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**INTERSECTIONALITY AND TITLE VII:  
A BRIEF (PRE-)HISTORY**

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INTRODUCTION .....	713
I. THE MYTHOLOGY OF TITLE VII’S SEX AMENDMENT .....	716
II. THE INTERSECTIONAL ORIGINS OF TITLE VII’S SEX AMENDMENT .....	718
III. TITLE VII, INTERSECTIONALITY, AND THE NEW CIVIL RIGHTS COALITION .....	721
IV. TITLE VII AND THE EMERGENCE OF INTERSECTIONALITY AS A CATEGORY OF CRITICAL LEGAL ANALYSIS .....	727
CONCLUSION.....	731

INTRODUCTION

Title VII was twenty-five years old when Kimberlé Crenshaw published her path-breaking article introducing “intersectionality” to critical legal scholarship.<sup>1</sup> By the time the Civil Rights Act of 1964 reached its thirtieth birthday, the intersectionality critique had come of age, generating a sophisticated subfield and producing many articles that remain classics in the field of anti-discrimination law and beyond.<sup>2</sup> Employment discrimination law was not the only target of intersectionality critics, but Title VII’s failure to

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<sup>1</sup> Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139. I adopt, for purposes of this Essay, a broad and admittedly imprecise definition of the term “intersectionality.” For a salutary reading of the term’s ambiguity, see Kathy Davis, *Intersectionality as Buzzword: A Sociology of Science Perspective on what Makes a Feminist Theory Successful*, 9 FEMINIST THEORY 67 (2008).

<sup>2</sup> See, e.g., Crenshaw, *supra* note 1; Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365.

capture and ameliorate the particular experiences of women of color loomed large in this early legal literature.<sup>3</sup> Courts proved especially reluctant to recognize multi-dimensional discrimination against African American female plaintiffs, reenacting the phenomenon encapsulated in the title of a 1982 Black feminist anthology: *All the Women are White, All the Blacks Are Men, But Some of Us Are Brave*.<sup>4</sup> By the mid-1990s, most courts no longer rejected intersectional claims out of hand.<sup>5</sup> But well into the twenty-first century, scholars find that “complex discrimination” claimants fare even worse than other employment discrimination plaintiffs, facing both structural and ideological barriers to recognition and redress.<sup>6</sup>

Although the term “intersectionality” dates to the late 1980s, the concept’s history predates the Civil Rights Act itself.<sup>7</sup> Moreover, what we now call intersectionality crucially shaped Title VII from its inception. Over the past two decades, historians have uncovered the critical role of intersectionality—and of women of color—in pre-Civil Rights Act activism against sex- and race-based employment discrimination; in the enactment of Title VII’s sex discrimination amendment; in early enforcement efforts; in advocacy to expand the definition of sex discrimination (to include, for instance, sexual harassment, pregnancy discrimination, and discrimination against unmarried

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<sup>3</sup> See *infra* notes 85-104 and accompanying text.

<sup>4</sup> ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE: BLACK WOMEN’S STUDIES (Gloria T. Hull et al. eds., 1982). See also, e.g., THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (Cherríe Moraga & Gloria Anzaldúa eds., 1981); ANGELA Y. DAVIS, WOMEN, RACE & CLASS (1981); BELL HOOKS, AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM 13 (1981).

<sup>5</sup> See, e.g., *Jefferies v. Harris Cnty. Cmty. Action Ass’n*, 615 F.2d 1025, 1032 (5th Cir. 1980) (“[D]iscrimination against black females can exist even in the absence of discrimination against black men or white women.”); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) (“Title VII prohibits an employer from discriminating against any individual because of race or because of sex. ‘The use of the word “or” evidences Congress’ intent to prohibit employment discrimination based on any or all of the listed characteristics.” (quoting *Jefferies*, 615 F.2d at 1032)); *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994) (“As other courts have recognized, where two bases for discrimination exist, they cannot be neatly reduced to distinct components.”).

<sup>6</sup> See, e.g., Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & SOC’Y REV. 991, 992 (2011) (“[P]laintiffs who make intersectional claims, alleging that they were discriminated against based on more than one ascriptive characteristic, are only half as likely to win their cases as are other plaintiffs.”); Bradley Allan Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. C.R. L.J. 199, 234-35 (2006) (proposing an amendment to Title VII because intersectional plaintiffs “lack[] full recourse”); Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1440 (2009) (“A sample of summary judgment decisions reveals that employers prevail on multiple claims at a rate of 96 percent, as compared to 73 percent on employment discrimination claims in general.”).

