Toward Normalizing Multiplicity: A Historical Analysis of the Legal Construction of Intersectional Identities in Title VII Cases

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ChaeRan Yoo Freeze, Advisor

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By
Cecile Honor Afable

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Committee Members
ChaeRan Yoo Freeze
Anita Hill
Joyce Antler

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Introduction

In August 2006, Amelco Electric paid $125,000 to settle multiple Title VII lawsuits alleging race, gender, and national origin discrimination and retaliation. The suits were brought by the Equal Employment Opportunity Commission (EEOC) on behalf of a class of Black, Asian, and female electricians that had endured harassment from their foreman due to their race, national origin, and gender, or any combination thereof. The employees had also complained about offensive graffiti in their workspace, which resulted in retaliation.[1] While *Amelco* shows that courts were willing to recognize the unique ways in which Black, Asian American, and female electricians experienced identity-based employment discrimination, broadly certifying them as a class, this kind of recognition of intersectional identity is a relatively recent development.

Amelco represents an inclusive understanding of how discrimination at the intersection of race and gender could be interpreted by courts in order to ensure that plaintiffs receive relief and remedy. This outcome seems almost miraculous when considered as part of a larger history of Title VII cases that alleged discrimination at the intersections of race, gender, and/or national origin, almost always unsuccessfully—in one early Title VII case, *DeGraffenreid v. General Motors* (1976), five Black women who alleged discrimination at the intersection of race and gender were not allowed to be certified as a class. Courts have changed over time in their interpretation of multi-dimensional

[1] "Eradicating Racism & Colorism from Employment," United States Equal Opportunity Commission. Accessed April 2016. <https://www.eeoc.gov/eeoc/initiatives/e-race/caselist.cfm>

discrimination, but historically have found it difficult to apply intersectionality theory in a way that offered meaningful recourse to women of color.

Black and Asian American women plaintiffs shared gendered experiences of discrimination, though their larger communities have vastly different histories that have resulted in the creation of varied stereotypes that have shaped their interactions with the American legal system. Black women have contended with the historical legacies of slavery and Jim Crow, while Asian American women have struggled with immigration and citizenship, language barriers, and American nativism. By tracing the trajectory of Black and Asian American history, this thesis shows how different tropes of Black and Asian American women developed and is able to provide a detailed historical contextualization for the outcomes of different Title VII cases.

Alongside the histories of Black and Asian American communities, this thesis shows the ways in which the idea of "intersectionality" has evolved over time. Kimberlé Crenshaw's 1989 article "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics" created specific and extraordinarily useful language; however, the concept itself had existed for decades prior, and women of color themselves have always understood it as an integral part of the reality of their lives.

Essentially: this thesis is an interdisciplinary exploration of the way that courts in employment discrimination cases have historically understood the identity of women of color, specifically Black and Asian American women; how legal constructions of identity have differed from women of color's own understandings; and how these varying conceptions about identity have changed over time, driven by external forces such as

immigration or federal economic policy. Through an analysis of Title VII cases throughout the 1970s and 1980s, courts are shown to be permeable—that is, they are not isolated institutions, but are influenced by a larger societal environment, which shapes legal analyses and court outcomes. Over time, courts have shifted in their understanding of intersectional identity, evolving from a position of outright denial of the unique positionality of women of color to a more inclusive understanding of their multilayered experiences. The tension between a positionality of multiplicity and the essentialization of identity was a key factor in early Title VII outcomes; this tension appears to have been considerably alleviated by the 2006 settlement of *Amelco*.

This thesis draws on scholarship from many different fields, such as legal studies,[2] feminist theory,[3] history,[4] critical race theory,[5] Black feminist thought,[6] Asian American Studies,[7] sociology,[8] feminist epistemology,[9] and political philosophy.[10] My contribution lies in taking these disparate fields and productions of scholarship and putting them in conversation with each other. Each represents an atomized and a particular analytical

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[2] Robert Belton, *The Crusade for Equality in the Workplace: The* Griggs v. Duke Power *Story.* Lawrence, Kansas: University Press of Kansas, 2014.
[3] Jennifer C. Nash, "Re-thinking Intersectionality." *Feminist Review* Vol. 89 (2008).
[4] Serena Mayeri, *Reasoning from Race*. Cambridge, Massachusetts: Harvard University Press, 2011.
[5] Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics." *University of Chicago Legal Forum* (1989).
[6] Patricia Hill Collins, "The Social Construction of Black Feminist Thought." *Signs* Vol. 14: No. 4 (1989).
[7] Angelo N. Ancheta, *Race, Rights, and the Asian American Experience*. New Brunswick, New Jersey: Rutgers University Press, 2006.
[8] Vilma Ortiz, "Women of Color: A Demographic Overview" in *Women of Color in U.S. Society*, edited by Maxine Baca Zinn and Bonnie Thornton Dill, 13-40. Philadelphia, Pennsylvania: Temple University Press, 1994.
[9] Miranda Fricker, *Epistemic Injustice: Power & the Ethics of Knowing*. Oxford: Oxford University Press, 2007.
[10] Charles Mills, *The Racial Contract*. Ithaca, New York: Cornell University Press, 1997.

approach; combining them offers the possibility of reaching new ways of seeing and interpretation. Moreover, different ethnic and minority studies are often treated as separate fields. I combine scholarship from Black Studies and Asian American Studies to illustrate the ways in which these two communities are dominated by white supremacy in varied ways, to show the historical emergence of the model minority myth as a tool of anti-Blackness, and put Black and Asian American women's varied experiences with workplace discrimination in conversation with each other.

Chapter 1 gives an account of the origins of Title VII, placing it within a broader historical context of anti-racist legislation from Reconstruction to the Civil Rights era, and details congressional debates, particularly those regarding the presence of the word "sex" in the statute. Chapter 2 provides a historical and theoretical framework for analyzing court cases by offering a definition of "women of color," discussing the unique disadvantages of women of color, the theory of intersectionality, the histories of Black and Asian American communities, and the reasons that women of color have found it difficult to obtain justice when they face employment discrimination and subsequently file Title VII suits. Chapters 3 and 4 explore larger social, political, and historical trends throughout the 1970s and 1980s, respectively, and analyze multiple court cases from each decade, tracing a trajectory of interpretations of intersectional identity by the courts. The thesis concludes with an epilogue that analyzes two contrasting cases from the 1990s that illustrate the continued contradictions of different rulings that offer implicit commentary on the validity of varied identities and associated allegations of employment discrimination.

1. The Origins of Title VII

While Title VII purports to prohibit "employment discrimination based on race, color, religion, sex and national origin" in hiring, compensation, firing, and membership to employee organizations,[11] its broad vision often falls short, leaving plaintiffs without remedy and allowing for the continuation of injustice. Conceptions of protected classes and identities have evolved in the last fifty years, but many "marginal members within marginalized groups"[12] have found what was at the time contemporary Title VII doctrine to be inadequate. This chapter provides historical context, detailing the decades of employment discrimination and activism that ultimately culminated in the passage of Title VII, as well as an analysis of the Congressional debates. It is impossible to overemphasize the importance of Black activists and the Civil Rights movement in the passage of Title VII, which was passed as part of the 1964 Civil Rights Act.

The Civil Rights Act of 1964 was designed to prohibit racist discrimination in all domains and "intended to remedy the practices and effects of racial oppression and discrimination."[13] Title VII "protects individuals against employment discrimination on the bases of race and color, as well as national origin, sex, and religion" for any employer with

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[11] "Title VII of the Civil Rights Act of 1964," United States Equal Employment Opportunity Commission. Accessed October 2015. <http://www.eeoc.gov/eeoc/history/35th/thelaw/eeo_1972.html>

[12] Valerie Purdie-Vaughns and Richard P. Eibach, "Intersectional Invisibility: The Distinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities," *Sex Roles* Vol. 59: Issue 5-6 (2008): 381.

[13] Julius L. Chambers and Barry Goldstein, "Title VII: The Continuing Challenge of Establishing Fair Employment Practices," *Law and Contemporary Problems* Vol. 49: No. 4 (1986): 9-10.

15 or more employees.[14] Equal employment opportunity must be afforded at all stages of employment, including recruiting, hiring, advancement, compensation, and layoffs; and employees must be protected from harassment, hostile work environments, segregation, and retaliation.[15]

Title VII is fundamentally about work and labor, and the Civil Rights Act of 1964 was crafted to combat pervasive anti-Black racism; the confluence of both of these was the chattel slave system that brought Africans to America in the 1600s. As it would be "a grievous error… to divorce…these constitutional and statutory enactments from the real world problems they were intended to address,"[16] the legal history of Black people and their legal status as property is critical to contextualize Title VII appropriately.

In postbellum America, the first attempts to "[design] race-conscious remedies" came during Reconstruction with the ratification of the 14th amendment in 1868 and the 1866 Freedmen's Bureau Act. However, the 14th amendment only prohibited states from "[depriving] any person of life, liberty, or property without due process of law;" it did not outlaw private discrimination, and so employers could purposefully and consciously "differentiate among applicants or employees on the bases of race, color, religion, education, ability, performance, or any other reason."[17] Because formerly enslaved skilled Black workers and tradesmen threatened the economic security of whites, employers were

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[14] "Federal Statutes, Regulations, and Guidance: Title VII of the Civil Rights Act of 1964," Society for Human Resource Management. Accessed October 2015. <http://www.shrm.org/legalissues/federalresources/federalstatutesregulationsandguidanc/pages/titleviiofthecivilrightsactof1964.aspx#sthash.sJsLSCsx.dpuf>

[15] Ibid.

[16] Chambers and Goldstein, "Title VII: The Continuing Challenge of Establishing Fair Employment Practices," 10.

[17] Herman Belz, *Equality Transformed* (New Brunswick: Transaction Publishers, 1991), 12.

incentivized to practice racial discrimination in order to maintain the existing racial hierarchy and their own privilege.

The Freedmen's Bureau was authorized to mobilize various resources—including "the lands and buildings of the confederate states, or the proceeds from the sale of rental of the properties"—for the "education of the freed people" but not for whites.[18] While this effort allocated resources for the educational advancement of former slaves, the benefits were outweighed by myriad other laws and practices that significantly curtailed the liberty of freed Black people; according to Justice Thurgood Marshall, "their freedom was of little value."[19] There were significant efforts to prevent Black workers from using their skills or learning new ones, such as the implementation of Black Codes in the South.[20] Black Codes varied from state to state, but all of them curtailed the employment opportunities available to newly free Black people. For example, in Mississippi, Black people were only allowed to rent land in cities,[21] effectively prohibiting them from being able to earn money through independent farming. Clearly, the employment opportunities available to former slaves "were in no realistic sense equal to those of whites,"[22] and patterns of employment discrimination that emerged after the Civil War remained up until the passage of Title VII nearly one hundred years later. [23]

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[18] Chambers and Goldstein, "Title VII: The Continuing Challenge of Establishing Fair Employment Practices," 10.
[19] Ibid., 10.
[20] Ibid., 11.
[21] "Mississippi Black Code," Roy Rosenzweig Center for History and New Media at George Mason University. Accessed January 2016. <https://chnm.gmu.edu/courses/122/recon/code.html>
[22] Belz, *Equality Transformed*, 12.
[23] Chambers and Goldstein, "Title VII: The Continuing Challenge of Establishing Fair Employment Practices," 11.

Another way in which Black people were prevented from improving their employment prospects was their systemic exclusion from collective bargaining. At the turn of the century, unions gained power and effectively organized workers in various industries to win better working conditions, higher wages, or shorter hours—but only for whites. They created "virtually insurmountable barriers," including explicit language in the organizations' constitutions or "ritual requirements,"[24] through a process called "occupational eviction."[25] Because unions were legally defined as "private voluntary associations," the common law rule that "private individuals [can] not be forced into association against their will" applied, and they could thus discriminate when deciding who was allowed to join. In the early 1900s, "racial discrimination was a basic, structural feature of the development of organized labor."[26] Unions that organized unskilled laborers admitted Black members, but segregated them into separate units. They also had different systems of seniority and job assignments.[27]

Paralleling union discrimination, Black people were excluded from many domains of work, creating the "traditional" ideas of 'Black' and 'white' jobs.[28] Black workers were almost uniformly restricted to menial jobs such as "domestics, waiters and waitresses, bellhops, janitors, caddies, delivery boys, and so on," and if they could find work in industry, they were restricted to the "the toughest and dirtiest jobs" in coal mines, iron and

[24] Ibid., 11.
[25] Belz, *Equality Transformed,* 13.
[26] Ibid., 13.
[27] Ibid., 13.
[28] Chambers and Goldstein, "Title VII: The Continuing Challenge of Establishing Fair Employment Practices," 12.

steel factories, foundries, tobacco processing plants, and fertilizer plants.[29] Particularly in the South, Black workers were regulated to segregated departments, which harmed their chances for promotion or wage increases.[30] Black women, unlike most white women, worked outside the home. Some had occupations perceived as feminine, such as childcare, cleaning, other domestic service, or waitressing, but a significant number worked in heavy industry, factories, agriculture, or even coal mines.[31]

The exclusion of millions of Black people from certain industries was felt most keenly by the American government during wartime, when they made reforms to open up certain jobs to Black laborers in order to maximize productivity or to attempt to maintain a progressive, democratic image. During and after World War II, the federal government made an effort to reduce employment discrimination vis-à-vis the federal contract program. Additionally, many states established fair employment practices commissions. However, these changes hardly made a dent and overall, civil rights activists "were unsuccessful in attempting to place the issue of job bias on the national political agenda."[32]

June 1941 marked the first substantive attempt to establish national policy regarding equal employment opportunity with the issuance Executive Order 8802 by President Franklin D. Roosevelt.[33] The Order outlawed discrimination in government employment, requiring employers and labors organizations to "provide for the full and

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[29] Robert Samuel Smith, *Race, Labor, & Civil Rights:* Griggs versus Duke Power *and the Struggle for Equal Employment Opportunity* (Baton Rouge: Louisiana State University Press, 2008), 9.
[30] Ibid., 9.
[31] Susanna Delfino, "Invisible Woman: Female Labor in the Upper South's Iron and Mining Industries," in *Neither Lady nor Slave: Working Women of the Old South*, ed. Delfino et al. (Chapel Hill: University of North Carolina Press, 2002), 285.
[32] Belz, *Equality Transformed*, 7.
[33] Ibid., 14.

equitable participation of all workers in defense industries, without discrimination because of race, creed, color, or national origin."[34] Enforcement was to be carried out by a new agency: the Fair Employment Practices Committee (FEPC), which had authority to hear and investigate allegations of discrimination and facilitate negotiations between the wronged party and the employer.[35]

However, the Order only applied to defense industries and said nothing about gender discrimination, leaving people of color and women of all races in all other domains vulnerable. Additionally, the FEPC had little enforcement power; they were never "given direct… authority and were authorized to enforce their decisions…only through negotiation, moral suasion, or the pressure of public opinion."[36] President Roosevelt's motivations for signing Executive Order 8802 were less than altruistic; he wanted to preserve America's international reputation as a democracy while the U.S. battled against fascist powers in Europe.[37] Roosevelt feared the impact of a March being planned by Civil Rights activist A. Phillip Randolph, who "threatened to assemble fifty thousand black workers in Washington in 1941 as a protest to raging discrimination in defense industries."[38] Roosevelt "exerted great effort" to avoid the March, but Randolph and his supporters moved forward because the President had not offered any clear commitment to establish equal employment opportunity.[39] The March was planned for July 1, 1941 and

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[34] Ibid., 14.
[35] Ibid., 14.
[36] Belton, *The Crusade for Equality in the Workplace*, 14.
[37] Smith, *Race, Labor, and Civil Rights*, 16.
[38] Ibid., 15-16.
[39] Belton, *The Crusade for Equality in the Workplace,* 13.

seemed likely to attract 100,000 participants; and so, "on June 25 the President capitulated."[40]

In 1943, Roosevelt issued Executive Order 9346, which extended the provisions of 8802 by making it illegal for government contractors to discriminate; it also strengthened the FEPC and gave it the power to hold public hearings and issue findings of fact regarding discriminatory employment practices.[41] This "symbolic response" occurred only as a result of labor shortages in the private defense industries during World War II.[42] The first FEPC "had no funding to operate regional offices and fielded a staff of only eight people," and was incapable "of addressing the widespread problems associated with job inequality."[43] In fact, most Congressmen thought the creation of the FEPC was of little importance.[44]

The WWII-era FEPC, which was terminated in 1946, had almost no tangible long-term effects and did not accomplish much in material terms, but it brought attention to employment discrimination and put it on the civil rights agenda.[45] The FEPC was effective in increasing awareness and "highlighting the vastness of wartime employment prejudice;" ultimately, it did process approximately 8,000 complaints and conduct 30 public hearings.[46] Between 1946 and 1964, twenty-six states outlawed employment discrimination and established bodies to enact a similar purpose as the FEPC. However, employment discrimination because of gender was still not mentioned, and enforcement

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[40] Ibid., 13.
[41] Belz, *Equality Transformed,* 14.
[42] Belton, *The Crusade for Equality in the Workplace,* 13.
[43] Smith, *Race, Labor, and Civil Rights*, 17.
[44] Ibid., 17.
[45] Belz, *Equality Transformed,* 14.
[46] Smith, *Race, Labor, and Civil Rights*, 18.

was accomplished through "voluntary compliance and individual complaint resolution, backed by regulatory action"[47]—which again proved to be ineffective and inadequate. [48]

Civil Rights, including employment opportunity, became increasingly politicized after *Brown v. Board of Education* in 1954 and Rosa Parks' arrest in 1955, creating a milieu in which more comprehensive legislation could be drafted and passed. Both Republicans and northern Democrats started to compete for the support of Black voters.[49] Some recognition and legal protection for the Civil Rights of racial minorities finally came in the Civil Rights Act of 1957 and the Civil Rights Act of 1960.[50] 1957 marked Congress' first passage of Civil Rights legislation since Reconstruction[51] and the enrollment of the Little Rock Nine. Before the 1857 legislation, reports from The Commission on Civil Rights "dramatized the plight of minorities," [52] NAACP and other organizations put pressure on courts, and there were protests and demonstrations that "heightened the sense of urgency."[53] The Civil Rights Act of 1957 established a Civil Rights Commission, the Civil Rights Division in the Justice Department, and made it illegal to attempt to intimidate voters or prevent voting.[54]

In 1960, both Democrats and Republicans promised to enact civil rights legislation in their platforms.[55] In February of that year was the Greensboro sit-in; in May, the founding of the Student Non-Violent Coordinating Committee. John F. Kennedy narrowly

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[47] Belz, *Equality Transformed,* 14.
[48] Smith, *Race, Labor, and Civil Rights*, 19.
[49] Belz, *Equality Transformed,* 7.
[50] Francis J. Vaas, "Title VII: Legislative History," *Boston College Law Review* Vol. 7: Issue 7 (1966): 431-432.
[51] Belz, *Equality Transformed,* 7.
[52] Vaas, "Title VII," 432.
[53] Ibid., 432.
[54] Belz, *Equality Transformed,* 7-8.
[55] Vaas, "Title VII," 432.

defeated Richard M. Nixon in the 1960 presidential election, "but did so only with solid support from Black voters."[56] Also in 1960, another Civil Rights act was passed which required states to preserve state records of federal elections and provided for the appointment of voter-referees to hear complaints from any person who was allegedly unable to vote.[57]

Specifically in the domain of employment, advocates for equal opportunity experienced "repeated failures" leading up to Title VII of the Civil Rights Act of 1964.[58] Two Civil Rights bills specifically regarding employment discrimination died in committee in the early 1940s.[59] The first was H.R. 3994, "A Bill to Prohibit Discrimination by Any Agency Supported in Whole or in Part with Funds Appropriated by the Congress of the United States, and to Prohibit Discrimination against Persons Employed or Seeking Employment on Government Contracts because of Race, Color or Creed" in 1941;[60] the second, H.R. 7142 "A Bill to Prohibit Discrimination in Employment because of Race, Color, Creed, Religion, National Origin, or Citizenship" in 1942.[61] In subsequent years, "literally hundreds of bills were filed" but all either died in committee or were killed due to senate filibuster[62] due to a lack of Congressional political will.

What became Title VII of the Civil Rights Act of 1964 would have never passed as its own piece of legislation. By attaching it to "more widely supported proposals," including

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[56] Belton, *The Crusade for Equality in the Workplace,* 19-20.
[57] Belz, *Equality Transformed,* 8.
[58] Vaas, "Title VII," 431.
[59] Ibid., 431.
[60] Ibid., 431.
[61] Ibid., 431.
[62] Ibid., 431.

banning discrimination in public facilities, elections, and public education,[63] Title VII was able to pass because the pressure for federal legislation became too great to be avoided by "the usual parliamentary maneuvering"[64] that led to the tabling or filibustering of the hundreds of employment opportunity bills proposed in the 1940s and 1950s.

In the years preceding Title VII during Kennedy's presidency, more than two hundred fair employment practices bills were proposed.[65] In March 1961, Executive Order 10925 was issued by Kennedy, confirming the nondiscrimination obligations of prior executive orders dealing with the government contract program, with an additional new requirement: federal contractors must "take affirmative action to ensure" that individuals were treated without regard to race, creed, color, or national origin.[66] This executive order also created the President's Committee on Equal Employment Opportunity (PCEEO), which had the ability to enforce the affirmative action mandate by "imposing sanctions in the form of contract cancellation or contractor debarment" with companies who contracted with the federal government. More than 250 companies signed agreements with PCEEO in which they promised to conduct surveys on race and improve their practices, incentivized into voluntary compliance because it would exempt them from contract compliance enforcement evaluations.[67]

President Kennedy gave his first special message on Civil Rights to the 88th Congress on February 28, 1963, but did not specifically ask for legislation on employment.[68] However, on June 19, 1963, he gave a second special message on Civil Rights after

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[63] Belz, *Equality Transformed,* 8.
[64] Vaas, "Title VII," 431.
[65] Belton, *The Crusade for Equality in the Workplace*, 19.
[66] Belz, *Equality Transformed,* 18.
[67] Ibid., 19.
[68] Vaas, "Title VII," 432.

demonstrations in Birmingham and elsewhere, referring to "a rising tide of discontent."[69] The Civil Rights demonstrations in May 1963 in Birmingham, Alabama were characterized by violent action taken by the city police against peaceful Black protestors—including many school children—who were beaten, attacked by dogs, and pelted with water from fire hoses.[70] The frequency of civil rights demonstrations "rose dramatically from 10 in 1954 and 15 in 1955 to 173 in 1956."[71] Though protests decreased in late 1950s, the decline was short-lived, leading to a "resurgence of activity"[72] in the early 1960s.

In his second special message, Kennedy addressed in detail "Fair and Full Employment" stressing that progress needed to occur in three different ways: creating more jobs through economic growth, raising the level of skill through more education and training, and eliminating racial discrimination in employment.[73] "Southern intransigence" and escalating protests pressured the Kennedy Administration to modify their Civil Rights policy in 1963 "to support comprehensive anti-discrimination legislation."[74] The Civil Rights movement gained efficacy "when the American people were confronted, day after day, by intensive media coverage of peaceful civil rights demonstrators being violently attacked by those who opposed their pleas for justice, particularly if the attackers were public officials."[75]

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[69] Ibid., 432.
[70] Belton, *The Crusade for Equality in the Workplace,* 20.
[71] Paul Burstein, *Discrimination, Jobs, and Politics* (Chicago: The University of Chicago Press, 1998), 75.
[72] Ibid., 75.
[73] Vaas, "Title VII," 432.
[74] Belz, *Equality Transformed,* 22.
[75] Burstein, *Discrimination, Jobs, and Politics,* 72.

Media coverage of Civil Rights "rose to historical highs in the mid-1960s,"[76] particularly coverage of Birmingham in 1963. Nicholas Katzenbach, a Deputy Attorney General, noted that "without television there wouldn't be a Civil Rights Act."[77] Public concern reached an "extremely high" level of intensity,[78] and Norbert Schlei, assistant Attorney General, remarked that "suddenly, literally overnight, the time had come for consideration by the country and by the Congress of major civil rights legislation."[79] Political will, lacking in earlier years, appeared as the urgency was made clear by the violent behavior of whites against the direct action taken by Civil Rights activists.

1963 was also the year of the March on Washington, during which Martin Luther King Jr. gave his 'I Have a Dream' speech,[80] and from the beginning of the 88th Congress, multiple senators and representatives proposed a plethora of Civil Rights bills.[81] Some were comprehensive, covering "all areas of civic and economic life where discrimination existed, including private employment" whereas others were concerned mostly with "equal employment opportunity in both private and public employment."[82] One of the bills that dealt with equal employment opportunity was H.R. 405 "A Bill to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry or Age."[83] H.R. 405 was the "nominal ancestor of Title VII."[84]

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[76] Ibid., 81.
[77] Belton, *The Crusade for Equality in the Workplace,* 20.
[78] Burstein, *Discrimination, Jobs, and Politics,* 84.
[79] Ibid.,72-73.
[80] Smith, *Race, Labor, and Civil Rights*, 94.
[81] Vaas, "Title VII," 433.
[82] Ibid., 433.
[83] Ibid., 433.
[84] Ibid., 433.

H.R. 405 was introduced in the House by Mr. Roosevelt of California on January 9, 1963, the opening day of the 1st Session of the 88th Congress, and was quickly referred to the House Committee on Education and Labor.[85] After extensive hearings, the Committee amended the bill and recommended its passage.[86] H.R. 405 was one of the "more comprehensive" House bills regarding civil rights; it and others like it were referred to the House Committee on the Judiciary. Hearings on these bills before Subcommittee No. 5 spanned 22 days lasting between May 8 and August 2, 1963.[87] Subcommittee No. 5 formally considered 172 bills, including six (H.R. 24, 2027, 6028, 6300, 6333, and 6757) that proposed outlawing discrimination in private employment.[88]

While these hearings were occurring, the administration's comprehensive Civil Rights bill, H.R. 7152 was introduced by Representative Celler of New York on June 20, 1963 and was referred to the Committee on the Judiciary and Subcommittee No. 4. [89] H.R. 7152 initially contained no compulsory FEP provisions with regards to private employment.[90] Title V of the bill proposed expanding the powers of the Commission on Civil Rights so that the Commission would serve as a national clearinghouse for information and would advise and support public and private employers in combatting discrimination "in employment and other areas."[91] Title VII of H.R. 7152 authorized the President to create another commission to be called the "Commission on Equal Employment Opportunity," thus giving statutory basis for the creation of the commission

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[85] Ibid., 433.
[86] Ibid., 433.
[87] Ibid., 434.
[88] Ibid., 434.
[89] Ibid., 434.
[90] Ibid., 434.
[91] Ibid., 434.

which had first been in established in 1961 pursuant to Executive Order No. 10925. The goal of the commission would have been to prevent discrimination by government contractors and subcontractors and in programs that receive federal funding or assistance.[92]

James Roosevelt of California, Chairman of the General Subcommittee on Labor of the House Committee on Education and Labor, testified as a co-sponsor for H.R. 7152 and favored amending it to include the provisions of H.R. 405. [93] Title VII of H.R. 7152 ended up reflecting the FEP content of H.R. 405, but was "different in certain respects."[94]

Title VIII of H.R. 7152 also included some content from H.R. 405—it provided for an administrative agency with "the authority to hold hearings and issue cease-and-desist orders…after a finding of discrimination in hiring or union membership."[95] The House Committee on the Judiciary filed their report on November 20, and H.R. 7152 was referred to the Committee on Rules on November 27, 1963.[96] Hearings before the Rules Committee lasted from January 9 to January 30, 1964, and debate on H.R. 7152 in the House began on January 31. The debate lasted for ten hours; when it ended on February 1, each title was read and amendments acted upon. Amendments to Title VII were considered on Saturday, February 8 and Monday, February 10, 1964. Forty amendments were proposed and only sixteen were adopted; fourteen of those survived the rewriting of the bill by the Senate.[97]

One of the key amendments made in the House was the addition of the word "sex" to the already existing list of race, color, religion, and national origin. The proposal was made

[92] Ibid., 434.
[93] Ibid., 435.
[94] Ibid., 435.
[95] Ibid., 435.
[96] Ibid., 437.
[97] Ibid., 438.

by Representative Howard Smith[98] on February 8, 1964.[99] Smith was a segregationist democrat from Virginia. The House had only a few female representatives at the time and "erupted in laughter" at Smith's proposal.[100] Smith responded by asserting that he was serious and that "it is indisputable fact that all throughout industry women are discriminated against."[101] However, Smith was "not a Civil Rights enthusiast…[and] offered his amendment in a spirit of satire and ironic cajolery."[102] He had actually "instigated an investigation determined to convince Congress that the FEPC needed elimination," and according to Historian Andre Kersten, "Smith adhered to a personal code of hatred, especially against African Americans."[103]

Smith had previously attempted to block Title VII as the chairman of the Rules Committee (which must approve legislation before it goes to the House floor). Smith believed that the addition of the word "sex" would undermine Title VII because it would mandate the government address both race and sex discrimination—which would take more resources and require more labor. [104] At the very least, he wanted the inclusion of "sex" to "cause mayhem among the liberal supporters of the bill, many of whom had an easier time imagining racial equality than gender equality."[105] Women's advocacy groups, whose members were overwhelmingly white, had been trying to find someone to introduce

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[98] Ibid., 439.
[99] "Fifty Years ago, a Southern Segregationist made sure the Civil Rights Act would Protect Women. Thanks!" by Clay Risen. Slate.com. Accessed October 2015. <http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/the_50th_anniversary_of_title_vii_of_the_civil_rights_act_and_the_southern.html>
[100] "Fifty Years ago…," Slate.com.
[101] Ibid.
[102] Vaas, "Title VII," 441.
[103] Smith, *Race, Labor, and Civil Rights*, 18.
[104] "Fifty Years ago…" Slate.com.
[105] Ibid.

an amendment to add "sex," but had trouble; "even the groups' allies were afraid it would scare off tentative conservative supporters of the Civil Rights Act."[106] Smith's racism was perfectly in line with a racist group of mid-1900s women's rights advocates who gained traction "in response to civil rights advances" by "objecting to giving labor protections to Black men, but not white women."[107]

