienced harm are left out of the narrative.¹³¹ To adequately recognize the harm intersectional plaintiffs experience, we must instead view Title VII as a “make-whole” relief system that gives plaintiffs the opportunity to have their injury recognized, both at the liability and the remedy phase of litigation. Any

123. Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2200–04 (2019).

124. *Id.* at 2203–04.

125. *Id.* at 2205.

126. *Id.* at 2203–04.

127. See generally Kimberlé W. Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151 (2010).

128. *Id.* at 155–56.

129. *Id.* at 156, 166 n.45.

130. See *id.* at 156.

131. See *supra* notes 63–66.

“make-whole” system will necessarily require viewing claims through an intersectional lens.

A new conception of Title VII and antidiscrimination law emerges when intersectionality, antiessentialism, and dominance theory are viewed as linked instead of as competing. When the Supreme Court held that sex stereotyping was discrimination on the basis of sex,¹³² it adopted a gender-essentialist, dominance framework for discrimination law, though perhaps unwittingly. While others may view this decision as a rejection of essentialism, the fact remains that judges, juries, and lawyers are now trained to think about discrimination in terms of what is or is not a stereotype.¹³³ Focusing on what permissible views of women are and are not necessarily means a court is not considering the actual *harms* experienced by claimants.

Perhaps this is all a feature of the “sameness/difference” paradox and is unavoidable in any interpretation of Title VII. Even so, a shift needs to be made from focusing on the *categorization* of people as being women, being stereotyped as women, etc., and toward an “individual-first” or “remedy-based” approach, asking what harm was experienced and how we can remedy that harm to make that person whole. A shift in focus to an individual-first or remedy-based approach that embraces intersectionality could radically improve the way discrimination claims are adjudicated in America.

III. A PATH FORWARD

So, what does an “individual-first” discrimination regime look like? To start, it is important to lay out what options we have. Two determinations must be made in any civil action: liability and damages. In a perfect world,¹³⁴ there would be space to recognize the harm of intersectional discrimination in both places. The unique harm experienced by multiple-axis claim-discrimination plaintiffs requires more than simply increasing damages awards as if being subjected to dual discrimination could be reduced to some kind of multiplying factor.

Perhaps practitioners should focus on obtaining damages awards that are more commensurate with the great harm their clients experience. Nearly

132. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

133. *See id.*

134. Although, perhaps in a perfect world, parties could avoid the legal system in the first place. With a judiciary that continues to narrow the conduct that it views as severe enough to warrant even being heard by a jury, let alone what can win, the law may not be the best avenue for most civil discrimination claims. *See* Alexia Fernández Campbell, *How the Legal System Fails Victims of Sexual Harassment* VOX (Dec. 11, 2017, 12:20 PM), <https://www.vox.com/policy-and-politics/2017/12/11/16685778/sexual-harassment-federal-courts> [https://perma.cc/8KM5-HL7F]. If courts are not the best route, other forms of conflict resolution such as mediation may be a better investment. For a more comprehensive analysis of the benefits and limitations of mediation in employment discrimination cases, see Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 BERKELEY J. EMP. & LAB. L. 321 (2005).

three-fourths of all Title VII cases result in settlement and, as one study highlights, only about one percent of plaintiffs who sue under Title VII win on the merits of their cases at trial.¹³⁵ Currently, law firms purport the average out-of-court settlement in a standard employment discrimination case is about \$40,000.¹³⁶ This data represents the total amount of economic, noneconomic, and punitive damages, as well as any attorneys' fees that may accompany the settlement verdict.¹³⁷ This data point may be a bit misleading, though, because the EEOC places limits on the compensatory and punitive damages plaintiffs may recover based on the size of their employer.¹³⁸ Even with the prospect of seemingly low damages, plaintiffs have every incentive to settle and put their discrimination case behind them. And for those who do make it as far as trial, they come face to face with a legal regime stacked against them. It is a wonder any cases make it to trial at all.