<sup>7</sup> See *infra* notes 28-39 and accompanying text.

parents); and in the development of constitutional sex equality arguments that influenced, and were shaped by, the evolution of Title VII.<sup>8</sup>

History, legal theory, and (to a lesser extent) anti-discrimination doctrine all incorporate accounts—explicit and implicit—of the relationship between intersectionality and Title VII. Rarely, however, do these accounts intersect (so to speak). This Essay is a preliminary and partial effort to put those disparate literatures in conversation, and to focus attention on the pre-history of intersectionality and Title VII. Doing so reveals how the insights Crenshaw and her contemporaries brilliantly theorized and elaborated during Title VII's second quarter-century are part of a longer and more complicated history than we often acknowledge.<sup>9</sup>

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<sup>8</sup> See SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011) [hereinafter MAYERI, REASONING FROM RACE] (examining the roots of feminist legal advocacy in intersectional experience); SUSAN M. HARTMANN, THE OTHER FEMINISTS: ACTIVISTS IN THE LIBERAL ESTABLISHMENT 176-206 (1998) (describing black feminists' "pursui[t of] feminist goals outside both the autonomous women's movement and the civil rights movement"); NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 117-54 (2006) (recognizing the pivotal role of African American feminists in shaping the early history of Title VII); CARRIE N. BAKER, THE WOMEN'S MOVEMENT AGAINST SEXUAL HARASSMENT *passim* (2008) (chronicling black women's pivotal roles as activists, plaintiffs, and government officials in the struggle against sexual harassment); ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 226-33, 240-48, 225-59, 262-68, 277-80, 283-88 (2001) (discussing evolving views about the relationship between race and sex discrimination in the 1960s and 1970s); LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 184-99 (1998) (relating Pauli Murray's role in the struggle for race and sex equality in jury service); Eileen Boris, *The Gender of Discrimination: Race, Sex, and Fair Employment*, in WOMEN AND THE UNITED STATES CONSTITUTION: HISTORY, INTERPRETATION AND PRACTICE 273, 273 (Sibyl A. Schwarzenbach & Patricia Smith eds., 2003) (describing neglect of "interactive discrimination" faced by black women); Eileen Boris, *Ledbetter's Continuum: Race, Gender, and Pay Discrimination*, in FEMINIST LEGAL HISTORY: ESSAYS ON WOMEN AND LAW 240 (Tracy A. Thomas & Tracy Jean Boisseau eds., 2011) (describing the interaction between race and sex in early pay discrimination cases); Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 759 (2004) [hereinafter Mayeri, *Constitutional Choices*] (exploring feminists' "dual constitutional strategy" and its relationship to "the interconnectedness of race and sex equality"); Serena Mayeri, Note, "*A Common Fate of Discrimination*": *Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045, 1046, 1052-72 (2001) [hereinafter Mayeri, *A Common Fate*] (investigating "the particular historical context of the 1960s in which race-sex analogies emerged as a central component of modern feminist legal thought").

<sup>9</sup> Cf. Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233 (2005).

## I. THE MYTHOLOGY OF TITLE VII'S SEX AMENDMENT

For much of the Civil Rights Act's first quarter-century, the origins of Title VII's "sex" amendment<sup>10</sup> were shrouded in layers of mythology and (sometimes willful) misunderstanding. Skeptical commentators and courts routinely dismissed the amendment as a "joke" or "fluke," born of segregationist antipathy to African American civil rights.<sup>11</sup> At best, went the conventional wisdom, Title VII's prohibition on sex discrimination was an ill-conceived afterthought; at worst, a "killer amendment" designed to scuttle the civil rights bill and destined to undermine its primary purpose.<sup>12</sup> Government officials, including early EEOC members, explicitly prioritized race discrimination and denigrated the sex amendment's importance.<sup>13</sup> This dismissive attitude toward the sex amendment, together with increasingly organized feminist activism and unexpectedly voluminous sex discrimination complaints flooding the EEOC, galvanized a resurgent women's movement to demand real protection against employment discrimination.<sup>14</sup>

Early and influential accounts of the Civil Rights Act's enactment perpetuated the myth that the sex amendment's passage was little more than the accidental byproduct of segregationist mischief.<sup>15</sup> This myth of the sex amendment as "joke" or "fluke" proved remarkably resilient, despite early revelations about the involvement of the National Woman's Party ("NWP") and female members of Congress in pushing for an amendment banning sex discrimination.<sup>16</sup> In some instances, feminists mobilized the myth for critical

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<sup>10</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. § 2000e-2).

<sup>11</sup> JO FREEMAN, *THE POLITICS OF WOMEN'S LIBERATION* 54 (1975); *see also* Mayeri, *A Common Fate*, *supra* note 8, at 1063.

<sup>12</sup> *See* sources cited *infra* note 15.

<sup>13</sup> *See, e.g.*, FREEMAN, *supra* note 11, at 185.

<sup>14</sup> On the EEOC's failure to enforce the sex discrimination provision of Title VII, *see* FREEMAN, *supra* note 11, at 76-79; HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972*, at 205-32 (1990); CYNTHIA HARRISON, *ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968*, at 192-209 (1988); KESSLER-HARRIS, *supra* note 8, at 246-47.

<sup>15</sup> *See* CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 234 (1985) ("[The proposed sex amendment] did not come about through strenuous lobbying by women's groups; it was the result of a deliberate ploy by foes of the bill to scuttle it."); Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 *BROOK. L. REV.* 62, 79 (1964) ("The sex amendment can best be described as an orphan, since neither the proponents nor the opponents of Title VII seem to have felt any responsibility for its presence in the bill."); Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 *IOWA L. REV.* 778, 791 (1965) ("The bill's history does reveal that, as the debate over racial aspects of the Civil Rights Act grew more heated, foes of its passage drafted an amendment to include sex, presumably designed to defeat the entire act.").