Opposition to Smith's amendment came from Edith Green of Oregon. The White House had asked her to speak out against Smith's proposal, because both the Johnson administration and Green were concerned that "sex" would make the bill harder to pass.[108] Others opposed to the addition of "sex" included some of the main supporters of H.R. 7152: Representative Emanuel Celler of New York, James Roosevelt of California, John V. Lindsay of New York, and Frank Thompson, Jr., of New Jersey.[109] Supporters of the amendment included many Southern Representatives, who likely had motives similar to Smith's, as well as five female Representatives: Frances P. Bolton of Ohio, Martha W. Griffiths of Michigan, Katharine St. George of New York, Catherine May of Washington, and Edna F. Kelly of New York.[110]

Ultimately, the bill passed the House, "sex" and all, with a vote of 168-133.[111] Franklin D. Roosevelt Jr., chairman of the Equal Employment Opportunity Commission, the agency responsible for enforcing Title VII, "considered the provision [the addition of 'sex'] a joke…[he] and a majority of his commissioners had no intention of enforcing the ban," and

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[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Vaas, "Title VII," 442.
[110] Ibid., 442.
[111] Risen, "Fifty Years ago…"

in fact they voted to allow gender discrimination in job advertising in September 1965.[112] The cavalier attitude that officials held towards sex discrimination may have caused the EEOC to take allegations of sex discrimination less seriously, and in fact, "it was a surprise" when one third of complaints they received in their first year were incidents of sex discrimination.[113]

After passing in the House on February 10, 1964, the bill then went to the Senate.[114] "The struggle in the Senate was titanic and protracted"[115] because the House version was "considered too radical."[116] H.R. 7152 was read before the Senate for the first time on February 17 and for the second time on February 26. Debate ensued about whether it should be referred to committee or be tabled. On March 9, 1964, Senator Mansfield, majority leader, made a motion for the Senate to consider the bill. After 14 days of debate on Mansfield's motion, they started to formally consider H.R. 7152 on March 26, 1964.[117]

Senator Morse of Oregon, an "ardent civil rights advocate" who later did vote in favor of the passage of H.R. 7152, proposed to immediately refer the bill to the Judiciary Committee; he was supported by Senator Dirksen of Illinois (majority leader), who was significant in in securing passage of H.R. 7152 in the Senate.[118] Their reasoning: they believed that the "defects in [the bill]," as passed by the House, would be best rectified by

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[112] Ibid.
[113] "The History Corner: Was the Addition of Sex to Title VII a Joke?" Society for Industrial and Organizational Psychology. Accessed January 2016. <http://www.siop.org/tip/jan11/12highhouse.aspx>
[114] Vaas, "Title VII," 443.
[115] Ibid., 443.
[116] Belz, *Equality Transformed*, 23.
[117] Vaas, "Title VII," 443-444.
[118] Ibid., 444.

sending it to Committee.[119] Although Morse's motion was struck down, the rational for the proposal "left their mark on the subsequent handling of the bill."[120] Very rarely has similar legislation been debated with such a level of conscientiousness of the importance of legislative history to eventually provide courts with guidance in interpreting and applying the law.[121]

Supporters of H.R. 7152 made extensive preparations for the debate.[122] The effort was bipartisan: Senator Humphrey of Minnesota (majority whip) and Senator Kuchel of CA (minority whip) were chosen to speak in favor of the bill and explain its provisions.[123] For each Title of the bill, bipartisan "captains" were chosen and were responsible for discussing it in detail, defending it, and leading discussion. Senator Clark of Pennsylvania and Case of New Jersey were the captains fo r Title VII.[124] Humphrey and Kuchel put out a newsletter called "Bipartisan Civil Rights Newsletter" which was distributed "whenever circumstances warranted (often daily)" to the offices of the Senators who supported H.R. 7152. [125]

The debate began on H.R. 7152 on March 30, 1964 and would continue for a subsequent 58 days. [126] While the debate occurred, a bipartisan group lead by Senators Dirksen, Mansfield, Humphrey, and Kuchel, worked outside the Senate floor to reach agreement on amendments of the bill that "would ensure its passage." They had multiple

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[119] Ibid., 444.
[120] Ibid., 444.
[121] Ibid., 444.
[122] Ibid., 444.
[123] Ibid., 444.
[124] Ibid., 445.
[125] Ibid., 445.
[126] Ibid., 445.

conferences with House leaders, the Attorney General, and other Senators who were essentially pro-civil rights, but sincerely concerned about various provisions of the bill.[127]

Senator Mansfield filed a motion for cloture on Saturday, June 6, 1964, but then withdrew after a unanimous consent agreement that created time limitations for debate on three particular amendments. The debates took place on June 8 and June 9, and were also voted on during those days. Mansfield re-filed his cloture motion on June 8 and the final Senate vote took place on Wednesday, June 10, 1964. The vote was 71-29—four more than the required two-thirds. There was "limited debate and action" on the pending amendments.[128]

The Senate made four amendments to Title VII. [129] First, they modified the definition of employer; previously, it had meant a person engaged in an industry with twenty-five or more employees. The Senate added the requirement have the twenty-five employers "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[130] Second, the Senate modified the exemption for religious organizations, permitting a religious organization to employ individuals of a particular religion to perform work connected with the carrying on of the organization's religious activities. In addition, the exemption was extended—in broad terms—to religious education institutions, for employees who would perform work related to the educational activities of such institutions. In effect, a religious organization or religious educational institution may discriminate in employment in favor of a particular religion, but not on the basis of race,

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[127] Ibid., 445.
[128] Ibid., 446.
[129] Ibid., 447.
[130] Ibid., 447.

color, sex or national origin.[131] Third, there was the Mansfield-Dirksen addition of subsection (j) to section 703, which stated that preferential treatment for individuals or minority groups to correct an existing imbalance may not be required under Title VII.[132]

The fourth amendment was to Section 705, concerning the Equal Employment Opportunity Commission.[133] Some restrictions were placed on the EEOC's discretionary powers; but also expanded their power to give assistance and make available their studies to the public instead of only nongovernmental or governmental agencies who expressed interest.[134] According to Section 706, only an aggrieved person can bring suit against an employer—unless there is a pattern of discrimination, which case the Atty. General can bring suit. The EEOC itself cannot bring suit at all.[135] In federal court, "the unlawful employment practice complained of must be an intentional one: The employer must have intended to discriminate before a court could grant any relief."[136]

After passage in the Senate, H.R. 7152 was referred to the House for concurrence. The House Committee on Rules reported the bill without amendments on June 30, 1964 and on July 2 adopted Resolution 789, indicated their agreement with the Senate's amendments. The President signed the bill into law later that same day.[137] The Civil Rights Act of 1964 was "the first comprehensive federal legislation ever to address the problems of discrimination."[138] It was passed in order to "avert a national crisis" with the idealistic

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[131] Ibid., 448.
[132] Ibid., 450.
[133] Ibid., 450.
[134] Ibid., 451.
[135] Ibid., 452.
[136] Ibid., 453.
[137] Ibid., 457.
[138] Chambers and Goldstein, "Title VII: The Continuing Challenge of Establishing Fair Employment Practices," 12.

goal of "end[ing] the odious legacy of slavery and racial oppression."[139] President Kennedy saw it as a way to resolve racial conflicts "in the courts [rather] than on the streets,"[140] referencing the unprecedented amount of organizing and direct action mustered by Civil Rights activists challenging the status quo and demanding comprehensive reforms. Ultimately, the Civil Rights Act was "an attempt to change the conduct of Americans—on a grand scale."[141]

While the Act was passed on July 2, 1964, Title VII did not take effect until summer 1965 so that the EEOC would have time to establish itself—and so that businesses and unions could begin to voluntarily comply. However, most the changes made were "cosmetic," [142] and the real work in enforcing the law and ensuring equal access to employment continued well past the mid-1960s.

Title VII is undoubtedly the legacy of the Black-led Civil Rights movement. The Civil Rights Act of 1964 was designed specifically with the goal of eradicating anti-Black racism, which was clearly necessary and continues to be important and relevant today. However, in the decades since then, the ramifications of using single-axis conceptions of discrimination and the Black-white binary as an organizing frame for understanding race have become elucidated. Title VII doctrine has considerably evolved since its passage in 1964, and courts have interpreted the statute in myriad ways—particularly with regards to women of color.

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[139] Ibid., 12.
[140] Ibid., 12.
[141] Ibid., 12.
[142] Smith, *Race, Labor, and Civil Rights,* 29.

2. Theoretical and Historical Foundations

Women of color have faced significant obstacles when attempting to obtain justice in Title VII cases. This chapter lays out important theoretical concepts and gives historical background, providing a foundation from which we can critically analyze court cases. It argues that the unique historical experiences of Black people and Asian Americans has led to the hypervisibility of the former and the invisibility of the latter, and explores the consequences of the stereotypes and common beliefs held about each group. Specifically, this chapter elucidates the construction of Black and Asian women's sexuality and gendered otherness and outlines the particular reasons that have made it difficult for Black and Asian women to achieve successful outcomes in Title VII cases.

Theoretical Concepts

"Women of color"

A "woman of color" is a meaning-laden term. Much has been written by non-white women of different races about who is included in this category, what it means to be a woman of color, and what political connotations might be assumed. Angela Davis traces the origin of the term to the civil rights movement, when Black, Asian, Latina, and Native women who were engaged in racial justice organizing began to articulate an internal critique of male-centered leadership.[143] The "refusal to separate sexual and gender

[143] Lisa Lowe, "Angela Davis: Reflections on Race, Class and Gender in the USA" in *The Politics of Cultural in the Shadow of Capital*, edited by Lisa Lowe and David Lloyd. Durham, NC; Duke University Press (1997): 310.

liberation from the goal of racial and economic justice" created the political milieu for women of color coalitional work in subsequent years.[144]

In the decades since the term originated, its meaning has evolved. At present, there is no singular, cohesive definition that is widely accepted. For our purposes, a "woman of color" is a person who is dominated by and experiences the ill effects of at least white supremacy and patriarchy; sociologist Vilma Ortiz similarly defines women of color as Black women, Latinas, Asian women, and Native American women "because of their non-white or mixed racial backgrounds."[145] Because of systemic oppression, a woman of color is subjected to identity-based discrimination as a result of her gendered and raced identity that may take a variety of forms, including employment discrimination. Women of color may also potentially experience other forms of oppression, such as classism, heterosexism, ableism, ageism, or transphobia. This is not an exhaustive list; and it is worth noting that these systems are not discrete and do work synergistically in ways that result in multifaceted experiences, which will be discussed.

Intersectionality and the Unique Disadvantages of Women of Color

It is generally accepted that race and gender are socially constructed categories of identity. However, this does not mean that gender and racial identity are unimportant.[146] In our society of stratified hierarchy, power aggregates around certain identity categories and

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[144] Shireen Roshanravan, "Passing-as-if: Model-Minority Subjectivity and Women of Color Identification," *Meridians* Vol. 10: No. 1 (2009): 6.
[145] Ortiz, "Women of Color: A Demographic Overview," 13.
[146] Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color." *Stanford Law Review* Vol. 43: No. 6 (1991): 1296.

is leveraged against others.[147] Women of color occupy a positionality that is "marginalized within dominant society"[148] due to the hegemony of androcentrism and ethnocentrism in which the white and male point of view is normalized and presented "as the societal standard."[149]

All humans use "interpretive tools" to create meaning and make sense of ourselves and others.[150] From birth, we are socialized to believe in the veracity of certain "cultural schemas and narrative tropes"[151] which misrepresent marginalized individuals, leaving them mischaracterized and misunderstood[152] by mainstream society. The pervasive devaluation that women of color are subjected to "is linked to how [they] are represented in cultural imagery"[153] vis-à-vis "symbolic images" [154] that are "applied to different race, class and gender groups" and serve to maintain systemic oppression.[155]

Race, gender, and other identities such as sexual orientation are constructed in such a way that the prototypical person who has a particular identity does not have any other marginalized identities. For example, the idea of gender, and the idea of womanhood, is implicitly associated with white women; and race is implicitly linked with Black men. This perception holds true among "scholars, policy makers, and lay people."[156]

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[147] Ibid., 1297.
[148] Ibid., 1250.
[149] Purdie-Vaughns and Eibach, "Intersectional Invisibility," 380-381.
[150] Ibid., 384.
[151] Ibid., 384.
[152] Ibid., 384.
[153] Crenshaw, "Mapping the Margins," 1282.
[154] Patricia Hill Collins, "Toward a New Vision: Race, Class, and Gender as Categories of Analysis and Connection," *Race, Sex & Class* Vol. 1: No. 1 (1993): 33.
[155] Ibid., 33.
[156] Purdie-Vaughns and Eibach, "Intersectional Invisibility," 384.

The concept of intersectionality, first coined by Kimberlé Crenshaw, explains the multidimensionality of oppressions that can be experienced by a marginalized person: one does not experience oppressions (or privileges) discretely, but simultaneously. The idea that identities can be isolated as disparate elements is fundamentally inaccurate. Intersectionality pushes back against the "tendency to treat race and gender as mutually exclusive categories of experience and analysis."[157] Identity is often treated "as an either/or proposition" and requires women of color to choose her gender or her race, ignoring the need to acknowledge multiple identities when considering how power is aggregated and dispersed throughout society.[158] Intersectionality recognizes that all women are impacted by race and racism.[159]

It is necessary to "[replace] additive models of oppression with interlocking ones;" the development of theory to do so was a significant shift.[160] Centering women of color in analyses of oppression "opens up possibilities for a both/and conceptual stance"[161] that would better represent the complex reality of the "matrix of domination."[162] Intersectionality is a conceptual tool that can be utilized to the benefit of women of color.[163]

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[157] Crenshaw, "Demarginalizing the Intersection of Race and Sex," 139.
[158] Crenshaw, "Mapping the Margins," 1245.
[159] Maxine Baca Zinn and Bonnie Thornton Dill, "Difference and Domination," in *Women of Color in U.S. Society*, ed. Maxine Baca Zinn and Bonnie Thornton Dill (Philadelphia, Pennsylvania: Temple University Press, 1994), 11.
[160] Patricia Hill Collins, excerpt from "Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment," in *Reading Feminist Theory From Modernity to Postmodernity*, ed. by Susan Archer Mann and Ashly Suzanne Patterson (New York, New York: Oxford Univerisity Press, 2015) 273.
[161] Ibid., 274.
[162] Ibid., 274.
[163] Ibid., 275.

Because intersectional experience "is greater than the sum of racism and sexism,"[164] the discrimination faced by women of color cannot be explained by separately analyzing the racial or gendered facets of discrimination.[165] In a society in which "the narratives of gender"[166] are centered on white women, women of color occupy "a location that resists telling."[167] While white women experience patriarchal subordination, they generally do not feel the adverse effects of white supremacy; whereas women of color must confront "intersecting patterns of racism and sexism."[168] Compared to relatively privileged individuals, women of color are "render[ed] 'invisible.'"[169] For example, when discussing American women's history, there is often the tendency to frame the second wave feminist movement as *the* female resistance of the twentieth century, ignoring the crucial role that Black women played in the Civil Rights movement.

This invisibility—as women, as people of color—is manifested in the "cumulative nature of disadvantage,"[170] which make working women of color more vulnerable[171] to discriminatory employment practices than either working white women or working men of color. Disparities in earning exist for working women who are Black, Latina, or Asian as compared to white women.[172] The stereotypes and tropes in larger society greatly affect

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[164] Crenshaw, "Demarginalizing the Intersection of Race and Sex," 140.
[165] Crenshaw, "Mapping the Margins," 1244.
[166] Ibid., 1298.
[167] Ibid., 1242.
[168] Ibid., 1243.
[169] Purdie-Vaughns and Eibach, "Intersectional Invisibility," 377.
[170] Ibid., 378.
[171] Judith Winston, "Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990," *California Law Review* Vol. 79: No. 3 (1991): 779.
[172] Ibid., 779.

the experiences women of color have at work.[173] Because identity is recognized only within certain "tightly-drawn parameters,"[174] so too is identity-based discrimination. This means that women of color often find it difficult when seeking justice for intersectional employment discrimination.

Courts do not exist in isolation and are saturated with the ideologies of mainstream American society—including the inability to recognize complexity of the identities and identity-based discrimination that women of color experience—and thus there is a continual disconnect between lived experiences of women of color and the way that courts interpret their experiences.

Anti-discrimination laws more broadly, crafted by predominantly white male legislators in a society in which "whiteness is the racial norm"[175] are on some level inadequate for all people of color, regardless of gender, because the laws "reflect whites' conception of race and racism"[176] which may differ from the way in which people of color understand race and the racism they experience. For women of color specifically, because "discrimination against a white female is…the standard sex discrimination claim,"[177] their non-whiteness and their raced gender identity mean that their allegations of sex discrimination "diverge from this standard."[178]

Mainstream conceptions of discrimination suggest that "disadvantage occur[s] along a single categorical axis," which allows men of color to pursue race discrimination cases

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[173] Ibid., 784.
[174] Crenshaw, "Demarginalizing the Intersection of Race and Sex," 152.
[175] Barbara Flagg, *Was Blind, But Now I See: White Race Consciousness & the Law* (New York: New York University Press, 1998), 2.
[176] Flagg, *Was Blind, But Now I See*, 25.
[177] Crenshaw, "Demarginalizing the Intersection of Race and Sex," 145.
[178] Ibid., 145.

and white women to press charges alleging sex discrimination, but does not necessarily leave room for women of color to bring suit against employers who are engaging in multidimensional discrimination.[179] The kind of intersectional, simultaneous employment discrimination that women of color may experience on the job is not adequately represented in anti-racist or anti-sexist policy, and existing structures began to seriously consider adopting an intersectional point of view relatively recently.[180]

This thesis examines the failure and success of courts between the 1970s and 1990s to recognize and respond to women of color's intersectional employment discrimination claims. It is evident that most women "suffer from sexist tyranny," but that fact alone has not been enough to create solidarity between women.[181] While women of color experience oppression in ways that are significantly different from white women, even between different populations of women of color there are meaningful disparities. Both Black and Asian women have historically been and presently are oppressed in the United States, but for different reasons and in different ways; and as a result, both groups have been unable to fully access rights within the American political system. The diverse experiences of Black and Asian women illustrate the varying ways that subordination operates and shows the impact of white supremacist patriarchy on different non-white populations.

Contemporarily, Asians (including Asian women) can be perceived as "model minorities" whose relative success under American capitalism is used to suggest that Black

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[179] Crenshaw, "Demarginalizing the Intersection of Race and Sex," 140.
[180] Virginia Wei, "Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims based on Combined Factors of Race, Gender, and National Origin," *Boston College Law Review* Vol. 37: No. 4 (1996): 1.
[181] bell hooks, "Black Women: Shaping Feminist Theory," in *The Black Feminist Reader*, ed. Joy James and T. Denean Sharpley-Whiting (Malden, Massachusetts: Blackwell Publishers, Inc., 2006), 134.

people could advance only if they were willing to work a little harder; the Asian model minority stereotype is a device that "justif[ies] the poverty of…. 'real' racial minorities," particularly Black people (including Black women).[182] The supposed capacity of Asians to overcome racism first entered the American lexicon in a 1966 article, written by sociologist William Pettersen.[183] Pettersen detailed the success of Japanese Americans post-World War II, praising their resiliency since internment. He juxtaposed the achievements of the Japanese with "problem minorities," and at the height of Civil Rights movement, this was thinly veiled code for "Black people." This article "germinat[ed] the model minority myth from the fertilizer of anti-Blackness,"[184] and the ideas put forth by Pettersen continue to resonate today. In the white American imagination, Asians and Asian Americans value "hard work, discipline, and obedience to authority,"[185] whereas Black people are "lazy" and "abuse the welfare system"—or are just plain criminals.[186]

Historical Contextualization: The Emergence of Stereotypes

The above ideas rely on "historical amnesia" and a collective forgetting of the realities of American colonialism, imperialism, and slavery.[187] Black women came to

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[182] Roshanravan, "Passing-as-if," 3.
[183] William Pettersen, "Success Story, Japanese-American Style," *New York Times*, published January 9, 1966. Accessed January 2016. <http://inside.sfuhs.org/dept/history/US_History_reader/Chapter14/modelminority.pdf>
[184] "When Nicholas Kristof Just Doesn't Get It About Asian Americans," Reappropriate Blog. Accessed January 2016. <http://reappropriate.co/2015/10/when-nicholas-kristof-just-doesnt-get-it-about-asian-americans/>
[185] Roshanravan, "Passing-as-if," 3.
[186] "Ten Unbelievable myths about Black people," Black Enterprise. Accessed January 2016. <http://www.blackenterprise.com/functional/black-history-month/10-black-people-myths-stereotypes-unbelieveable/>
[187] Roshanravan, "Passing-as-if," 3.

America as slaves in the 1600s, and American chattel slavery continued until the passage of the Thirteenth Amendment in 1864. Many contemporary stereotypes of Black women can trace their roots back to ideas that were conceived during slavery. The legacy of slavery set "standards for a few womanhood" in the Reconstruction era up to the present day.[188]

During the Middle Passage, Africans were "literally suspended in the 'oceanic'… removed from the indigenous land and culture, and not-yet 'American' either."[189] This "diasporic plight" and "theft of the body"[190] did not take account of the humanity of future slaves. Rather, "subjects [were] taken into 'account' as *quantities*" [emphasis in-text].[191] While more men entered the Atlantic slave trade than women, [192] the kidnapped Africans were dehumanized so severely that the slave body was de-gendered; "one is neither female, nor male."[193] Once on American soil, particularly after the ceasing of the slave trade but not the abolishment of the institution of slavery itself, the profitability of Black women's reproductive capabilities became clear: their flesh became "a prime commodity of exchange,"[194] and slave women were highly valued for their reproductive capacity.[195]

Female slaves were seen as sexually promiscuous with "'matriarchal' proclivities."[196] This idea comes from the practice of *partus sequitur ventrem*, Latin for "the child follows the condition of the mother;" if born to a slave woman, then the child is also a

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[188] Angela Davis, *Women, Race, & Class* (New York: Random House, 1983), 3.
[189] Hortense Spillers, "Mama's Baby, Papa's Maybe: An American Grammar Book" in *The Black Feminist Reader*, ed. Joy James and T. Denean Sharpley-Whiting (Malden, Massachusetts: Blackwell Publishers, Inc., 2006), 70.
[190] Ibid., 60.
[191] Ibid., 70.
[192] Ibid., 70.
[193] Ibid., 70.
[194] Ibid., 76.
[195] Davis, *Women, Race, & Class*, 6-7.
[196] Ibid., 3.

slave.[197] The cult of domesticity, an "ideological exhalation of motherhood" that began in the 1800s, did not apply to female slaves.[198] Stereotypes that supposedly illustrate Black women's role during slavery, such as Aunt Jemima or the Black Mammy,[199] suggest that most Black female slaves were in domestic child caring roles, however, most slave women were fieldworkers.[200]

Despite the end of slavery and the post-Civil War amendments that optimistically hoped to remedy the harms of racial oppression, Black women continued to face challenges. Many of the negative stereotypes associated with Black women that originated with slavery were supplemented with the 1965 Moynihan Report,[201] which claimed that the social and economic problems of the Black community were a result of their "putatively matriarchal family structure."[202] Essentially, the thesis argued that Black people remained oppressed in America because of a matriarchal familial structure and needed more male authority. The myths of the "broken Black family" and the associated "single Black mother on welfare" were arguably created, or at least entered mainstream American consciousness, with the publication of the Moynihan Report.

Today, Black womanhood is "a locus of confounded identities."[203] Black women's bodies are subjected to "externally imposed meanings and uses;"[204] an "American grammar" of "symbolic order."[205] The ideologies of white supremacy and patriarchy

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[197] Ibid., 12.
[198] Ibid., 7.
[199] Ibid., 5.
[200] Ibid., 5.
[201] Ibid., 13.
[202] Ibid., 13.
[203] Spillers, "Mama's Baby, Papa's Maybe," 57.
[204] Ibid., 60.
[205] Ibid., 63.

imprint certain significances upon Black women, which simultaneously creates representations and misrepresentations that render them legible to the white and patriarchal gaze as caricatures, creating an entity that can be used to suggest immorality, greed, promiscuity, and other stereotypes. This "distortion"[206] takes the form of various tropes that are "loaded with mythical prepossession,"[207] making Black women into an archetypal other[208] full of "irresistible, destructive sensuality."[209]

The hypersexualization of Black women implies that they cannot be sexually abused and rests on the myth of Black women's overpowering sexuality,[210] which portrays them as "immoral, insatiable, [and] perverse."[211] It is assumed both in law and in social sensibilities that "Black women cannot be raped or otherwise sexually abused,"[212] an idea that again has its origins in slavery when white men used sexual assault as "a weapon of domination."[213] Mirroring the trope of the unrapeable Black woman is the stereotype of the indomitable strong Black woman. Both of these "operative myths"[214] work to create the illusion that Black women are incapable of feeling pain or suffering, which makes it particularly difficult for them to seek justice for discrimination; since Black women are typed as "superhuman" beings, they must not feel the ill effects of oppression and thus have no business doing

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[206] Ibid., 65.
[207] Ibid., 57.
[208] Ibid., 60.
[209] Ibid., 60.
[210] Winston, "Mirror, Mirror on the Wall," 785.
[211] "African American Women in Defense of Ourselves," in *The Black Feminist Reader*, ed. Joy James and T. Denean Sharpley-Whiting (Malden, Massachusetts: Blackwell Publishers, Inc., 2006), 272.
[212] Ibid., 272
[213] Davis, *Women, Race, & Class*, 24.
[214] hooks, "Black Women: Shaping Feminist Theory," 143.

things like filing Title VII lawsuits. As this thesis will explore in detail, the law "is conspicuously absent when protection is needed."[215]

Like Black women, many Asian women have found themselves unprotected or unduly persecuted by the American legal system. However, historically this has been for quite different reasons that center around language barriers or concerns regarding immigration and citizenship status.

Asians in America and Asian Americans are a vastly heterogeneous population, and the white-invented categories of "Asian" and "Asian American" obscure the differences between different groups of Asian (Americans), homogenizing them into a monolith of "middleman minorities" that "buffer the white-supremacist power structure" by suggesting that the racial barriers that prevent the success of other communities of color are more permeable than they appear.[216] As part of the "model minority racial project,"[217] Asians are stereotyped as successful, hard workers who are just as good as or even better off than white people. In the white American imagination, the continent of Asia is a singular entity, and the success of Asian Americans can be chalked up to "Confucian values," which is completely illogical; Confucian values—originating in China—are unlikely to be imparted as wisdom from Indian parents to Indian children, or from Korean parents to Korean children.[218]

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[215] Jodie Michelle Lawston, "Women, the Criminal Justice System, and Incarceration: Processes of Power, Silence, and Resistance," *Feminist Formations* Vol. 20: No. 2 (Summer 2008).
[216] Roshanravan, "Passing-as-if," 19.
[217] Ibid., 2.
[218] Nicholas Kristof, "The Asian Advantage," *New York Times,* published October 11, 2015. Accessed January 2016. < http://www.nytimes.com/2015/10/11/opinion/sunday/the-asian-advantage.html?_r=3>

This contemporary construction of Asian Americans as successful and better off than white people as a result of something intrinsic to "Asian culture" is fundamentally ahistorical and relies on orientalist stereotyping. Historically, the largest population of Asians in America has been on the west coast. Bordering the Pacific Ocean, the west coast is the closest continental American soil to the continent of Asia, though the first Asians in America were Filipino sailors who settled in the bayous of Louisiana in the 1700s.[219] In the 1840s, Chinese immigrants arrived in Hawai'i to work on plantations and on the American west coast to work in gold mines and build the first transcontinental railroad;[220] "they were despised laborers who toiled for low wages in the harshest of conditions."[221]

Much like Black slave labor competed with free labor, the influx of Chinese labor threated the economic security of west coast whites. In 1852, the California Assembly committee issued a report criticizing the influx of Chinese labor, and in the 1860s and 1870s Unions and political parties adopted explicitly anti-Chinese platforms. These decades also gave rise to the formation of anti-Coolie clubs.[222] The 1875 Page Law prohibited immigration of Chinese women in an effort to prevent the growth of "prostitution," essentially categorizing all Chinese women as sex workers, and in 1882, the Chinese Exclusion Act was passed, which barred Chinese laborers from entry for a period of ten years.[223] The 1888 Scott Act expanded on the 1882 Exclusion Act and prevented the re-entry of Chinese workers who had left the United States temporarily with return

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[219] Ancheta, *Race, Rights, and the Asian American Experience,* 21.
[220] Ibid., 21.
[221] "The Source of the 'Asian Advantage' Isn't Asian Values" by Janelle S. Wong. NBC News. Accessed January 2015. <http://www.nbcnews.com/news/asian-america/editorial-source-asian-advantage-isnt-asian-values-n443526>
[222] Ancheta, *Race, Rights, and the Asian American Experience,* 21.
[223] Ibid., 25.

certificates.[224] The Supreme Court upheld the constitutionality of the Exclusion Act in *Chae Chan Ping v. United States*, writing that the presence of "foreigners of a different race…who will not assimilate" was "dangerous to… peace and security."[225] Thus the stereotype of Asians who do not assimilate as threatening and suspicious was enshrined in Supreme Court case law, and in 1892 the Geary Act extended the Chinese Exclusion Act for ten more years.[226]

In 1898, American obtained the Philippines as a colonial possession, which in future decades would give them a territorial base from which to act out imperialist interventionist policies throughout Asia. In 1902, Congress renewed the Chinese Exclusion Act for a third time, and two years later, passed legislation that extended it indefinitely.[227]

These legislative efforts had wide popular support, and Chinese immigrants were not the only targets of anti-immigration efforts. White delegates from more than sixty labor organizations formed the Japanese and Korean Exclusion League in 1905 in San Francisco, which was later renamed the Asiatic Exclusion League.[228] Attempting to curb Japanese immigration in the long term, a "Gentleman's Agreement" was reached between 1907 and 1908. The Japanese government stopped issuing papers to workers who wanted to go the United States, and in exchange, the spouses and children of Japanese laborers already in America could migrate. [229]

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[224] Ibid., 25.
[225] Ibid., 25.
[226] Ibid., 25.
[227] Ibid., 26.
[228] Ibid., 21.
[229] Ibid., 26.