As originally written, Title VII only allowed the recovery of economic damages for the amount of pay plaintiffs lost and their attorney's fees.¹³⁹ It was not until the Act was amended in 1991 that Congress recognized the need for a more complete form of relief that allowed plaintiffs to recover damages for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."¹⁴⁰ This amendment represented a shift in the purpose of Title VII. Prior to 1991, the Act was intended to only provide compensation for "injuries of an economic character," as discrimination was something the legal system cared about only as far as it interfered with one's ability to work.¹⁴¹ The Court acknowledged that Title VII's purpose was to "make persons whole" for injuries suffered from employment discrimination, but it only viewed these injuries as economic.¹⁴²

The 1991 amendment shows that Congress wanted Title VII to extend beyond mere economic injuries—a shift well-supported by psychological research. Discrimination is not only problematic because it can cause you to lose wages, be overlooked for a promotion, or even get fired. An increasing number

135. Stephen Rynkiewicz, *Workplace Plaintiffs Face Long Odds at Trial, Analytics Data Indicates*, ABA J. (July 17, 2017, 8:00 AM), https://www.abajournal.com/news/article/workplace_trial_analytics_lex_machina [<https://perma.cc/CZY3-GD9X>].

136. *What Is My Employment Discrimination Case Worth?*, KING & SIEGEL LLP (May 5, 2021), <https://www.kingsiegel.com/blog/what-is-my-employment-discrimination-case-worth/> [<https://perma.cc/UR6G-6TM9>]. A study of settlements from 1987-2001 supports this estimate. At that time, the average settlement amount was \$54,651. Wendy Parker, *Juries, Race, and Gender: A Story of Today's Inequality*, 46 WAKE FOREST L. REV. 209, 222 n.108 (2011).

137. See *What Is My Employment Discrimination Case Worth?*, *supra* note 136.

138. *Remedies for Employment Discrimination*, EEOC, <https://www.eeoc.gov/remedies-employment-discrimination> [<https://perma.cc/ZPU6-SP9B>].

139. Scott A. Moss & Peter H. Huang, *How the New Economics Can Improve Employment Discrimination Law, and How Economics Can Survive the Demise of the "Rational Actor,"* 51 WM. & MARY L. REV. 183, 195–96 (2009).

140. 42 U.S.C. § 1981a(b)(3).

141. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975).

142. *Id.*

of studies have shown that workplace discrimination can cause depression,¹⁴³ heightened stress levels, and even health disparities.¹⁴⁴ By focusing only on the economic harm experienced by plaintiffs, courts miss what really makes discrimination bad: it interferes with our ability to move through the world fearlessly as who we are. This new “make-whole” principle not only addresses this crux of why discrimination law matters, but also perfectly poises the law to embrace intersectionality.

With the “make-whole” principle, the two types of damages that present the largest relative potential gain for plaintiffs are punitive and emotional distress damages.¹⁴⁵ Both have been limited by statute and case law, and punitive damages especially are rare.¹⁴⁶ Still, some creative lawyering, backed by the theoretical lenses I have outlined in Part II, could move the needle on emotional damages as a viable remedy for intersectional discrimination claims. Nothing in Title VII explicitly requires a professional diagnosis or testimony as to the severity of the emotional distress caused by the discrimination. However, case law has placed a *de facto* limit of “four figures or low five figures” for these claims without a professional diagnosis that the alleged behavior caused a “specific psychiatric impairment.”¹⁴⁷ Further, plaintiffs very often decline to pursue the expert testimony needed to prove their psychological harm because of the additional emotional toll required to recount their experiences and because of the monetary cost of hiring such a witness.¹⁴⁸ As Moss and Huang propose, one way around this hurdle would be for courts to adopt a presumption of emotional damage at least for unlawful termination cases instead of the current model which assumes “garden variety” emotional damage that results in no compensation.¹⁴⁹

This proposal presents a good starting point for incorporating an intersectional lens into the remedies process. Taking Moss and Huang’s proposal a step further, instead of forcing plaintiffs with multiple identities to prove that they have experienced discrimination on the basis of several or all of their

143. Wisdom Powell Hammond, Marion Gillen & Irene H. Yen, *Workplace Discrimination and Depressive Symptoms: A Study of Multi-Ethnic Hospital Employees*, 2 RACE & SOC. PROBS. 19, 28 (2010) (studying hospital workers who have experienced workplace discrimination).

144. *The Impact of Discrimination: 2015 Stress in America*, AM. PSYCH. ASS’N (2015), <https://www.apa.org/news/press/releases/stress/2015/impact> [<https://perma.cc/LL5H-J858>].

145. To be clear, neither of these damages types is an ideal vehicle to increase jury awards, but these two areas are not limited by objective constraints like back-pay or front-pay estimates, giving them at least the potential for some wiggle room.