<sup>16</sup> *See, e.g.*, PATRICIA G. ZELMAN, *WOMEN, WORK, AND NATIONAL POLICY: THE*

purposes, as when Catharine MacKinnon wrote in a landmark 1991 article that “sex discrimination in private employment was forbidden under federal law only in a last minute joking ‘us boys’ attempt to defeat Title VII’s prohibition on racial discrimination.”<sup>17</sup> Courts, too, used the “joke” theory to various ends when discussing Title VII’s legislative history.<sup>18</sup>

The scholars and commentators who discredited the notion that Title VII’s sex amendment was a fluke highlighted the NWP’s behind-the-scenes advocacy and the House floor debate, which featured Rep. Martha Griffiths’s skillful manipulation of segregationist concern for the “White Christian Woman of United States Origin.”<sup>19</sup> A new picture emerged from early literature debunking the “joke” myth: now the key actors in the story of the sex amendment’s enactment included congresswomen such as Griffiths and Katherine St. George; NWP leaders such as Alice Paul, Emma Guffey Miller, and Nina Horton Avery; and, in some versions, the journalist May Craig.<sup>20</sup> This story improved upon the conventional narrative, to be sure. But it may inadvertently have helped to perpetuate the misconception that the sex

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KENNEDY-JOHNSON YEARS 60 (1982); Caruthers Gholson Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 VAL. U. L. REV. 326, 336-37 (1970) (“[T]he accusation of misogynists that the passage of the sex discrimination provision was Representative Smith’s joke contrived to hurt racial minorities is utterly untrue.”); Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 453-54 (1980) (“The conventional view is that sex was added as a protected class to the employment discrimination title of the Civil Rights Act of 1964 (Act) for the purpose of defeating it by making it unacceptable to some of its supporters or by laughing it to death. . . . And [the conventional view] is wrong.”).

<sup>17</sup> She continued: “Sex was added as a prohibited ground of discrimination when this attempted *reductio ad absurdum* failed and the law passed anyway.” Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1283-84 (1991). For more examples, see Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 139-40 (1997).

<sup>18</sup> See Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1310 (2012) (“[C]ourts commonly cited the lack of legislative history attending Title VII’s sex provision as a reason for interpreting the statute narrowly.”); Rachel Osterman, Comment, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII’s Ban on Sex Discrimination Was an Accident*, 20 YALE J.L. & FEMINISM 409, 425-34 (2009) (tracing judicial treatment of the sex provision’s legislative history).

<sup>19</sup> Mayeri, *Constitutional Choices*, *supra* note 8, at 772; see also GRAHAM, *supra* note 14, at 137; Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. S. HIST. 37, 37-56 (describing political pressure for the sex amendment from the NWP and from Griffiths); Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 L. & INEQ. 163, 172-79 (1991) (describing the NWP’s efforts to have “sex” added to the Civil Rights Act).

<sup>20</sup> See Brauer, *supra* note 19, at 39-45.

amendment's primary constituencies were white women and lawmakers who were indifferent, or even hostile, toward racial justice and civil rights.

## II. THE INTERSECTIONAL ORIGINS OF TITLE VII'S SEX AMENDMENT

During Title VII's second quarter-century, a consensus emerged among historians that the sex amendment should be seen not only as the product of an unholy alliance between white feminists and segregationist conservatives, but also as reinforcing a longer tradition of advocacy that married the causes of racial justice and women's rights. True, the House sex amendment debate depicted a prohibition on sex discrimination as necessary to prevent white women from standing "last at the hiring gate,"<sup>21</sup> and prominent progressive Democrats, such as Edith Green of Oregon, opposed the amendment for fear it would sink the civil rights legislation altogether.<sup>22</sup> But when the bill reached the Senate, African American lawyer Pauli Murray, a veteran of the civil rights movement and of personal battles against "Jane Crow," wrote an influential memorandum designed to persuade civil rights supporters that the sex amendment was integral, rather than antithetical, to Title VII's goals.<sup>23</sup> Circulated to members of Congress and the Johnson administration, Murray's memo presciently reframed the sex amendment as a unifying, rather than divisive, force within the broader civil rights and women's advocacy communities.<sup>24</sup>

The memo, circulated in April 1964 as the sex discrimination provision approved by the House in February faced danger in the Senate, was written in the style of a brief.<sup>25</sup> Murray first laid out the arguments for and against the sex amendment as articulated during the House debate: opponents concerned about the fate of the civil rights bill worried, above all, that the sex amendment would "clutter up the bill and jeopardize its primary purpose" of "end[ing] discrimination against Negroes."<sup>26</sup> And the amendment's most vocal

<sup>21</sup> 110 CONG. REC. 2578 (1964) (statement of Rep. Griffiths).

<sup>22</sup> See *id.* at 2581 (statement of Edith Green) ("[L]et us not add any amendment that would place in jeopardy in any way our primary objective of ending that discrimination that is most serious, most urgent, most tragic, and most widespread against the Negroes of our country."). Edith Green herself was an avid proponent of women's rights, having championed a much more capacious version of the Equal Pay Act of 1963 than the legislation that resulted. On Green and the Equal Pay Act, see DOROTHY SUE COBBLE, *THE OTHER WOMEN'S MOVEMENT* 163, 165-66 (2004); KESSLER-HARRIS, *supra* note 8, at 236-37; see also HARRISON, *supra* note 14, at 100, 102.

