# The Fifth Black Woman

DEVON W. CARBADO*
MITU GULATI**

## I. INTRODUCTION

This symposium raises a pointed question about intersectionality: What is its future? The short answer is that the future of intersectionality is promising. In part, this promise derives from the foundation intersectionality has laid for the construction of an entire set of new theories of discrimination. One such theory is identity performance. In a nutshell, the theory of identity performance is that a person's experiences with and vulnerability to discrimination are based not just on a status marker of difference (call this a person's status identity) but also on the choices that person makes about how to present her difference (call this a person's performance identity).[1] For example, take a person with the status of a male. This person makes choices (dress, hair style, accent, etc.) about how to present that maleness. These choices may be highly constrained by societal and other pressures,[2] but they are nevertheless

* Acting Professor of Law, University of California at Los Angeles.

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1. For a general discussion of identity performance theory, see Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000). *See also* Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103 (2001) (discussing the relationship between identity performance and the norms and structures of institutions). Certainly we are not the first to employ the term identity performance in the context of a discussion about discrimination. Perhaps the most widely cited person on the subject is Judith Butler. *See* JUDITH BUTLER, BODIES THAT MATTER (1993). For a discussion of how our theory of identity performance differs from Butler's, see Carbado & Gulati, *supra* at 1265, n.11.

2. *See* Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76, 97-105 (2000) (discussing gender identity in terms of societal norms about appropriate and inappropriate "male" and "female" behavior).

choices about performance.[3] Understanding the relationship between discrimination and performance, we argue, is crucial to developing a plausible and coherent theory of discrimination. The insights of intersectionality theory provide a useful point of departure for the development of identity performance theory.

Among other things, intersectionality pushes for the legal recognition and delineation of specific status identities.[4] The notion is that particular social groups (e.g., black people) are constituted by multiple status identities (e.g., black lesbians, black heterosexual women, and black heterosexual men). According to intersectionality theory, the different status identity holders within any given social group are differently situated with respect to how much, and the form of, discrimination they are likely to face. Intersectionality argues that, in ascertaining whether a particular individual is the victim of discrimination, courts should pay attention to the specific status identity that the person occupies. For example, if the plaintiff bringing a discrimination suit is a heterosexual Asian American female attorney, courts should adjudicate her discrimination claim with that status identity in mind. More specifically, the fact that the employer in question treated Asian American men (or white or other women) well should not be taken as dispositive evidence that the employer did not either exhibit animus towards or harbor negative impressions of Asian American women.

The significance of paying attention to the plaintiff's specific status

3. *See* generally BUTLER, *supra* note 1 (arguing that gender is always already a performance).

4. *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 [hereinafter Demarginalizing the Intersection] (discussing the inability of racial and gender subordination theories to fully address discrimination against black women); Pamela J. Smith, *Part II—Romantic Paternalism —The Ties That Bind: Hierarchies of Economic Oppression That Reveal Judicial Disaffinity for Black Women and Men*, 3 J. GENDER RACE & JUST. 181, 224 (1999) (remarking that under Title VII, "a Black woman should be able to have a court see her nuanced, but very real existence, which includes Black group stereotypes, woman group stereotypes, and Black woman subgroup stereotypes"); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 376-81 (1991) (analyzing courts' reluctance to treat both race and sex discrimination claims simultaneously); Alfred Dennis Mathewson, *Emphasizing Torts in Claims of Discrimination Against Black Female Athletes*, 38 WASHBURN L.J. 817 (1999) (arguing that Title IX's gender-based protection does not adequately protect black female athletes). Not all intersectionality theory focuses on woman. Floyd Witherspoon has employed the theory to analyze the particular ways in which black men—because of their race and gender—are vulnerable to being victims of the criminal justice system. *See* Floyd D. Witherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REVIEW 23 (1994).

identity is that it allows courts to consider or allow discovery on the question of whether the plaintiff's discrimination derives from an intra-group distinction. Typically, courts conceptualize racial discrimination as an inter-group distinction, a distinction, for example, between whites and Asian Americans. Under this conceptualization, an Asian American plaintiff, will typically be required to demonstrate that she was treated differently (disparately) from a similarly situated non-Asian American (usually a white) employee.[5] But our hypothetical plaintiff might not be the victim of this form of discrimination. As noted in the prior paragraph, it is possible that her firm prefers Asian American men to Asian American women, discriminating against the latter but not the former. Framing the discrimination question solely in terms of the plaintiff's *Asian American* identity ignores the fact that the plaintiff's discrimination could be a function of her more specific status identity, her identity as an *Asian American female*.

The project of this Essay is to demonstrate how identity performance theory—the area of discrimination in which we have done most of our work—builds on intersectionality's insight that discrimination is based both on inter-group and intra-group distinctions. Central to performance theory is the idea that to fully appreciate a person's vulnerability to an intra-group distinction, identity performances must be taken into account. This is because intra-group distinctions are based not only on identity status but on identity performance as well. More concretely, while it is certainly true that a firm might prefer Asian American women to Asian American men (an intra-racial status distinction), it is also true that a firm might prefer quiet and passive Asian American women to Asian American women who do not exhibit those characteristics (an intra-racial performance distinction). Intersectionality does not capture the latter distinction, a distinction that performance theory conceptualizes as discriminatory.

The argument develops as follows. Part II presents a taxonomy for organizing the basic ideas of intersectionality. The discussion here is summary. Its purpose is to provide an intellectual context for the specific intersectionality problem Part III identifies: the race and gender problem using the standard example of the black female employee who is denied her discrimination claim because the employer was shown to

5. Of course, this simple comparison to white men (who were taken as the norm) has become more complex since discrimination law was expanded to recognize claims by white men themselves.

have no animus towards either black men (i.e., no racial animus) and no animus towards white women (i.e., no gender animus). Part III articulates the nature of this problem and provides an indication of how intersectionality helps to ameliorate it. Part IV articulates the identity performance problem. Using what we call "the problem of the fifth black woman," it argues that the solution of intersectionality (recognizing the ways in which status identities are interconnected) does not capture this particular problem. Part V explains why this is an anti-discrimination problem. Part VI concludes with some thoughts as to directions that future work in the area might take.

## II. INTERSECTIONALITY: THE IDEAS

More than ten years ago, Kimberlé Crenshaw published *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*.[6] The article remains the preeminent piece of scholarship in this area.[7] In it, Crenshaw identifies an anti-discrimination problem that derives from the employment of "single axis frameworks"[8] to adjudicate discrimination claims brought by black women. These frameworks typically focus on just race or just sex, failing to consider that these two identities interact in ways that materially shape a person's vulnerability to and experiences of discrimination. Crenshaw's insight and, perhaps more important, the clarity with which she articulated the problem, has generated an entire body of literature.[9] Much of that literature expands on Crenshaw's work, pushing the envelope on her insights. A brief

6. Crenshaw, *supra* note 4.

7. Indeed, Crenshaw's essay has been cited in at least 485 articles. At or around the time that Crenshaw was developing her theory of intersectionality, other black women were also thinking about the relationship between race and gender. *See, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Regina Austin, *Sapphire Bound*, 1989 Wis. L. Rev. 539; Caldwell, *supra* note 4; Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989); Madeline Morris, *Stereotypic Alchemy: Transformative Stereotypes and Antidiscrimination Law*, 7 YALE L. & POL'Y REV. 251 (1989). For an elaboration of the intersectionality thesis, see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). For a discussion of the relationship between intersectionality and the Critical Race Theory notion that anti-racist politics should be informed by the "people on the bottom," see Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. (forthcoming 2002).