Throughout the early 1900s, west coast Asians faced "legal subordination" that functioned similarly to the treatment of Black people in the South post-Reconstruction.[230] Segregation abounded; Asian immigrants were refused service in theaters, hotels, and restaurants. If allowed inside, they sat in areas separate from whites-only sections.[231] Housing discrimination was also quite common, with landlords and realtors telling Asians "Only whites allowed in this neighborhood" or "No Orientals allowed."[232]

Asian immigrants of varying nationalities realized that legally speaking there were essentially two races in America: "Black or white and nothing else."[233] In 1790, a Nationality Act was passed that established "free white persons" could become American citizens after two years of residency.[234] Concerned about being sent back to their home countries, and wanting the rights afforded to full citizens, Asians attempted to establish "whiteness" legally in order to gain naturalized citizenship, since they could not benefit from the amendments made to naturalization laws in 1870 that allowed people of "African nativity' and "African descent" to become naturalized citizens.[235]

Several cases in the 1920s solidified the non-whiteness of Asian immigrants. In *Ozawa v. United States*, the Supreme Court ruled that Japanese immigrants were non-white; and in *United States v. Thind* that Asian Indians were non-white.[236] Burmese, Chinese, Filipino, Native Hawai'ian, and Korean plaintiffs were all held to be non-white, and so too

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[230] Ibid., 22.
[231] Ibid., 22.
[232] Ibid., 22.
[233] Ibid., 6.
[234] Ibid., 23.
[235] Ibid., 23.
[236] Ibid., 6.

were mixed-race plaintiffs who had one Asian parent and one white parent.[237] Courts never offered an explicit definition of what whiteness *actually was*, but it was abundantly clear that Asians did not belong in that category.[238]

However, the refusal to grant Asian immigrants citizenship did not prevent the United States from seeking to recruit Filipinos and other Asians as low-wage workers in Hawai'i and on the west coast.[239] The increases in Filipino population led to a series of anti-Filipino riots in California and Washington state throughout the 1920s and 1930s.[240] In 1934, the Tydings-McDuffie Act granted commonwealth status to the Philippines, divesting Filipinos of their status as American nationals and making them eligible for deportation.[241] Between 1934 and 1946, there was an annual quota of only fifty visas allocated to Filipinos.[242]

While most of the early immigrants from Asia to America were male, the legal policies that were enacted as a reaction to their presence on American soil also impacted Asian women in two ways: first, in that they were almost entirely excluded from entering the United States, and second, the legal history that worked in tandem with racist nativism to set up the idea of Asians as foreigners who have not assimilated continues to affect Asian women today.

The most immediate effect of the exclusion of most Asian women from entering the United States (with the exception of some Japanese women who were able to enter after the Gentleman's Agreement of 1907-1908) was decrease in Asian populations over time.

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[237] Ibid., 6.
[238] Roshanravan, "Passing-as-if," 23.
[239] Ancheta, *Race, Rights, and the Asian American Experience*, 24.
[240] Ibid., 22.
[241] Ibid., 27.
[242] Ibid., 27.

California anti-miscegenation legislation, passed in the 1880s, prohibited marriages between whites and "Negroes, mulattoes, or Mongolians" and was extended by state legislature over fifty years later to include Filipinos, who were of the "Malay race" according to a California appeals court decision.[243] Asian men thus lived in almost exclusively bachelor societies.

The few single Asian immigrant women who were able to come to the United States "faced severe forms of subordination."[244] Those who were able to work legally found themselves in "marginal economic roles" and worked mainly as "manual workers, seamstresses, cooks, cleaners, and washers."[245] Others became sex workers for lack of meaningful economic opportunities.[246]

The Japanese women who were able to immigrate legally to America as wives of Japanese men who were already in the United States were in their forties and fifties when President Roosevelt issued Executive Order 9066 and authorized Japanese Internment,[247] sending over 110,000 Japanese Americans—including women and children—to camps.[248] The constitutionality of internment was upheld by the Supreme Court in the 1944 case *Korematsu v. United States.*[249]

The 1940s and aftermath of World War II set several new standards for Asian Americans. The majority of Japanese Americans sent to internment camps were citizens; *Korematsu* sent the clear message that even if Japanese Americans could formally gain

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[243] Ibid., 30.
[244] Ibid., 22.
[245] Ibid., 22.
[246] Ibid., 22.
[247] Ibid., 30.
[248] Ibid., 31.
[249] Ibid., 31.

citizenship status, their foreign otherness ultimately outweighed their rights. In 1946, the Philippines was granted independence from America, leaving the island nation reeling and releasing the United States from any responsibility. As an American commonwealth, the Philippines was occupied by the Japanese army and suffered atrocities such as the Bataan Death March in which up to 80,000 Filipino and American prisoners of war were forced by the occupying Japanese army to march sixty-five miles on the island of Luzon to prison camps,[250] and endured sustained Japanese bombing campaigns that wreaked havoc on the existing infrastructure. While independence gave the Philippines political autonomy, it also allowed the United States to evade legal culpability for the horrors of war that the Philippines was subjected to because of their status as an American commonwealth.

The sexual commodification of Asian American women became engrained in the public imagination in the second half of the twentieth century. The end of the Second World War brought a surge of Filipino immigration to the United States. From 1945 to 1946, 33,000 Filipinos came to America; 16,000 of them were Filipina wives of white American soldiers.[251] Stereotypes of Asian Americans evolved with American geopolitical relationships; anti-Communism in the 1950s and 1960s inspired anti-Chinese sentiment, and precipitated the involvement of the United States in the Vietnam War.[252] The Vietnam War was particularly brutal in the way that imperialism, racism, and misogyny intersected, leading to violent outcomes for Vietnamese women. American GIs were encouraged to

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[250] "World War II: the Bataan Death March," History.com. Accessed February 2016. <http://www.history.com/topics/world-war-ii/bataan-death-march>
[251] Yen Le Espiritu, *Filipino American Lives* (Philadelphia: Temple University Press, 1995), 18.
[252] Ibid., 5.

"search" local women "with their penises," forging "a weapon of mass political terrorism."[253]

Both Filipinas in World War II and Vietnamese women in the Vietnam War were seen as wartime spoils. Their "exotic" sexuality was something to be enjoyed by white men—either within the context of a marriage, as was the case with the Filipina "war brides," or a conquest to be taken by force, as was the case in both Vietnam and the Philippines when American troops were on the ground.[254]

The model minority began to emerge as an Asian American stereotype concurrently with the Vietnam War. In the same year as the Moynihan Report was published, the Immigration Act of 1965 removed Asian immigration quotas that had been established in 1924 and set an allocation of 20,000 visas per year for every country not in the Western hemisphere with a preference for reuniting families and meeting the need of the American economy through entry of skilled laborers.[255] While this formally ended Asian exclusion, it also prevented low-skilled Asians from entering the United States in large numbers. The educated and skilled Asians who were then able to come to America, combined with Petersen's 1966 New York Times article about the success of Japanese Americans, created the myth of the Asian model minority. American policy that excluded poorer or low-skilled Asians created an artificial impression of intrinsic high intelligence and work ethic of Asian Americans; because only educated and skilled Asians were allowed to enter the country, white Americans assumed that *all* Asians must be high-achieving and able to succeed.

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[253] Davis, *Women, Race, & Class*, 24.
[254] Espiritu, *Filipino American Lives,* 5.
[255] Ancheta, *Race, Rights, and the Asian American Experience,* 34.

In 1987, *Time* magazine featured a cover with 'Asian-American whiz kids,' showing a group of bespectacled Asian children and teens grinning at the camera.[256] Twenty-two years after immigration reform was passed, the "selective recruitment"[257] of educated and skilled Asians had firmly and undoubtedly resulted in the coalescing of the model minority stereotype. While it is true that some Asian Americans have had extraordinary successes, disaggregating contemporary statistics and looking at data for different Asian populations as separate groups shows that the success of Asian Americans is not evenly distributed. The fact that some Southeast Asian American and Pacific Islander groups have a bachelor's degree attainment rate of less than 15% and poverty rates that are "distressingly [high]" is completely obscured when looking at aggregate statistics. Many of these populations also experience "profound public health disparities," such as increased rates of anxiety, depression, and suicide.[258]

Even for high-achieving Asian Americans, the association with immigration can reduce them to "symbols of foreignness,"[259] and high-achieving but non-assimilating Asians are seen as a threat to white American intellectual superiority. A host of negative stereotypes also exist for Asians, which rely upon assumptions of savagery or the idea of Asia as an "uncivilized" continent. Asians are typed as untrustworthy "dogeaters," and anti-Asian racism is primarily motivated by nativist and anti-immigrant sentiment, prior American military involvement in Asia, and white fear of both foreign and domestic economic competition.[260]

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[256] "When Nicholas Kristof Just Doesn't Get It About Asian Americans," Reappropriate Blog.
[257] "The Source of the 'Asian Advantage' Isn't Asian Values," NBC News.
[258] "When Nicholas Kristof Just Doesn't Get It About Asian Americans," Reappropriate Blog.
[259] Purdie-Vaughns and Eibach, "Intersectional Invisibility," 381.
[260] Ancheta, *Race, Rights, and the Asian-American Experience*, 11.

Nativist ideology equates Asian Americans with foreigners—no matter if they are American-born fifth generation who have never visited the homeland of their ancestors. "Race and nativism intersect" when the white American gaze is directed at Asian Americans.[261] Asian American women are seen as foreign and malignant or assimilated and docile; either "dragon ladies" or "China dolls."[262] The trope of Asian women as "mail-order brides" similarly paints Asian women as subservient, submissive wives who desire nothing more than to please their white American husband or cunning, scheming foreigners plotting to take advantage of an innocent American man to gain citizenship and remove him from the pool of eligible partners for white American women.[263]

Asian women are seen as passive, sweet "orientals,"[264] a stereotype perpetuated by the modern American film industry.[265] Whites often perceive Asian women as "nice…police… obedient…non-trouble-making" and unassertive,[266] and are shocked when Asian women do not fit the mold of "the submissive, subservient, ready-to-please, easy-to-get-along-with-Asian-woman."[267] Asian women are "expected to move, charm, or entertain, but not to educate in ways that are threatening to [their] audiences."[268]

Closely linked to the stereotype of Asian women as passive is the expectation that Asian women are apolitical. Asian women's political ideologies are seen unimportant,

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[261] Ibid., 12.
[262] Espiritu, *Filipino American Lives,* 129.
[263] Constable, Nicole. *Romance on a Global Stage,* p. 13.
[264] Mitsuye Yamada, "Asian Pacific American Women and Feminism," in *This Bridge Called My Back: Writings by Radical Women of Color*, ed. Cherrié Moraga et al. (Berkeley, California: Third Woman Press, 2002), 74.
[265] Winston, "Mirror, Mirror…" 785.
[266] Mitsuye Yamada, "Invisibility is an Unnatural Disaster: Reflections of an Asian American Woman," in *This Bridge Called My Back: Writings by Radical Women of Color*, ed. Cherrié Moraga et al. (Berkeley, California: Third Woman Press, 2002), 35.
[267] Ibid., 36.
[268] Yamada, "Asian Pacific American Women and Feminism," 74.

harmless, and non-threatening.[269] Among women of color, Asian women are presumed to be "the least political, or the least oppressed, or the most polite"[270] and are often treated as token add-ons to white feminism.[271] The apparent political disinterest of Asian women is often a combination of several factors. One of them is socialization; being constantly inundated with cultural imagery of the model minority, "Asian women have not admitted to [themselves] that [they] *were* oppressed…the visible minority that is invisible."[272] It is also a self-protection mechanism from a group typed as non-native immigrants, who are reluctant to express "personal angers against the dominant society" for fear of hearing, "If [you] hate it so much here, why don't [you] go back?"[273]

These expected roles render Asian women invisible.[274] When Asian women express dissatisfaction,

> [They] may be listened to and responded to with placating words and gestures, but [their] psychological mind set has already told [them] time and again that [they] were born into a ready-made world into which [they] must fit [them]selves…. people are still looking right through and around [Asian women].[275]

Asian American women "remain in the background" and may be heard, "but not really listened to."[276]

Writing about Black and Asian women is valuable not only because it illustrates the variable mechanisms of white supremacy on different racial groups, but also because it shows us the how the Black-white racial binary operates and the limits of this paradigm.

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[269] Yamada, "Invisibility is an Unnatural Disaster," 37.
[270] Yamada, "Asian Pacific American Women and Feminism," 74.
[271] Ibid., 75.
[272] Yamada, "Invisibility is an Unnatural Disaster," 35.
[273] Yamada, "Asian Pacific American Women and Feminism," 78.
[274] Yamada, "Invisibility is an Unnatural Disaster," 36.
[275] Ibid., 38-40.
[276] Ibid., 40.

Under the Black-white binary, Black people are hypervisible and harshly oppressed; systemic racism is not only white supremacist, but specifically anti-Black. Furthermore, when we write about Asian women, we see that this dichotomy "provides minimal space to articulate experiences independent of a Black-white framework"[277] which is a mechanism by which other people of color are erased.

Historically, the racial category of Asian—an invention that is courtesy of white Americans—has been seen legally as "constructive[ly]" Black. Frank Wu posits that America and the American legal system have created four main racial categories: white, Black, honorary white, or constructive (implied) Black.[278] "For most of the nation's history," within the paradigm of two racial classes, Asians "have been treated primarily as constructive[ly] Black,"[279] denied access to the privileges afforded to whites; in *Gong Lum v. Rice*, decided twenty-seven years before *Brown v. Board of Education*, the United States Supreme Court ruled it was constitutional to send Asian Americans to segregated schools.[280]

The Black-white binary, like all racial schemas invented by whites, is fundamentally flawed. This "model of race" based on relations between Black people and whites "cannot fully describe the complex racial matrix that exists in the U.S."[281] It minimizes, if not completely disregards, the role of immigration and nationality in American race relations,[282] which are essential to consider because "recent immigration…has elevated

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[277] Ancheta, *Race, Rights, and the Asian-American Experience*, 3.
[278] Ibid., 5.
[279] Ibid., 5.
[280] Ibid., 5.
[281] Ibid., 13.
[282] Ibid., 13.

culture and language to prominent places on the race relations landscape."[283] The Black-white binary "in essence…fails to recognize that the basic nature of discrimination can differ among racial and ethnic groups."[284]

Writing specifically about Asian women also illustrates the limits of the construction of antidiscrimination legislation within Black-white binary; public policy and legislation such as Title VII "approach race in terms of Black and white,"[285] and *only* Black and white, leaving out Asians, Latinos, and Native Americans who also deserve and desperately need a legal framework of racial justice. There is a clear need to "move beyond a black-white model of racial jurisprudence" because anti-Asian subordination is qualitatively different from anti-Black subordination. Concerns regarding citizenship are central, and immigration from Asia in recent decades has shifted demographics in the US to cause ethnicity to become more important.[286]

Laws that conceive of rights and justice within the Black-white binary "contain significant limitations in accommodating the full array of Asian-American experiences."[287] When questions of access to civil rights go beyond a Black-white dichotomy, Asian Americans are frequently left without the full protection of the law.[288] Anti-discrimination law fails to recognize intersection of race and nativism that Asian Americans experience, particularly those of Asian descent who are American-born but who are treated differently because they are *perceived* as a foreigner.[289] Additionally, Asians who are immigrants may

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[283] Ibid., 13-14.
[284] Ibid., 13.
[285] Ibid., 3.
[286] Ibid., 16.
[287] Ibid., 14.
[288] Ibid., 14.
[289] Ibid., 14.

seek relief based on race or national origin, but there are no explicit protections "for immigrants *as immigrants*"[290] [emphasis mine], and "characteristics inherent to immigrants are often ignored in the law."[291]

Moreover, access to the American legal system at present requires a certain level of English language skills, and "civil rights laws…generally lack explicit protections for language minority groups"[292] or corrective measures that allocate resources to enable non-English speakers easy access to the court system; generally, the model minority stereotype leads to exclusion of Asian Americans from corrective civil rights programs.[293] Protections for immigrants and language barriers are concerns that also resonate with non-Asian populations, particularly Latinos, who are also ill-served by the Black-white binary in this regard.

Anti-discrimination law, as it stands, does not reflect the concerns of women of color.[294] There is a clear need for substantially reframing analysis of race- and gender-based discrimination and "evaluat[ing] the potential benefits of expanded title VII remedies,"[295] as there significant barriers that women of color encounter when seeking justice for employment discrimination.

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[290] Ibid., 14.
[291] Ibid., 15.
[292] Ibid., 15.
[293] Ibid., 15.
[294] Winston, "Mirror, Mirror on the Wall," 778.
[295] Ibid., 778.

Why Women of Color Face Difficulty in Obtaining Justice

Interpretation of the Congressional Record

Title VII is hard to interpret partially because of the convoluted congressional record, which courts turn to in order to clarify congressional intent. The fact that "the Senate saw fit to amend the House version in so many respects—usually after extended debate" is important because it suggests that the congressional record "should itself be given substantial weight in the administration and interpretation of Title VII."[296] From the point of view of the legislators who worked on the legislation, race and sex seemed to be discrete categories—for example, Howard Smith's understanding of "women" clearly did not include women of color.

Many courts have struggled with the intent of Title VII with regards to whether or not Congress wanted "the legislation to apply to issues arising simultaneously under multiple categories," because as written, the language of Title VII is ambiguous in guiding a "potential plaintiff with multiple claims."[297] However, some key decisions made about word choice during the process of passing the bill that seem to point to the validity of an intersectional interpretation of Title VII:

> Some argue that the "or" in the present form of the statute should be considered an additive term rather than an exclusive one. If read as an additive term, the prohibited discrimination based on race, color, religion, sex *or* national origin would allow a claimant to bring a Title VII suit under more than one of the protected classes. If, however, the "or" is read exclusively, a plaintiff could bring suit based on only one of the protected categories. The legislative history of Title VII does not elucidate Congress's intention with regard to multiple claims.[298]

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[296] Vaas, "Title VII," 456.
[297] Wei, "Asian Women and Employment Discrimination," 3.
[298] Ibid., 3.

Additionally, Senator McClellan[299] proposed an amendment to include the word "solely" in Title VII, so that "any discrimination proscribed in the bill must be based solely on race, color, religion, sex or national origin."[300] However, his amendment was rejected, and some have argued that in doing so, "Congress expressed its desire to have the terms interpreted inclusively." [301]

Despite these two indicators that multiple-axis discrimination was a valid way to interpret Title VII, problems persist in interpretation and implementation of the law when women of color file intersectional suits due to the convoluted record; "legislative history [is] less than clear on the intended operation of the statute."[302] The entirety of the Civil Rights Act of 1964 was amended 105 times; it was debated by the House Judiciary Committee twenty-two days, by the Rules Committee seven days, by the House six days, and by the Senate eighty-three days.[303] The Senate passed it only after a 534-hour filibuster, and the debates surrounding the Act were "the longest debates in the history of Congress."[304]

The Legal Invisibility of Women of Color

Another reason Title VII is difficult to interpret intersectionally is because women of color are illegible in a white-male dominated society, which means that claims of intersectional oppression are seen as non-valid. Because whites are "the socially dominant

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[299] Vaas, "Title VII," 456.
[300] Wei, "Asian Women and Employment Discrimination," 3.
[301] Ibid., 3.
[302] Chambers and Goldstein, "Title VII: The Continuing Challenge of Establishing Fair Employment Practices," 12.
[303] Belton, *The Crusade for Equality in the Workplace*, 22-23.
[304] Ibid., 22-23.

ethnic group" in America, whiteness prescribes societal norms.[305] Throughout the course of our daily lives, we "encounter images of [other race, class and gender groups] and are exposed to the symbolic meaning attached to those images,"[306] and are socialized to believe that the perspectives of upper-class white men are the "interpretations of reality" that are "natural, normal and 'true.'"[307]

White men have systemic and structural power and privilege that they are often unaware of, which is an epistemic gap resulting from "historical narratives, cultural understandings, interest group politics, and legal frameworks" that "render the intersectionally subordinate person socially invisible."[308] White ignorance abounds; as Barbara Flagg astutely remarks, "the most striking characteristic of whites' consciousness of whiteness is that most of the time [they] don't have any."[309] White-centric decision-making at the higher echelons of power that impact women of color without power "is one form of institutional racism."[310]

"We require new categories of connection"[311] because American society utilizes "an antidiscrimination legal construct" that is inadequate for women of color.[312] This flawed legal construct leads to legal invisibility, "a special type of cultural invisibility that centers on the mismatch between intersectional subordinate- group identities and dominant legal anti-discrimination frameworks."[313] Legal anti-discrimination frameworks favor

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[305] Purdie-Vaughns and Eibach, "Intersectional Invisibility," 381.
[306] Collins, "Toward a New Vision," 34.
[307] Ibid., 33.
[308] Purdie-Vaughns and Eibach, "Intersectional Invisibility," 383.
[309] Flagg, *Was Blind, But Now I See*, 1.
[310] Ibid., 8.
[311] Collins, "Toward a New Vision," 27.
[312] Winston, "Mirror, Mirror on the Wall," 796
[313] Purdie-Vaughns and Eibach, "Intersectional Invisibility," 387.

individuals with a single marginalized identity, such as white women or men of color, and it remains to be seen whether women of color can successfully and consistently seek remedy for intersectional discrimination.[314] Women of color are legally invisible because courts are incapable of providing the same legal protections to them that are accessible to people with a single subordinated identity.[315]

Impaired Communication as a Result of "Identity-Prejudicial Credibility Deficit"[316]

Even though women of color consistently articulate their unique experiences with the simultaneity of racism and sexism, they are unable to effectively communicate their knowledge of their oppression to the white-male individual actors that are in positions of power within the justice system such as judges and attorneys. White people, especially white men, are privileged in our court system, and "the struggle to be recognized or represented is the most distinctive form of oppression for people with intersectional subordinate-group identities."[317] Women of color "face a continuous struggle to have their voices heard and, when heard, *understood*"[318] [emphasis mine].

The fact that women of color cannot communicate their experiences with intersectional workplace discrimination is an example of epistemic injustice, resulting from an "identity-prejudicial credibility deficit."[319] This phenomenon occurs when a speaker attempting to communicate is hindered in that effort because of a prejudice on the part of the hearer, which predisposes the hearer to give the speaker less credibility to the speaker due to the

[314] Ibid., 387.
[315] Ibid., 387.
[316] Fricker, *Epistemic Injustice*, 28.
[317] Purdie-Vaughns and Eibach, "Intersectional Invisibility," 383.
[318] Ibid., 383.
[319] Fricker, *Epistemic Injustice*, 28.

speaker's identity. The "hearer" sees the "speaker" as "more, or less, credible in what [they are saying]" because of the hearer's "identity prejudice."[320]

The existence and cultural salience of what Miranda Fricker calls identity prejudice in the "collective social imagination" is an "endemic hazard"[321] that harms marginalized people in unique and specific ways in everyday life—and in courtrooms. For women of color navigating a court system where the key actors are often (though not always) white men, "collective negative imaginings"[322] lead to difficulties—if not an impossibility—of "epistemic trust"[323] between the authorities hearing and deciding on the case (and thus the legitimacy of the discrimination claim) and the women of color alleging the discrimination.

Women of color experience difficulty communicating their identity-specific experiences in a society in which white-male experience is seen as normative. The struggle of effectively explaining multi-axis discrimination when dealing with a credibility deficit is partially alleviated with the development—and academic validation—of terminology. The importance of Crenshaw's creation of the term 'intersectionality' to describe Black women's experiences cannot be understated.

Other women of color, seeing the theoretical and practical utility of a term that explicitly describes the way that misogyny is racialized, racism is gendered, and the unique ways that the powers of patriarchy and white supremacy interactionally dominate women of color, embraced 'intersectionality.' However—'intersectionality' requires us to ask questions about who has the power to access the institutions that are central to the

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[320] Ibid., 86.
[321] Ibid., 86.
[322] Ibid., 28.
[323] Ibid., 44.

creation of such terminology and the associated "knowledge-validation process,"[324] and to think of the potentially appropriative use of the term by non-Black women. The popularity and increasing use of the term indicates its necessity; the importance of being able to name ones' own oppression is paramount in avoiding (or at least mitigating) the vulnerability, confusion, and isolation of hermeneutical injustice (a particular type of epistemic in justice): "the injustice of having some significant area of one's social experience obscured from collective understanding owing to a structural identity prejudice in the collective hermeneutical resource."[325]

Essentially, hermeneutical injustice occurs when one is experiencing oppression and lacks the means to communicate about that oppression; not only because there is no conception of what that particular oppression actually *is*, but also because that oppression is so normalized that to think of it as anything other than the normal course of events is to challenge fundamental norms and values of one's society. The invention of 'intersectionality' was a turning point for women of color seeking remedy for employment discrimination because they no longer had to deal with hermeneutical injustice, an example of what José Medina describes as "meta-lucidity," which is the "capacity to see the limitations of dominant ways of seeing."[326]

Fricker's framework of epistemic injustice (and hermeneutical injustice) is quite useful; Medina's scholarship takes it a step further by discussing the way that systemic oppression and epistemic injustices happen in mutually-reinforcing cycles of dominance and subordination of marginalized people. He posits that privileged individuals within

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[324] Collins, "The Social Construction of Black Feminist Thought," 752.
[325] Fricker, *Epistemic Injustice*, 155.
[326] José Medina, *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and Resistant Imaginations* (New York: Oxford University Press, 2013), 47.

"unjust societies"[327] have the ability to indulge in "epistemic laziness"[328] and remain ignorant of "the machinery of oppression"[329] because of a "socially produced…lack of curiosity."[330] This lack of awareness of systemic oppression "render[s] certain people, their perspectives, and their suffering virtually invisible."[331]

Privileged individuals tend to be the key actors in courtrooms and the ones making judgments on the epistemic value of marginalized people's claims regarding their oppression; these individuals are often steeped in the "dominant social imaginary"[332] of racism and sexism, and it is impossible to "correct the flaws" of oppressive "judicial attitudes" without addressing how judges view women of color and how "their imaginings" come from "a particular social imaginary" that relies on "distorted images of women and their perspectives."[333]

The tropes and "stereotypical generalizations" that are "take[n] for granted" guide the actions of the privileged, making them "insensitive to marginalized subjectivities and perspectives."[334] In seeking epistemic justice (which is a key first step in being able to pursue justice in a courtroom), we must turn to "alternative epistemologies…that take into account non-hegemonic perspectives,"[335] such as women of color's accounts of their own lives.

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[327] Ibid., 28.
[328] Ibid., 33.
[329] Ibid., 33.
[330] Ibid., 33.
[331] Ibid., 84.
[332] Ibid., 185.
[333] Ibid., 84.
[334] Ibid., 152.
[335] Ibid., 47.

This is difficult because marginalized people's voices have been historically discounted and their ability to speak about their own experiences has been circumscribed.[336] Whites have been traditionally seen as more credible than people of color; in the 1800s, the testimony of a white person was required for Asian immigrants to gain a certificate of residence,[337] and in *People v. Hall*, a court ruled that a Chinese witness could not testify against a white defendant in a criminal trial.[338]

Another important intervention that Medina makes in Fricker's analyses is the that epistemic injustices are "typically not direct and immediate harms; they have a temporal trajectory and they reverberate across a multiplicity of contexts and social interactions."[339] Epistemic injustice does not occur in isolated incidents that have clear and tangible negative ramifications. Instead, it is part of a larger, continuous machinery of dehumanization, because when epistemic injustice occurs

> the subject is wronged in her capacity as a knower. To be wronged in one's capacity as a knower is to be wronged in a capacity essential to human value [because] our rationality is what lends humanity its distinctive value… in contexts of oppression the powerful will be sure to undermine the powerless in just that capacity, for it provides a direct route to undermining them in their very humanity…When someone suffers a testimonial injustice, they are degraded *qua* knower, and they are symbolically degraded *qua* human.[340]

Women of color are undoubtedly the authorities on their own experiences with discrimination; to deny them the opportunity to fully explain that discrimination is to

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[336] Ibid., 295.
[337] Ancheta, *Race, Rights, and the Asian American Experience,* 25.
[338] Ibid., 28.
[339] Medina, *The Epistemology of Resistance,* 59.
[340] Fricker, *Epistemic Injustice*, 44.

participate in a denial of "the reality of their experiences," which in turn dehumanizes them.[341]

It makes no sense to treat courtrooms as if they are perfectly neutral sites where fair, just outcomes are delivered mechanically; they rely on human judgment and these humans often have internalized biases that they may or may not be aware of and may or may not check. A courtroom, for all of its claims to neutrality, is a milieu saturated with power, and attempts to articulate identity-based oppression are subject to "communicative dynamics."[342] Power dynamics can and do impede communication in such environments.

The Origins of the Law

Courts are an example of how "institutional expectations based on inappropriate nonintersectional contexts" curtails " opportunities for meaningful intervention" on behalf of women of color.[343] Women of color are at an epistemic disadvantage in courtrooms--however, while the social positionality of actors in courts creates the potential for, if not predicts, epistemic injustice; one must consider not just who is in the courtroom, but *how the court was built and how the laws were made*.

Injustice is inherently built-in to the courts because of the way white supremacy is imbedded in the western political system that relies on the social contract. As articulated by Charles Mills: "White supremacy is the unnamed political system that has made the

[341] Collins, "Toward a New Vision," 33.
[342] Medina, *The Epistemology of Resistance*, 97.
[343] Crenshaw, "Mapping the Margins," 1251.

modern world what it is today."[344] Racism has underwritten the formation of every Western political system, even those that have ostentatiously purported to be founded on equality. The American government, predicated on the idea of the social contract—that humans decide to form a government and civil society together—is an ideology that supposedly constructs a "government on the popular consent of individuals taken as equals."[345]

However, the way that American society was set up was not on 'the popular consent of individuals taken as equals;' it was "between just the people who count, the people who really are people,"[346] which is to say, white men who were property holders. America is "a racial polity, a racial state" with "a racial juridical system"[347] that put (mostly) white men in charge of crafting legislation that ought to be for the benefit of women of color, validating the white-male conception of discrimination, while ignoring and erasing the understandings of discrimination that come from women of color.