<sup>23</sup> Pauli Murray, Memorandum in Support of Retaining the Amendment to H.R. 7152, Title VII (Equal Employment Opportunity) to Prohibit Discrimination in Employment Because of Sex (Apr. 14, 1964) (Pauli Murray Papers, MC 412, Box 85, Folder 1485, on file with the Schlesinger Library, Radcliffe Institute, Harvard University) [hereinafter Murray, Title VII Memorandum]; see also Mayeri, *Constitutional Choices*, *supra* note 8, at 774.

<sup>24</sup> See Mayeri, *Constitutional Choices*, *supra* note 8, at 774.

<sup>25</sup> Murray, Title VII Memorandum, *supra* note 23.

<sup>26</sup> *Id.* at 2. Opponents also argued that "the amendment would be an entering wedge to

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proponents framed the sex discrimination provision as necessary to protect white women, “since employers, fearing prosecution for race discrimination under the act, will tend to give preference to Negro women (and Negro men) over white women.”<sup>27</sup>

Murray’s memo critically reframed the debate. Instead of a contest pitting “Negroes” against “women” or “Negro women and men” against “white women,” Murray’s analysis made the fate of “Negro women” the ultimate barometer of the civil rights bill’s success. “[I]f there is no ‘sex’ amendment,” Murray warned,

*both* 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 intertwined [sic] and so similar that Negro women are uniquely qualified to affirm their interrelatedness.<sup>28</sup>

Murray, who had often spoken of the “twin immoralities” of “Jim and Jane Crow,” theorized black women’s singular experience in language that anticipated the concept Crenshaw would term “intersectionality” a quarter-century later.<sup>29</sup>

Murray’s Title VII memo was part of a larger strategy that predated the Civil Rights Act’s enactment. Murray had long protested the exclusion of “Negro women” from visible leadership positions in the civil rights movement, and by the early 1960s, she had become a key figure in a revitalized interracial feminist movement.<sup>30</sup> An earlier memorandum—authored by Murray when she served on the Civil and Political Rights Committee of the President’s Commission on the Status of Women—had revolutionized feminist constitutional strategy by urging that advocates for women circumvent the divisive Equal Rights Amendment controversy by pursuing a Fourteenth Amendment litigation campaign modeled on the NAACP Legal Defense

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destroy protective legislation favorable to women”; that “Congress has not had time to study this proposal; there is no legislative record or findings and hearings should be held before any vote is taken on the amendment”; and that “biological differences between men and women pose different problems with respect to employment, and thus Congress should wait until further studies are made.” *Id.* at 2-3. *See also* 110 CONG. REC. 2578-84 (1964).

<sup>27</sup> Murray, Title VII Memorandum, *supra* note 23, at 3.

<sup>28</sup> *Id.* at 20.

<sup>29</sup> Mayeri, *Constitutional Choices*, *supra* note 8, at 774, 806.

<sup>30</sup> *See* SARAH AZARANSKY, *THE DREAM IS FREEDOM: PAULI MURRAY AND AMERICAN DEMOCRATIC FAITH* 62 (2011); MACLEAN, *supra* note 8, at 119-23; MAYERI, *REASONING FROM RACE*, *supra* note 8, at 16-23; Serena Mayeri, *Pauli Murray and the Twentieth-Century Quest for Legal and Social Equality*, 2 *IND. J.L. & SOC. EQ.* 80, 88 (2013). On Murray’s earlier activism, see generally GLENDA ELIZABETH GILMORE, *DEFYING DIXIE: THE RADICAL ROOTS OF CIVIL RIGHTS, 1919-1950* (2008); KENNETH W. MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* (2012).

Fund's successful desegregation efforts.<sup>31</sup> Murray's strategic use of analogies between race and sex discrimination linked civil rights and feminism both rhetorically and practically.<sup>32</sup>

Crucially, Murray understood "Negro women's" central importance to the civil rights struggle through the lens of history—a history replete with conflict between and within movements for racial justice and women's rights. These movements ignored the imperatives of coalition at their peril, Murray warned.<sup>33</sup> Past failures to unite—for instance, the post-Civil War rift between advocates of black male enfranchisement and women's suffrage—had not only obscured African American women's interests, but also fatally undermined an alliance that might have prevented everything from post-Reconstruction retrenchment to lynching.<sup>34</sup>

Murray linked the need for a sex discrimination prohibition not only to black women's underrepresentation in lucrative jobs, but also to their overrepresentation among women who provided the sole or primary support for their families. "In a more sharply defined struggle than is apparent in any other social group in the United States, [the Negro woman] is literally engaged in a battle for sheer survival," she wrote.<sup>35</sup> The "Negro woman," Murray explained, had trouble "finding a mate, remains single longer and in higher incidence, bears more children, is in the labor market longer, has less education, earns less, is widowed earlier and carries a heavier economic burden as a family head than her white counterpart."<sup>36</sup> For many of her male contemporaries, both inside and outside the civil rights movement, the cure for these ills was to shore up black men's employment prospects through the civil rights bill and other legislation. For Murray, however, such an approach was a halfway measure at best. "Title VII without the 'sex' amendment would benefit Negro males primarily and thus offer genuine equality of opportunity to only *half* of the potential Negro work force," Murray wrote.<sup>37</sup> Given that "[t]he Negro woman must be prepared to support herself and others for a considerable period of her life . . . if civil rights legislation is to be effective, it must of necessity include protection against discrimination in employment by reason of sex."<sup>38</sup>

Murray's intersectional position also helped her to foresee the essential role an inclusive Title VII could play in uniting social movements through a convergence of common interests. Employers historically exploited workers

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<sup>31</sup> See Mayeri, *A Common Fate*, *supra* note 8, at 1057-58.