146. As of 2009, punitive damages were rarely awarded in Title VII cases. See Moss & Huang, *supra* note 139, at 198–99.

147. *Id.* at 199–200.

148. See *id.* at 220; see also Carolyn Casey, *Fee Structure and Payment Forms: How Expert Witnesses Are Paid*, EXPERT INSTITUTE (Apr. 22, 2022), <https://www.expertinstitute.com/resources/insights/fee-structure-and-payment-forms-how-expert-witnesses-are-paid/> [<https://perma.cc/J7RB-86J8>] (citing the average hourly rate of a medical expert for record review as \$356 per hour).

149. Moss & Huang, *supra* note 139, at 221–22.

identities, it could be assumed from the start. Then, the burden would fall on the plaintiff to provide medical records, expert testimony, or any other evidence they would like to prove the exact nature of their psychological harm. Doing so would also unroot Title VII as a doctrine currently based in nonintersectional antisubordination theory.

We could also imagine a remedies framework that, in addition to presuming the plaintiff deserves emotional distress damages, also presumes those damages are greater for anyone who has alleged intersectional discrimination. Studies have shown that individuals who experience discrimination along multiple axes have worse impacts than those similarly situated along a single axis.¹⁵⁰ But more importantly, intersectional discrimination has a worse psychological effect than nonintersectional discrimination.¹⁵¹ So, instead of forcing plaintiffs to prove their harm against their peers along a single axis of their identities, plaintiffs should only have to prove the extent of the actual emotional distress they experienced. Such a scheme would align with Title VII's "make-whole" objective and would better serve the principles of intersectionality than anything the courts are currently doing.

CONCLUSION

If Title VII is not working, then who is responsible for making it work? Scholars and practitioners have widely diverging views on this question. Some argue that change has to come from the legislature¹⁵² and, given the current composition of the Supreme Court, that may be the best channel. Others argue that change must come from the EEOC¹⁵³ or even from workplaces in the form of antidiscrimination trainings.¹⁵⁴

150. For example, a 2020 report by the Williams Institute found that LGBTQ people of color experience a higher wage gap than what mathematical models for wages according to race and sexual orientation individually predicted. CHRISTY MALLORY, TAYLOR N.T. BROWN & BRAD SEARS, THE WILLIAMS INST., *THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN VIRGINIA* 29 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-VA-Jan-2020.pdf> [<https://perma.cc/PA8Y-B7TF>].

151. See Javier Alvarez-Galvez & Antonio Rojas-Garcia, *Measuring the Impact of Multiple Discrimination on Depression in Europe*, 19 BMC PUB. HEALTH, article no. 435, Apr. 25, 2019 (finding that experiencing intersectional discrimination led to increased rates of depression as compared to experiencing nonintersectional discrimination).

152. Rosalio Castro & Lucia Corral, Comment, *Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims*, 6 LA RAZA L.J. 159, 172 (1993) (proposing an amendment to Title VII or any combination thereof to create a "legal construct . . . which is responsive to the needs" of multiple identity individuals).

153. See Pappoe, *supra* note 23, at 19.

154. See JoAnna Suriani, "Reasonable Care to Prevent and Correct": Examining the Role of Training in Workplace Harassment Law, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 813–815 (2018). Although who is truly arguing that we need more trainings? For an example of the smattering of studies that show antidiscrimination and antibias trainings do not work, see Frank Dobbin & Alexandra Kalev, *Why Doesn't Diversity Training Work? The Challenge for Industry and Academia*, ANTHROPOLOGY NOW (Oct. 27, 2018), <http://anthronow.com/uncommon-sense/why-doesnt-diversity-training-work> [<https://perma.cc/SDC3-7U4S>].

Regardless of how the change is made, and what that change brings, lawyers, legislators, and judges alike must consider the values they want to center. It is, of course, worth asking whether recognizing intersectional discrimination matters at all, particularly in light of a Supreme Court opinion that seemed to suggest textual support for the recognition of a broad range of discrimination.¹⁵⁵ Still, regardless of whether the current regime provides adequate remedies, we must continue to ask whether it is possible for the law to address these harms. Empirical data demonstrates that Title VII is not currently serving that role.¹⁵⁶ Reexamining the major theory on intersectionality and the scholarship on the failure of dominant feminist legal theory to embrace intersectionality provides an important starting point. But, to create any lasting change, the legal profession must broaden the scope of harms it considers worthy of its time.

155. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

156. See *supra* notes 63–66 and accompanying text.