Conclusion

Black and Asian women filing Title VII suits face myriad challenges in their quest for justice. The varying interpretations of the text of statute and the convoluted Congressional record is one reason that courts find it difficult to apply intersectionality. Moreover, legislation based on the Black-white binary ignores differences between and within different racial groups, preventing Asian women from accessing remedies for race-based

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[344] Mills, *The Racial Contract,* 1.
[345] Ibid., 3.
[346] Ibid., 3.
[347] Ibid., 13-14.

claims, and preventing Black women from being able to articulate their experiences when they differ from those of Black men. Black and Asian women must also navigate a variety of tropes and preconceptions which have their roots in the history of both communities in America. These stereotypes make them vulnerable to epistemic injustice, which is dehumanizing and precludes them from effectively communicating their knowledge of their own oppression to actors within institutions—such as courts—that were constructed by and for white male property owners. The following chapters provide more in-depth historical contextualization and offer analysis of a variety of Title VII cases filed by Black and Asian women. Taken in the aggregate, these cases indicate a trend towards intersectional judicial decision-making; however, the progress made ultimately falls short of the protection needed by women of color.

3. "Women and Minorities" in the 1970s

The first Title VII cases to test the legal validity of allegations of intersectional discrimination occurred in the 1970s. During this decade, mainstream conceptions of race and gender evolved as Civil Rights legislation was implemented and a new wave of feminist activism began. The phrase "women and minorities" entered the American political consciousness, solidifying the construction of the prototypical victims of discrimination as white women (who experienced sexism) and men of color (who experienced racism). Under this understanding of "women and minorities," women of color were rendered invisible and unable to seek relief for intersectional discrimination under Title VII, paralleling the ways in which the feminist and Civil Rights movements were often seen at odds with each other.

Context

Title VII took effect in July 1965, one year after its passage,[348] supposedly giving employers, labor unions, and employment agencies time to begin voluntary compliance and to avid an excess of claims during a period of adjustment.[349] The one-year grace period was also intended to provide the Equal Employment Opportunity Commission (EEOC) time to "organize, to employ a staff, and to establish procedures for its operation," but its early efficacy was hindered because President Johnson did not appoint commissioners until May, and the EEOC was "underfunded and understaffed" when it began operations.[350]

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[348] Belton, *The Crusade for Equality in the Workplace,* 25.
[349] Ibid., 24.
[350] Ibid., 25.

1965 was an impactful year for both Black and Asian-American communities; historically, we can trace the developments of modern stereotypes of each group to key events from this year, and key legislation pertaining to each group was passed. For the Black community, two particularly momentous events were the drafting of the Moynihan Report (discussed in Chapter 2) and the passage of the Voting Rights Act (VRA), which was devised to defend "the most basic political right" and to eradicate racial discrimination in the electoral process.[351] A product of the Civil Rights movement, the VRA is widely considered to be "responsible for eliminating state and local barriers to voting."[352] In the realm of academic scholarship, Pauli Murray co-authored *Jane Crow and the Law* with Mary Eastwood, drawing explicit comparisons between sexism and anti-Black racism creating parallels and the potential for connections that had not existed before,[353] arguing that "sex discrimination can be better understood if compared with race discrimination" and that identifying "the similarities of the two problems" would ameliorate the legal status of all marginalized people.[354]

Relevant to the Asian American community, Congress passed the Immigration Act of 1965, which removed quotas of the Immigration Act of 1924 and allocated 20,000 visas per year for every country outside the Western hemisphere with a preference for reuniting families and meeting the need of the American economy through entry of skilled laborers.[355] The Act "ended Asian exclusion"[356] and indicated "a sharp ideological

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[351] Ancheta, *Race, Rights, and the Asian American Experience,* 19.
[352] Ibid., 19.
[353] Pauli Murray and Mary Eastwood, "Jane Crow and the Law: Sex Discrimination and Title VII," *The George Washington Law Review* Vol. 34: No. 2 (December 1965): 234.
[354] Ibid., 233.
[355] Ancheta, *Race, Rights, and the Asian American Experience,* 34.
[356] "The Source of the 'Asian Advantage' Isn't Asian Values," by Janelle Wong. NBC.com.

departure" from the self-conception of America as a predominately white nation.[357] The Civil Rights Movement had created a "countervision" of pluralism, and a revised the idea of who was American.[358] The 1965 immigration law opened up the second wave of Asian immigration.[359] Also in 1965 was the beginning of the ground war in Vietnam, and the publication of the *New York Times* article by William Pettersen that brought the idea of the Asian model minority into the American collective consciousness (discussed in Chapter 2).

The implementation of Civil Rights legislation created new questions about the best methods for combating discrimination, and the early 1970s were rife with debates regarding affirmative action and racial quotas in employment. In a 1972 Labor Day Message, President Nixon offered his point of view:

> In employment and in politics, we are confronted with the rise of the fixed quota system—as artificial and unfair a yardstick as has even been used to deny opportunity to anyone…Quotas are intended to be a shortcut to equal opportunity, but in reality they are a dangerous detour away from the traditional value of measuring a person on the basis of ability.[360]

However, Nixon encouraged that 'goals' to hire more minorities not be interpreted as 'quotas,' even though "goals and timetables were commonly regarded as a euphemism for quotas."[361]

Ultimately, the "quota controversy of 1972"[362] did not result in any quota-related policy changes. According to historian Herman Belz, it was essentially "an exercise in

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[357] Ronald Takaki, *Strangers From A Different Shore: A History of Asian Americans* (New York: Back Bay Books, 1998), 419-420.
[358] Ibid., 419-420.
[359] Ibid., 420.
[360] Belz, *Equality Transformed,* 95.
[361] Ibid., 96.
[362] Ibid., 96.

semantics and political maneuvering."[363] However, it did show that an important shift in mindset—the debate had changed from whether or not discrimination existed to the best way to combat it. Discrimination itself was framed as something harmful that needed to be addressed, rather than as a pattern of 'normal' behavior to be justified or continued, and the key question became what would be the most efficacious methods for eliminating it.

Ostentatiously, there were those who recognized inequality in the low employment numbers of people of color, but who also thought that quotas were an unfair and unjust method of addressing the problem. This belief was espoused mainly by the Nixon administration and Republican supporters, and while there were still "defenders of segregation," the Civil Rights Act indicated "a bipartisan intention" to commit to civil rights "beyond political maneuvering and manipulation."[364] Though no quota-related laws were passed in 1972, the Equal Employment Opportunity Act of 1972[365] did make significant legislative amendments to Title VII.366 These amendments allowed Title VII to be applied to public employment[367] and gave the EEOC enforcement powers.[368]

The new historical realities on the ground also influenced a shift in attitudes about race and Asian Americans in the early 1970s. 1973 brought ceasefire in Vietnam and the end of the American ground war. In 1964, when Title VII was passed, there were only 603 Vietnamese living in the United States—they were primarily "students, language teachers,

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[363] Ibid., 96.
[364] Ibid., 97.
[365] Ibid., 93.
[366] Serena Mayeri, *Reasoning From Race* (Cambridge, Massachusetts: Harvard University Press, 2011), 154.
[367] Ibid., 154.
[368] Belton, *The Crusade for Equality in the Workplace,* 25.

and diplomats."[369] The war "ended disastrously" for the United States and South Vietnam, leading to a dramatic increase in Vietnamese immigration to the United States.[370] Unlike other Asian communities in the US, the "wave of [130,000 Vietnamese] migrants" who came in 1974 and 1975 "did not choose to come here" and were "driven out," fleeing the North Vietnamese troops.[371]

Other populations of Asians also grew post-1965. While World War II devastated West-Coast Japanese-Americans, according to historian Ronald Takaki, it also "blew a fresh breath of democracy through American and opened the way toward greater 'diversity.'" [372] The war against Hitler's Nazism fostered greater consciousness of racism in America, making white American superiority "less popular and less plausible."[373] The second wave of Asian immigrants to the United States, who included professionals, were quite different from those who had come earlier,[374] leading to the development of a binary: "a colonized working class and an entrepreneurial-professional middle class."[375] In the Chinese communities, this resulted in the creation of 'Downtown Chinese' (who worked as tailors or seamstresses, or in occupations like food service) and 'Uptown Chinese' (who were more "affluent and professional").[376] This pattern was mirrored in other Asian immigrant communities, leading to a division along socioeconomic class lines that was often predicated on levels of education attainment.

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[369] Takaki, *Strangers from a Different Shore,* 448.
[370] Ibid., 449.
[371] Ibid., 449-451.
[372] Ibid., 406.
[373] Ibid., 406.
[374] Ibid., 420.
[375] Ibid., 425.
[376] Ibid., 425.

Other Asian countries also sent an unprecedented number of professionals to America. Two thousand Filipino nurses came in the United States in the 1970s, forty percent of all Filipino doctors across the globe practiced in America, and Filipino doctors were on the staff of every hospital in the states of New York and New Jersey.[377] However, many Filipinos had to deal with legal inconsistencies upon arrival before being allowed to practice; often, they were granted visas because of their skills, but it could take years to successfully navigate the intransience of the American medical bureaucracy. As foreign doctors, Filipinos were required to pass an exam administered by the Educational Council for Foreign Medical Graduates before they could engage in private practice or obtain an internship or residency at a hospital. This forced Filipino doctors to pursue further study and work jobs they were overqualified for, such as nurses' aides or laboratory assistants.[378] Like Filipinos, post-1965 Korean immigrants included many medical professionals who struggled with bureaucratic red tape;[379] some Koreans also opened greengrocer shops, and the Korean population grew enough to populate and sustain 'Koreatowns.'[380] Both populations were pushed to America because the local economies in the Philippines and Korea could not support the number of doctors who were graduating from medical school,[381] and once in America, Asian doctors were minorities who were interspersed in predominantly white institutions.

In addition to the dramatic increases in Asian-American population, the 1970s are often remembered as an important decade in terms of feminist activism. Debates about the

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[377] Ibid., 434.
[378] Ibid., 434-435.
[379] Ibid., 438.
[380] Ibid., 437.
[381] Ibid., 434 and 439.

implementation of Title VII led to the creation of a new organization: the National Organization for Women (NOW). In June 1966, NOW was founded by a group of women who were attending the Third National Conference of Commissions on the Status of Women in Washington, D.C.[382] Frustrated with the EEOC's failure to enforce Title VII, they attempted to take action in the form of a resolution that recommended the EEOC "carry out its legal mandate to end sex discrimination in employment," but were "prohibited" from doing so.[383] At a meeting in Betty Friedan's hotel room, they agreed to form a grassroots organization dedicated to women's advocacy;[384] "to take action to bring women into full participation in the mainstream of American society now, assuming all the privileges and responsibilities thereof in truly equal partnership with men."[385]

NOW's primary focus was sex discrimination, and though Pauli Murray and several other women of color, such as Aileen Hernandez, were key figures in NOW's early years, the mainstream feminist movement of the 1970s is often remembered as one that prioritized the concerns of white women. For example, the abortion rights activism undertaken in the years preceding the landmark 1973 Supreme Court decision *Roe v. Wade* was led almost exclusively by white women. *Roe* is widely regarded as one of the feminist movement's

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[382] "Honoring our Founders," NOW.org. Accessed February 2016. <http://now.org/about/history/honoring-our-founders-pioneers/>
[383] "NOW's 47th Anniversary," makers.com. Accessed February 2016. <http://www.makers.com/blog/nows-47th-anniversary-celebrating-its-founders-and-early-members>
[384] "Feminist Chronicles – 1966," Feminist Majority Foundation. Accessed February 2016. <http://www.feminist.org/research/chronicles/fc1966.html>
[385] "NOW's 47th Anniversary," makers.com.

greatest reproductive justice triumphs—an "important victory" [386] on a topic that was, and remains, "controversial."[387]

However, Black, Puerto Rican, and Native American women were more likely to focus on the American government's history of forced, non-consensual sterilization in an attempt to curtail population growth,[388] and Black feminism offered one alternative to white-centric mainstream feminism. In 1974, the Combahee River Collective was founded in Boston. A collective of Black feminists, involved in the process of "defining…[their] politics, while…doing political work," their 1977 Black Feminist Statement defined Black feminism as "committed to struggling against racial, sexual, heterosexual, and class oppression." They stressed the importance of "the development of integrated analysis and practice," because "the major systems of oppression are interlocking." The statement argued for solidarity between Black women and with Black men and outlined how the liberation of Black women would necessarily liberate all people. The Combahee River Collective also pointed out the paradox of the marginal place of most Black women in the labor force, while at the same time some Black women were viewed as "desirable tokens" in white-collar workplaces.[389]

The 1970s reflected a mounting tension between feminism—which was perceived by many as a movement organized exclusively around white women's interests—and civil rights. In terms of the movement du jour, "feminism seemed ascendant" while "civil rights

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[386] Davis, *Women, Race, & Class,* 203.
[387] Ibid., 202.
[388] Ibid., 203-205.
[389] "The Combahee River Collective Statement," circuitous.org. Accessed February 2016. <http://circuitous.org/scraps/combahee.html>

advocates struggled to defend their gains."[390] However, the reality was more complicated as courts showed themselves to be ""enthusias[tic]… in the context of racial discrimination,"[391] setting landmark precedents in cases such as *Griggs v. Duke Power* (discussed later in this chapter) "[but]…exhibited a curious reluctance in cases of sex discrimination."[392]

In the aftermath of the 1964 Civil Rights Act, "the origins of Title VII's 'sex' amendment were shrouded in layers of mythology and (sometimes willful) misunderstanding."[393] Doubtful courts frequently dismissed the "sex" amendment as a "'joke' or 'fluke,' born of segregationist antipathy."[394] The conventional wisdom suggested that at best, "sex" was an "illconceived afterthought;" at worst, a "killer amendment" intended to derail Title VII and the Civil Rights Act and undermine its "primary purpose" of combating racial discrimination.[395] Courts made reference the 'joke' theory when writing opinions that discussed Title VII's legislative history,[396] and early EEOC members and other government officials "explicitly prioritized race discrimination"[397]—some were even "hostile to the addition of sex discrimination."[398] In 1966, the first executive director of the EEOC, Herman Edelsberg, publicly stated that the "sex" amendment was "fluke" that had

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[390] Mayeri, *Reasoning from Race*, 183.
[391] Karen Hastie Williams, "*Phillips v. Martin Marietta Corporation*: A Muted Victory," *Catholic University Law Review* Vol. 22: Issue 2 (1973): 441.
[392] Ibid., 441.
[393] Mayeri, "Intersectionality and Title VII," 716.
[394] Ibid., 716.
[395] Ibid., 716.
[396] Ibid., 717.
[397] Ibid., 716.
[398] Jo Freeman, *The Politics of Women's Liberation: A Case Study of an Emerging Social Movement and its Relation to the Policy Process* (New York: David McKay Company, Inc., 1975), 171.

been "conceived out of wedlock" at a Conference on Labor at New York University. He personally was of the opinion that "men were entitled to female secretaries."[399]

While segregationist Senator Smith had less-than-honorable intentions when he proposed the "sex" amendment (discussed in Chapter 1), not everyone was in alignment with his thinking. Prominent lawyer and activist Pauli Murray, who was active in the civil rights movement and one of the most vocal critics of what she termed 'Jane Crow,' penned a memorandum "designed to persuade civil rights supporters that the sex amendment was integral, rather than antithetical, to Title VII's goals."[400] Murray's memo was sent to members of Johnson's administration and Congress. It "reframed" the amendment "as a unifying, rather than divisive, force within the broader civil rights and women's advocacy communities."[401] Rather than considering the debate in terms of white women versus Black men, Murray centered "the fate of 'Negro women'" as "the ultimate barometer of the civil rights bill's success."[402] Murray noted that

> [B]oth Negro and white women will share a common fate of discrimination, since it is exceedingly difficult for a Negro woman to determine whether or not she is being discriminated against because of race or sex. These two types of discrimination are so closely entertwined [sic] and so similar that Negro women are uniquely qualified to affirm their interrelatedness.[403]

This memo predated Kimberlé Crenshaw's scholarship on intersectionality by a quarter of a century;[404] intersectionality "provided a name to a pre-existing theoretical and political commitment."[405] Unfortunately, Murray's memo, while representing an important

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[399] Ibid., 54.
[400] Mayeri, "Intersectionality and Title VII," 718.
[401] Ibid., 718.
[402] Ibid., 719.
[403] Ibid., 719.
[404] Ibid., 719.
[405] Nash, "Re-thinking Intersectionality," 3.

paradigm shift in thinking of discrimination in terms of Black women (instead of white women or Black men), was circulated to such a small audience that its ideas were not disseminated enough to be of significant assistance to women of color who filed suits alleging intersectional discrimination in the 1970s. Nonetheless, because Title VII included race and sex in the same piece of legislation, it forced an unprecedented link between the struggles for racial justice and gender equity.[406]

The explicit inclusion of both "race" and "sex" in Title VII led to the creation of the category of "women and minorities," and by the early 1970s, this phrase "had entered the American political lexicon."[407] "Women and minorities" still implied white women and Black men (and possibly other men of color), but it provided ideological scaffolding from which feminism and civil rights "formed a powerful alliance."[408] Driven largely by the coalition-building work of Black feminists, employment discrimination was beginning to be conceptualized in a more intersectional fashion[409] by plaintiffs, but unfortunately, not necessarily by courts.

Even in situations where "race and sex intersected concretely," the links between the two "often evaporated in court opinions."[410] Post-1964 and into the 1970s, "the changing methodology of white supremacy"[411] explained the frequency of early sex discrimination cases that also involved race, because once American law formally prohibited "overt racial…discrimination," maintaining racial oppression required the

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[406] Mayeri, "Intersectionality and Title VII," 721.
[407] Ibid., 721.
[408] Ibid., 723-724.
[409] Ibid., 723-724.
[410] Mayeri, *Reasoning From Race,* 182.
[411] Ibid., 181.

institutional adaptation of "more subtle, ostentatiously race-neutral policies,"[412] which were more insidious and difficult to effectively combat than ostentatious exclusion.

Cases

Myriad Title VII cases were heard in various courts in the 1970s, some resulting in contradictory rulings to the detriment of women of color plaintiffs who subsequently had no coherent body of case law to turn to when deciding on the most effective way to frame intersectional discrimination claims, creating conditions that lead to the exclusion and invisibility of women of color in this legal context. Though the first sex discrimination case to come before the Supreme Court[413] in 1971,[414] *Phillips v. Martin Marietta Corporation,* was filed by a white female plaintiff, it set an important precedent that became relevant to women of color in subsequent years (notably in the case *Jeffries v. Harris County Community Action Association*, discussed in the following chapter) because it acknowledged the validity of a certain kind of multi-axis discrimination.

Ida Phillips was a mother of several pre-school-aged children when she answered a local newspaper ad placed by Martin Marietta Corp. seeking factory assembly-trainees[415] in 1966. [416] She was informed that they were not accepting job application from women with children in pre-school. However, they did employ men with pre-school age children at the

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[412] Ibid., 181.
[413] Williams, "*Phillips v. Martin Marietta Corporation*," 441-442.
[414] "Phillips v. Martin Marietta Corporation," aclu.procon.org. Accessed October 2015. <http://aclu.procon.org/view.background-resource.php?resourceID=003291>
[415] Williams, "*Phillips v. Martin Marietta Corporation*," 445-446.
[416] "Phillips v. Martin Marietta Corporation," aclu.procon.org.

time Phillips applied for the job,[417] and they accepted applications from men with pre-school children.[418] Phillips believed that Martin Marietta Corp. had refused to hire her because of sex and filed a charge with the EEOC; she "exhausted her administrative remedies"[419] through the EEOC and then filed a complaint in the United State District Court for the Middle District of Florida.[420] Because roughly 70 percent of people who had applied for the job were women and ultimately roughly 70 percent of the people who were hired for the job were women, the trial court found no evidence of discrimination[421] and granted summary judgment to Martin Marietta Corp.[422]

Phillips appealed to the Fifth Circuit, which affirmed the decision of the District Court, though "on a somewhat different ground,"[423] writing that company's policy was not sex discrimination as defined by Title VII, "inasmuch as the discrimination was not based 'solely' on sex, but rather on 'a two-pronged qualification,' *i.e.,* a woman with pre-school age children."[424] This "sex-plus" theory interpreted Title VII as outlawing employment policies where sex is the only factor in making distinctions between applicants; under this scheme, if an employer adds another factor—such as having pre-school children—they can discriminate without violating Title VII because sex "becomes merely one of two factors considered in the development of [the] employment criteria."[425]

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[417] Ibid.
[418] Williams, "*Phillips v. Martin Marietta Corporation*," 445-446.
[419] Ibid., 445-446.
[420] Ibid., 445-446.
[421] "Phillips v. Martin Marietta Corporation," aclu.procon.org.
[422] Williams, "*Phillips v. Martin Marietta Corporation*," 445-446.
[423] Ibid., 445-446.
[424] Ibid., 445-446.
[425] Ibid., 445-446.

Phillips appealed again, and upon review, the Supreme Court vacated the summary judgment for Martin Marietta Corp. and remanded the case,[426] writing that Title VII "requires that persons of like qualifications be given employment opportunities irrespective of their sex" and therefore the Fifth Circuit had erroneously "misinterpreted the statute."[427] This decision codified that Title VII required employment opportunities to be the same for all "similarly situated" applicants;[428] an employer could not have one hiring policy for women with pre-school children and a separate policy for men with pre-school children.[429] Additionally, the Supreme Court concluded that Martin Marietta Corp. had a discriminatory hiring process,[430] and that treating a "subclass" of women differently was in violation of Title VII."[431]

Phillips established precedent for alleging discrimination based on sex plus a "neutral factor"[432]—an identity that anyone can have and that may not necessarily be mentioned in the text of Title VII—which had implications for later rulings involving Black women (discussed in subsequent chapters). While Phillips was white and a widow, her status as a single, working, woman with children resembled that of many Black women.[433] Seeing the "possible spillover effects" and the potential relevance of Phillips' case to racial discrimination, the NAACP Legal Defense Fund took on the case, arguing that the "'primary adverse impact' of [the] policy" was on Black people, "since '[m]ore than twice as many

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[426] Ibid., 445-446.
[427] Ibid., 448.
[428] Ibid., 448.
[429] "Phillips v. Martin Marietta Corporation," aclu.procon.org.
[430] Williams, "*Phillips v. Martin Marietta Corporation*," 448.
[431] Peggie Smith, "Separate Identities: Black Women, Work, and Title VII," *Harvard Women's Law Journal* Vol. 14 (1991): 40.
[432] Mary Elizabeth Powell, "The Claims of Women of Color Under Title VII: The Interaction of Race and Gender," *Golden Gate University Law Review* Vol. 26: Issue 2 (1996): 420.
[433] Mayeri, "Intersectionality and Title VII," 723.

non-white mothers as white mothers' were 'heads of families.'"[434] Feminists also saw the connections and used *Phillips* to "make common cause" with civil rights advocates.[435]

However, the connections between the feminist and civil rights movements were not necessarily always advantageous to the women located at the intersection of the two. Inez Smith Reid, a Black professor and attorney, wondered "How far can one push the analogy between sex and race?" in 1975[436]—one year before the "deservedly notorious"[437] case that is a classic of Title VII and intersectionality scholarship: *DeGraffenreid v. General Motors.*

In 1976 in St. Louis, Missouri,[438] Emma DeGraffenreid[439] and four other Black women (Brenda Hines, Alberta Chapman, Brenda Hollis, and Patricia Bell)[440] sued General Motors, alleging that their 'last hired, first fired'[441] policy uniquely disadvantaged Black women. They argued that GM's seniority system perpetuated past discrimination against Black women because the company had not hired Black women before 1964—only white women[442]—and in 1974, all of the Black women hired after 1970 lost their jobs in a seniority-based layoff. [443]

The Supreme Court had not yet addressed if these kinds of policies violated Title VII, but "lower courts had held [that they] could be invalid under Title VII if they perpetuated

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[434] Ibid., 723.
[435] Ibid., 723.
[436] Mayeri, *Reasoning from Race*, 102.
[437] Kathryn Abrams, "Title VII and the Complex Female Subject," *Michigan Law Review* Vol. 92: No. 8 (1994): 2494.
[438] Smith, "Separate Identities," 30.
[439] Ibid., 30.
[440] Mayeri, *Reasoning from Race,* 103.
[441] Smith, "Separate Identities," 30.
[442] Crenshaw, "Demarginalizing The Intersection of Race and Sex," 142.
[443] Ibid., 141.

past patterns of discrimination against 'women' or 'minorities.'"[444] The plaintiffs were represented by the NAACP LDF, and their case was the first "to address explicitly whether Black women should gain combined race and gender relief under Title VII."[445] District Court Judge H. Kenneth Wangelin, appointed by Nixon,[446] found that the plaintiffs "could sue on the basis of race or on the basis of sex, but they were not allowed to combine the claims" because a combination claim would be "beyond the scope of Title VII."[447]

The Court justified the decision because of "the absence of legislative history or applicable precedent"[448] and created a way of understanding intersectional claims like these using a "'but for' theory;" according to this theory, plaintiffs could only bring a discrimination suit if they alleged that "but-for one factor they would have been treated the same as White men."[449] Under this paradigm, a claim of 'but-for-sex' or 'but-for-race' was seen as valid, whereas a claim of both was seen as disallowed.[450] Wangelin additionally wrote that Black women were not a protected class and emphasized the importance of the intentions of Congress:

> [P]laintiffs have failed to cite any decisions which have stated that Black women are a special class to be protected from discrimination… they should be not allowed to combine statutory remedies to create a new 'super-remedy' which could give them relief beyond what the drafters of the relevant statutes intended. Thus, this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.[451]

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[444] Mayeri, *Reasoning from Race,* 103.
[445] Smith, "Separate Identities," 30.
[446] Mayeri, *Reasoning from Race,* 103.
[447] Powell, "The Claims of Women of Color Under Title VII," 417.
[448] Abrams, "Title VII and the Complex Female Subject," 2494.
[449] Powell, "The Claims of Women of Color Under Title VII," 418.
[450] Ibid., 418.
[451] Crenshaw, "Demarginalizing The Intersection of Race and Sex," 141.

Wangelin then separated the claims into two distinct causes of action: race discrimination and sex discrimination.[452] The court found that no sex discrimination occurred from seniority rules because GM had hired (white) women "for a number of years prior to the enactment of the Civil Rights Act of 1964," and dismissed the allegation of racial discrimination, suggesting that the plaintiffs consolidate their complaints with another case that charged GM with racial discrimination. Plaintiffs indicated that they were uninterested in doing so because their suit was brought specifically "on behalf of Black women alleging race *and* sex discrimination" (emphasis in-text).[453] The court responded with an analysis of Title VII, writing that:

> Title VII does not indicate that the goal of the statute was to create a new classification of 'black woman'…The prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box.[454]

According to the court, Congress either did not consider the possibility that Black women could experience unique discrimination as Black women, or did not intend to offer them a mechanism to seek relief when discrimination of that nature occurred.[455] Despite the plaintiff's assertion during oral argument that a merger with an existing racial discrimination suit would "not adequately represent their interactive discrimination claim," the court ordered the consolidation,[456] preventing Black women from arguing that

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[452] Powell, "The Claims of Women of Color Under Title VII," 417.
[453] Crenshaw, "Demarginalizing The Intersection of Race and Sex," 142.
[454] Ibid., 142.
[455] Ibid., 142.
[456] Powell, "The Claims of Women of Color Under Title VII," 417-418.

any given employment practice disproportionally and adversely affected "Black women in particular."[457]

Wangelin's ruling implies that "Black women's Title VII claims are valid only if they can show that white women or Black men are similarly affected,"[458] which is "absurd" because this burden cannot be met; Black men and white women occupy different social positions relative to Black women and therefore "are not similarly situated to [them]."[459] The decision codified that Black women could not be a protected class all their own and either had to bring a racial discrimination suit or a sex discrimination suit, and left Black women in "an ambiguous position."[460]

This interpretation of VII is unaccommodating, not only because of its insistence on a single-axis framework of discrimination, but also because it offers no analysis of facially neutral policies, put into place without a discriminatory motive, that negatively impact only certain groups of employees. A 'last hired, first fired' seniority system, like the one in *DeGraffenreid,* could have been considered as such a facially neutral policy with a disparate impact by the court—the case touched upon the differences between disparate treatment and disparate impact. Disparate treatment is intentional discrimination, whereas disparate impact describes situations in which policies adopted without discriminatory motive disproportionally disadvantage a protected class.

Despite the fact that disparate impact theory was developed in 1971, it was not applied in *DeGraffenreid. Griggs v. Duke Power*, the first Title VII case to come before the

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[457] Smith, "Separate Identities," 31.
[458] Ibid., 31.
[459] Ibid., 31.
[460] Burstein, *Discrimination, Jobs, and Politics,* 173.

Supreme Court,[461] was a "landmark civil rights case"[462] decided in March 1971.[463] In *Griggs,* the Supreme Court found that Title VII prohibited not only just disparate treatment, but also disparate impact, a concept oriented around the actual effects of a given policy. *Griggs* established that the *results* of policy that appeared to be neutral but had a disproportionately negative effect on a protected class could be considered when interpreting Title VII. The court explicitly rejected the argument that only intentional discrimination was prohibited by the statute; under disparate impact theory, "the fact that an employer or union was not motivated by discriminatory intent is totally irrelevant."[464] Before *Griggs*, "there had not been a single reported judicial decision" in support of a disparate impact interpretation.[465]

Griggs echoes an earlier case: *Yick Wo v. Hopkins*, an 1886 case that originated in California.[466] An 1880 San Francisco laundry ordinance made laundries in wooden buildings illegal; all Chinese laundry owners were denied license renewals, while non-Chinese laundry owners were allowed renewals despite also being in wooden buildings.[467] Yick Wo's lawsuit made it all the way to the Supreme Court, who ruled in his favor, and established two important precedents: first, that non-citizens are protected by the equal protection clause of the 14th amendment, and second, a law that appears to be race-neutral but is applied in a racially discriminatory manner violates the Constitution.[468] The second

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[461] Belton, *The Crusade For Equality in the Workplace,* 5.
[462] Ibid., 1.
[463] Ibid., 1.
[464] Ibid., 2.
[465] Ibid., 3.
[466] Ancheta, *Race, Rights, and the Asian American Experience,* 28-29.
[467] Ibid., 29.
[468] Ibid., 28-29.

precedent in particular is quite similar to the Court's finding in *Griggs* with regards to the creation of disparate impact theory.