<sup>32</sup> I have discussed this phenomenon at greater length in earlier works. See generally MAYERI, *REASONING FROM RACE*, *supra* note 8; Mayeri, *A Common Fate*, *supra* note 8.

<sup>33</sup> See Murray, Title VII Memorandum, *supra* note 23, at 4-9.

<sup>34</sup> *Id.* at 9-11.

<sup>35</sup> *Id.* at 21.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 20-21.

<sup>38</sup> *Id.* at 23.



through divide-and-conquer tactics, especially in “semi-skilled and unskilled categories where women and Negroes are found in large numbers.”<sup>39</sup> Murray predicted that “[u]nless *all* workers are reassured that they will have equal employment opportunities bitter competition and conflict with racial implications will continue . . . thereby defeating the main purpose” of the bill.<sup>40</sup> Hope that the inclusion of sex in Title VII would help to bridge these divisions *and* address the particular needs of “Negro women” suffused Murray’s memo.

### III. TITLE VII, INTERSECTIONALITY, AND THE NEW CIVIL RIGHTS COALITION<sup>41</sup>

Title VII’s passage was indeed a watershed in the relationship between the civil rights and feminist movements. Its enactment swiftly and decisively destroyed the alliance of convenience between conservative white feminists and segregationists. Title VII also united and galvanized advocates for women long divided over sex-specific protective labor legislation. Moreover, by tying the fates of race and sex discrimination claims together, Title VII—perhaps more than any other legislative enactment—cemented a sometimes uneasy, but nonetheless crucial, alliance between civil rights and women’s rights. By the early 1970s, the category “women and minorities”—virtually unthinkable just a few years earlier—had entered the American political lexicon. Title VII and the advocates who ensured its enforcement could claim much of the credit.<sup>42</sup>

Title VII took effect in 1965, the same year that the Moynihan Report crystallized a consensus among commentators and policymakers that restoring African American men to their proper role as breadwinning heads of households was a prerequisite for racial progress.<sup>43</sup> In the late 1960s, civil rights leaders not only prioritized African American male employment, but many viewed equal employment opportunity for women of all races as antithetical to achieving racial justice and equality.<sup>44</sup> At the same time, some longtime advocates for labor and civil rights, including Murray herself, worried that organizations like the National Organization for Women (“NOW”) stifled the voices of women with multifaceted identities and political commitments.<sup>45</sup>

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<sup>39</sup> *Id.* at 19.

<sup>40</sup> *Id.*

<sup>41</sup> The discussion in this Part incorporates text adapted from MAYERI, REASONING FROM RACE, *supra* note 8.

<sup>42</sup> See MAYERI, REASONING FROM RACE, *supra* note 8, at 41-75; see also MACLEAN, *supra* note 8, at 154; Mayeri, *Constitutional Choices*, *supra* note 8, at 773-77 (illustrating how Title VII’s passage “provided an unprecedented link between struggles for racial justice and sex equality”).

<sup>43</sup> See Serena Mayeri, *Historicizing the “End of Men”*: *The Politics of Reaction(s)*, 93 B.U. L. REV. 729, 730 (2013) and sources cited therein.

<sup>44</sup> *Id.* at 731.

<sup>45</sup> See HARTMANN, *supra* note 8, at 189-90; MAYERI, REASONING FROM RACE, *supra* note

Against this backdrop, a small cadre of black feminist lawyers, activists, and government officials insisted that women's advancement in the workplace and egalitarian partnerships with men were crucial to realizing the promise of the civil rights movement. The key figures in this story were African American women who used their multi-dimensional identities and their positions at the intersection of the civil rights and women's movements to promote a distinctive brand of feminist activism and an expansive interpretation of Title VII's promise. This black feminist legal agenda responded directly to the Moynihanian consensus and to the limitations of both mainstream liberal feminism and civil rights advocacy.<sup>46</sup>

No mere outsiders or gadflies, these women were enormously influential in Title VII's early development. Pauli Murray's seminal 1965 article *Jane Crow and the Law*, co-authored with Mary Eastwood, encapsulated the feminist case for vigorous enforcement of anti-sex discrimination norms under Title VII and the Fourteenth Amendment.<sup>47</sup> Murray's call for a women's "March on Washington" to protest the EEOC's failure to enforce the sex amendment made national headlines,<sup>48</sup> and foreshadowed her role as co-founder of NOW in 1966.<sup>49</sup> As chair of the New York City Human Rights Commission in the early 1970s, Eleanor Holmes Norton vigorously investigated, publicized, and expanded the scope of antidiscrimination laws: she prioritized claims based on sex as well as race, and included low-income women and women of color as key constituencies.<sup>50</sup> As President of NOW and co-founder of Black Women Organized for Action in the early 1970s, Aileen Hernandez joined Murray and Norton in building coalitions between white-dominated women's organizations, male-dominated civil rights groups, and a growing contingent of self-identified black feminists.<sup>51</sup>

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8, at 36; Mayeri, *Constitutional Choices*, *supra* note 8, at 790-92.