8. Crenshaw, *supra* note 4, at 139.

9. We note again the extent to which Crenshaw's article is discussed in the legal literature. *See supra* note 7. It bears mentioning as well that this article is part of the women's study canon.

description of some of these developments will help situate our own attempts at building on the original intersectionality insights. The discussion is cursory, but the hope is that it will lay some groundwork for additional thinking on the question of where intersectionality presently is and where it might still need to go.

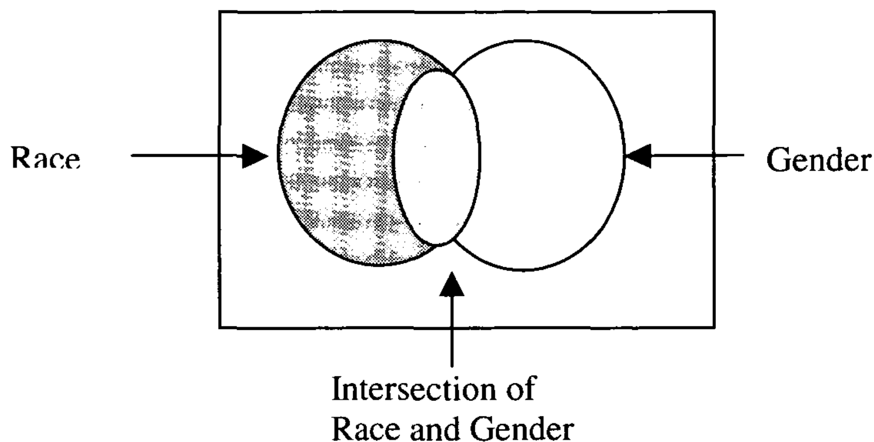
The basic ideas of intersectionality theory, as it stands today, can be organized under the following rubrics: identity intersectionality, experiential intersectionality, discrimination intersectionality, political intersectionality, and multiracial intersectionality. Each rubric is discussed in turn.

### *A. Identity Intersectionality*

#### *1. The Basic Idea*

The theory here is that who we are and are perceived to be is a function of the intersection of different aspects of our personhood (for example, the intersection of our race and our gender). One can read this idea to mean that our personhood can be disaggregated into its constitutive parts—that, for example, our race can be separated from our gender. This is because the notion that two things "intersect" brings readily to mind a Venn diagram within which each thing exists both inside and outside of the intersection. Indeed, this is the conception of intersectionality that students who are being introduced to Critical Race Theory most often articulate. Below is an indication of how race and gender might be represented in such a diagram.

FIGURE 1
THE RACE/GENDER INTERSECTION



The diagram suggests that there are social moments in which race and gender exist apart from each other as "pure" identities. Although the *metaphor* of intersectionality conveys this idea, the fuller *theory* of intersectionality, and certainly Crenshaw's conceptualization of this theory, rejects it. Fundamental to intersectionality theory is the notion that race and gender are interconnected; they do not exist as disaggregated identities (in other words, there are no non-intersecting areas in the diagram). In this sense, there is a tension between the substantive theory that identity intersectionality presents and the conception of identity that the intersectional metaphor invites. Perhaps because of this tension, some scholars have employed other terms—cosynthesis,[10] multidimensionality,[11] multiple consciousness,[12] compoundedness,[13] interconnectivity,[14] and multiplicity[15]—to discuss the "single axis" problem (or some variation of the problem) that Crenshaw identified.

### *2. The Basic Idea Transcends Race and Gender*

Although intersectionality emerged as an intervention into the dominant subject position from which race discrimination and sex

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10. *See* Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1280 (1997) (suggesting that "[c]osynthesis offers a dynamic model whose ultimate message is that multiple categories through which we understand ourselves are sometimes implicated in complex ways with the formation of categories through which others are constituted").

11. *See* Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997) (discussing the interaction between racial, class, and sexual oppression).

12. *See* Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297 (1992) (explaining the ability of women of color to view their lives as being affected by both race and sex oppressions).

13. *See* Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. Rev. 1467 (2000) (recognizing that discrimination might be based on more than one facet of a person's identity and suggesting that identity and discrimination are "compounded").

14. *See* Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Interconnectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25 (1995) (arguing that although racial and gender differences among sexual minority communities exist, these communities are nonetheless linked by Euro-patriarchal subordination).

15. *See* Adrien Katherine Wing, *Brief Reflections Toward a Multiplicative Theory and Praxis of Being*, 6 BERKELEY Women's L.J. 181 (1990-91) (observing that each person has multiple identities that constitute one indivisible being).

discrimination claims were framed (black male and white female identities, respectively), the theory quickly developed to account for other axes of difference. There now exists a burgeoning literature integrating class and sexual orientation into the intersectionality framework.[16] The aim is not simply to make particular identity categories visible, it is also to center those categories in anti-discrimination law and politics. To the extent, for example, that judges recognize that black lesbians exist and understand that there is a particular racial materiality to that identity status (e.g., that black lesbians and black heterosexual women do not experience racial discrimination in the same way), they are more likely to deem that identity legally cognizable. If that occurred, black lesbians would be able to bring *racial* discrimination claims as *black lesbians*.

### *B. Experiential Intersectionality*

Two key points capture experiential intersectionality. The first is that people are differentially vulnerable to discrimination based on the specific ways in which their identities intersect. In other words, the differential experience of discrimination is a function of the intersection of identities. For example, a white heterosexual male is less likely to be a victim of discrimination than an Asian American heterosexual female. Whereas in most contexts, the intersectional identity of the former is privilege-conferring, the intersectional identity of the latter is subordinating. The equation, and the experience of discrimination, likely would be markedly different if we altered heterosexual to homosexual for either one of the people in the example.

The second point is that the nature and extent of one's vulnerability to

16. *See e.g.*, RACE, CLASS, AND GENDER: AN ANTHOLOGY (Margaret L. Andersen & Patricia Hill Collins eds., 1992); BROTHER TO BROTHER: NEW WRITINGS BY BLACK GAY MEN (Essex Hemphill ed., 1991); PIECE OF MY HEART: A LESBIAN OF COLOUR ANTHOLOGY (Makeda Silvera ed., 1991); URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY & LESBIAN LIBERATION (1995) (discussing sexual orientation, racial, gender, and class equality). Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103 (year) (discussing how lesbian legal theory has been insufficiently attentive to race and class); Eric Heinze, *Gay and Poor*, 38 HOW. L.J. 433 (1995) (suggesting that civil rights activism needs to be informed by the particular needs of poor lesbians and gays); Joan W. Howarth, *First and Last Chance: Looking for Lesbians in Fifties Bar Cases*, 5 S. CAL. L. REV. & WOMEN'S STUDIES 143 (1995) (analyzing how race, gender, and class are implicated in state efforts in the 1950s to close gay bars).

discrimination is not a constant (even if one's status categories remain the same). An identity intersectionality that is marginalized in one context might be privileged in another. For example, the Asian American heterosexual female mentioned above may be privileged in an Asian American social or political setting in which heterosexuality is presumed and/or operates as the preferred sexual orientation.[17]

### *C. Discrimination Intersectionality*

The claim here is that the systems of discrimination–e.g., racism, sexism, homophobia, and classism—are themselves intersectional.[18] As in the case of identity intersectionality, the intersectional metaphor invites us to imagine a Venn diagram. Consider what this diagram might look like with respect to racism and sexism: both would exist inside and outside the intersection. There is the question, again, of whether the intersection metaphor captures the substantive intersectional argument. Although this issue is under-theorized, there is some suggestion that racism and sexism do not exist as disaggregated and independent systems of discrimination.[19]

### *D. Political Intersectionality*

Political intersectionality suggests that the intersectionality problem is not just doctrinal, it is political as well. Consider, for example, how particular civil rights communities articulate political claims for equality. Historically, those communities have privileged the experiences of the most advantaged members of the identity group they represent. For example, the discourse on women's rights has come under much attack

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17. *See e.g.,* Devon W. Carbado, *The Construction of O.J. Simpson as a Racial Victim, in* BLACK MEN ON RACE, GENDER, AND SEXUALITY 159 (Devon W. Carbado ed., 1999) (discussing the privileged victim status of heterosexual men in antiracist discourse).