While *Yick Wo* and *Griggs* created a legal framework for marginalized individuals to seek relief for neutral policies applied in a discriminatory fashion, Wangelin's refusal to certify Black woman as a class precluded the possibility of applying disparate impact theory.[469] The key doctrinal takeaway from *DeGraffenreid* is that Black women cannot allege intersectional discrimination—one must choose between filing a race-based claim or a sex-based claim. Other Black women also experienced the invalidation of their intersectional claims; such as in *Jewel C. Rich v. Martin Marietta* (1975), *Ella Logan v. St. Luke's Hospital Center* (1977), and *Mary M. Love v. Alamance County Board of Education* (1984).[470] Judges in all of these cases conceived of race and sex as distinctly separate entities and found statistical evidence of discrimination against Black women to be "legally irrelevant."[471]

However, another ruling made in the same year[472] as *DeGraffenreid* directly contradicted Wangelin's analysis. In *Payne v. Travenol*, the court found that Black women were a distinct identity category.[473] The suit began in March 1972, with three plaintiffs who sought to represent all Black employees at Travenol Laboratories pharmaceutical plant: one Black male employee of the Travenol's Cleveland, Mississippi facility, and two Black

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[469] Smith, "Separate Identities," 32.
[470] Rachel Kahn Best, Linda Hamilton Krieger, Lauren B. Edelman and Scott R. Eliason, "Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation," *Law and Society Review* Vol. 45 (2011): 6.
[471] Ibid., 6.
[472] "*Payne v. Travenol Laboratories,* Memorandum of Decision," Leagle.com. Accessed January 2016. <http://www.leagle.com/decision/1976664416FSupp248_1623.xml/PAYNE%20v.%20TRAVENOL%20LABORATORIES,%20INC.>
[473] Crenshaw, "Demarginalizing the Intersection of Race and Sex," 147.

female job applicants at the same plant.[474] Between the time the complaint was filed and the case was actually heard by the court, ruling had to be made on a number of motions; in the summer of 1974, "the court bifurcated the trial of the case," declining to consider what relief was entitled to the plaintiffs until after the court had ruled on whether or not the defendants' conduct was prohibited by Title VII.[475] This 'bifurcation' was a result of the fact that the named plaintiffs changed before the case made it into court. James Williams (the Black male employee) and Alma Jean Williams (one of the Black female applicants) withdrew as parties; Willie Mae Payne was the only original plaintiff who ultimately saw the case through to trial.[476]

In 1973, Delilah Cherry and Birdie Griffin, two Black women, were added as plaintiffs.[477] They alleged that Travenol's requirement that all employees have at least a tenth grade education violated Title VII because it had "a distinctly disparate effect" on prospective Black employees in the Cleveland, Mississippi area and could not be "justified as a business necessity."[478] They used Census Bureau figures to show an educational attainment gap, and then argued that a tenth grade education was not necessary in order to perform the assembly line tasks[479] required of employees at the Travenol plant.[480] Plaintiffs also brought up the fact that no Black people had been hired by Travenol before 1965.[481] The plaintiffs later additionally claimed that Travenol "restrict[ed] the better-

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[474] *Payne v. Travenol Laboratories,* Memorandum of Decision, Leagle.com.
[475] Ibid.
[476] Ibid.
[477] Ibid.
[478] Ibid.
[479] Powell, "The Claims of Women of Color Under Title VII," 429.
[480] *Payne v. Travenol Laboratories,* Memorandum of Decision, Leagle.com.
[481] Powell, "The Claims of Women of Color Under Title VII," 428.

paying jobs to male employees."[482] Thus, the plaintiffs attempted to simultaneously file for solely race discrimination with regards to hiring, and solely sex discrimination with regards to pay—not intersectional discrimination.[483]

In response, Travenol attempted to "blunt the effect of the Census Bureau figures"[484] and "speculate[d]" that the educational gap between Black and white applicants would be "considerably narrower" if hypothetical statistics that included GED equivalencies were available—these statistic did not exist.[485] Travenol offered "no concrete proof…in support of this contention," and the court was unconvinced by the argument, concluding that "plaintiffs have shown in a most convincing manner that Travenol's tenth grade or equivalency requirement disqualifies substantially more black applicants than white."[486]

In the decision, the court quoted *Griggs*: "Nothing in [Title VII] precludes the use of testing or measuring procedure; obviously they are useful…What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."[487] The court held that the tenth grade requirement "does not measure the person for the operative job at its Cleveland plant."[488] However, the court granted a request of the defendant to narrow the plaintiff class to solely Black women and excluded Black men[489] because of their interpretation of the nature of the sex discrimination claim that was also filed. The plaintiffs argued that Travenol's policies with regard to pay and

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[482] *Payne v. Travenol Laboratories,* Memorandum of Decision, Leagle.com.
[483] Powell, "The Claims of Women of Color Under Title VII," 428.
[484] *Payne v. Travenol Laboratories,* Memorandum of Decision, Leagle.com.
[485] Ibid.
[486] Ibid.
[487] Ibid.
[488] Ibid.
[489] Crenshaw, "Demarginalizing the Intersection of Race and Sex," 147.

maternity leave favored men "at their expense;"[490] in response, the court wrote that "this claim plainly draws at the interests of the males into contrast with the interests of the females."[491]

The court found that "there had been extensive racial discrimination at the plant" and back pay was awarded to the class of Black female employees.[492] However, despite findings of racial discrimination, the court did not extend the compensation to Black men "for fear that their conflicting interests would not be adequately addressed."[493] The court failed to understand the plaintiffs' specific claims—while there was one claim of sex discrimination and one claim of racial discrimination, they were with regards to different policies. The sex discrimination claim was about pay equity; the race discrimination claim concerned hiring[494] and was pertinent to Black men as well as Black women. The district court ruling combined the two claims in such a way that the similarities between Black women and Black men were erased.

Both plaintiffs and defendants appealed the ruling of the district court; Payne requesting that Black men be added to the class, Travenol arguing that no discrimination had occurred.[495] The Fifth Circuit affirmed the decision of the lower court to limit the class to solely Black women and then clarified the extent and form of discrimination that occurred in order to strike down Travenol's claim.[496] *Travenol* was a "partial victory"[497] in

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[490] Powell, "The Claims of Women of Color Under Title VII," 429.
[491] Ibid., 429.
[492] Crenshaw, "Demarginalizing the Intersection of Race and Sex," 147-148.
[493] Ibid., 147-148.
[494] Powell, "The Claims of Women of Color Under Title VII," 428.
[495] "United States Court of Appeals, Fifth Circuit Decision: *Payne v. Travenol Laboratories*," openjurist.org. Accessed December 2015. <http://openjurist.org/673/f2d/798/payne-v-travenol-laboratories-inc>
[496] Crenshaw, "Demarginalizing the Intersection of Race and Sex," 147-148.

that it created a precedent for Black women to file suits as a unique class of Black women, but because of "the court's narrow view of class interest,"[498] the Black men who also experienced racial discrimination were unable to receive back pay.

The district court and Fifth Circuit both assumed that "Black women cannot represent an entire class of Blacks due to presumed class conflicts in cases where sex additionally disadvantaged Black women."[499] They fundamentally misinterpreted the nature of the claims that the plaintiffs were making; they were not alleging intersectional discrimination, but "discrimination based on race and sex separately."[500] The plaintiffs did not place themselves in opposition with Black men; they never argued that Black men were treated better than Black women. Instead, "the plaintiffs were alleging they had been adversely affected by both discriminatory practices,"[501] and though they were "able to use … statistics of race discrimination" as evidence, Black men who were included in those statistics "were unable to share in the remedy."[502]

The contradiction between *DeGraffenreid* and *Travenol* with regards to whether or not Black women can be considered a class is a "manifestation of the conceptual limitations of [a] single-axis analys[i]s"[503] that assumes that "claims of exclusion must be unidirectional."[504] While the facts of each case can perhaps elucidate the reasoning behind the respective courts' rulings, they do not adequately justify the final decisions. In both cases, justice was not done; DeGraffenreid et al. were denied the opportunity to elucidate

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[497] Ibid., 148.
[498] Ibid., 147-148.
[499] Ibid., 148.
[500] Powell, "The Claims of Women of Color Under Title VII," 429.
[501] Ibid., 429.
[502] Ibid., 429.
[503] Crenshaw, "Demarginalizing the Intersection of Race and Sex," 149.
[504] Ibid., 149.

the unique experiences of Black women, and in *Payne*, Black men were unable to access relief for racial discrimination, despite the finding that racial discrimination did in fact exist. Moreover, the inherent paradox between the two cases renders Black women's identity ambiguous and leaves them vulnerable to continuing employment discrimination without the potential for relief, because it is unclear under what circumstances class certification can occur.

This dilemma is not unique to Black women. As in *Travenol*, Marian Lim filed a suit in which she argued that her employer, Citizens Saving & Loan Association ("Citizens") discriminated against the classes of women and Asians; Lim also initially began the suit with one form of discrimination (race) and then amended her claim to include a second form of discrimination (sex).[505] Lim positioned herself as similarly situated to the classes of Asians and women, and cited two incidents of alleged discrimination to support her claims.[506]

Lim had been working for Citizens for fourteen years during which she worked "mostly as a clerk" but developed "some expertise in the more managerial aspects of banking."[507] In January 1970, Lim was transferred from a supervisory position in the Insurance Department and was assigned to work as an Installment Credit Clerk; Lim alleged that she agreed to the transfer because she was promised a promotion to the position of Installment Loan Officer if she assisted in establishing the new Installment Loan

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[505] Opinion and Order of the Court, *Lim v. Citizens Saving and Loan Association*, law.justia.com. Accessed February 2016. <http://law.justia.com/cases/federal/district-courts/FSupp/430/802/2136701/>
[506] Ibid.
[507] Ibid.

and Credit Department. However, as the new Department expanded, a white male was hired for the position and Lim was transferred again.[508]

The second incident involved one of Lim's co-workers. When Lim took a medical leave of absence in April 1974, she was notified that her position at that time—Loan Documentation Auditor—was going to be terminated. Lim's co-worker, a white woman, continued to work as a Loan Documentation Auditor until November 1974, when her position was also terminated. Lim argued that there was a connection between the two terminations and Citizens' hiring of a white male as Senior Loan Auditor in June 1974, because the Senior Loan Auditor position "was a newly created job classification designed to supersede the Loan Documentation positions."[509] The creation of the new classification, and the fact that a white male was chosen for the position over Lim and her co-worker—both of whom had relevant experience—indicated to Lim that "[she] and her co-worker were effectively replaced"[510] in a discriminatory manner.

The court refused to certify the class of Asian and female employees, citing statistics "that indicated that the percentage of women and Asians employed by Defendant was comparable to relevant labor pools."[511] The court also granted Citizens' motion for summary judgment in a pre-trial motion, writing that Lim had "either failed to prove a prima facie case for discrimination, or that Defendant rebutted her "with several legitimate reasons for its decisions" such that "no genuine issue of material fact as to discrimination

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[508] Ibid.
[509] Ibid.
[510] Ibid.
[511] Peggy Li, "Hitting the Ceiling: An Examination of Barriers to Success for Asian American Women," *Berkeley Journal of Gender, Law & Justice* Vol. 29: Issue 1 (2014): 162.

remains,"[512] completely denying that any discrimination had occurred before a real trial could be had at all.

Conclusion

These three cases—*DeGraffenreid*, *Payne*, and *Lim*—all happened within the same year. Courts struggled to interpret Title VII regarding class certification, and had difficulty in accommodating the diverse experiences of Black and Asian women when they alleged more than one form of discrimination at a time. The phrase "women and minorities" had become ingrained into the American political consciousness such that white women and men of color were seen as the proper victims of sex- and race-based discrimination, respectively, rendering women of color practically invisible in the eyes of the law and mirroring the way in which the civil rights movement and feminism were seen as at odds with each other. Furthermore, the discrepancy between *DeGraffenreid,* and *Payne* and *Lim*, regarding what group of people could be certified as a class made it difficult for other women of color to ascertain what kinds of allegations would be accepted by courts, and illustrated the lack of unity, communication, and coherence between different courts that were all administering the same law in different ways.

Analyzing *DeGraffenreid, Payne*, and *Lim* also highlights some important similarities and differences between Black and Asian women. Lim worked at a bank; *DeGraffenreid* and *Payne* were concerned with factory, assembly-line work, reflecting the different social locations and kinds of work typically done by each community. While there were undoubtedly many Asian Americans who performed manual labor and worked blue-collar

[512] Ibid., 162.

jobs, it was likely that language barriers and the inaccessibility of the American legal system to working class immigrants played a role in prevented them from filing cases like *DeGraffenreid* and *Payne*.

Additionally, while Asian Americans had a history of legal resistance against American white supremacy (such as in *Korematsu* or *Yick Wo*), they had far less than did the Black community at the time—again, this was likely due to inaccessibility, as well as the fact that pre-1965, Asian immigration was so restricted that the population of Asians available to participate in such resistance was incredibly small, and this population was so heterogeneous that solidarity between immigrants from different countries may have been impossible to negotiate. The Asian community also had fewer legal resources available; for example, the plaintiffs in *DeGraffenreid* were represented by counsel from the NAACP LDF, but there was no equivalent institution for Asian Americans.

DeGraffenreid, Payne, and *Lim* were all limited in terms of material success. Of these three cases, *Lim* was dismissed the earliest—during pre-trial—illustrating how Asian women are silenced and not only assumed to be unworthy of receiving remedy for mistreatment, but also assumed to not have endured mistreatment in the first place. Lim, as an Asian woman, was "given so little credibility" that "her word [was] as noise"[513] and subsequently, she was prevented from getting into court at all. The resulting lack of a court record regarding Asian women reinforced their "invisibility."[514]

In *DeGraffenreid*, while the combined claim of intersectional race and sex discrimination was dismissed, the court at least acknowledged the validity of the racial discrimination claim when he suggested the plaintiffs merge with another ongoing lawsuit.

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[513] Fricker, *Epistemic Injustice*, 137.
[514] Yamada, "Invisibility is an Unnatural Disaster," 34.

Travenol arguably had the best outcome, with Black women actually receiving a remedy (back pay), but was still an example of a fundamental misunderstanding of the nature of the plaintiff's claims.

These rulings gave women of color no room to articulate their experiences with discrimination, whether it was race and sex separately or intersectionally. While we might expect the benefits from *Phillips* (a victory for a white woman) and *Griggs* (a victory for Black men) to trickle down to women of color, they clearly did not, indicating the dire need to develop new legal doctrine to protect some of the more marginalized members of society who might seek relief under Title VII. In *DeGraffenreid, Payne*, and *Lim*, we see the ineffectiveness of the court system's white-male-centric point of view when considering how class identities and identity-based discrimination can function in varying ways.

Part of the problem was that there was there was no vocabulary readily available—the word "intersectionality" was not to enter legal discourse for more than a decade—which left all the plaintiffs in a position where they experienced hermeneutical injustice. However, even though the word "intersectionality" had not been coined, the idea had been developed thanks to the work of Pauli Murray in the mid-1960s and was expounded on by the Combahee River Collective's Black Feminist Statement, which was published only a year after the rulings in *DeGraffenreid*, *Payne*, and *Lim*. But, because "the powerful have an unfair advantage in structuring collective social understandings,"[515] marginalized individuals' own knowledge of their oppression is not usually readily accessible to larger society. Clearly, the idea of intersectionality was understood by Black women, showing that

[515] Fricker, *Epistemic Injustice*, 147.

the judges in these cases were remarkably out of touch with the reality of discrimination as experienced by women of color.

Wangelin in particular favored the white-male point of view at the expense of the Black women in the *DeGraffenreid* case, citing Congressional intent as the reason to deny the plaintiffs relief for intersectional discrimination. While "the statute does not explicitly state that a plaintiff may bring an action on the basis of simultaneous, multiple claims,"[516] it could still be argued that his reasoning was unsound because he overlooked the portion of the record in which Congress rejected including the word "solely" in Title VII. This could have provided justification for allowing intersectional discrimination, and his errors prevented the plaintiffs from accessing the relief that they deserved.

DeGraffenreid, *Payne*, and *Lim* were less-than-ideal early Title VII cases, establishing legal precedent that would make it difficult for women of color in subsequent years. However, courts, as institutions that are influenced by the dominant ideas of society, continued to show themselves to be permeable into the 1980s, absorbing some emerging academic articulations of multi-dimensional oppression—such as intersectionality—and slowly beginning to incorporate varying conceptions of discrimination into their rulings.

[516] Wei, "Asian Women and Employment Discrimination," 16.

4. Backlash and New Understandings of Identity in the 1980s

Throughout the 1980s, women of color continued to face employment discrimination, though the ways in which it was manifest and the methods for combatting it shifted. Backlash against the Civil Rights and feminist movements created a conservative political environment that was apologetic regarding discrimination. Colorblindness became the new politically correct normative conception of racial difference, suggesting that race had become irrelevant and making claims of racial discrimination appear less valid; high-level decision makers urged a return to a disparate treatment theory of employment discrimination and putting aside disparate impact. However, the backlash also resulted in multi-racial coalition work, with activists from different movements making common cause together against conservatism, and the production of new scholarship, such as critical race theory. The dissonant synergy between the broader political environment and activists working against the conservative backlash created varying outcomes in Title VII cases.

Some Title VII cases from this decade claimed simultaneous, multiple-axis discrimination; while some courts attempted to accommodate intersectional identity, they struggled with finding legal doctrine that would accurately represent women of color's experiences. The "sex-plus" concept, first articulated in *Phillips,* was utilized to create a sex-plus-race framework; other cases alleging intersectional discrimination were ruled on based on only one factor. Nonetheless, there was a clear shift from the logic used in the *DeGraffenreid* ruling, with some consideration of the unique positionality of women of color, but no clear, cohesive move towards creating legal doctrine that would truly serve their interests.

Context

The 1980s were marked by backlash against feminism and Civil Rights. Social conservatism and economic neoliberalism, under president Reagan, was ascendant. The prolife movement gained ground, eroding feminist progress of the 1970s; similarly, Civil Rights advocates struggled to defend the gains of previous decades as the ideologies of colorblindness and meritocracy permeated American society. In the 1970s, naysayers generally agreed that race equality was valid, but "doubted its applicability to sex."[517] In the 1980s, conservatives condemned legal precedents established by the Civil Rights movement as well as arguments that sex ought to be treated similarly to race.[518] However, by the early 1980s, "Title VII had become a potent if imperfect weapon against employment discrimination."[519]

Feminist saw Ronald Reagan's presidential victory in the 1980 elections as a "catastrophic defeat,"[520] interpreting his election as a sign that the successes of the 1970s were going to be difficult to defend. A main feminist concern at the time was working towards the ratification of the Equal Rights Amendment (ERA), a constitutional amendment to guarantee equal rights for women under the law that had been proposed decades before. Feminist activists "hoped to unite all women"[521] in pro-ERA advocacy. Historically, women of color had "an ambivalent relationship to the ERA," because before the 1960s, many of the ERA's leading advocates expressed not only callous indifferences

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[517] Mayeri, *Reasoning From Race*, 215.
[518] Ibid., 215.
[519] Ibid., 215.
[520] Ibid., 199.
[521] Ibid., 194.

but even outright antipathy towards the civil rights movement.[522] Title VII, with its explicit commitment to the eradication of both race *and* sex discrimination, "finally divorced ERA supporters from their alliance with Southern segregationists."[523] Black feminists like Pauli Murray argued that the ERA was "vitally important" to Black women, and public opinion polls in the 1970s and early 1980s indicated that Black women were more likely than white women to support the ERA.[524]

This may have been partially due to the fact that in the late 1970s, ERA advocates attempted to acknowledge and incorporate communities of color.[525] The pro-ratification group ERAmerica, on the advisement of African American board chair Mary Futrell, pledged to "correct some of the past 'oversights' committed against ethnic groups who had been actively involved in ERA ratification efforts."[526] Pro-ERA racial justice organizations resolved dispel the myth that the ERA was something that only concerned white women, and to render the ERA more "credibl[e]…in the Multi-Cultural community."[527] *Essence* and *Black Scholar* published articles seeking to "dispel the 'confusion'" created by anti-ERA forces that suggested that feminism was "the exclusive property of so-called middle-class, frustrated, bra-burning housewives;"[528] multi-racial advocacy groups used depictions of the "white patriarchy" to show connections between white women and women of color. Attempting to win over an audience that was committed to civil rights but who felt

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[522] Ibid., 194.
[523] Ibid., 194.
[524] Ibid., 194.
[525] Ibid., 195.
[526] Ibid., 195.
[527] Ibid., 195.
[528] Ibid., 195.

ambiguously towards feminism, proponents of the ERA argued "that the 'bond of common problems can be a tool for a bond of common action.'"[529]

Some Black feminists agreed, arguing that 1980s conservatism was part of a larger effort mobilized against "not only women, but… [also] black and other working people."[530] However, ERA proponents attempts to convince the Black community "may have been too little, too late"—by the time they pursued this course of action on a larger scale, it appeared unlikely that the amendment would succeed.[531] The ERA's ratification deadline passed during the summer of 1982, and within two weeks, over two hundred representatives and senators reintroduced it.[532]

Hearings on "ERA II" and the reaction of the feminist movement itself showed how the "resurgence of conservatism" had fundamentally altered the political milieu from the 1970s:[533] "partisan and ideological alignments shifted."[534] Democrats who had once been doubtful now supported ERA II, and Republicans revoked "long-standing support."[535] Some feminists were "ambivalent" about ERA II, because litigation and substantial legislative reform had eradicated many of the restrictions and classifications that the ERA was designed to address. Meanwhile, Democrats were hopeful that they could use the "gender gap" to humiliate Reagan's administration.[536] Ultimately, ERA II did not receive enough votes to pass the House, and was never voted on by the Republican-majority Senate.[537]

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[529] Ibid., 195.
[530] Ibid., 196.
[531] Ibid., 196.
[532] Ibid., 214.
[533] Ibid., 214.
[534] Ibid., 214.
[535] Ibid., 214.
[536] Ibid., 214.
[537] Ibid., 220.

ERA II revealed a disconnection between the feminist movement's goals and the reactionary political environment of the time. By the early 1980s, the vision of the feminist movement had become quite broad, resembling the "most expansive aspirations" of the Civil Rights movement.[538] Feminists were now demanding "equality in fact" vis-à-vis disparate impact, and explicitly linked reproductive freedom and equality law. Unfortunately, the "Reagan counterrevolution" rendered the victories of both Civil Rights and feminist activism "more tenuous than ever"—the two movements formed a tentative alliance just as the dominance of conservatism rendered their coalition politically impotent.

The failure of ERA II was not necessarily a loss. On its face, the ERA and ERA II addressed sex equality; however, the amendment was controversial because of its potential implications for abortion. The ERA and ERA II necessitated serious political maneuvering on the part of feminist activists. Advocating for the ERA had forced feminists to frame abortion debates only in terms of privacy, because opponents to the ERA often brought up the argument that the ERA would enable abortion access to an unprecedented and dangerous degree.[539] With the ERA gone, feminists could draw more explicit connections between sex equality and the right to abortion without worrying about the potential legislative implications. [540]

Another legislative challenge facing feminists was the Hyde amendment, a rider attached to appropriations bills[541] that was first introduced in 1976 that continued into the 1980s (and continues today). In its original form, it was "a straight-out ban" on government

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[538] Ibid., 224.
[539] Ibid., 218.
[540] Ibid., 220.
[541] "Abortion Funding Ban Has Evolved Over the Years," NPR.org. Accessed March 2016. <http://www.npr.org/templates/story/story.php?storyId=121402281>

funding for abortion,[542] and the devastating consequences of the Hyde amendment on all women throughout the country paved the way for the development of coalitional work between white feminists and women of color. In preventing government funding for abortion, conservatives unintentionally linked the concerns of white middle-class and professional women to the interests of poorer women and women of color.[543] The Hyde amendment reframed a debate that had long been contentious; in the early 1970s, when white feminists were advocating for abortion rights, women of color were more concerned with state-imposed population control policies such as involuntary sterilization.[544] When impoverished women did want to get abortions, the expense of the procedure was more likely to be an impediment than legal restrictions.[545]

Feminist legal scholar Sylvia Law and reproductive rights lawyer Harriet Pipel argued that restrictions on abortion funding resulted in the creation of "an invidious classification which effectively denies poor pregnant women their Constitutional right to privacy."[546] Some Black feminists, such as Linda LaRue outspokenly defended abortion rights, fostering the development of a tentative alliance between civil rights activists and feminists.[547] Yvonne Braithwaite-Burke, a Democratic Representative from California, characterized the Hyde amendment as a "forced childbearing amendment," and emphasized the lack of support structures for young, poor women of color who became mothers after unwanted pregnancies: "no one is willing to feed those children after they

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[542] Ibid.
[543] Mayeri, *Reasoning from Race*, 194.
[544] Ibid., 191.
[545] Ibid., 191.
[546] Ibid., 192.
[547] Ibid., 191.

have them."[548] The U.S. Commission on Civil Rights and the Congressional Black Caucus were also against the Hyde amendment for analogous reasons.[549]

However, any solidarity formed because of the Hyde amendment was outweighed by the continuing gap between the concerns of many mainstream white feminists and the reality that many women of color experienced. In her 1981 work *Ain't I a Woman*, bell hooks critiqued white feminists for their "constant comparison[s] of the plight of 'women' and 'blacks,'" arguing that these comparisons "support[ed] the exclusion of black women" and epitomized a "sexist-racist attitude endemic to the women's liberation movement."[550] hooks denounced analogies between race and sex, particularly by white feminists who "used black people as metaphors" as opportunistic and oppressive.[551]

bell hooks was correct to point out the gap between white feminism and Black women's lives. While mainstream feminists increased the visibility of sexual violence and worked to protect the rights of rape victims, this increased awareness did not extend to Black women. The prototypical rape victim was conceived of as a white woman; this erased Black women and contributed to the perpetuation of "Black women's sexual vulnerability and powerlessness as victims of rape and domestic violence."[552] It was a bizarre form of cognitive dissonance that completed ignored the fact that "virtually every known nineteenth-century female slave narrative contains a reference to…the ever present threat and reality of rape."[553]

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[548] Ibid., 192.
[549] Ibid., 192.
[550] Ibid., 222.
[551] Ibid., 222.
[552] Darlene Clark Hine, "Rape and the Inner Lives of Black Women in the Middle West," *Signs* Vol. 14: No. 4 (1989): 912.
[553] Ibid., 912.

Black women and other women of color also suffered erasure due to the rise of the new racial ideology, colorblindness, which "had gained ground in 1970s race discrimination jurisprudence"[554] and suggested the best way to ameliorate the harms of racism was to ignore race all together. Essentially, this assertion of sameness and the notion of equality opportunity for all worked to disconnect race from the structures of power that perpetuated inequality.[555] 1980s conservatives attacked "the 'excesses' of the civil rights revolution;" Reagan's transition team asked for dramatic cuts to the "already cash-strapped" EEOC.[556] Reagan's belief in capitalist meritocracy justified the validity colorblindness; no need to support marginalized communities and individuals when they could be successful with their own hard work.

Reagan's presidency marked the ascendency of American conservatism in the latter half of the twentieth century. Inaugurated in January 1981, he was "committed to the nation's traditional capitalist orientation"[557] and determined to "put the sluggish United States economic system in order."[558] Reagan saw American society as a meritocracy, where hard work would enable upward mobility,[559] and crafted his economic policy (often referred to as "Reaganomics") to reflect this philosophy. Reagan believed that "opportunity for advancement" for the unemployed could be realized by economic growth and that this "advancement" would save the government money by reducing the need for government

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[554] Mayeri, *Reasoning from Race*, 199.
[555] Jason Rodriquez, "Color-Blind Ideology and the Cultural Appropriation of Hip-Hip," *Journal of Contemporary Ethnography* Vol. 35: No. 6 (December 2006): 645-646.
[556] Mayeri, *Reasoning from Race*, 199
[557] Arthur L. Tolston, "Reaganomics and Black Americans," *The Black Scholar* Vol. 16: No. 5 (1985): 37.
[558] Ibid., 37.
[559] Ibid., 37.

programs—he therefore aggressively cut government programs and focused his policies on what he believed would foster economic growth.[560]

Reaganomics relied on some key operative assumptions: big government is a problem, federal spending must be curbed, and that capitalism is a self-correcting mechanism—one must have "faith in the marketplace."[561] Reagan also cited his desire to "make American great again,"[562] appealing to conservative nationalism. Reaganomics called for "a massive redistribution of wealth and power;" leading to further gains for the wealthy "at the expense of millions of the poor,"[563] despite the president's claim that budget cuts to education, job training programs, public service employment, and social services "[wouldn't] hurt the poor."[564] These budget cuts totaled $22.5 billion.[565]

The Reagan presidency and the popularity of his particular brand of conservative politics is often interpreted as backlash against advocates of the civil rights and feminist movements, who were some of his most outspoken critics. Black activists at the 72nd NAACP Annual Convention in Denver worried that Reaganomics would "cost their movement 15 years of hard-won gains."[566] One year of Reagan's policies had already added 2.6 million people to America's poor—and 9,173,000 of them were Black.[567]

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[560] Ibid., 37.
[561] Ibid., 37.
[562] Ibid., 37.
[563] Ibid., 38.
[564] Ibid., 39.
[565] Ibid., 39.
[566] Ibid., 39.
[567] Ibid., 40.