<sup>46</sup> See MAYERI, REASONING FROM RACE, *supra* note 8, at 41-42; MACLEAN, *supra* note 8, at 153; PAULI MURRAY, SONG IN A WEARY THROAT: AN AMERICAN PILGRIMAGE 356-57 (1987).

<sup>47</sup> Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965).

<sup>48</sup> Pauli Murray, Remarks at the Women and Title VII Conference, National Council of Women of the United States 13 (Oct. 12, 1965) (Mary Eastwood Papers, MC 596, Box 4, Folder 34, on file with the Schlesinger Library, Radcliffe Institute, Harvard University); MAYERI, REASONING FROM RACE, *supra* note 8, at 23-24; Mayeri, *Constitutional Choices*, *supra* note 8, at 776.

<sup>49</sup> See Mayeri, *Constitutional Choices*, *supra* note 8, at 784.

<sup>50</sup> See MACLEAN, *supra* note 8, at 143-45; MAYERI, REASONING FROM RACE, *supra* note 8, at 46-49.

<sup>51</sup> See MAYERI, REASONING FROM RACE, *supra* note 8, at 45-47. On Black Women Organized for Action, the National Black Feminist Organization, and other organized African American feminist groups in the 1970s, see KIMBERLY SPRINGER, LIVING FOR THE REVOLUTION: BLACK FEMINIST ORGANIZATIONS, 1968-1980 (2005). See also PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN

If the intersectional identities and experiences of women such as Murray, Norton, and Hernandez critically shaped their advocacy and motivated their coalition-building efforts, so too did the maturation of Title VII litigation and enforcement unite the civil rights and feminist movements to an unprecedented degree. Whereas in the mid- to late-1960s the women's movement seemed like a threat rather than a boon to the civil rights movement, by the early 1970s, civil rights leaders and their congressional supporters recognized women's rights advocates as indispensable allies. This dramatic and relatively rapid transformation owed a considerable debt to the political economy of employment discrimination law. Cases such as *Phillips v. Martin-Marietta Corp.*,<sup>52</sup> which challenged a policy excluding mothers of preschool-age children from employment, made clear that a broad interpretation of Title VII's bona fide occupational qualification exception could endanger the rights of racial and religious minorities as well. Ida Phillips was white and widowed, "but her plight as a [single] working mother resembled that of many African American women."<sup>53</sup> Recognizing the possible spillover effects in race discrimination law, the NAACP Legal Defense Fund ("LDF") took Phillips's case, arguing that the "'primary adverse impact' of Martin-Marietta's policy was 'on blacks,' since '[m]ore than twice as many non-white mothers as white mothers' were 'heads of families.'"<sup>54</sup> Feminists, too, used the *Phillips* case to make common cause with the civil rights movement.

Feminists capitalized on women's potential political and electoral clout, as well as "Title VII's linkage of race and sex" to win over skeptical civil rights leaders.<sup>55</sup> By the early 1970s, feminists and civil rights advocates together championed extending the EEOC's jurisdiction to educational institutions and state and local governments. As lawmakers debated the amendments to Title VII, the Congressional Record teemed with earnest declarations about the menace of sex discrimination.<sup>56</sup> Civil rights and women's rights advocates collaborated in several national actions and lawsuits against large companies such as DuPont, Hughes Tool, Firestone, and the Big Three automakers.<sup>57</sup> A coalition of feminist and civil rights groups won a landmark consent decree with AT&T, addressing occupational segregation uncovered by the African American economist Phyllis Wallace.<sup>58</sup> In short, by 1973, thanks in no small part to the pioneering advocacy of African American feminists, the women's

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AMERICA (1984).

<sup>52</sup> 400 U.S. 542 (1971).

<sup>53</sup> MAYERI, REASONING FROM RACE, *supra* note 8, at 51.

<sup>54</sup> *Id.* at 53 (quoting Brief for Petitioner at 13-14, *Phillips*, 400 U.S. 542 (No. 69-1058)).

<sup>55</sup> *Id.* at 54.

<sup>56</sup> "A House report declared that 'women's rights are not judicial divertissements,' and that sex discrimination was 'to be accorded the same degree of social concern given to any type of unlawful discrimination.'" *Id.* at 55.

<sup>57</sup> *Id.* at 56.

<sup>58</sup> *Id.* (citing MACLEAN, *supra* note 8, at 131-32).

movement and civil rights advocates had formed a powerful alliance—and Title VII was among its most potent weapons.

Intersectionality did not only inform an oppositional critique of employment discrimination law; intersectional experience also proved a constructive, integrative force in expanding Title VII's substantive reach.<sup>59</sup> Two striking examples involve discrimination against unmarried mothers and the development of sexual harassment as a harm prohibited under Title VII.<sup>60</sup> In both instances, African American women pioneered as plaintiffs in cases that redefined employment practices once seen as “natural” and legitimate as violations of women's civil rights.