18. *See* Audre Lorde, *Age, Race, Class, and Sex: Women Redefining Difference, in* WOMEN: IMAGES AND REALITIES 361, 362 (Amy Kesselman et al. eds., 1999) (*"Racism, the belief in the inherent superiority of one race over all others and thereby the right to dominance. Sexism, the belief in the inherent superiority of one sex over the other and thereby the right to dominance. Ageism. Elitism. Classism."*).

19. *See id.* ("Somewhere, on the edge of consciousness, there is what I call a *mythical norm* . . . . In America, this norm is defined as white, thin, male; young, heterosexual, Christian, and financially secure. It is with this mythical norm that the trappings of power reside within this society."); PETER BLOOD ET AL., UNDERSTANDING AND FIGHTING SEXISM: A CALL TO MEN IN RACE, CLASS, AND GENDER: AN ANTHOLOGY (Margaret L. Andersen & Patricia Hill Collins eds., 1992) ("All forms of oppression in our society are closely connected both to each other and to our economic system.").

for its tendency to focus on the gender issues that affect white women.[20] Similarly, the criticism has also been made that gay and lesbian groups focus on equality concerns that are likely to be most beneficial to white gays and lesbians.[21] Along those lines, black civil rights groups have been rebuked for their focus on race discrimination problems that most directly affect black heterosexual men.[22] The list of rebukes could go on. The point is that the political agendas of identity groups tend to focus on the interests of the privileged within the group. Put differently, even within these groups of disadvantage (e.g., blacks) the intersection of certain identities are privileged (e.g., black and male and heterosexual and middle class) vis-à-vis the intersection of others (e.g., black and female and homosexual and working class).

### *E. Multiracial Intersectionality*

The concept of multiracial intersectionality conveys at least two ideas. The first is that the intersectional problem affects non-black people of color. For example, an Asian American woman is vulnerable to discrimination based on the fact that she is an *Asian American woman.* Indeed, one Circuit Court opinion that doctrinally legitimized intersectionality involved an Asian American female plaintiff.[23] In that case, the court, in accepting the intersectionality argument that the employer's lack of hostility towards Asian American men and white women did not negate the possibility of discrimination against an Asian American woman, recognized the point that the negative stereotypes to which Asian American women are often subjected are very different from and often independent of the stereotypes to which either Asian American men or white women are subjected.

The second idea that multiracial intersectionality conveys is that the racial (or other) experiences of one racial group intersect with the racial (or other) experiences of another.[24] Here, the intersectionality metaphor accurately captures the substantive intersectionality argument.

20. *See, e.g.*, Harris, *supra* note 7, at 585 (stating that "the experience of black women is too often ignored both in feminist theory and in legal theory"); ANGELA Y. DAVIS, WOMEN, RACE, AND CLASS (1981); BELL HOOKS, AIN'T I A WOMAN? BLACK WOMEN AND FEMINISM (1981) (arguing that black anti-racist politics tend to focus on black men and feminist anti-sexist politics tend to focus on white women).

21. *See* Hutchinson, *supra* note 11, at 583-636; Valdes, *supra* note 14, at 38-47.

22. *See* Carbado, *supra* note 13, at 1472-84.

23. Lam v. University of Hawaii, 40 F. 3d 1551 (9th Cir. 1994).

24. *Id.* at 1578.

Take, for example, the racial experiences of Japanese Americans and Latinas/os. While these two sets of experiences converge (Japanese Americans and Latinas/os are vulnerable to anti-immigrant sentiment so that both groups are often perceived to be foreigners),[25] they also diverge (Japanese Americans but not Latinoas/os were interned). While the insight is useful, much work needs to be done delineating the precise points at which the experiences of different racial groups diverge and converge. This delineation should include an account of the role law plays in structuring the divergence/convergence dynamic, as well as an examination of whether this dynamic simultaneously creates opportunities for and obstacles that interfere with meaningful inter-racial coalition building.

### *F. Conclusion*

The preceding discussion is, at best, summary. It does not, for example, attempt to provide an intellectual history of the ideas. Nor does it discuss the political and legal contexts in which these ideas have been deployed. The aim was to sketch the contours of the basic theory by synthesizing the intersectionality literature in a way that heretofore has not been done. Part III elaborates on one aspect of the theory: identity intersectionality. Specifically, Part III articulates the nature of the identity intersectionality problem and reveals how intersectionality theory helps to ameliorate it. This discussion is then employed as a window through which to examine what identity performance theory adds to the analysis.

## III. IDENTITY INTERSECTIONALITY: THE CLASSIC INTERSECTIONALITY PROBLEM

Consider the following hypothetical. Mary, a black woman, works in an elite corporate firm. There are eighty attorneys at the firm, twenty of whom are partners. Only two of the partners are black, and both are men. The firm has three female partners, and all three are white. There

25. *See e.g.*, Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1255-58 (1993) (arguing that Asian Americans are viewed as un-American); Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1188 (1985) (reviewing PETER IRONS, JUSTICE AT WAR (1983)) (noting the treatment of non-Black minorities as foreigners); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997) (discussing the construction of Asian Americans as foreign); Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347 (1997) (comparing the constructions of Asian Americans and Latinas/os as foreigners).

are no Asian American, Native American, or Latina/o partners. The firm is slightly more diverse at the associate rank. There are fifteen female associates: three, including Mary, are black, two are Asian American, and one is Latina. The remaining female associates are white. Of the forty-five male associates, two are black, two are Latino, three are Asian American, and the rest are white.

Mary is a seventh-year associate at the firm. She, along with five other associates, is up for partnership this year. Her annual reviews have been consistently strong. The partners for whom she has worked praise her intellectual creativity, her ability to perform well under pressure, her strong work ethic, her client-serving skills, and her commitment to the firm. She has not brought in many new clients, but, as one of the senior partners puts it, "that is not unusual for a person on the cusp of partnership."

For the past three years, the Chair of the Associate's Committee, the committee charged with making partnership recommendations to the entire partnership, has indicated to Mary that she is "on track." Being "on track" was important to Mary because, were she not on track, she would have seriously explored the option of moving either to another firm with better partnership prospects for her or in-house to an investment bank that provided greater job security. It was generally understood, however, and the Chair made sure to make it clear that "being on track is not a guarantee that you will ultimately make partner."

Recall that Mary and five other associates are up for partnership. The Associate Committee recommends that the firm promote all six. However, the partners vote only four into the partnership: one black man, one Asian American male, one white man, and one white woman. They deny partnership to Mary and a white male associate. The partnership's decision to depart from the Associate Committee's recommendation is not unusual. While the partnership almost always accepts the Associate Committee's negative recommendation (i.e., a recommendation that an offer of partnership *not* be extended to a particular associate), it accepts the committee's positive recommendation only half of the time.