Reagan's "war on crime" that targeted low-income communities "for surveillance and punishment" also had a devastating effect on Black Americans across the country.[568] For the entirety of his presidency, Reagan was at the forefront of "an ultra-conservative economic and political reformation"[569] with goal of unequivocally altering U.S. politics—which was "catastrophic" for marginalized individuals and communities.[570] Historian Ronald Takaki, writing in 1989, observed that "the situation of the poor has deteriorated during the last two decades of expanded government social services," a fact which was then used by conservatives to justify cutting welfare.[571] Pundits argued that "the interventionist federal state" was operating on "misguided wisdom" from the 1960s that had created "a web of welfare dependency" and any American could pull themselves out of poverty if only they would work harder.[572]

Specifically with regards to Title VII, Reagan's transition team criticized disparate impact theory and advocated for a regression back to intentional disparate treatment.[573] However, at the time that Reagan was elected, there were "enormous political obstacles" to reforming civil rights policies.[574] Polls showed that most Americans were opposed to preferential treatment, but was in favor of civil rights enforcement and affirmative action in the form of "recruitment and training programs for minorities."[575] Affirmative action in

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[568] Julia Sudbury, "Unpacking the Crisis: Women of Color, Globalization, and the Prison Industrial Complex." In *Interrupted Life: Experiences of Incarcerated Women in the United States*, ed. Rickie Solinger et al. (Berkeley, California: University of California Press, 2010), 12.
[569] Tolston, "Reaganomics and Black Americans," 47.
[570] Ibid., 47.
[571] Takaki, *Strangers From a Different Shore,* 478.
[572] Ibid., 478.
[573] Belz, *Equality Transformed*, 181.
[574] Ibid., 181.
[575] Ibid., 181.

employment thus was the primary target of reform at the beginning of Reagan's first presidential term.

Despite the dominance of conservatism, Reagan did make one choice that feminists approved of: the appointment of the first woman to the Supreme Court. Sandra Day O'Connor was unanimously approved in September 1981.[576] O'Connor's appointment "surprised everyone;" she was virtually unknown outside of her home state of Arizona. Her stance regarding abortion and women's rights "alarmed social conservatives," and her opinions of *Roe v. Wade* were "far too ambiguous" for those who desired a clearly pro-life Justice.[577] Two prominent conservative organizations, The National Right to Life Committee and the Moral Majority, opposed her nomination.[578] Meanwhile, NOW praised the nomination of O'Connor as "a victory for women's rights;" though she had never been an activist, she had supported the ERA and encouraged state legislators to vote in its favor.[579] There were other small gains for women in the 1980s: in 1983, Sally Ride became the first American woman to go into space, and in 1984, Walter Mondale, the Democratic candidate for president, chose Geraldine Ferraro as his vice president. She was the first woman to be chosen as a running mate in a presidential race.[580]

One likely unanticipated consequence of Reagan's widespread and far-reaching conservatism was the solidification of coalition between civil rights and feminist activists, "nurtured by the conservative reactions to affirmative action and abortion rights" in the

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[576] "U.S. Timeline – The 1980s," americasbesthistory.com. Accessed March 2015. <http://americasbesthistory.com/abhtimeline1980.html>
[577] Mayeri, *Reasoning From Race*, 208.
[578] Ibid., 208.
[579] Ibid., 208.
[580] "U.S. Timeline – The 1980s," americasbesthistory.com.

late 1970s.[581] Following the 1980 presidential election and into 1981, the ACLU, the NAACP, and NOW reported "unprecedented surges in membership and donations."[582] At an "emergency" meeting of civil rights, civil liberties, labor, and feminist activists in December 1980, called to discuss strategies to deploy against conservatism, labor leader William Robertson called upon the attendees to "forget your differences;" he argued that "[they didn't] have the luxury of dividing …over single issues any longer."[583] Robertson, like Pauli Murray and the plaintiffs in *DeGraffenreid*, articulated the importance of intersectional thinking in combating "the right-wing threat."[584] While the Reagan administration's animosity towards civil rights and feminism dismayed progressives, it also motivated them to seek new means of working towards their goals.[585]

There were, of course, some victories in addition to the appointment of Sandra Day O'Connor and the highly visible success of Sally Ride. Dr. Martin Luther King Jr. Day was celebrated for the first time on January 20, 1986;[586]in the same year, the Oprah Winfrey Show received nation syndication.[587] Claire Huxtable of *The Cosby Show* provided another positive portrayal of Black womanhood on television.[588] New representation of Blackness became visible with the proliferation of Black Studies, which in the 1980s had been institutionalized for approximately a decade. Black lesbian feminist Audre Lorde published

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[581] Mayeri, *Reasoning from Race*, 207.
[582] Ibid., 207.
[583] Ibid., 207.
[584] Ibid., 207.
[585] Ibid., 207.
[586] "U.S. Timeline – The 1980s," americasbesthistory.com.
[587] "1980 Timeline," about.com. Accessed March 2015. <http://history1900s.about.com/od/timelines/tp/1980timeline.htm>
[588] Patricia S. E. Darlington and Becky Michele Mulvaney, *Women, Power, and Ethnicity: Working Toward Reciprocal Empowerment* (Binghamton, New York: The Haworth Press, 2003), 28.

multiple works in the 1980s, including *Zami: A New Spelling of My Name* and *Sister Outsider* in 1982 and 1984, respectively. *Zami*, a memoir of a multiply marginalized woman, gave increased visibility to an often-erased population. *Sister Outsider* became a seminal women's studies text, dealing with a diverse array of subjects from love to police brutality.

Lorde also believed in the power of multi-racial coalition work. She was one of the founders of Kitchen Table: Women of Color Press in 1980 with Barbara Smith and Cherríe Moraga,[589] which was the first American publisher specifically oriented towards publishing women of color.[590] The second edition of the landmark anthology *This Bridge Called My Back: Writings by Radical Women of Color* was published by Kitchen Table in 1983. (The first was published by a white women's press.) *This Bridge Called My Back* was revolutionary, putting the poetry, analyses, and other works of women of color into conversation and offering alternatives to the universalization of white womanhood in the mainstream feminist movement.

This proliferation of women-of-color-centric work was a continuation of that done in the 1970s, when Black feminists described the intersection of race, gender, class, and sexuality. In the 1980s, women of color entered academia "in larger and more influential numbers," [591] producing scholarship that centered their experiences. However, this tendency appeared in the legal academy at a later date, with a few notable exceptions (such as Pauli Murray). Relatively few women of color lawyers had been able to access prestigious academic posts, and in the early 1980s, "race and feminism remained largely separate in legal scholarship," despite the fact that the two had been in conversation for

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[589] Barbara Smith, "A Press of our Own: Kitchen Table: Women of Color Press," *Frontiers: A Journal of Women's Studies,* Vol. X: No. 3 (1989): 11.
[590] Ibid., 11.
[591] Mayeri, *Reasoning from Race*, 222.

years in activist circles.[592] By the late 1980s, women of color in the legal field embraced Kimberlé Crenshaw's theory of intersectionality and "sought to place women of color at the center, rather than the margins, of critical inquiry."[593]

However, legal theorists "rarely grappled with the legacies of women like Murray."[594] Instead, intersectionality was a product of a new field of legal inquiry: critical race theory (CRT). CRT aimed to analyze race and racism from a specifically legal point of view, recognizing that racism "is engrained in the fabric and system of the American society," and focusing on the effects of institutional racism rather than "the individual racist."[595] CRT defined power structures as "based on…white supremacy" that upheld the oppression of people of color.[596] In many ways, CRT was a response by the legal scholars of color to the prevailing ideology of colorblindness; pushing back against the idea that the law is "neutral and colorblind," CRT analyzed the law as one way in which "self-interest, power, and privilege" could be maintained.[597]

CRT more broadly and the concept of intersectionality provided a much-needed alleviation of hermeneutical injustice for Black women and other women of color who still were struggling with finding language that would express their positionality in Title VII suits. This boon was desperately needed, given the challenges posed to the Black community and other populations of people of color in the 1980s as a result of escalating poverty that was in no small part caused by Reaganomics.

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[592] Ibid., 223.
[593] Ibid., 223.
[594] Ibid., 223.
[595] "What is Critical Race Theory?" UCLA School of Public Affairs. Accessed March 2016. <https://spacrs.wordpress.com/what-is-critical-race-theory/>
[596] Ibid.
[597] Ibid.

The 1980s marked "the emergence of a new Black underclass,"[598] who were seen as "unemployable, irrelevant, surplus population."[599] The advent of the prison industrial complex coupled with the development of new stereotypes of Black women and the continual perpetuation of certain stereotypes of Black men resulted in the creation of a new conception of Black criminality that was fueled by the growth of federal and state crime budgets, the war on drugs, and tough-on-crime legislation.[600]

One of the most enduring stereotypes of Black men, termed "The Myth of the Black Rapist" by Angela Davis, was further perpetuated into the 1980s as the Black population as a whole was demonized.[601] In the white supremacist cultural imaginary, the Black Rapist targeted white women and worked in tandem with the Bad Black Woman; these tropes were "designed to apologize for and facilitate the exploitation of Black men and women."[602] The myth of the Black Rapist worked synergistically with the stereotype of white women as prototypical rape victims to enable to criminalization of Black men.

Black women were newly stereotyped as "crack addicts" as usage skyrocketed in the early 1980s. The "apparent confinement" of crack to urban, inner-city areas made it "the perfect target" for Reagan's war on drugs.[603] After "whipp[ing] up a panic" about the drug, the media solidified tropes of "the pregnant addict" and her "crack baby," who were "both irredeemable [and] Black."[604] The linkage of Black women with addiction and subsequent criminalization of addiction had devastating effects; smoking crack while pregnant was

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[598] Takaki, *Strangers From a Different Shore*, 478.
[599] Smith, *Race, Labor, and Civil Rights*, 187.
[600] Sudbury, "Unpacking the Crisis," 12.
[601] Davis, *Women, Race, & Class*, 172.
[602] Ibid., 174.
[603] Dorothy Roberts, "Making Reproduction a Crime," in *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (New York: Vintage Books, 1997), 155.
[604] Ibid., 156.

often treated as child abuse, and many Black women were prosecuted for doing so.[605] Prosecution could be avoided with abortion, creating a coercive mandate that disincentivized Black reproduction[606] and criminalized addiction in mothers.[607] The systemic prosecution of addicted mothers was "part of an alarming trend toward greater state intervention into the lives of pregnant women;"[608] however, the mainstream white feminist movement remained silent, enabling the widespread "disparagement of Black Americans."[609]

In terms of labor force participation rates, Black women's working patterns throughout the 1980s were a continuation of earlier trends. Historically, due to economic necessity, more Black women worked outside their homes than did white women, which continued into the 1980s.[610] The 1980s were characterized by an "industrial restructuring" which shifted the majority of blue-collar jobs from manufacturing to service-oriented industries, which was mostly concentrated in the Northeast and Midwest. Many Black women in these regions, particularly in cities, lost their manufacturing jobs. However, white flight and migration of middle-class whites out of cities created a demand for some service jobs in the suburbs, which only a few Black women were able to access.[611] In the South and West, this restructuring led to a net gain in manufacturing jobs, bolstering Black

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[605] Ibid., 152.
[606] Ibid., 152.
[607] Ibid., 153.
[608] Ibid., 153.
[609] Ibid., 155.
[610] Marlene A. Lee and Mark Mather, "U.S. Labor Force Trends," Population Bulletin, Vol. 63, No. 2 (June 2008), a publication of The Population Reference Bureau, 7. <http://www.prb.org/pdf08/63.2uslabor.pdf>
[611] Ibid., 7-8.

employment and that of poorer whites.[612] Unfortunately, Black women as an aggregate group still experienced the double effect of the racial and gendered wage gap,[613] and the negative stereotypes of Black women that proliferated throughout the 1980s undoubtedly created barriers to hiring and promotion. Black working-class women found themselves "segmented and limited to the least… prestigious occupations," and in many instances, were only able to find work in occupations that whites rejected.[614]

Even for the Black middle class and the "tiny elite" of professional, educated Black women—a population that had grown since 1970s—discrimination continued to be a problem.[615] In 1984, out of all employed Black women, 14.3 percent had professional or technical jobs; 5.4 percent were managers or of higher rank.[616] These two groups combined made up almost one-fifth of full-time Black women workers. Black women throughout the 1980s slowly increased their access to white male professions, such as law or medicine;[617] in academia, this translated to an increase in scholarship that addressed Black women's histories and created Black feminist thought. Though Black women had somewhat higher rates of access to middle class positions and salaries than they had before, most of them were able to attain that work only in providing health and human services, or managerial or professional services to the Black community—positions "often shunned" by whites.[618]

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[612] Ibid., 7.
[613] Ibid., 15.
[614] Elizabeth Higginbotham, "Black Professional Women: Job Ceilings and Employment Sectors" in *Women of Color in U.S. Society*, ed. Maxine Baca Zinn and Bonnie Thornton Dill (Philadelphia, Pennsylvania: Temple University Press, 1994), 115.
[615] Ibid., 113.
[616] Ibid., 113.
[617] Ibid., 113.
[618] Ibid., 115.

Meanwhile, white supremacy continued to construct Asian Americans as the model minority, juxtaposed against and used to justify the continual persecution and mistreatment of other communities of color. However, the praise of white Americans for the Asian American community was coupled with nativism and racism, creating a bizarre dualism that simultaneously valorized and devalued Asian Americans. The 1980s saw the entrenchment of the model minority myth and the utilization of Asian Americans as tokens, as well as anti-Asian violence and a resulting solidification of a pan-Asian-American identity.

In 1984, Reagan gave a speech with Asian Americans as the intended audience. He praised the successes of the Asian American community, crediting their "values" of "religious faith, community spirit and the responsibility of parents and schools to be teachers of tolerance, hard work, fiscal responsibility, cooperation, and love." He closed his speech again commending "your values, your hard work."[619] Acting similarly to Reagan, media portrayals of Asian Americans emphasized the academic success of Asian American children and young adults. In 1986, *NBC Nightly News* and the *McNeil/Lehrer Report* aired special segments on Asian Americans' success. In 1987, CNN's *60 Minutes* did the same; *U.S. News & World Report* featured Asian American achievement in a cover story; *Time* devoted an entire section to Asian Americans in their special issue on immigrants, "The Changing Face of America;" *Newsweek* dedicated the cover story of its college-campus magazine to "The Drive to Excel" of Asian Americans, and for its weekly edition, published a lead article titled "Asian Americans: A Model Minority;" *Fortune* labeled them "America's Super

[619] Takaki, *Strangers From a Different Shore,* 474-475.

Minority," *New Republic* characterized "The Triumph of Asian Americans" as "American's Greatest success story."[620]

In November 1982, the Vietnam veteran's memorial was dedicated in Washington, D.C., featuring the names of 58,000 American soldiers killed or missing in action.[621] There was resounding silence from the U.S. government regarding the atrocities committed by American troops during the Vietnam war—such as the use of agent orange or the widespread sexual violence that was used to terrorize Vietnamese women, and despite the entrenchment of the model minority myth, many Asian Americans continued to struggle, including those who had come as refugees after the Vietnam war and other less visible groups such as the Hmong immigrant community.[622]

Upward mobility was very limited for working-class Asian immigrants because they often had a "consciousness of their limited options"—not necessarily expecting to be welcomed or supported by American society, and often lacking English skills, they were unable to advocate for themselves or engage in activities such as organizing to form unions.[623] Reagan and the media ignored the fact many "long-term welfare" families (receiving public assistance for between four and ten years) were Asian refugee families—especially in California.[624] The Hmong community in particular was "barely surviving."[625]

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[620] Ibid., 474
[621] "U.S. Timeline – The 1980s," americasbesthistory.
[622] Takaki, *Strangers From a Different Shore,* 465.
[623] Karen J. Hossfeld, "Hiring Immigrant Women: Silicon Valley's 'Simple Formula,'" in *Women of Color in U.S. Society*, ed. Maxine Baca Zinn and Bonnie Thornton Dill (Philadelphia, Pennsylvania: Temple University Press, 1994), 89.
[624] Takaki, *Strangers From a Different Shore,* 465.
[625] Ibid., 465.

Other Asian Americans were faring similarly but were also "rendered invisible."[626] The media had nothing to say about "the Downtown Chinese, the elderly Japanese, [or] the old Filipino farm laborers" and their descendants who were struggling to get by.[627] Historian Ronald Takaki remarked that "to be out of sight is also to without social services;"[628] the myth of the model minority, which portrayed *all* Asian Americans as successful and thus not in of need support, led to the denial of government funding for social service programs designed to help Asian immigrants learn English and find employment. Asian American students were excluded from Education Opportunity Programs designed to assist all low-income students because college administrators forgot that some Asian Americans were poor, recent immigrants, or came from families of refugees.[629]

When demographic information about Asian Americans is disaggregated by ethnicity or nationality, it reveals "an array of differences in education, occupation, and economic class."[630] For Southeast Asians and Pacific Islanders in particular, "poverty rates are high, median incomes are low, and educational attainment is far below the national average."[631] Takaki cites "the refugee experience" as a primary cause for the disadvantages faced by these groups, especially the Vietnamese, Cambodian, Laotian, and Hmong. For these Southeast Asians, "language and cultural differences, wartime traumas, forced uprooting, relocation, and resettlement"[632] made it difficult for them to participate in

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[626] Ibid., 478.
[627] Ibid., 478.
[628] Ibid., 478.
[629] Ibid., 478.
[630] Ancheta, *Race, Rights, and the Asian American Experience*, 133.
[631] Ibid., 133.
[632] Ibid., 135.

American society. Many Southeast Asian refugees who entered the U.S. in the 1980s were poor and came from rural areas in their countries of origin, lacking education and English and professional skills to succeed in the American labor market.[633] Consequently, chronic unemployment and dependency on welfare became reality for many Southeast immigrant families.[634]

This is reflective of a "structural problem"—many Asian Americans were located in the "secondary sector" of the labor market, with low wages and virtually no promotional prospects (such as food service workers or postal clerks).[635] Even when Asian Americans found employment in the "primary sector" and worked as engineers, pharmacists, or bank tellers, they were still clustered in "lower-tier levels" and were very rarely promoted to "the upper tier levels of management and decision making."[636]

There were, of course, a not insignificant number of Asian Americans who enjoyed a degree of professional success and economic comfort; often, they were one of the few persons of color in their workplace. Viewed as model minorities, their presence was tokenized. Among people of color, "the more successful have a highly selective immigration history." Because of the 1965 Immigration Act's preference for educated and skilled Asians, "migration from these countries involves persons of higher socioeconomic status than other immigrant groups."[637] When viewed with the conditions of the 1965 Immigration Act in mind, the success of some Asian Americans is hardly surprising; if some Asians who entered America were highly educated, then that would create conditions for their children

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[633] Ibid., 135.
[634] Ibid., 135.
[635] Takaki, *Strangers From a Different Shore,* 476.
[636] Ibid., 476.
[637] Ortiz, "Women of Color: A Demographic Overview," 34.

to also be successful in that regard, leading the artificial illusion that Asians are just "like that," when in reality, the success of some Asian Americans can be traced back to *which* Asians were welcomed into the U.S. post-1965 (as compared to those who entered as refugees, or those Asian-Americans who were the descendants of Chinese laundry owners or Filipino farm laborers whose families who had been in America since the 1800s or early 1900s.) (For other immigrant communities, such as Mexicans and Puerto Ricans, "migration is not as selective with respect to socioeconomic characteristics" because the barriers between Latin America are "less restrictive."[638])

The model minority stereotype became so culturally salient because it was useful—it could be used to justify the continuing existence of white supremacy by suggesting that all people of color could be successful and high-achieving if only they were willing to work hard and ignored the realities of colonialism and imperialism that that plagued many Asians, as well as the history of systemic racism and anti-Blackness endemic to American society. In the 1980s, "an era anxiously witnessing the decline of the United States in the international economy," the model minority myth "offer[ed] ideological affirmation of the American Dream."[639] With regards to education, "the ideology of the model minority myth…subordinates" Black and Latino students by "linking Asian Americans to….family values, hard work, quiet persistence—that are meant to serve as a 'model'… In other words," Black and Latino students "should try to act more like Asians."[640]

Asian American students were ubiquitous examples of the model minority. In 1987, 25% of students at UC Berkeley were Asian, but only one of the University's one hundred

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[638] Ibid., 34.
[639] Takaki, *Strangers From a Different Shore*, 478.
[640] Ancheta, *Race, Rights, and the Asian American Experience*, 163.

and two administrators was Asian,[641] and despite the white media's adoration of successful young Asian Americans, it was clear that white college students did not share this affection. The success of Asian Americans on college campuses was "accompanied by the rise of a new wave of anti-Asian sentiment."[642] Disparaging slogans appeared, such as "M.I.T. means Made in Taiwan" or "Stop the Yellow Hordes."[643] A group of Asian female students at the University of Connecticut, on a bus en route to a formal dance, were spat on by a group of white students; when their boyfriends turned around, the aggressors referred to them as "Oriental faggots."[644] This kind of white resentment and backlash revealed the hypocrisy of white supremacy—Asian American success was to be praised, but only when contrasted with other communities of color; when Asian Americans attempted to enter predominantly white spaces (such as universities) in larger numbers, they were seen as a threat, giving rise to the idea of an "Asian Invasion"[645]—something sinister, foreign, and malignant encroaching upon white America.

Many Asian American college students in the 1980s were children of recent immigrants; seeing their parents work as grocers, food service staff, and storekeepers, they desired a wider range of career choices for themselves.[646] Once these Asian Americans arrived on college campuses, white students felt threatened and feared that they were raising class grade curves.[647] White parents, especially alumni, worried that Asian American students were taking away "their" slots—admissions that, in their mind, ought to

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[641] Takaki, *Strangers From a Different Shore,* 476.
[642] Ibid., 479.
[643] Ibid., 479.
[644] Ibid., 479.
[645] Ibid., 480.
[646] Ibid., 479.
[647] Ibid., 479.

be reserved for their children. These kinds of legacy admissions served as an "invisible affirmative-action program for whites"[648] and was now under attack by Asian Americans, revealing the racist nativism of whites. The "falsely elevated position" of Asian American students relative to whites was seen as cause for alarm.[649]

This resentment was paralleled in broader American society, and employment discrimination against Asian Americans was widespread. Even though some Asian Americans had high levels of educational attainment, they were noticeably absent from executive or leadership positions with decision making power[650] because they are stereotyped as passive and lacking the "aggressiveness required in administration."[651] Asian Americans also had to confront exclusion from the "old boys' club" and were "told they are inarticulate" because of their accent; oddly enough, whites with French, German, or English accents were not told the same thing.[652] This kind of "accent discrimination"[653] was used to justify the denying Asian Americans positions because they "sound[ed] foreign,"[654] and Asian Americans were "among those… most often subjected to discrimination because of accent."[655]

These patterns of discrimination were mirrored in broader society. There was "a growing worry that there [were] 'too many' immigrants coming from Asia"[656] leading to efforts in the 1980s to reform the 1965 Immigration Act, which was "reminiscent of the

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[648] Ibid., 479.
[649] Ancheta, *Race, Rights, and the Asian American Experience*, 163.
[650] Takaki, *Strangers From a Different Shore*, 476.
[651] Ibid., 476.
[652] Ibid., 477.
[653] Ancheta, *Race, Rights, and the Asian American Experience*, 123.
[654] Ibid., 124.
[655] Ibid., 123.
[656] Takaki, *Strangers From a Different Shore*, 480.

nativism prevalent in the 1880s and the 1920s."[657] Senator Alan Simpson from Wyoming cited the fact that "a substantial portion" of new immigrants—from both Asia and Latin America—did not "integrate fully" into American society.[658] He warned of the dangers of "language and cultural separatism" which would apparently "seriously [erode]" "the unity and political stability of the Nation."[659] From the point of view of many proponents of immigration reform, the post-1965 wave of Asian and Latin American immigrants "threaten[ed] the traditional unity and identity of the American people."[660] They had some success—in March of 1988, the Senate passed a bill that would limit the entry of family members of immigrants already here and would provide 55,000 visas to be awarded to "independent immigrants" on the basis of education, work experience, occupations, and "English language skills."[661]

Throughout the 1980s, Anti-Asian sentiment "explode[ed] violently in communities across the country" in places such as Philadelphia, Boston, New York, Denver, Galveston, Seattle, Portland, Monterey, and San Francisco.[662] In Jersey City, where 15,000 Asian Indians lived at the time, a local newspaper published a hate letter that warned: "We will go to any extreme to get Indians to move out of Jersey City." It was allegedly written by a group calling themselves the "Dotbusters"—a reference to the bindi worn by many Hindu women.[663] The threats went beyond mere words. In September 1987, four teenagers beat

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[657] Ibid., 480.
[658] Ibid., 480.
[659] Ibid., 480.
[660] Ibid., 480.
[661] Ibid., 480.
[662] Ibid., 481.
[663] Ibid., 481.

Asian Indian Navroz Mody to death in Hoboken while chanting "Hindu, Hindu."[664] Vincent Chin, a Chinese man, was out at a bar in Detroit with two friends to celebrate his upcoming wedding in June 1982.[665] Two white autoworkers approached him, calling him a "Jap" and blaming him for the fact that they were out of work. Chin left the bar, while the two white men retrieved a baseball bat from their car, chased Chin down the street, and then beat him to death. They were allowed to plead guilty to manslaughter and sentenced to 3 years probation and fined $3,780 each. Neither of them had to spend "a single night in jail."[666]

The murderers of Vincent Chin were part of a larger cadre of white autoworkers who blamed the Japanese auto industry for being out of work. Throughout the 1980s, there were promotional campaigns to "buy American" and anti-Japanese bumper stickers appeared with slogans like ""Unemployment – Made in Japan" [667] or "Toyota-Dausun-Honda-and-Pearl-Harbor."[668] The Vincent Chin murder also revealed one of the ways in which the white American gaze dehumanized Asian Americans by assuming that they were a heterogeneous mass, vilifying anyone who "looked Japanese"[669] and leading to "a series of violent racial hate crimes" committed by whites against Asian Americans of varying ethnicities and national origins.[670]

According to Marisa Chuang of American Citizens for Justice, the murder of Vincent Chin was an important moment in Asian American history because it led to the coalescing of "Asian American" as an identity category, as opposed to ethnicity-specific identities such

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[664] Ibid., 481.
[665] Ibid., 481-482.
[666] Ibid., 481-482.
[667] Ibid., 483.
[668] Ancheta, *Race, Rights, and the Asian American Experience*, 75.
[669] Hossfeld, "Hiring Immigrant Women," 70.
[670] Ibid., 70.

as "Korean American" or "Filipino American."[671] "This is [a] historical moment," she said, "because for the first time we are all united."[672] Though Chin was Chinese, the fact that he was mistaken for Japanese and subsequently killed for it sent a clear message to Asian Americans: white Americans saw them as a homogenous group and would mistreat them because of that. This process of "constructing Asian America"[673] was partially "a product of racialization" that was imposed upon Asian Americans by the nativist racism of the white gaze, but it was also a source of pride for community engaged in "self-identification and internal organizing."[674] Despite the heterogeneity of the Asian American population, which in the past had served as an impediment to forging a common Asian American identity, Asian Americans realized that "because of appearance, they are all treated as if they are foreign-born outsiders and not really Americans."[675]

Asian-American women were subjected to this and also experienced uniquely gendered forms of discrimination while at work. The "seemingly obedient and submissive character" of Asian American women meant that they were seen as "good candidates for bureaucratic control."[676] This gendered application of the model minority myth rendered them susceptible to certain kinds of domination at work;[677] "many administrators see Asian American women…as ideal candidates for treatment as token."[678] Tokenism became a "powerful and division tactic" used by members of the white managerial class to "pit

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[671] Takaki, *Strangers From a Different Shore*, 484.
[672] Ibid., 484.
[673] Ancheta, *Race, Rights, and the Asian American Experience*, 130.
[674] Ibid., 130.
[675] Ibid., 131.
[676] Esther Ngan-Ling Chow, "Asian American Women at Work," in *Women of Color in U.S. Society*, ed. Maxine Baca Zinn and Bonnie Thornton Dill (Philadelphia, Pennsylvania: Temple University Press, 1994), 210.
[677] Ibid., 210.
[678] Ibid., 210.

individuals or minority groups against each other."[679] While tokenism enabled some Asian women to gain white collar employment they may have otherwise been excluded from, they often faced discrimination in the hiring process because most of these jobs not only required "middle-class literacy and educational credentials," but also " 'cultural resources' (e.g., values, mannerisms, lifestyle, language, and symbols)…that many Asian American women, especially immigrant ones, [had] not acquired or [could not] easily obtain."[680] If they were hired, they were often stereotyped as "childlike" and thus not suited to highly skilled or demanding work,[681] decimating any chances they might have had at promotion.

Many Asian American working class women worked in assembly shops or factories in Silicon Valley, recruited by whites who had a preference for "small, foreign, and female" entry level workers.[682] They stereotyped Asian women as "little foreign gals" who were "grateful" to find work.[683] The growth of the new tech industry in the 1980s and the subsequent utilization of Asian female labor was an example of "capitalistic economic development" that "utilizes and thrives on racism as a method of labor division and control."[684]

Asian American in Silicon Valley and other workplaces across the country had difficulty in "demanding their fair share"[685] and pointing out unfair working conditions or discrimination. In a study conducted by sociologist Esther Ngan-Ling Chow, many Asian American women cited "accent and language barrier" as a common reason they did not

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[679] Ibid., 210.
[680] Ibid., 211
[681] Ibid., 211.
[682] Hossfeld, "Hiring Immigrant Women,'" 65.
[683] Ibid., 65
[684] Ibid., 69.
[685] Chow, "Asian American Women at Work," 215.

speak up at work.[686] Additionally, "most…Asian immigrants were not very knowledgeable about U.S. racism when they immigrated,"[687] meaning that newly arrived workers were ill-prepared and ill-equipped to combat the discrimination they experienced.