Before Title VII, employers could, and did, discriminate against women based on sex, marital status, or both. After Title VII's passage, marriage bars and anti-nepotism rules continued to prevent many women from obtaining or retaining jobs when they married. Also common were formal or informal rules prohibiting the employment of unmarried mothers or parents known to have “illegitimate” children.<sup>61</sup> Initially, civil rights advocates challenged these policies as racially discriminatory: for instance, in 1968, the NAACP LDF filed a suit against Southwestern Bell for excluding “unwed mothers” from employment.<sup>62</sup> An Arkansas federal district court judge rejected the LDF's arguments: “[M]ore Negro women have illegitimate children than do white women,” he acknowledged, but this fact, though “interesting sociologically,” did not render the policy unlawful.<sup>63</sup> Employers had a “legitimate interest at least to a point in the sexual behavior of [their] employees and their morale while at work. A woman who has had an illegitimate child,” Judge Jesse Smith Henley wrote, “can well have an upsetting effect on other employees . . . .”<sup>64</sup> Even if “certain classes of Negroes have a different attitude toward extramarital sex than do most white people,” he wrote, Title VII did not “require[] an employer to conform his standards to the Negro attitude.”<sup>65</sup>

Judge Henley did not consider whether Southwestern Bell's exclusion of unmarried mothers might violate Title VII's ban on *sex* discrimination, but others soon did.<sup>66</sup> When an African American woman rejected for a job as a telephone operator filed a race discrimination charge with the EEOC in 1970, the employer explained that her status as an unwed mother, not her race, was

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<sup>59</sup> I develop this argument with respect to constitutional law in MAYERI, REASONING FROM RACE, *supra* note 8, at 144-85.

<sup>60</sup> *See id.*

<sup>61</sup> *See id.* at 145-67.

<sup>62</sup> *Id.* at 153 (citing *Parham v. Southwestern Bell Telephone Co.*, No. LR-68-C-81, 1969 WL 109 (E.D. Ark. July 8, 1969)).

<sup>63</sup> *Id.* (quoting *Southwestern Bell*, 1969 WL at \*9).

<sup>64</sup> *Id.* (quoting *Southwestern Bell*, 1969 WL at \*9).

<sup>65</sup> *Id.* (quoting *Southwestern Bell*, 1969 WL at \*9).

<sup>66</sup> *Id.*

the basis for its decision not to hire her.<sup>67</sup> The EEOC ruled that the employer's policy discriminated based on race *and* sex, in violation of Title VII.<sup>68</sup> Since "80 percent of 'illegitimate' births in the surrounding community were to 'non-white females,'" the disproportionate impact constituted race discrimination.<sup>69</sup> And even if the employer had attempted to apply the "illegitimacy standard" to unmarried fathers too, the decision noted, "it's a wise employer indeed that knows which of its male applicants truthfully answered its illegitimacy inquiry."<sup>70</sup> Thus, the EEOC declared, the "foreseeable and certain impact of an illegitimacy standard . . . is to deprive females . . . of employment opportunities."<sup>71</sup> In short, the intersection of race and sex alerted judges and administrators to the multifaceted discriminatory impact of employment bans based on non-marital childbearing.

African American women also led the way in expanding Title VII's sex discrimination provision to proscribe sexual harassment.<sup>72</sup> Historically, women of color had been especially vulnerable to sexual exploitation at the hands of employers. Black female plaintiffs, primed by their experiences with racial discrimination and harassment, brought many of the early cases against employers that characterized sexual objectification and coercion in the workplace as wrongful civil rights violations, rather than interpersonal problems to be endured in silence.<sup>73</sup> During her years in local and federal government, Eleanor Holmes Norton was among the first government officials to recognize and combat sexual harassment.<sup>74</sup> Black feminist legal practitioners and scholars such as Judy Trent Ellis (later Judy Scales-Trent) used sexual harassment law as a basis for larger critiques of courts' failure to grapple with intersectionality.<sup>75</sup> Long before Anita Hill's testimony at Clarence Thomas's Supreme Court confirmation hearings transformed her into the foremost spokesperson against sexual harassment and an inspiration for a new

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (citing EEOC Decision No. 71-332, 2 Fair Empl. Prac. Cas. (BNA) 1016 (1970)).

<sup>69</sup> *Id.* (quoting EEOC Decision No. 71-332, at 1016).

<sup>70</sup> *Id.* (quoting EEOC Decision No. 71-332, at 1017).

<sup>71</sup> *Id.* (quoting EEOC Decision No. 71-332, at 1017).

<sup>72</sup> Carrie N. Baker, *Race, Class, and Sexual Harassment in the 1970s*, 30 FEMINIST STUD. 7 (2004); see also MAYERI, REASONING FROM RACE, *supra* note 8, at 144. This history is more familiar to legal scholars. See, e.g., CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 127-41 (1979); Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1469-70 (1992) ("Perhaps it is due to this racialization of sexual harassment that Black women are disproportionate[ly] represented as plaintiffs in these cases. . . . Racism may provide the clarity to see that sexual harassment is . . . an intentional act of sexual discrimination . . .").

<sup>73</sup> See BAKER, *supra* note 8, at 15-17.