Subsequently, Mary brings a disparate treatment discrimination suit under Title VII.[26] She advances three separate theories: race discrimination, sex discrimination, and race and sex discrimination. She does not, however, have any direct evidence of animus against her on the part of

26. Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (2000).

the employer. In other words, Mary can point to no explicit statements such as "We don't like you because you are a woman," or "We think that you are incompetent; all blacks are." The evidence is all circumstantial: Mary was highly qualified, but was rejected for a position that was arguably open.

The court, ruling in favor of the firm's summary judgment motion, rejects all three of Mary's claims. With respect to the race discrimination claim, the court reasons that it is not supported by evidence of intentional or animus-based discrimination. According to the court, there is no evidence that the firm dislikes (or has a taste for discrimination against) blacks. In fact, argues the court, the evidence points in the other direction. The very year the firm denied partnership to Mary, it extended partnership to another African-American. Further, within the past five years, the firm had promoted two other African-Americans to the partnership. The court notes that both of these partners participated in the deliberations as to whether Mary would be granted partnership, and neither has suggested that the firm's decision to deny Mary partnership was discriminatorily motivated. The court concludes that the simple act of denying one black person a promotion is, especially when other blacks have been promoted, insufficient to establish discrimination.

The court disposes of Mary's gender discrimination claim in a similar way. That is, it concludes that the fact that the firm has in the past promoted women to the partnership, that the partners who voted to deny partnership to Mary extended partnership to another woman, and that women participated in the firm's deliberations as to whether Mary would be promoted, and none of these women have claimed that Mary was treated unfairly because she is a woman, suggests that the firm did not engage in sex-based discrimination against Mary.

The court concludes its dismissal of Mary's compound discrimination claim (the allegation of discrimination based on her race and sex) with an argument about cognizability. It explains that while Mary may argue that the firm discriminated against her based on her race or based on sex, she may not argue that the firm discriminated against her based on her race and sex. According to the court, there is no indication in the legislative history of Title VII that the statute intended "to create a new classification of 'black women' who would have greater standing than, for example, a black male." According to the court, "[t]he prospect of the creation of new classes of protected minorities, governed only by mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box."

The foregoing hypothetical articulates the classic intersectionality problem wherein black women fall through an anti-discrimination gap

constituted by black male and white female experiences.[27] The problem can be framed in terms of essentialism. Consider first the court's response to Mary's race discrimination claim. In determining whether Mary experienced race discrimination, the court assumes that there is an essential black experience that is unmodified by gender. The court's adjudication of Mary's race discrimination claim conveys the idea that racism is necessarily total. It is a particular kind of animus that reaches across gender, and affects men and women in the same way. It is about race—a hostility against all black people. This conception of discrimination suggests that it is unlikely that institutions possessing this animus will make intraracial distinctions, or that if such distinctions are made (i.e., a firm promotes and hires some black people but does not promote and hire others), what is at play is not *racial* animus. With this conception of anti-discrimination law, it is not surprising that the court would have difficulty with Mary's race discrimination claim. After all, this claim emerges out of a factual context in which there is no allegation that the firm discriminated against black men.

Yet this is precisely what Mary is arguing. The intra-racial distinction argument is that the firm distinguishes between black women and black men, that it prefers the latter, and that this preference is discriminatory. However, to the extent that a court essentializes race (by, for example, conceptualizing race without gender specificity), it makes it likely that the court will not view the preference Mary identifies as racially discriminatory. Put another way, if, as in our hypothetical case, a court's anti-discrimination starting point is buttressed by an essential conception of race, that court may have difficulty understanding that a racist firm might promote some black people (e.g., men) but not others (e.g., women).

Consider now the court's adjudication of Mary's sex discrimination. Here, too, the court's analysis reflects essentialism. The essentialism in this context conveys the idea that women's experiences are unmodified by race. The court assumes that if a firm engages in sex discrimination, such discrimination will negatively affect all women—and in the same

27. The actual case analyzed in Crenshaw's article, *Demarginalizing the Intersection*, *supra* note 4, was DeGraffenreid v. General Motors, 43 F. Supp. 142 (E.D. Mo. 1976), where five black women had brought a discrimination claim against their employer, General Motors. In Crenshaw's words, "[b]ecause General Motors did hire women—albeit *white women*—during the period that no Black women were hired, there was, in the court's view, no sex discrimination that the seniority system could conceivably have perpetrated." Crenshaw, *supra* note 4, at 142.

way. Thus, the possibility that an institution might make intra-gender distinctions does not occur to the court. The intra-gender distinction argument is that the firm distinguishes between black women and white women, that it prefers the latter, and that this preference is discriminatory. However, to the extent that a court essentializes gender (by, for example, conceptualizing gender without racial specificity), likely that court will not view the preference Mary identifies as gender discrimination. In other words, if, as in our hypothetical case, a court's anti-discrimination starting point is buttressed by an essential conception of gender, that court may have difficulty understanding that a sexist firm might promote some women (e.g., whites) and not others (e.g., blacks).

Finally, consider the court's rejection of Mary's compound discrimination claim. Here, the court doctrinally erases black women's status identity as *black women*. Its conclusion that this identity status is not cognizable means that, for purposes of Title VII, black women exist only to the extent that their experiences comport with the experiences of black men or white women. Under the court's view, and in the absence of explicit race/gender animus, black women's discriminatory experiences as *black women* are beyond the remedial reach of Title VII.

## IV. The Identity Performance Problem

To appreciate the identity performance problem, assume again that Mary is an African American female in a predominantly white elite corporate law firm. As before, Mary is up for partnership and her evaluations have been consistently strong. Stipulate now that four other black women are up for partnership, as are two white women and two white men. The Associate's Committee recommends that the firm extends partnership to all nine associates. The members of the partnership, however, decide to depart from this recommendation. They grant partnership to four of the black women. The fifth black woman, Mary, does not make partner. Of the four white associates, the firm extends partnership to one of the men and one of the women.

The partnership's decision creates a buzz around the firm. The firm had never before granted partnership to so many non-white attorneys. Moreover, in the firm's fifty year history, it had only ever promoted two black people to partnership. Both of these partners are men, and the firm promoted both of them in the mid-1980s, a period during which the firm, along with many others, had enjoyed a high level of prosperity.

Prior to 1980, the firm had never hired a black female associate. Furthermore, most of those who were hired after that date left within two to three years of their arrival. Given the history of black women at the firm—low hiring rate, high attrition rate, low promotion rate—associates at

the firm dubbed this year the "year of the black woman."

Mary, however, does not agree. Subsequent to the partnership decision, she files a Title VII discrimination suit, alleging (1) race and sex compound discrimination, i.e., discrimination against her on account of her being a black woman, and (2) discrimination based on identity performance. The firm moves for summary judgment on two theories. First, it argues that Mary may not ground her discrimination claim on her race and sex. According to the firm, Mary may separately assert a race discrimination claim and/or a sex discrimination claim; however, she may not, under Title VII, advance a discrimination claim combining race and sex. Second, the firm contends that whatever identity Mary invokes to ground her claim, there is simply no evidence of intentional discrimination.

With respect to the first issue, the court agrees with Mary that a discrimination claim combining race and sex is, under Title VII, legally cognizable. The court has read, and understood, and it agrees with the literature on intersectionality. Under the court's view, black women should be permitted to ground their discrimination claims on their specific status identity as black women. According to the court, failing to do so would be to ignore the complex ways in which race and gender interact to create social disadvantage: a result that would be inconsistent with the goals of Title VII.