Title VII served as one potential outlet for some of the Asian American women who sought remedy for employment discrimination, though they were met with limited success, as were Black women. The ideology of colorblindness had "gained ground" in race discrimination law in the late 1970s,[688] and the benefits of comparing race and sex were beginning to run out.[689] Despite the "integral role" of Pauli Murray's intersectional thought in the origin of Title VII, few court opinions integrated intersectional analysis into their decisions;[690] by the late 1980s, "an intersectionality anti-canon had emerged."[691]

The anti-canon was not without its challengers, "inspir[ing] and inform[ing] a new generation of scholarship and advocacy."[692] In the early 1980s, law professor and EEOC lawyer Judy Scales-Trent published several articles discussing how Title VII had failed to incorporate the experiences of Black women.[693] Many legal scholars who discussed what Kimberlé Crenshaw termed "intersectionality" just a few years later focused on Title VII cases[694] because of the way in which these cases illustrated the failure of the law to

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[686] Ibid., 215.
[687] Hossfeld, "Hiring Immigrant Women," 89.
[688] Mayeri, *Reasoning from Race*, 199.
[689] Ibid., 204.
[690] Mayeri, "Intersectionality and Title VII," 727.
[691] Ibid., 727.
[692] Ibid., 727.
[693] Ibid., 727.
[694] Ibid., 727.

acknowledge multi-dimensional experiences with discrimination, and how courts "seemed spectacularly oblivious" to the realities of women of color.[695]

Cases

While Title VII cases featuring women of color plaintiffs in the 1970s had been characterized by an abject denial of the validity of intersectional discrimination, the 1980s, with the development of critical race theory and the naming of intersectionality, brought the possibility to dispute what historian Serena Mayeri terms the "intersectionality anti-canon."[696] There were some successes for women of color; courts recognized that women of color experienced discrimination in ways that were distinct from men of color and white women (in *Tennie v. City of New York Department of Social Services*), and one Chinese American woman was able to gain promotion as a result of her Title VII suit (in *Lee v. Walters*), but the court ignored the tri-pronged nature of her claim of discrimination based on race, sex, and national origin and instead made the ruling solely based on national origin discrimination. Other cases went through lengthy appeals processes that at varying stages seemed to offer the potential for relief or new legal conceptions of intersectional discrimination, but then ultimately were dismissed or had ruling that were unfavorable to the plaintiffs.

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[695] Ibid., 728.
[696] Ibid., 727.

One such case was *Jefferies v. Harris County Community Action Association*. Dafro Jefferies, a Black woman, worked at Harris County Community Action Association (HCCAA), a non-profit in Texas, as Secretary to the Directory of Programs and then as a Personnel Interviewer until her termination in April, 1974.[697] Between her promotion to Personnel Interviewer in 1970, and her termination in April 1974, she unsuccessfully applied for several other promotions.[698] On April 2, 1974, a posted notice announced two vacancies for the position of Field Representative, open until April 11. Jeffries applied; she also noticed a "personnel action" form that showed Eddie Jones, a Black man, had been chosen for the position of Acting Field Representative. After complaining to the Acting Personnel Manager and the Acting Executive Director, Jefferies was told that the posting was a mistake.[699]

Jefferies believed that she had been a victim of discrimination, so she photocopied the form with Jones' name on it and sent it to Janet Walker, who chaired the HCCAA personnel committee and was also a member of the HCCAA Board of Directors.[700] Instead of the support that Jefferies had anticipated, Walker expressed concern that the form was confidential, leading to an investigation by the Acting Executive Director. At the end of the month, she was fired for "conduct prejudicial to the interest of HCCAA."[701] Before her

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[697] "Judicial decision, *Jefferies v. Harris County Community Action Association*, 1980," OpenJurist.org. Accessed October 2015. <http://openjurist.org/615/f2d/1025/jefferies-v-harris-county-community-action-association>

[698] Ibid.

[699] Ibid.

[700] Ibid.

[701] Ibid.

termination, Jefferies had expressed dissatisfaction regarding Jones' promotion to her supervisors and written a memo to one of them.[702]

Because the open positions had been filled by a white woman and a Black man, Jefferies alleged that she had been discriminated against a Black woman.[703] The District Court ruled against her, dismissing the claim of race and sex discrimination in HCCAA's decision not to promote her, and also dismissed her claim that she had been fired as retaliation.[704] Jefferies testified that every position that she had ever applied for at HCCAA had subsequently been filled by "males or non-Black females," and she had never been informed that she was unqualified for these position.[705]

She appealed to the Fifth Circuit and her case was heard by the Appeals Court in 1980.[706] Jefferies argued that the district court had erroneously dismissed her claim of race and sex discrimination, that their findings of fact had been incorrect, that they had failed to consider "the correctness of HCCAA's decision" to fire her, and that she had been denied due process of law.[707] The Fifth Circuit affirmed the decision of the lower court in part, but also remanded with further instruction; they found that she had violated confidentiality when she had photocopied Jones' personnel action form, but believed that her allegation of discrimination as a Black woman needed to be explored from an intersectional point of view.

The reasoning used by the Fifth Circuit to justify their remand seemed promising. The District Court had found that no race discrimination and no sex discrimination had

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[702] Ibid.
[703] Ibid.
[704] Ibid.
[705] Ibid.
[706] Ibid.
[707] Ibid.

occurred, however, they "made no findings concerning this claim of discrimination based on a combination of race and sex" and instead had "separately addressed Jefferies' claims of race discrimination and sex discrimination."[708] On appeal, Jefferies argued that this had been an error, because "if a Title VII plaintiff alleges that her employer discriminated against black females, the only statistics relevant to that claim of discrimination would be the number of black females hired or promoted by the employer."[709] The Appeals Court agreed with Jeffries that the district court "failed to address her claim of discrimination on the basis of both race and sex" and wrote that "discrimination against Black females can exist even in the absence of discrimination against Black men or white women;"[710] it was "irrelevant" whether or not Black men or white woman had been slighted.[711]

To support this statement, the decision of the Fifth Circuit cited Congress' intentions with regards to the word "or" in the text of Title VII: "The use of the word "or" evidences Congress' intent to prohibit employment discrimination based on any *or all* of the listed characteristics"[712] [emphasis mine]. The decision also mentioned that Congress had "refused to adopt an amendment which would have added the word 'solely'"[713] to the statute, therefore indicating that any combinations of "race, color, religion, sex, or national origin"[714] were valid. The court emphasized that they were unwilling to "condone a result which leaves Black women without a viable Title VII remedy," especially when they

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[708] Ibid.
[709] Ibid.
[710] Ibid.
[711] Powell, "The Claims of Women of Color Under Title VII," 420.
[712] "Judicial decision, *Jefferies v. Harris County Community Action Association*, 1980."
[713] Ibid.
[714] Ibid.

believed that their interpretation of the congressional record proved that Title VII could be interpreted in an intersectional manner.[715]

The Fifth Circuit also cited *Phillips v. Martin Marietta Corp.* (discussed in Chapter 3), which had developed a framework to evaluate discrimination based on more than one factor: sex-plus analysis.[716] At the time, the only precedent that explicitly addressed discrimination at the specific intersection of Blackness and womanhood was *DeGraffenreid v. General Motors*[717] (also discussed in Chapter 3); the Appeals Court directly contradicted the *DeGraffenreid* ruling, which had denied the validity of intersectional discrimination. The Fifth Circuit used sex-plus analysis in *Jefferies*, making "Black females… a distinct protected subgroup,"[718] interpreting sex-plus analysis as "establishing precedent for protection against intersectional discrimination."[719]

While this validation of intersectional discrimination seemed promising, it still perpetuated the idea that race and sex are separate categories of identity by treating race as an add-on. The Court recognized that Black men and white women ought to be treated as "outside Jefferies' class,"[720] but *Jefferies* was not an unambiguous victory for women of color. Because the court framed the claim within a sex-plus analysis, the court essentially stated that "but-for sex and an added characteristic, the plaintiff would have been treated the same as a White man," which "continues to characterize Black women as a compound of two separate parts" instead of a unique identity category who have unique experiences of

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[715] Ibid.
[716] Powell, "The Claims of Women of Color Under Title VII," 420.
[717] Mayeri, *Reasoning from Race*, 197.
[718] "Judicial decision, *Jefferies v. Harris County Community Action Association*, 1980." OpenJurist.org.
[719] Abrams, "Title VII and the Complex Female Subject," 2495.
[720] Ibid., 2496.

discrimination.[721] Sex-plus analysis "infers that the race of Black women is a secondary characteristic, to be analyzed in addition to the sex discrimination claim…the door is left open for lower courts to tally how many factors a person is removed from the 'norm' (i.e. White male) and then decide if the claim is one which the court will recognize."[722]

After being remanded, the case was dismissed by the district court. Jefferies appealed again, and found that the Fifth Circuit affirmed the dismissal, "[saying] nothing about the possible outcome of the case if evidence [had been] introduced" with a sex-plus framework in mind.[723] The original Fifth Circuit decision, which included sex-plus analysis and the instruction, had been 2-1. One judge was "not persuaded" that 'combination discrimination' violated Title VII, believing that "the practical dilemmas associated with combined race-sex claims warranted caution."[724] This second appeal was heard by a different set of judges[725] that as a group were less sympathetic to Jefferies than those who had ordered the remand.

Ultimately a loss, *Jefferies* "reflected the ambivalent state of antidiscrimination law in [the 1980s]."[726] However, the first decision by the Fifth Circuit did have potential as a possible means to alleviate hermeneutical injustice; "disparate treatment on the basis of sex-plus-race discrimination" was more of a mouthful than "intersectionality" but it was better than nothing, and if the case had not been dismissed, it would have created an

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[721] Powell, "The Claims of Women of Color Under Title VII, 421.
[722] Ibid., 422.
[723] Minna J. Kotkin, "Diversity and Discrimination: A Look at Complex Bias," *William & Mary Law Review* Vol. 50: Issue 5 (2009): 1472.
[724] Mayeri, *Reasoning from Race*, 198.
[725] Kotkin, "Diversity and Discrimination," 1472.
[726] Mayeri, *Reasoning from Race*, 198.

important legal precedent, allowing other women of color to utilize this framework of understanding of identity in a legal context.

The first *Jefferies* decision made by the Fifth Circuit additionally exemplified the validation of "subjugated knowledge."[727] Black feminist theorist Patricia Hill Collins analyzes knowledge in terms of power; "dominant groups" work to suppress and "replace subjugated knowledge" with their own lines of thought, because "gaining control over this dimension of subordinate groups' lives simplifies control."[728] When the powerful and the privileged control the discourse regarding oppression, those who have intimate knowledge of and experiences with discrimination are barred from offering their own understandings. The first Fifth Circuit decision, which recognized Jefferies' unique position as a Black woman (albeit under the somewhat reductive sex-plus framework), made room for subjugated knowledge to enter courtroom. Unfortunately, she did lose her case and the interpretation made regarding interactive discrimination and sex-plus was not necessarily useful to other women of color in the future.

One case from 1987, *Hicks v. Gates Rubber Company*, cites *Jefferies* and uses a similar—though not identical—analysis to understand the effect of "race discrimination in a sexually harassing environment."[729] Sadly, Hicks, like Jefferies, had to endure a series of trials—a first case in a district court, an appeal with an order to remand, a loss, and another appeal that affirmed—that ultimately did not grant her any relief.

Marguerite Hicks alleged that she experienced racial and sexual harassment, and complained to the EEOC. She believed that she was subsequently fired in retaliation. Her

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[727] Collins, "Black Feminist Thought," 274.
[728] Ibid., 274.
[729] Wei, "Asian women and Employment Discrimination," 5.

employer, Gates, believed that Hicks had been neither racially nor sexually harassed and had been dismissed only because of "unsatisfactory job performance."[730] During the trial in the District Court, Hicks argued that the work environment at Gates was "permeated with racial and sexual hostility;" other employees testified that "an atmosphere existed in which racial slurs and jokes were tolerated."[731] At least one supervisor, Gleason, repeatedly said the n-word and complained about "lazy…Mexicans."[732] Gleason also violently threatened Hicks, saying that she would "have to go to clinic" because of what he would do to her in a hypothetical physical assault. Hicks also cited an incident in which a different supervisor rubbed her thigh and a larger pattern of sexual harassment, including an occasion in which Gleason grabbed her buttocks and touched her breasts.[733]

Gates claimed that the supervisor who had stroked Hicks' thigh had not been sexually harassing her and that she "had misconstrued an innocent and harmless gesture of encouragement,"[734] and that the incident where Gleason had engaged in "unwarranted touching" was simply "[a consequence] of Mr. Gleason's own proclivities." In interpreting the implications of this episode, the District Court found that acquiescing to his behavior was never a requirement to receive favorable treatment or continual employment, indicating a fundamental misunderstanding of the nature of sexual harassment. The Tenth Circuit, on first appeal, somewhat elucidated: "indeed it appears that Mr. Gleason was guilty

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[730] "Judicial Decision, *Hicks v. Gates Rubber Co.,* 1987," OpenJurist.org. Accessed October 2015. <http://openjurist.org/833/f2d/1406/hicks-v-gates-rubber-company>
[731] Ibid.
[732] Ibid.
[733] Ibid.
[734] Ibid.

of gratuitous acts of boorish personal conduct unrelated to any overt or implicit demand or invitation by him for responsive conduct of any kind by plaintiff."[735]

However, the fact that Gleason apparently did not expect Hicks to respond to his behavior does not mitigate the harmful effect the harassment had on her. This issue which was completely ignored by the District Court, who chose to see the question of sexual harassment through the lens of her termination and did not consider the harassment to be a harm in and of itself; the District Court was subsequently quoted by the Tenth Circuit:

> because her tolerance of or consent to the acts of … Mr. Gleason was not made a condition of her continued employment.... The defendant discharged the plaintiff because of her inability to adequately perform the job for which she was hired and for no other reason.[736]

The District Court also found that the occasion that another supervisor patted Hicks' thigh was an "isolated incident in which there was no sexual advance intended."[737] Finally, they ruled that there was no evidence to support Hicks' allegation that Gates Co. was a hostile work environment for Black people in that the company never "condoned such conduct."[738] Again, the District Court misunderstood the nature of the claim; the question should not have been whether or not the usage of slurs was "condoned," but what impact that had on Hicks, as a Black person. In both this and the sexual harassment claim, we see the harm of operating from a white male point of view and the unwillingness to address the real effects of discriminatory conduct.

Hicks appealed, alleging that the lower court had erred in finding that she had not been subjected to racial and sexual harassment and that Gates had terminated Hicks for

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[735] Ibid.
[736] Ibid.
[737] Ibid.
[738] Ibid.

non-discriminatory, non-retaliatory reasons.[739] The Appeals Court upheld the rejection of the racial discrimination claim because the working environment was not "dominated" by racial slurs, following the reasoning of the lower court.[740] Regarding sexual harassment, the Tenth Circuit felt that they could not say whether or not the District Court "was *clearly* erroneous" [emphasis mine];[741] they approached the question similarly to the District Court in that they believed that behavior could be classified as quid pro quo sexual harassment only if "her employment was conditioned on granting sexual favor,"[742] but refused to rule on whether or not Hicks was sexually harassed because the record did not show if any suggestions were made to Hicks that she was required to acquiesce in order to maintain her employment.[743]

However, the Tenth Circuit made a distinction with regards to the role of sexual harassment in creating a hostile work environment. The District Judge had found that "at least two incidents of serious sexual harassment…occurred" against Hicks;[744] upon appeal, she also cited that "a number of [other] employees" had also been harassed by Gleason. The Tenth Circuit wrote that this evidence should be considered with regards to a claim of a sexually harassing work environment—one of several instructions included with their remand.

Upon remand, they also wrote instruction to the District Court to consider the possibility of "aggregation" of the claims, writing that it is "permissible" to "aggregate

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739 Ibid.
740 Ibid.
741 Ibid.
742 Ibid.
743 Ibid.
744 Ibid.

evidence of racial hostility with evidence of sexual hostility."[745] Here, the Tenth Circuit quotes the first ruling the Firth Circuit made in *Jefferies*, where the Fifth Circuit made reference the use of the word "or" in the text of Title VII: "The use of the word 'or' evidences Congress' intent to prohibit employment discrimination based on any or all of the listed characteristics."[746] The Tenth Circuit was "persuaded that the *Jefferies* ruling [was] correct."[747]

The Tenth Circuit ordered the lower court to consider the fact that Gleason had said "serious racial slurs" and to consider this "to determine whether there was a pervasive discriminatory atmosphere" by "combining the racial and sexual harassment evidence." After this aggregation was completed, the court could then assess if the combination created a hostile work environment;[748] the Tenth Circuit did not necessarily believe that the racial discrimination *alone* created a hostile environment, but instructed that the question of racial harassment should be considered "within the context of the sexually harassing environment."[749] Here, the Appeals Court "deemed the racial slurs relevant, but only within the framework of a gender-based claim."[750] The case was remanded; the District Court subsequently ruled against Hicks, who then appealed. This time, the Tenth Circuit affirmed.[751]

In the first Tenth Circuit decision in *Hicks*, the merger of the race and sex discrimination claims represented the possibility of intersectional discrimination, though it

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[745] Ibid.
[746] Ibid.
[747] Ibid.
[748] Ibid.
[749] Wei, "Asian women and Employment Discrimination," 5
[750] Ibid., 5.
[751] "Judicial Decision, *Hicks v. Gates Rubber Co.,* 1991," OpenJurist.org. Accessed October 2015. <http://openjurist.org/928/f2d/966/hicks-v-gates-rubber-company>

is unclear whether Hicks herself conceived of it in that way. The various decisions also revealed the weaknesses and inutility of considering the discrimination experienced by a woman of color from a white-male point of view; the courts at various points declined to assess how the usage of racial slurs and the sexually inappropriate behavior of Gleason and others actually affected Hicks, instead offering opinions on the basis of whether the oppressive actions were "condoned" by Gates—a vague and not particularly useful standard of assessment that refused to acknowledge Hicks' own interpretations and understandings of the events.

While both Marguerite Hicks and Dafro Jefferies ultimately lost their cases, the fact that there was some contemplation of intersectional discrimination represented a departure from the abject rejection of intersectionality seen in *DeGraffenreid* and made space for the consideration of the validity of alleging more than one claim at a time. The first appeals decision in *Jefferies* also made use of the Congressional record, paying attention to the history of Title VII and the decisions made regarding the wording of the statute. Perhaps if the Court had dug a little deeper, they would have encountered the work done by Pauli Murray and found firmer intellectual scaffolding to base their ruling upon.

When *Hicks* and *Jefferies* are compared to another case that occurred the same year as *Hicks*, *Tennie v. City of New York Department of Social Services*, one sees that courts were completely incoherent and out of touch with each with regards to intersectional allegations of sex and race discrimination—their understandings of race and women of color were completely different. In one decision, *Hicks* drew on some of the ideas of *Jefferies*, but the court in *Tennie* had a completely different view of the way that rulings could be made with regard to the intersection of race and gender.

In *Tennie*, Black women were allowed to "represent the claims of all minority women,"—including a non-Black woman of color.[752] Six Black women and one Latina filed a class action suit based on "a claim of interactive discrimination."[753] They alleged that the defendants, "a municipal employer and a municipal employee labor union," acted in a discriminatory manner towards the plaintiffs because they were paid less.[754] The plaintiffs worked as children's counselors until "the city's children's institutions…were abolished."[755] When they and other similarly situated employees were transferred, they were given the same responsibilities as caseworkers but were paid less than the caseworkers. The claim that Tennie et al. were discriminated against on the basis of race and sex originated from the fact that the former children's counselors were primarily Latinas and Black women, whereas the caseworkers "were mostly white and male."[756]

The seven representative plaintiffs—Brenda Tennie, Willie Waddell, Yvonne Redcross, Maurice Baker, Carolyn Blanchett, Mamie Neal, and Mary Littlepage—moved for certification of all former counselors as a class, which was challenged by the defendants, who argued that "there was no commonality of issues among the proposed class that consisted of minority men and women and white women"[757]—but not white men. The Defense argued that the proposed class was "too diverse" meet "commonality and typicality perquisites."[758] Plaintiffs responded, asserting that their "common identity as former children's counselors who…are paid less than co-workers with the same job

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[752] Powell, "The Claims of Women of Color Under Title VII," 430-431.
[753] Ibid., 430-431.
[754] Judicial decision, *Tennie v. City of New York Department of Social Services*. Accessed March 2016 via LexisNexis Academic.
[755] Ibid.
[756] Ibid.
[757] Ibid.
[758] Ibid.

responsibilities" fulfilled the requirement of commonality; they believed that the Defense was "overstat[ing]" the differences between members of the proposed class.[759]

The court was sympathetic to the defendant's argument, envisioning that white women in the proposed class would be most interested in the gender dimension of the discrimination charge, while the men of color would be more concerned with the race aspect; ultimately, they granted class certification to Latinas and Black women as women of color.[760] (From the text of the judicial decision, it appears as though no Asian American or Native American women had worked for the city as children's counselors.)

In this case, six of the seven proposed representative plaintiffs were Black women.[761] They alleged "discrimination based on race and sex as…female minority members of the proposed class."[762] The court excluded the white women and men of color from the class certification because of lack of common interest, but believed that both the Black women and the Latina were

> alleging that they are being *discriminated against in favor of white males because of their sex and their minority identity*. Thus, both…are alleging that they have been discriminated against in precisely the same manner… In sum, the claims of the…class representatives… are sufficiently interrelated to meet… prerequisites of commonality and typicality" [emphasis in-text].[763]

The court, certifying the six Black women and one Latina as a class of "minority women," reasoned that they experienced the same *kind* of discrimination as women of color, which erased the difference between Black women and Latinas, but at least acknowledged the fact

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[759] Ibid.
[760] Ibid.
[761] Ibid.
[762] Ibid.
[763] Ibid.

that white women and men of color do not experience discrimination in the same way that women of color do.

The court justified the exclusion of white women and men of color by writing that they "would complicate and burden an already complex action" or "lead to conflicts of interest amongst class members."[764] Subclasses of white women and men of color were not viable options because they were not enough of them to meet numerosity requirements and formed "only a small percentage of the proposed class."[765]

In excluding white women and men of color because of worries of conflicting interest, the Court drew on reasoning somewhat similar to that which was exhibited in *Payne* (discussed in Chapter 3). Here however, instead of seeing Black men and women in conflict with each other in a case that was about race, the court identified women of color as victims of a unique kind of discrimination that white women and men of color did not share. The court's decision in *Tennie* could also be analyzed in terms of 'but-for' logic utilized in *DeGraffenreid* (discussed in Chapter 3); in that case, the court had disallowed allegation of discrimination that was not 'but-for-race' (racial discrimination) or 'but-for-sex' (sex discrimination), believing that only one characteristic could be taken into account at a time. In *Tennie*, the court apparently treated that characteristic as 'being a woman of color'—that but-for-being-a-woman-of-color, the plaintiffs would have received the same treatment as white men.[766]

As a class action suit, *Tennie* was the most explicit affirmation thus far of the ways in which women of color's intersectional discrimination was different from the mere sum of

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[764] Ibid.
[765] Ibid.
[766] Powell, "The Claims of Women of Color Under Title VII," 430-431.

the racism experienced by men of color and the sexism experienced by white women. While the court in *Tennie* could have better articulated this, it at least acknowledged that oppression operates differently depending on social positionality. Interestingly, of the cases discussed in this thesis thus far, only one involved a plaintiff who alleged intersectional discrimination and at any point had a court validate her intersectional understanding—*Jefferies,* which used a reductive framework (sex-plus analysis) and was ultimately dismissed. Of all the other cases that in one way or another combined race and sex claims or engaged in a quasi-intersectional analysis, the plaintiff(s) had *not* been alleging discrimination as such: in *Payne* (discussed in chapter 3), the plaintiff class was restricted to Black women only because of the court's perception of difference between them and Black men; in *Hicks*, the plaintiff appeared to consider sexual harassment as separate from the hostile work environment created by the use of racial slurs, yet the court ordered that be merged together; and in *Tennie*, the perceived differences between women of color and men of color and white women in the eyes of the court precluded the certification of a class that would have included all three groups. Ironically, given the outcomes, it seemed that the best way for a women of color to receive acknowledgement and validation of an intersectional claim was to file class action suit with non-women of color and then for them to be rejected as part of the plaintiff class.

Two cases from the 1980s involving Asian American women showed that the difficultly of navigating discrimination lawsuits was not unique to Black women. Like *Jefferies*, *Fang-Hui Liao v. Dean* explicitly alleged simultaneous race and sex discrimination; and the ruling had the potential to address the possibility of combining race and gender claims, similar to way in which Marian Lim sued her employer (discussed in Chapter 3). In

Lee v. Walters, the plaintiff was granted relief, but the court rejected her three-pronged allegation of discrimination based on three factors—race, sex, and national origin—ruling on only national origin.

In *Liao,* the initial 1987 ruling of the District Court for the Northern District of Alabama seemed promising; however, that decision was reversed on appeal in 1989. Later that year, the Supreme Court declined to hear the case. Christina Fang-Hui Liao worked as a chemist for the Tennessee Valley Authority (TVA) and sued the Directors of the TVA after she was terminated, believing that she was the victim of "racial and/or sexual discrimination," in the words of the District Court judge.[767] Liao was a Chinese woman with U.S. citizenship who had been hired by the TVA in July 1977 as a research scientist in the National Fertilizer Development Center. She had a Ph.D. in chemistry and co-lead a project on nitrogen; her entrance pay classification was SD-3, which was "lower than the entrance pay classification of white male Ph.D. research scientists" who worked on the same project at the TVA before and after she did.[768] Over the course of her time at the TVA, Liao made several written and verbal complains to her supervisors, alleging disparate treatment with regards to slow promotion and unfair differentiation in job classification; lack of an exclusive laboratory and a lab assistant; unfair performance evaluations; lack of exposure to educational and advancement opportunities; and ostracism.[769]

> The District Court chose not to directly address any of Liao's claims, writing that
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> a good argument [could] be made that one or more of Dr. Liao's pretermination complaints was valid, but the court finds it unnecessary to decide whether or not anything Dr. Liao complained of prior to her termination constituted an act

[767] "Judicial decision, *Fang-Hui Liao v. Dean*, 1987," Law.justia.com. Accessed November 2015. <http://law.justia.com/cases/federal/district-courts/FSupp/658/f1554/2362022/>
[768] Ibid.
[769] Ibid.

> motivated by sexual and/or racial discrimination, that is, except to the extent that her complaints may tend to reflect an adverse white male reaction to TVA's affirmative action program (AAP), which will be the primary subject of this opinion.[770]

Thus, the court chose to frame the case around the AAP, and the decision in Liao's favor ultimately hinged on the finding that the TVA had violated its own AAP.[771] Liao found herself before the court as a direct result of her termination, which was part of a reduction in force (RIF) in January 1982. She was the only employee in the Soil and Fertilizer Branch who was terminated as part of the RIF, but Dr. Bert Bock, a white male with two fewer years of seniority, was retained.[772]

The court noted that it seemed quite obvious that Liao had been hired as a result of the TVA's AAP, which was adopted "shortly prior to her recruitment."[773] In the opinion, Judge Acker dryly remarked, "How wonderful it was to have signed up a highly qualified Ph.D. who was also Asian and female"[774] before discussing the events leading up to Liao's termination.

Liao's department decided to terminate one SD-4 position; at that time, Liao had obtained SD-4 status and was also the only SD-4 in the department. The court believed that this was "a euphemistic way" of targeting solely Liao "because the description fit Dr. Liao and no other."[775] Acker also believed that "the discussions which led to the decision make it obvious that the idea was eliminate Dr. Liao,"[776] and that the choice regarding who was to

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[770] Ibid.
[771] Wei, "Asian women and Employment Discrimination," 5.
[772] "Judicial decision, *Fang-Hui Liao v. Dean*, 1987," Law.justia.com.
[773] Ibid.
[774] Ibid.
[775] Ibid.
[776] Ibid.

be terminated was made in such a way that Bock was favored, despite the fact that they did similar work and had "virtually identical" academic qualifications:

> The only real distinction between them was that their supervisors liked Dr. Bock better than they liked Dr. Liao. A comparison of their respective personalities definitely played a large part in the decision. Of course, there can be no more subjective criterion for an employment decision than "personality."[777]

The RIF "attempted to pay lip service to the AAP," but ultimately terminated a qualified Asian American woman over a white male who had worked for the TVA for two fewer years, "further skew[ing] an already admittedly badly imbalanced scientific work force as to both race and sex."[778]

The District Court thus centered the case around the question of whether or not an employer must follow their own AAP designed to correct such workforce imbalances, ruling that after adopting an AAP, "the employer is then required to adhere to its own program," because if not, "the adoption of an AAP would be meaningless" and "[a] hypocrisy."[779] The court believed that the decision to favor Bock was a clear violation of the TVA's AAP, because of Liao's seniority and the fact that she was a skilled chemist, "dedicated to her job," with a "performance level…recognized as more than adequate by her superiors," and ordered that she be re-instated with back pay.[780] There was no explanation of whether the granting of Liao's claim was "based on race or sex or a combination of the two."[781]

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[777] Ibid.
[778] Ibid.
[779] Ibid.
[780] Ibid.
[781] Wei, "Asian women and Employment Discrimination," 5.

The case was appealed and the decision reversed in March 1989.[782] The Eleventh Circuit found that an employer's violation of their own AAP did *not* constitute a violation of Title VII, and that the district court had misinterpreted the AAP itself. The Appeals court noted that the AAP "did not contain provisions governing procedures to be followed during any cutbacks in staff size," and only stated numerical goals with regards to hiring for "targeted occupations."[783] The Eleventh Circuit also delved into the rational behind choosing Liao for termination over Bock, though with a different interpretation than the District Court; they instead chose to focus on instructions given to the Chief of the Soil and Fertilizer Research Branch, Dr. Eugene Sample.[784]

Sample was told that he should prioritize not eliminating "an entire area of research" and to "continue high-priority projects."[785] Because the nitrogen research project, of which Liao was one of three project leaders, was the only area of research that could sustain a cut, and because the other project leaders "had more broad-based expertise than Liao," Liao was terminated while others (such as Bock) were not.[786]

The decision of the District Court was thus reversed by the Eleventh Circuit. In October 1989, Liao appealed to the Supreme Court, who believed that the Appeals court

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[782] "Judicial decision, *Fang-Hui Liao v. Dean*, 1989," Plainsite.org. Accessed March 2016. <http://www.plainsite.org/dockets/ch2w14sz/court-of-appeals-for-the-eleventh-circuit/christina-fanghui-liao-v-tennessee-valley-authority-charles-h-dean-jr-in-his-official-capacity-as-a-member-of-the-board-of-directors-of-the-tennessee-valley-authority-john->

[783] Ibid.