With respect to second issue, the court agrees with the firm. The court reasons that recognizing Mary's status identity does not prove that the firm discriminated against her because of that identity. It explains that the firm promoted four associates with Mary's precise status identity—that is, four black women. Why, the court rhetorically asks, would a racist/sexist firm extend partnership to these women? The court suggests that when there is clear evidence of non-discrimination against the identity group within which the plaintiff is situated, that produces an inference that the plaintiff was not the victim of discrimination.

The court rejects the plaintiff's arguments that Title VII itself and the Supreme Court's interpretation of Title VII focuses on protecting individuals, not groups, from discrimination.[28] According to the plaintiff, a

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28. *See* 42 U.S.C. § 2000(e)-2(a)(2) (2000) (prohibiting an employer from "limit[ing]. . .or classify[ing]. . .applicants for employment in any way which would deprive or tend to deprive *any individual* of employment opportunities. . .") (emphasis added); Connecticut v. Teal, 457 U.S. 440, 455 (1982) ("It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees'

black applicant who is not promoted may bring a discrimination claim even if another black person is promoted instead or even if there are other black employees represented in the position for which the plaintiff is applying and/or in the workplace more generally. Central to the plaintiff's argument is the idea that an employer cannot escape liability for having a group represented in the workplace; there is no "bottom line" defense to discrimination.[29]

The court maintains that, as a "theoretical matter," the plaintiff is right. That is, the firm's non-discrimination against the four black women is not proof positive that it did not discriminate against the fifth. The court insists, however, that such evidence is highly persuasive. It explains that

> [p]roof that [the employer's] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided. We cannot say that such proof would have absolutely no probative value in determining whether the otherwise unexplained rejection of the minority applicants was discriminatorily motivated. Thus, although we agree that such proof neither was nor could have been sufficient to conclusively demonstrate that [the employer's] actions were not discriminatorily motivated, [it is proper] to consider the racial mix of the work force when trying to make the determination as to motivation.[30]

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group. . . . [T]he 'statute's focus on the individual is unambiguous.'") (citation omitted).

29. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978) ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination. . . . It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force."); *see also* Connecticut v. Teal, 457 U.S. 440, 455 (1982) ("[A]n employer's treatment of other members of the plaintiffs' group can be 'of little comfort to the victims of . . . discrimination.' Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired. That answer is no more satisfactory when it is given to victims of a policy that is facially neutral but practically discriminatory.") (internal citation omitted).

30. *Furnco*, 438 U.S. at 580. Consider also *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973). In *Espinoza*, a Mexican was not hired for a position within a workplace in which there was a very high percentage of employees of Mexican descent (96%). While the Court explained that such statistics "do not automatically shield an employer" from a discrimination claim, the Court essentially implied that statistics were sufficient to negate a discrimination claim because the Court did not rely on any other evidence. "[T]he plain fact of the matter is that [the employer] does not discriminate against persons of Mexican national origin. . . In fact, the record shows that the worker hired in place of [the plaintiff] was a citizen with a Spanish surname." *Espinoza* and *Furnco* suggest that courts sometimes do deny plaintiff's discrimination claims if members of the plaintiff's protected class are represented in the workplace or if someone of plaintiff's

The court also rejects Mary's performance argument. It reasons that the evidence Mary presented tending to show that she performed her identity somewhat differently from the women at the firm (including the other black women), is insufficient to sustain, indeed, is irrelevant to, a discrimination claim. According to the court, because Title VII provides no protection for an employee's choices relating to appearance,[31] there is no need to engage the question of whether Mary's means of self-presentation (e.g., her hair style and manner of dress) caused discomfort to her colleagues at the firm.

The problem with the court's approach is that it fails to consider whether Mary was the victim of an intra-racial (or intra-gender) distinction based not simply on her identity status as a black woman but on her performance of that identity. In effect, the court's approach essentializes the identity status "black female." More specifically, the court assumes that Mary and the other four black women are similarly situated with respect to their vulnerability to discrimination. However, this might not be the case. The social meaning of being a black woman is not monolithic and static but contextual and dynamic. An important way in which it is shaped is by performance. In other words, how black women present their identity can (and often does) affect whether and how they are discriminated against.

Consider, for example, the extent to which the following performance issues might help to explain why Mary was not promoted, but the other black women were.

*Dress.* While Mary wears her hair in dreadlocks, the other black women relax their hair. On Casual Fridays, Mary sometimes wears West African influenced attire. The other black women typically wear khaki trousers or blue jeans with white cotton blouses.

*Institutional Identity.* Mary was the driving force behind two controversial committees: the committee for the Recruitment and Retention of Women and Minorities and the committee on Staff/Attorney Relations. She has been critical of the firm's hiring and work allocation practices. Finally, she has repeatedly raised concerns about the number of hours the firm allocates to pro bono work. None of the other four black women have ever participated on identity-related or employee relations-related committees. Nor have any of them commented on either the racial/gender

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protected class was hired instead of the plaintiff).

31. *See, e.g.*, Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 196 (2000).

demographics of the firm or the number of hours the firm allocates for pro bono work.

*Social Identity*. Mary rarely attends the firm's happy hours. Typically, the other four black women do. Unlike Mary, the four black women each have hosted at least one firm event at their home. All four play tennis, and two of them play golf. Mary plays neither. Finally, while all four black women are members of the country club to which many of the partners belong, Mary is not.

*Educational Affiliations.* Two of the other four black women graduated from Harvard Law School, one graduated from Yale, and the other graduated from Stanford. Mary attended a large local state law school at the bottom of the second tier of schools.

*Marital Status*. All four of the other black women are married. Two are married to white men and each of them is married to a professional. Mary is a single mother.

*Residence*. Each of the other four black women lives in predominantly white neighborhoods. Mary lives in the inner city, which is predominantly black.

*Professional Affiliation*. Mary is an active member of the local black bar association, the Legal Society Against Taxation, and the Women's Legal Caucus. None of the four black women belongs to any of these organizations. One of them is on the advisory board of the Federalist Society. One of the four black women is a Catholic, two are Episcopalian, and the other does not attend church. Mary is a member of the Nation of Islam.

Because the court conceptualizes Mary's discrimination case solely in terms of her identity status as a black female, it does not consider any of the foregoing performance dynamics. Yet any one of them could (and certainly all of them together would) explain the firm's decision not to promote Mary. In other words, it is possible that the partnership's promotion decisions reflect an identity preference based on performance.

Intersectionality does not capture this form of preferential treatment. While intersectionality recognizes that institutions make intra-group distinctions, that understanding is situated in an anti-discrimination context that is buttressed by a status conception of identity.

Assuming the foregoing performance issues obtain in Mary's case, do they reflect impermissible discrimination? The answer is not obviously yes. Perhaps the partners simply do not like Mary. Based on the description of how Mary performs her identity, could one not reasonably conclude the following: She does not attend happy hours, she creates trouble, she is not a team player, she does not dress or act professionally. Redescribing Mary's performance in this way makes the employer's

decision to deny her partnership appear non-discriminatory (and even legitimate). After all, working and succeeding in an organization is not only about doing work. It is also about getting along with people and getting them to like you. An argument can be made that Mary simply did not do much work in the direction of getting the people who mattered to like her. The other four black women did; and they got promoted. On its face some—perhaps—will see this as fair. Those who do the extra work of making people like them *should* get promoted. Given our claim that this line of reasoning is flawed, the question is: What exactly is the relationship between identity performance and workplace discrimination?

## V. Why Identity Performance is Workplace Discrimination

Broadly speaking, there are two ways to make the point that intra-group distinctions based on identity performance implicate workplace discrimination. The first is to focus on the preferred group members. In our hypothetical, they are the four black women. The second way is to focus on the disfavored group members. Mary, the fifth black woman, falls into this category.

### *A. The Preferred Group Members: The Four Black Women*

The question here is whether the firm's institutional norms (e.g., collegiality) and hard-to-measure criteria (e.g., social effort) created a workplace context within which the four black women were disadvantaged because of their status identity. This could come about because of a perception on the part of the firm that black women are likely to be both uncollegial and lazy. Within such an institutional context, black women might be said to have what we call "negative workplace standing."

In a prior article, *Working Identity*, we argued that an employee's awareness that identity-based assumptions about her are at odds with the institutional norms and criteria of a firm creates an incentive for that employee to work her identity.[32] There are a number of ways an employee might do this. The employee might laugh in response to, or engage in racist humor (signaling collegiality). She might socialize with her colleagues after work (signaling that she can fit in; is one of the boys). She might avoid contact with other employees with negative workplace standing (signaling that she is not really "one of them"). The

32. Carbado & Gulati, *supra* note 1.

list goes on. The point is that whatever particular strategy the employee deploys, her aim will likely be to comfort her supervisors/colleagues about her negative workplace standing. Specifically, the employee will attempt to signal that she can fit in, that she is not going to make her supervisors/colleagues uncomfortable about her identity—or theirs—and, at bottom, that the negative stereotypes that exist about her status identity are inapplicable to her. *Working Identity* refers to these strategies collectively as "comfort strategies." These strategies are constituted by identity performances.

Stipulate that the four black women in the hypothetical performed comfort strategies. The claim that the performance of such strategies constitutes discrimination is based on the idea that people with negative workplace standing (e.g., people of color) have a greater incentive to perform comfort strategies than people with positive workplace standing. This means that identity performances burden some employees (e.g., blacks) more than others (e.g., whites). Without more, this racial distribution of identity performances is problematic. The problem is compounded by the fact that identity performances constitute work, a kind of "shadow work." This work is simultaneously expected and unacknowledged. Plus, it is work that is often risky. Finally, this work can be at odds with the employee's sense of her identity. That is, the employee may perceive that she has to disassociate from or disidentify with her identity in order to fit in. To the extent the employee's continued existence and success in the workplace is contingent upon her behaving in ways that operate as a denial of self, there is a continual harm to that employee's dignity.

### *B. The Disfavored Group Member: The Fifth Black Woman*

Recall that the claim is that the firm's discrimination against Mary derives from an intra-group distinction based on Mary's dress, institutional identity, marital status, professional and educational affiliations, and residence. The question becomes, why is this discrimination impermissible? The short answer is that the distinction creates an intra-racial and an inter-racial problem. The problem is that the firm draws a line between black people who do (or whom the firm perceives as performing) identity work to fit in at the firm and black people who do not perform (or whom the firm perceives as not performing) such work. The interracial problem is that white people are not subject to this subcategorization. There are three ways to make the point that this subcategorization of black people but not white people violates Title VII: (1) it constitutes a racial term and condition of employment; (2) it is a form of race-plus discrimination; and (3) it reflects racial stereotyping.

We do not present these arguments as fully worked-out theories. Instead, we introduce them as possible approaches courts can develop to address the identity performance problem.

### *1. Racial Terms and Conditions of Employment*

The terms and conditions of employment argument is this: Subcategorizing black people based on those who do identity work and those who do not constitutes the imposition of a race-based term and condition of employment.[33] In effect, an institution that draws such a distinction vis-a-vis black people is saying:

> We hire only black people of a certain kind at our firm: black people who have a weak sense of racial identity and who eschew identity politics, black people who are assimilationist in political and social orientation, black people who are comfortable around, and who will not cause discomfort to, white people. In short, if you want a job at, or expect to do well within, this firm, you have to present yourself as a "good black."

The claim is that drawing intra-racial distinctions based on identity performances is tantamount to establishing the racial (identity) terms upon which people will be hired and/or promoted. This alone would seem to violate Title VII. The problem is compounded by the fact that white people are not subcategorized based on their performance of (white) racial identity. In other words, they are not subject to racial terms and conditions of employment.

### *2. Race Plus Discrimination*

Another argument to suggest that discrimination based on identity performances violates Title VII is to conceptualize such discrimination as race-plus discrimination. In the context of gender, courts have said that it is violation of Title VII for an institution to subcategorize women based on gender plus some "other characteristic."

33. "Terms" and "Conditions" are key words in Title VII. The statute makes it an unlawful employment practice for an employer 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. Civil Rights Act of 1964 § 2000(e)-2(a)(1). Performance claims, as a recent article points out, are often found to fail the requirements of the statute on the ground that they constitute "de minimis" discrimination. *See* Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L. J. 1121, 1122-23 (1998).

Consider, for example, *Phillips v. Martin Marietta Corp.*[34] In that case the Supreme Court held that it was illegal for an employer to discriminate against a particular sub-category of women: those who had pre-school age children. In reaching this conclusion, the Court explicitly rejected the defendant's claim that, because the defendant did not discriminate against all women, its conduct was not in violation of Title VII prohibition against discrimination based on sex.

*Phillips* established what is now referred to as the sex-plus doctrine.[35] Under this doctrine, an employer may not discriminate against an employee on the basis of sex plus another factor. To qualify as a sex plus case, courts have held that the factor aside from sex must implicate (a) a fundamental right, (b) an immutable characteristic, or (c) a significant burden on only one sex that deprives that sex of employment opportunities.[36]

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34. 400 U.S. 542 (1971).

35. Courts have not extended the "sex plus" doctrine in many cases in which an extension seemed warranted. For example, five years after the *Phillips* decision, the Supreme Court held in *General Electric Co. v. Gilbert* that an employer did not violate Title VII when it excluded pregnancy from a list of conditions in its benefits plan for which the employer paid benefits for non-occupational sickness and accidents. 429 U.S. 125 (1976), *overruled by statute* 42 U.S.C. § 2000e(k) (2000) (Pregnancy Discrimination Act of 1978). The Court drew a distinction between "pregnant women and nonpregnant persons, implying that because there were women in the nonpregnant group, there was no discrimination against women. *Id.* at 135 (citing *Geduldig v. Aiello*, 417 U.S. 484, 496-97 n.20 (1974)). The Court reasoned that, "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.* at 138 (citing *Geduldig*, 417 U.S. at 496-97). *Gilbert* is inconsistent with *Phillips*. Although women were hired in *Gilbert*, the terms of their employment (non-occupational sickness benefits) were worse than those of the men if they became pregnant; women did not receive benefits if they were absent due to pregnancy related illnesses whereas similarly situated people (men and women who became disabled due to other conditions) did receive such benefits. Thus, a woman's benefits were adversely affected if she made the choice, based on her fundamental right, to have children. The *Gilbert* decision was soon overruled by the Pregnancy Discrimination Act of 1978, which amended Title VII's definition of "because of sex" to "on the basis of sex." 42 U.S.C. § 2000e(k) (2000).