[784] Ibid.

[785] Ibid.

[786] Ibid.

ruling was correct and that the case "[did] not warrant review."[787] Neither the District Court nor the Eleventh Circuit actually addressed Liao's claim in terms of race and sex discrimination, choosing instead to focus on the AAP—an example of the way in which Asian women may be heard, but are not listened to, a phenomena discussed by Mitsuya Yamada in an essay on the invisibility of Asian American women.[788] The Supreme Court could have actually addressed the crux of Liao's concerns, but declined to hear the case, precluding the possibility of an influential ruling on the way that race and sex discrimination functioned with regards to women of color. The refusal of any of the courts to examine Liao's case on her terms was an example of silencing, similar to the way that Marian Lim was silenced when her race and sex discrimination case was dismissed during pretrial (discussed in Chapter 3).

The discussion of seniority status in *Liao* brings to mind the same in *DeGraffenreid*. In *DeGraffenreid*, the potential disparate impact of a last-hired-first-fired policy was a central focal point, and ultimately the Black female plaintiffs were unable to obtain relief after alleging that they had experienced race and sex discrimination. Despite the fact that Liao *had* seniority, it did not protect her. She was terminated while a white male with less seniority was retained, and was unable to get courts to address her experiences with discrimination in a way that actually assessed the way that she was treated instead of devoting pages of judicial decisions to analyzing the TVA's AAP. The similarity between the outcomes of *DeGraffenreid* and *Liao* is striking, and is another example of the way in which

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[787] Brief for the Respondents in Opposition, United States Supreme Court, *Fang-Hui Liao v. Dean*, 1989. Justice.gov. Accessed March 2016. <https://www.justice.gov/sites/default/files/osg/briefs/1989/01/01/sg890198.txt>

[788] Yamada, "Invisibility is an Unnatural Disaster," 40.

courts fail to protect women of color from discrimination when RIFs are being made, regardless of their seniority status relative to others in their workplaces.

Only one year later, in 1988, another Asian American woman alleged intersectional employment discrimination on the basis of race, sex, and national origin regarding a lack of promotion and the fact that she was reprimanded for a transgression when others were not. The court ultimately ruled that Patricia Lee had been a victim of discrimination on the basis of national origin and ordered that she be promoted, but agreed with the defendant that the reprimand was appropriate and should remain in her record.[789]

Lee was born in China, received a medical degree from the National Taiwan University College of Medicine in 1950, and later moved to the U.S.[790] where she became a naturalized citizen.[791] From 1957 to 1962, she had various internships and residencies at multiple hospitals in the U.S. and Canada, and returned to Taiwan to serve as the attending physician at the Provincial Taipei Hospital; following that, she was appointed as an associate professor of medicine at Taipei Medical College, and worked there in that capacity for two years.[792] In 1968, she moved to Pennsylvania and began a two-year fellowship in cardiology at the Veterans Administration Medical Center (VAMC) in Coatesville. In 1970, upon completion of the fellowship, she was hired by the hospital as a senior grade staff physician.[793]

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[789] Judicial decision, *Lee v. Walters,* 1988. Accessed March 2016 via LexisNexis Academic.
[790] Braden Beard, "No Mere 'Matter of Choice:' The Harm of Accent Preferences and English-Only Rules," *Texas Law Review*, Vol. 91 (2013): 1505.
[791] Wei, "Asian Women and Employment Discrimination," 5-6.
[792] Judicial decision, *Lee v. Walters,* 1988. Accessed via LexisNexis Academic.
[793] Ibid.

Lee worked at the VMAC for over a decade and "regularly requested, but was denied" promotional opportunities.[794] She filed a formal complaint with the EEOC regarding the Coatesville hospital's refusal to promote her to the position of chief grade physician. Prior to 1983, three white male physicians were promoted despite the fact their credentials did not meet the hospital's criteria; all three of them also had "less training" than Lee did.[795] Lee filed a second EEOC grievance regarding a reprimand that she had received for prescribing medication to a patient solely on the basis of listening to their description of their symptoms during a phone conversation. She did not conduct a physical exam, and noted that white male doctors at the hospital had behaved in a similar manner and had not received reprimands. The hospital's rules did restrict under what circumstances such prescribing could be done, but Lee argued that they were unfairly applied to her.[796]

After a five-day visit to the VAMC, the EEOC investigator assigned to Lee's case found that she had been subjected to race and sex discrimination, "[finding] that it was acceptable and common practice for physicians at Coatesville to prescribe medication by telephone," and recommended that the reprimand be expunged.[797] The investigator also noted the three of Lee's superiors, who were key decision makers regarding promotion, often discussed her Chinese accent and "were dissatisfied" in her progress in "learning to speak English clearly."[798] The issue was not whether or not she could speak English per se, but the clarity with which she did so. One of them "often became angry…because he had

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[794] Braden Beard, "No Mere 'Matter of Choice,'" 1505.
[795] Judicial decision, *Lee v. Walters,* 1988. Accessed via LexisNexis Academic.
[796] Ibid.
[797] Ibid.
[798] Ibid.

difficult understanding her." Another of the three, a Dr. Harris, who was the VAMC's chief of staff, "never spoke to Dr. Lee alone, insisting that she have an interpreter."[799]

The court ultimately ruled in the defendant's favor with regards to the reprimand, disagreeing with the results of the EEOC investigation and writing that the failure of the hospital to discipline other transgressions regarding over-the-phone prescription did not excuse Lee's conduct. According to the defendant, the decision to promote or not promote Lee hinged on a requirement that a physician's appointment at a medical school must "have some relevance" to the work done at the VAMC.[800] The text of the District Court's decision reveals that there was "substantial disagreement among the decisional staff" with regards to the precise meaning of the "relevancy" standard, and wrote that it was "subject to particularly close scrutiny because of the increased potential for discriminatory decision-making."[801] The relevancy standard was "vague and open to highly discretionary interpretation."[802]

Dr. Harris was of the opinion that it required a professorship at the Thomas Jefferson Medical School, affiliated with Coatesville; in his opinion, "a professorial appointment at Harvard would not be sufficient," because Harvard did not have a working relationship with Coatesville. Alternatively, another administrator testified that approximately forty medical schools had "effective working relationships with Coatesville" and that a professorial appointment at any of those forty schools would have been "relevant."[803] A third had still another understanding of the relevancy standard: "a

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[799] Ibid.
[800] Ibid.
[801] Ibid.
[802] Ibid.
[803] Ibid.

candidate's professorial appointment had to be 'equivalent' to appointments held by physicians then employed at the chief grade level" and mentioned nothing regarding an affiliation or working relationship with Coatesville.[804] The court remarked that "these inconsistencies[,] together with the absence of a clearly defined standard…undercut the explanation of the decision" to not promote Lee, and that the justifications for the refusal "suggest[ed] a 'strained effort'… to devalue plaintiff's qualifications."[805]

Dr. Harris and others were also apparently "concerned by Dr. Lee's accent and lack of intelligibility."[806] The court noted that Lee's accent was "quite noticeable," but that "she was able to communicate," and that

> A foreign accent that does not interfere with a Title VII claimant's ability to perform duties of the position [she] has been denied is not a legitimate justification for adverse employment decisions.[807]

The court emphasized that "Dr. Lee's command of English was not an issue" that interfered with her capacity to "communicate and do [her job] responsibly."[808] Because her accent was "a product of her national origin," and a factor in refusing her promotion despite the fact that her competency as a physician was not question, the court ruled that the decision not to promote Lee was "an intentional and legally impermissible depreciation" of her abilities and qualifications: "but for her national origin she would have been promoted."[809] The court made this decision based solely on national origin discrimination, disregarding the fact that Lee's claim was based on the intersection of race, gender, and national origin; and in fact mentioned in a footnote that there was "no direct evidence of anti-female or

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[804] Ibid.
[805] Ibid.
[806] Ibid.
[807] Ibid.
[808] Ibid.
[809] Ibid.

anti-[A]sian animus."[810] The defendant was thus ordered to promote Lee to the position of chief grade physician.

In *Lee v. Walters*, discrimination based on her Chinese accent—and thus her national origin—was rectified with her court-ordered promotion. However, for Lee and for many Asian Americans immigrants, race and national origin are inextricably linked; the courts' outright dismissal of her claim of race discrimination claim indicated a lack of judicial understanding of the reality of Asian American identity. While the court admirably addressed the accent discrimination, they did not consider the other dimensions of Lee's claim, reducing the complex nature of her discrimination to a single factor. Like other forms of intersectional discrimination, the intersection of race and national origin was not necessarily conceived of by the legislators who were responsible for the creation of Title VII, betraying the inadequacy of conceiving of discrimination as one-dimensional within the Black-white binary.

Throughout the 1980s, some courts attempted to rectify the harms of women of color who had experienced employment discrimination. While some outcomes were undoubtedly less than ideal, as a whole, they represented an improvement and a progression from the state of mind embodied by Judge Wangelin and the ruling in *DeGraffenreid*. Despite the ascendency of conservatism under Reagan and the subsequent hardships this created for communities of color, courts tentatively offered alternative conceptions of discrimination that attempted to accommodate women of color. Even in some cases that were outright losses, such as *Jefferies* and *Hicks*, some courts made an attempt to articulate new conceptions of discrimination—perhaps as a consequence of

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[810] Ibid.

feminist and civil rights activism that brought visibility to the plight of "women and minorities."

The failed attempts to ratify the ERA and discontinue use of the Hyde amendment brought visibility to the unique positions of diverse groups of women who were harmed by the conservative political milieu. This, as well as the creation of CRT and the naming of the term intersectionality, provided the scaffolding from which women of color could engage in self-advocacy to alleviate hermeneutical and epistemic injustice, despite the backlash against advancements made by the feminist and racial justice movements. The alliance of groups such as NAACP and NOW, reacting to Reagan, highlighted the common concerns of different activist organizations, embodied in women of color.

The first Appeals Court in *Jefferies*, while utilizing a reductive sex-plus framework, nonetheless would have been considered impossible a few years earlier during the time that the *DeGraffenreid* ruling was made. The sex-plus approach to intersectional discrimination was an attempt of the court to acknowledge that Jefferies' experiences were different from white women and Black men; while this ruling was ultimately thrown out, it was seen as valid by some, including those who ruled on *Hicks* and cited Jefferies when recommended the combination of sex and race claims. *Hicks* was also a loss, but in some ways, these two cases indicated that courts were at least looking for ways to understand intersectionality give the legal analyses at their disposal. Of the cases discussed in the chapter regarding Black women, *Tennie* arguably had the greatest potential for setting precedent that would be helpful to women of color in the future. *Tennie* explicitly recognized the way that the experiences of women of color (specifically, Black women and a Latina) were different from those of white women and men of color, pushing back against

white-centric constructions womanhood and affirming (though probably unintentionally) the work of Black feminists like Audre Lorde and bell hooks.

This decade also shed light on the harms of the Black-white binary when Asian American women attempted to seek relief for employment discrimination. In *Liao*, the question of affirmative action was central to the outcome. Debates about affirmative action had been framed in prior years primarily in terms of access for Black prospective employees, but the influx of Asian educated and skilled immigrants post-1965 and into the 1980s provided employers with an opportunity for tokenism and the appearance of welcoming marginalized individuals to their companies, as was likely the case with the hiring of Christina Fang-Hui Liao, who was only valued until the TVA needed to make budget cuts. In this way, the model minority myth was further entrenched as a mechanism of anti-Blackness.

In keeping with Reagan's ideology, whites believed that Asian Americans had attained their status through "hard work" because American society was a meritocracy, and that Black employees could attain the success of Asian Americans if only they were willing to put in a little more effort—ignoring the role of selective immigration in creating the model minority, the many working-class Asian Americans who were refugees or recent immigrants, the long history of American anti-Blackness, and the horrifying effects of Reagan's policies on the Black community, from the cutting of funding for public services to the war on drugs. Asian Americans were subsequently tokenized and valorized as model minorities, and their presence in their workplaces was often used to justify the exclusion of Black people.

As Liao discovered, model minority status did not offer her protection from discrimination; she was terminated, District, Appeals, and the Supreme Court declined to acknowledge her claims of intersectional discrimination. Her identity as an Asian woman, while central to the case, was never seriously analyzed by any court, denying the possibility of providing appropriate remedy.

Lee was clearly the most successful case in terms of actual relief; she was promoted as a direct result of her Title VII suit. Accent discrimination, intimately tied to her national origin and race, was crucially important to her case. Lee, unlike some other Asian American women who felt that their accent and language barriers precluded the possibility of pushing back against oppressive employers, resisted by filing multiple EEOC grievances and her Title VII suit. In examining the behavior of her superiors at the hospital, notably the chief of staff Harris, we see the ways that race and national origin intersect for Asian Americans (though the court did not conceive of her racial identity and her national origin as linked). Despite the fact the Lee was qualified for promotion, she was denied, while multiple white males were promoted. Harris likely thought of Lee as foreign and attempted to exclude her, as indicated by his refusal to speak to Lee alone because of her accent. The decision of the hospital to deny Lee's promotion despite her extensive experience also suggested that they saw her as a threat—part of the "Asian Invasion"—and wished to prevent her from accesses the success enjoyed by white doctors.

Conclusion

Throughout the 1980s, the political, economic, and social conditions continued to shape the experiences of Black and Asian American women who filed Title VII suits.

Women of color continued to face discrimination, though it took different forms as oppression evolved due to the development of colorblindness, conservative backlash against Civil Rights and feminism, and the implementation of Reaganomics. This combination enabled the entrenchment of the model minority myth, which was then used to justify continuing anti-Blackness; simultaneously, fears of an "Asian Invasion" surfaced alongside new conceptions of Black criminality.

The conservative milieu of the 1980s created new possibilities for coalition work between oppressed groups, such as the Black and Latina women in *Tennie*. However, conservatism also normalized and therefore justified the continuing devaluation and mistreatment of marginalized individuals, such as in *Hicks*. Backlash made harassment more acceptable and created an environment that was conducive to permitting and apologizing for that kind of behavior. Moreover, while courts attempted to find a way to incorporate multi-dimensional discrimination in their decision making, such as in *Jefferies* or *Hicks*, the cases ultimately fizzled out after lengthy appeals processes, providing no relief to the Black women plaintiffs and invalidating the importance of recognizing the uniqueness of their experiences.

For Asian American women, stereotypes based on the model minority myth were juxtaposed with mistreatment based on nativist racism. Like the Black plaintiffs in *Jefferies* and *Hicks*, Asian American women were silenced with regards to the possibility of articulating intersectional discrimination; in *Liao*, courts from the District Court to the Supreme Court failed to address the crux of the plaintiffs' claim regarding the ways that she had experienced racialized misogyny, instead focusing on the text of her company's Affirmative Action Plan. The refusal to acknowledge Liao's actual claim erased the reality of

the discrimination experienced by Asian American communities across the country. Similarly, *Lee*, despite having a favorable outcome in that the plaintiff was promoted, failed to address her claims of discrimination in an intersectional sense, divorcing her national origin from her racial and gender identity.

When considering *Jefferies*, *Hicks*, *Liao*, and *Lee* within their historical context, we see how the prevailing attitudes towards "women and minorities"—the category of "minorities" now including Asian Americans—shaped judicial decisions. *Jefferies* and *Hicks* exemplified the unwillingness of American society to treat Black women as human beings, worthy of having their experiences understood in their fullness and of accessing remedy for their unjust experiences; the developing stereotype of Black women as drug addicts and the stress imposed on the Black community at large certainly did not help.

In *Liao*, the court immediately assumes—and perhaps was correct, though it is impossible to know from the available record—that the plaintiff was hired as a token under an affirmative action program. As a "model minority" *and* a woman, Liao was situated at a unique intersection, and a ruling that adequately addressed this could have created valuable precedent for other Asian American women, but as in *Jefferies* and *Hicks*, the courts failed to provide any relief. The *Lee* case defined the plaintiff as solely an immigrant, erasing the ways in which her race and gender impacted her experiences, perpetuating the one-dimensional vision of Asian Americans as foreigners that became popular during the 1980s as American nativism increased.

Epilogue

Throughout 1970s and 1980s, there was a slow shift from abject denial of validity of intersectional identity-based discrimination claims (*DeGraffenreid*) to failed attempts of accommodation (*Jefferies*, *Hicks*) that still relied on reductive logic that assumed race and gender to be separate. There was some recognition of the unique positionality of women of color in *Tennie*, and a victory in *Lee*, but even in that case, the ruling was made on basis of national origin only and despite the immediate positive outcome (her promotion), *Lee* set precedent that validated court misinterpretation of intersectional identity. The *Lee* ruling suggests that courts can ignore certain identities in multi-faceted claims and make a ruling based only one axis of discrimination. Difficulties with getting courts to acknowledge women of color's intersectional claims continued into the 1990s.

However, two white men who alleged a claim of reverse discrimination *as white men*—not as whites or men, but the specific identity at the intersection of whiteness and maleness—faced no difficulty in convincing a court that alleging discrimination under Title VII as a white male was valid, in stark contrast to myriad women of color in the preceding decades who had attempted to make claims as Black women or Asian-American women. *Wilson v. Bailey* was heard by the Eleventh Circuit in 1991, and while the ruling from the Appeals Court was ultimately a loss for the plaintiffs, not once did the court question the idea that a white male could allege simultaneous reverse discrimination.[811]

The Birmingham, Alabama Sherriff's Department entered into a consent degree in the mid-1970s as a result of allegations of employment discrimination. The degree

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[811] "Judicial Decision, *Wilson v. Bailey,* 1991," OpenJurist.org. Accessed October 2015. <http://openjurist.org/934/f2d/301/wilson-v-bailey-e-w>

required a "good faith effort" of the Sherriff's Department to hire Black people and women for entry-level positions, and to ensure that promotions were made in such a way that the number of Black people and women promoted at any give time was proportional to the number of Black and female applicants.[812]

Deputy sheriffs who applied for promotion to Sheriff's sergeant were required take an exam, and the names of the candidates who had the highest scores were submitted to the Sherriff for consideration. If necessary, this list of candidates was also supplemented with the names of the highest scoring Black and female candidates so that the number of Black and female applicants who were reviewed by the Sherriff was proportionate to the number of Black and female applicants overall.[813] The Sherriff had no knowledge of whether a not a given candidate was initially on the list or not, and the Sherriff also had the final say regarding which candidates would be promoted. The Sherriff implicated in the *Wilson* case was "aware of, and consider[ed], the race and gender of each candidate," but that he had "never promoted an unqualified African American or woman."[814]

In *Wilson*, two white male deputy sheriffs were listed as candidates for the Sherriff's consideration. He reviewed them twice—in two separate rounds of promotion—but they were never promoted. During those promotions, the Sherriff interviewed eight "minority or women" candidates; six of them were offered promotions. He also interviewed eleven white males, and five of them were promoted.[815]

The plaintiffs filed their original suit against the Sherriff and the County in July 1989. During the District Court trial, the Sherriff testified that "race and gender played a

[812] Ibid.
[813] Ibid.
[814] Ibid.
[815] Ibid.

small role in [the] decision-making process," and that he believed "rank on the tests was not the most relevant indicator of…qualifications."[816] He also gave explanations for the hiring choices made regarding the minority or women candidates instead of the plaintiffs. The District Court ruled for the defendant. On appeal, plaintiffs argued that race and gender played too large a role in the promotions and that otherwise they would have been promoted because of their high test scores and lack of demerits, pointing out that the women and minorities that had received promotion outnumbered the white men, and that the Sheriff had previously said that race and gender informed his choices. Plaintiffs believed that "any consideration of race or gender by the Sheriff [would be] illegitimate."[817] However, the Eleventh Circuit found that the decision of the lower court was "not clearly erroneous" and that taking a candidate's race or gender into account was a valid consideration, thus affirming.[818]

While the plaintiffs ultimately lost their case, the fact that they alleged discrimination as "white men" was never once questioned by the court, nor was the claim bisected into discrimination against whites and discrimination against men.[819] The power—and credibility—given to these white men allowed them to "normalize a particular…multiplicity."[820] This privilege was not given to women of color who alleged suits as Black women, or as foreign-born Asian-American women; even legislation created with the aim of benefiting the marginalized can be co-opted and capitalized on by the privileged in ways that the intended beneficiaries are unable to access.

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[816] Ibid.
[817] Ibid.
[818] Ibid.
[819] Powell, "The Claims of Women of Color Under Title VII," 424.
[820] Abrams, "Title VII and the Complex Female Subject," 2492.

The origin of mainstream knowledge regarding identity rests with the powerful, particularly in a legal context. The normativity of the white-male point of view and white-male-centric epistemologies regarding identity is clearly illustrated in the court's tacit acceptance of the validity of the plaintiff's claims in *Wilson*. The plaintiffs were taken at their word when they alleged discrimination as white men; the court believed that their own account of their alleged discrimination was credible regarding their own interpretation of their identity-based (supposed) discrimination. Meanwhile, for decades women of color had tried and failed to get courts to validate their own understandings of intersectional discrimination. Their knowledge was outright dismissed at worst and bisected into sex-plus-race at best.

Comparing *Wilson* with another case from the 1990s illustrates the comparative disadvantage of women of color. Although at one point Maivan Clech Lam was able to receive clear acknowledgement and validation of the existence of discrimination at the intersection of race, gender, and national origin,[821] her case oscillated between District and Appeals Courts, and it is unclear whether or not she was ever able to obtain remedy.

Lam brought suit alleging individual disparate treatment[822] in the University's hiring processes for the position of Director of the Pacific Asian Legal Studies (PALS), to which Lam applied to twice, once in 1987-1988, and then again in 1989-1990. During the first search, she was a finalist, however it was cancelled and no one was hired. The position was offered to another candidate during the second search; the candidate declined to take

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[821] "Judicial Decision, *Lam v. University of Hawai'i,* 1994," Google Scholar. Accessed October 2015. <https://scholar.google.com/scholar_case?case=18424459011078466152&hl=en&as_sdt=6&as_vis=1&oi=scholarr>

[822] Powell, "The Claims of Women of Color Under Title VII," 432.

the position, and the second search was also cancelled.[823] Lam filed a Title VII suit, alleging discrimination on the basis of race, gender, and national origin.[824] The district court sided with the defendant, because the hiring committee had favorably considered an Asian American man and a white woman, following a line of analysis similar to that in *DeGraffenreid* and separating Lam's claim into race and gender separately, disallowing a claim of interactive discrimination.[825]

Upon appeal, the Ninth Circuit found "a genuine issue of material fact" with regards to the first search and thus remanded the case.[826] One member of the hiring committee, referred to by the record as "Professor A.," exhibited behavior that Lam believed was highly suspect. In a committee meeting, he publicly claimed that Lam "was not collegial, was a poor scholar, and had poor administrative ability;" in his view, "Lam was unfit to teach anywhere on the University of Hawai'i campus."[827] Lam spoke to an EEO officer, which then resulted in the resignation of Professor A. The Dean announced Professor A.'s resignation, which most of faculty believed was due to conflict with Lam, but the Dean "never attempted to alleviate the resulting controversy" by explaining or being fully transparent about Professor A.'s conduct.[828]

Nonetheless, Lam made it onto a finalized list of four candidates to be considered by the full fifteen-member faculty of the University of Hawai'i Law School at a faculty meeting. Professor A. seized upon another opportunity to disparage Lam, whereas Emeritus Law Professor John Craven advocated strongly on her behalf. Their "polarization" made other

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[823] "Judicial Decision, *Lam v. University of Hawai'i,* 1994," Google Scholar.
[824] Wei "Asian Women and Employment Discrimination," 1.
[825] Powell, "The Claims of Women of Color Under Title VII," 432.
[826] "Judicial Decision, *Lam v. University of Hawai'i,* 1994," Google Scholar.
[827] Ibid.
[828] Ibid.

faculty members uncomfortable.[829] A white male candidate received the highest number of votes, but no consensus was reached about any of the candidates and no decision was made to give any of them an offer of employment, and two weeks later, "a bare majority" of the faculty voted to cancel the search.[830]

The second search for PALS director began in 1989. This time, the Vice President of the University asserted that the process would be more transparent, utilizing clearer criteria in evaluation of candidates, such as rating sheets and selective evaluation sheets, and enacting search procedures that encouraged applicants of color.[831] Lam applied again, and the committee who reviewed her second application was composed of completely different members than the first committee. The committee also considered applicants to a commercial law position before reviewing applications for PALS director.[832] While Professor A. was not present, a different male professor said that "the Law School should not have two women teaching commercial law," at one particular committee meeting. The comment was reported to the Dean, who replied by saying that he "recognized that the professor had difficulty dealing with women," but did remove him from the committee.[833]

When the committee considered the new PALS director candidates, none of the promises of the University's Vice President came to fruition, and "no mechanism was put into place to screen out potential bias or retaliatory sentiments resulting from the prior search."[834] Lam's application was never discussed by the committee, and the final list recommended to the faculty "consisted entirely or almost entirely of persons of United

[829] Ibid.
[830] Ibid.
[831] Ibid.
[832] Ibid.
[833] Ibid.
[834] Ibid.

States origin," both white and of color, contrasting with the significant number of non-white and foreign-born candidates that had made the list of the first committee.[835] The faculty met with six candidates. Of these candidates, three of them had also applied during the first search and had received lower ratings than Lam did.[836] The faculty voted to offer the position to Alison Conner, a white female graduate of Harvard Law with a Ph.D. in Chinese History who had significant experience teaching law. Conner declined the offer. Instead of making an offer to any of the other candidates, the faculty canceled the search again.[837]

Lam lost her first case alleging race, gender, and national origin discrimination. Upon appeal, the Ninth Circuit pointed out "the district court specifically found that "the evidence suggests that Professor A. harbored prejudicial feelings towards Asians and women,"" and agreed with Lam that Professor A. "had a biased attitude."[838] Because the defendant was the entire University, and not only Professor A., the district court had ruled against Lam. The Ninth Circuit criticized this logic:

> The principal defendant in this case is the University, which has delegated to the faculty near-total control over hiring. The faculty, first in committee, then as a whole, reviews applications, chooses the final candidates, and votes on whether to extend any candidate an offer of employment. The hiring process is therefore not insulated from the illegitimate biases of faculty members. Indeed, since the faculty is small—only fifteen members—and great emphasis is placed on collegiality and consensus decisionmaking, even a single person's biases may be relatively influential. That is particularly true where, as here, that person plays a significant role in the selection process and leads the fight pro or con with respect to a particular candidate.[839]

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[835] Ibid.
[836] Ibid.
[837] Ibid.
[838] Ibid.
[839] Ibid.

The Appeals Court also based its remand on the fact that the District Court emphasized the defendant's favorable consideration of white women and Asian American men in writing their decision. The language used by the Ninth Circuit indicates a serious consideration of intersectionality theory:

> In assessing the significance of these candidates, the court seemed to view racism and sexism as separate and distinct elements amenable to almost mathematical treatment, so that evaluating discrimination against an Asian woman became a simple matter of performing two separate tasks: looking for racism "alone" and looking for sexism "alone," with Asian men and white women as the corresponding model victims. The court questioned Lam's claim of racism in light of the fact that the Dean had been interested in the late application of an Asian male. Similarly, it concluded that the faculty's subsequent offer of employment to a white woman indicated a lack of gender bias. We conclude that in relying on these facts as a basis for its summary judgment decision, the district court misconceived important legal principles. At least equally significant is the error committed by the court in its separate treatment of race and sex discrimination. As other courts have recognized, where two bases for discrimination exist, they cannot be neatly reduced to distinct components.[840]

At this point, the court cites *Jefferies*, and subsequently goes on to assert that attempts to separate any plaintiff's identity into separate parts "distorts or ignores the particular nature of their experiences."[841]

In this decision, the Ninth Circuit also explicitly named "Asian women" as a subclass under Title VII and wrote that "Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women," and therefore may experience discrimination even in situations in which discrimination against Asian men and white women does not exist.[842] The Court believed that assessing a "combination of factors" was essential.

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[840] Ibid.
[841] Ibid.
[842] Ibid.

As promising as this judicial decision seemed, Lam endured another district court trial and another appeal that again resulted in a remand. The second Appeals Court decision largely discussed the exclusion of the testimony of a Professor Kastely, a female professor who had experienced sexism at the hands of her colleagues, some of whom had been on the committee, and who could have helped to establish a "pattern of behavior indicative of several male faulty members' discriminatory state of mind."[843] However, based on the available records, it is difficult to ascertain what has happened since the second Ninth Circuit remand in 1999.

It is worth making note of Lam's counsel the first time her case was heard by the Ninth Circuit—she was represented by Asian American legal organizations (Asian American Legal Defense and Education Fund, Asian Law Caucus, and Asian Pacific American Legal Center), as well as lawyers from the Center for Constitutional Rights, Equal Rights Advocates, and the National Conference of Black Lawyers.[844] Black lawyers clearly saw the potentially beneficial spillover effects for Black women, and the 1994 decision represented a reciprocal relationship between Asian American and Black women; Black women's scholarship had given Lam and her counsel the language to describe her discrimination, and this decision could have provided a much-needed alternative to the intersectionality anti-canon that had harmed Black women time and time again throughout the prior decades. However, Lam's case also shows us the difficulties women of color faced

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[843] "Judicial Decision, *Lam v. University of Hawai'i,* 1999," Google Scholar. Accessed March 2016. <https://scholar.google.com/scholar_case?case=11642627295887049986&hl=en&as_sdt=6&as_vis=1&oi=scholarr>

[844] "Judicial Decision, *Lam v. University of Hawai'i,* 1994," Google Scholar.

into the 1990s, and the continuing inadequacy of a white male court system to create just outcomes on a reliable basis.

Amelco (discussed in the Introduction), in which a class of Black, Asian, and female electricians were able to win a settlement against a major public works contractor in 2006, was a clear victory and represents an inclusive interpretation of Title VII. In *Amelco*, plaintiffs were able to receive remedy for their experiences with discrimination on the basis of race, national origin, and gender, or any combination thereof.[845] This case illustrates a 21st century shift, germinating the promising but ultimately ineffective decision in Lam's first appeal, moving towards an intersectional understanding of identity and the unique challenges faced by the multiply subordinated.

[845] "Eradicating Racism & Colorism from Employment," United States Equal Opportunity Commission.

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