36. *See* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091-92 (5th Cir. 1975) (holding that employers cannot discriminate against employees based on immutable characteristics or fundamental rights); Gerdom v. Continental Airlines, Inc., 692F. 2d 602, 605-606 (9th Cir. 1982) (concluding that employers can promulgate rules that are different for men and women as long as they "do not significantly deprive either sex of employment opportunities, and [] are even-handedly applied to employees of both sexes"). Fundamental rights include the right to have children or to marry. Immutable characteristics include the protected categories themselves. Willingham, *id.* The scope of the third category—policies that have a significant burden on only one sex that deprive that sex of employment opportunities—is less clear. *See, e.g.*, Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago, 604 F. 2d 1028, 1033 (7th Cir. 1979) (finding employer's

The sex-plus regime provides a basis for arguing that identity performances implicate Title VII. The claim would be that discrimination based on identity performance constitutes "race-plus" discrimination, the "plus" here being the performance. One difficulty with this argument is that "performance" is not an immutable characteristic. It is, by definition, changeable. Theoretically, this difficulty is not insurmountable if it is kept in mind that racial identity is constituted by identity performances. Put another way, the social meaning of a person's phenotypic racial identity is a function of the ways in which that person performs her identity. To appreciate how this observation helps to support a race-plus argument, consider the hypothetical below.

Imagine that a law firm is racially discriminatory. Stipulate that the law firm is situated in Manhattan, New York, and that it recruits most of its attorneys from the "top ten" law schools. Although this firm is discriminatory, it is institutionally invested in hiring some blacks. This is because hiring no blacks would create a public relations problem for the firm. Specifically, it would call into question the firm's public identity as an "equal opportunity" employer.

Assume that Toney, a black man, applies for a position as an associate at this firm. Because this firm does not have a per se racial rule of discrimination—that it does not hire black people—it is possible that the firm will hire Toney. Should the firm not hire him, it will not be because Toney is black in a phenotypic sense. (Again, the firm is invested in hiring some black people.) Instead, the decision will be based on the kind of black person the firm perceives Toney to be—that is, the individualized social meaning of Toney's black identity. The

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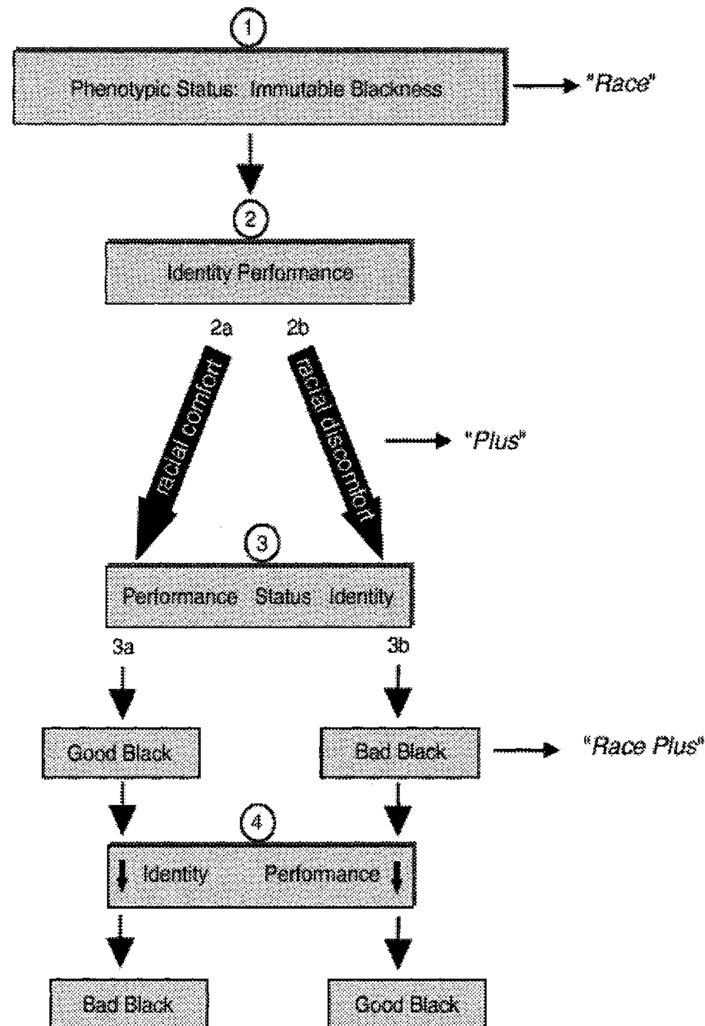
policy requiring women, but not men, to wear uniforms violated Title VII because "when some employees are uniformed and others are not there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes"); Priest v. Rotary, 634 F. Supp. 571, 581 (N.D. Cal. 1986) (holding that the employer's policy requiring female employees to wear sexually suggestive clothing violated Title VII); EEOC v. Sage Realty Corp., 507 F. Supp. 599, 608-09 (S.D.N.Y. 1981) (same); *see also* Allen v. Lovejoy, 553 F. 2d 522, 524 (6th Cir. 1977) (holding that the employer's rule requiring women to change their last names to their husband's names when they got married violated Title VII because "[a] rule which applies only to women, with no counterpart applicable to men, may not be the basis for depriving a female employee who is otherwise qualified of her right to continued employment"). *But cf.* Stroud v. Delta Air Lines, Inc., 544 F. 2d 892 (5th Cir. 1977) (holding that a rule prohibiting flight attendants from being married did not violate Title VII because there were only female flight attendants, even though the no-marriage rule did not apply to other job classifications in which men were employed).

firm's determination of that meaning will be a function of Toney's identity performance. In this sense, Toney's identity performance is constitutive of his racial identity. It gives content to his phenotypic blackness. This observation allows for the conceptualization of identity performances as a "plus" for purposes of Title VII, notwithstanding that such performances are not per se immutable. Figure 2 below helps to explain why.

FIGURE 2
RACE–PLUS DISCRIMINATION



Point One on the diagram delineates racial identity in terms of its phenotypic immutability. Call this a person's phenotypic status identity. This identity constitutes the "race" of the "race–plus" regime. Point Two accounts for identity performance. Broadly speaking, there are two kinds of performances that matter: racial comfort performances, or performances that signal racial palatability (2a), and racial discomfort performances, or performances that signal racial unpalatability (2b). Significantly, neither of these performances can be disaggregated from phenotypic status. That is to say, the performances are intelligible as racial comfort and racial discomfort strategies precisely because they are phenotypically marked. This is why conceptualizing performance as a "plus" does not create an immutability problem. The plus (e.g., racial discomfort) does not exist outside of the phenotypic status (e.g., immutable phenotypic Blackness).

Point Three on the diagram indicates that each identity performance produces a performance status identity: racial comfort performances produces good blacks and racial discomfort performances produces bad blacks. The bad black identity is vulnerable to race-plus discrimination.

It is important to point out that neither the good black nor the bad black identity is fixed. Unlike phenotypic status identities, performance status identities are unstable and can be changed by subsequent identity performances (Point Four). In other words, a good black can (easily) become a bad black and a bad black can (after much identity work sometimes) become a good black.

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The point of making the discrimination argument under the rubrics of "terms and conditions" and "race-plus" is conceptual. More specifically, the aim is to demonstrate that, as a theoretical matter, the performance claim could plausibly fit into the traditional doctrinal boxes. But, of course, the doctrinal boundaries would have to be pushed. And, as a practical matter, we do not expect courts to expand these particular doctrines that far, if at all. With respect to the "terms and conditions" argument, most courts are likely to see Mary's performance as demonstrative of her unwillingness to fit in or assimilate. That, for them, is a matter of *choice* and the fault of those like Mary and not that of the employer.[37] As for the "race-plus" argument (or race-gender plus,

37. For a discussion of the relationship between this choice conception of identity

in Mary's case), there are two problems. First, individuals do not have a fundamental right to define, via identity performances, the content of their racial identities. A person who *is* phenotypically black, for example, does not have a fundamental right *to be* black by any means necessary. Second, it is unlikely that a court would embrace a co-constituitive, status/performative conception of racial identity. For the most part, Title VII case law conceptualizes race as phenotype and performance as "grooming." Disaggregating performance from race and re-articulating it as grooming provides courts with a doctrinal way to delegitimize discrimination claims based on performance: unlike (phenotypic) race, grooming practices are "mutable," reflecting individual agency on the part of the employee.[38] In sum, because of the fundamental right and immutability criteria of the sex-plus regime, judges have been hostile to identity performance claims of the type we discuss.[39] That is, until a recent development, one that was flagged in, of all places, the *Wall Street Journal*.[40]

### *3. Stereotyping on the Basis of Performance*

The set of cases that perhaps most clearly illustrate the judicial hostility towards performance claims are the transsexual cases. Typically, the case would involve a biological man who was performing in the workplace as a woman. These cases were easy losers, as one court explained, because Title VII protected biological sex and not social sex (i.e., gender).[41] In other words, there was no room for claims based on

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and the pro-assimilationist bias in the law, *see* Carbado & Gulati, *supra* note 1; *see also* Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of* Spanish, 84 CORNELL L. REV. 595 (1999) (discussing the assimilationist bias); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Cost of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485 (1998) (observing assimilationist bias in equal protection doctrine).

38. The case most often cited for the immutability requirement is Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091-92 (5th Cir. 1975). For examples of other performance claims that were rejected by the courts as minimal, *see, e.g.*, Tavora v. New York Mercantile Exch., 101 F.3d 907 (2d Cir. 1997); Barker v. Taft Broad Co., 549 F.2d 400 (6th Cir. 1977); Dodge v. Giant Food, 488 F.2d 1333 (D.C. Cir. 1973).

39. *See, e.g.*, Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 18-30 (2000); White, *supra* note 33, at 1121-23 (1998); Katherine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541 (1994); Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENGL. L. REV. 1395 (1992); Caldwell, *supra* note 3.

40. *See* Jess Bravin, *Courts Open Alternate Route to Extend Job Bias Laws to Homosexuals*, WALL ST. J., Sept. 22, 2000, at B1.

41. *See* Holloway v. Arthur Andersen, 566 F.2d 659, 661-63 (9th Cir. 1977); *see*

gender performance. All of this changed recently.

A series of recent cases out of the First, Second, and Ninth Circuits, however, suggest that these claims are no longer easy losers.[42] The rationale is that these cases can be conceptualized as stereotyping claims. Stereotyping as related to Title VII's protected categories, everyone agrees, is covered under Title VII.[43] Take then the case of Brian, a biological man who is terminated by an employer because he is performing his identity as a woman (for example, by wearing a dress, lipstick, and affecting an effeminate manner). In terms of stereotyping, one could argue that Brian was fired because he did not behave in stereotypically masculine ways. If phrased in these terms, all four of the opinions agreed, there was an actionable claim.[44] The notion is that Title

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*also* Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984); Dobre v. Amtrak, 850 F. Supp. 284, 286 (E.D. Pa. 1993). For critiques of the binary system, *see, e.g.*, Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstruction the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3, 130 (1995); Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 36 (1995); Bennett Capers, *Sexual Orientation and Title VII*, 91 COLUM. L. REV. 1158, 1170 (1991).

42. *See* Higgins v. New Balance Athletic Shoe, 194 F.3d 252 (1st Cir. 1999) (Selya, J.); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (Reinhardt, J.); Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (Lynch, J.); and Simonton v. Runyon, 2000 WL 1190195 (2d Cir. 2000) (Walker, J.).

43. *See, e.g.*, City of Los Angeles v. Manhart et al., 435 U.S. 702, 705 n.13 (1978) (citing Sprogis v. United Air Lines Inc., 444 F.2d 1194, 1198) (7th Cir. 1971) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."); *Accord* County of Washington v. Gunther, 452 U.S. 161, 180 (1981). As Post points out in his recent article, however, the actual protections provided by the courts are a great deal narrower than the "entire spectrum of disparate treatment." He writes:

> Because the dominant conception offers an implausible story about the shape of antidiscrimination law, I have proposed an alternative perspective, which we may call *the sociological account*, in which antidiscrimination law is understood as a social practice that acts on other social practices. According to the sociological account, antidiscrimination law must be seen as transforming preexisting social practices, such as race or gender, by reconstructing the social identities of persons. (citations omitted) The sociological account does not ask whether "stereotypic impressions" can be eliminated *tout court*, but rather how the law alters and modifies such impressions.

Post, *supra* note 39, at 31.

44. *See Schwenk*, *supra* note 42, at 1202; *Higgins*, *supra* note 42, at 261 n.4; *Simmonton, supra* note 42, at 4-5; *Rosa*, *supra* note 42, at 35.

VII protects employees from impermissible stereotyping: in Brian's case, sex-based stereotyping.[45] Because sex-based stereotyping is conceptualized as discrimination "based on sex," there is no need to address the issue of immutability or fundamental rights.

As articulated above, the doctrine requires little expansion to encompass Mary's claim. Brian was terminated because he *did not* engage in what his employer perceived to be stereotypically masculine behavior. Mary was denied partnership because she *did* engage in what her employer perceived to be stereotypically black female behavior. The essence of both claims is the same, that is, an employer penalizing an employee for behavior that activated negative stereotypes.

Of course, things are never that simple.

## VI. CONCLUSION

The logical applicability of the doctrine is but the tip of the iceberg. There are a host of questions that will need to be answered before the doctrine finds broad acceptability among the courts. A fuller discussion of both the doctrine and those questions is the subject of a paper on which we are currently working. [46] We flag three of those questions here.

First, will this new performance doctrine find political acceptability among the courts? Many courts will likely see this doctrine as a thinly veiled attempt to subvert Congressional desires and provide some protection to gays and lesbians. If so, they may refuse to accept the doctrine at all.

Second, there is the question of the employer's need to regulate the workplace. Many judges are loathe to interfere with what they see as legitimate employer regulation of the workplace. These judges will likely see the doctrine as unduly interfering with employers' ability to maintain "professional" workplaces. Indeed most of these judges likely would be mortified if they had a male law clerk show up to work in a dress and pumps.

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45. As authority, these courts pointed to the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In that case, the plaintiff, Ann Hopkins, had been denied partnership at Price Waterhouse because the firm's partners had thought her not to be feminine enough and that claim was upheld by the Court. *Id.* at 240. *Price Waterhouse*, as the *Schwenk* court explained, "barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed to 'act like a woman.'"

46. Devon W. Carbado & Mitu Gulati, *Crossdressing Identity* (on file with authors).

Third, will the stereotyping claims have to be buttressed by showings of disparate treatment? In other words, will the plaintiffs in a performance case have to show that there are others whose performance is not being similarly regulated. In the gender performance case, this may be easy because the negative stereotype is activated by performing against stereotype (for example, men are discriminated against because they are not allowed to wear skirts, whereas women are). But in the race cases, the negative stereotypes are activated by performing according to stereotype. In other words, the fifth black woman cannot show that the others were allowed to behave in ways that she was not. Indeed, the employer can argue that she was discriminated against precisely because she did not perform her identity in the way that the others did.

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