<sup>74</sup> See *id.* at 32, 115.

<sup>75</sup> See *id.* at 98-99; Judy Trent Ellis, *Sexual Harassment and Race: A Legal Analysis of Discrimination*, 8 J. LEGIS. 30, 30-45 (1981).

wave of intersectionality scholarship, intersectional experience shaped the recognition and litigation of sexual harassment as sex discrimination.

The process of translating and generalizing the particular experiences of women of color into a universal language of sex discrimination often caused race and intersectional insights to fade from view, however.<sup>76</sup> This “whitewashing” of Title VII law reflected a larger trend in antidiscrimination law. African American feminists’ triumphs in the 1970s came at a price. Putting a white face on feminists’ agenda increasingly seemed expedient, especially to advocates intent on building coalitions to resist the headwinds of an increasingly conservative political climate.<sup>77</sup> Employment policies that targeted single mothers, for example, “affected a wide swath of women, and universalizing their appeal could broaden feminists’ constituency and defuse troubling stereotypes” about black unwed mothers.<sup>78</sup> In Title VII cases and in sex equality law more generally, discrimination claims’ origins in the experiences of black women and in the intersection of race and sex often gave way to a focus on “pure” sex discrimination, untainted by the complexities of intersectionality.<sup>79</sup>

Throughout the 1970s, African American feminists often found themselves “torn between [a] universalist approach that emphasized commonalities between black and white, male and female, and a more particularistic view that focused on minority women’s interests.”<sup>80</sup> Balancing these conflicting imperatives required a thoughtful amalgam of insider and outsider sensibilities, and careful attention to context and audience. When speaking to skeptical black women and men, these advocates often argued for strategic alliances with white feminists. When acting as government officials, they sometimes quietly—but often forcefully—advanced the interests of women of color and working-class women, as well as of white women. African American feminists spoke to many audiences about how intersectional experiences shaped their political outlook and advocacy, and they did not shy away from constructive

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<sup>76</sup> “By 1980, when the EEOC issued sexual harassment guidelines for public comment, some advocates worried that policy makers had forgotten the roots of sexual harassment law in the experiences of black women. They insisted that for women of color, sexual harassment could not be separated from racial subordination.” MAYERI, REASONING FROM RACE, *supra* note 8, at 145 (citing Carrie N. Baker, *Race, Class, and Sexual Harassment in the 1970s*, 30 FEMINIST STUD. 7, 21-22 (2004)).

<sup>77</sup> On the effects of rightward political drift on feminist legal advocacy during the 1970s, see MAYERI, REASONING FROM RACE, *supra* note 8, 76-106, 186-224.

<sup>78</sup> *Id.* at 57 (“Like Ida Phillips, other white women challenged job training programs that explicitly favored male job seekers, trained women for inferior positions, and focused on job categories that excluded women.”); *see also id.* (“The plight of white or racially non-specific ‘women’ increasingly dominated feminists’ political lobbying as well as their litigation strategy.”).

<sup>79</sup> *Id.* at 167.

<sup>80</sup> *Id.* at 57-58. On the whitewashing phenomenon in constitutional sex equality law, see *id.* at 144-85.

criticism of anti-racist and feminist movements. Aileen Hernandez, for instance, grew fond of quoting a young black poet's reproach to white women activists, concluding with the line, "We share all of *your* problems; we share few of mine."<sup>81</sup>

#### IV. TITLE VII AND THE EMERGENCE OF INTERSECTIONALITY AS A CATEGORY OF CRITICAL LEGAL ANALYSIS

Despite the integral role of intersectional experiences in informing the origins and early development of Title VII, court opinions that acknowledged, much less discussed, intersectionality were few and far between. In some cases, judges explicitly rejected the notion that plaintiffs suffering from what would later be called intersectional or complex bias could find refuge in Title VII. By the late 1980s, an intersectionality anti-canon had emerged, featuring cases such as *DeGraffenreid v. General Motors Assembly Division*,<sup>82</sup> which rejected the claim of Emma DeGraffenreid and her co-workers that a GM plant's "last hired-first fired" layoff policy discriminated against black women and seemed to foreclose the possibility of bringing combined race-sex discrimination claims; *Rogers v. American Airlines, Inc.*,<sup>83</sup> where a court upheld the employer's ban on a "corn row" hairstyle against a Title VII challenge by an African American woman; and *Moore v. Hughes Helicopters, Inc.*,<sup>84</sup> which denied a black female plaintiff's motion to represent a class that included white women.

The intersectionality anti-canon helped to inspire and inform a new generation of scholarship and advocacy. Beginning in the early 1980s, EEOC lawyer and later law professor Judy Scales-Trent published several articles highlighting Title VII's failure to address black women's workplace experiences.<sup>85</sup> Indeed, many if not most of the early classics of intersectionality legal scholarship featured Title VII cases as primary evidence of

<sup>81</sup> *Id.* at 58.

<sup>82</sup> 413 F. Supp. 142, 143 (E.D. Mo. 1976), *aff'd in part, rev'd in part*, 558 F.2d 480 (8th Cir. 1977) ("[T]his 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."). For more on the factual background of *DeGraffenreid*, see MAYERI, REASONING FROM RACE, *supra* note 8, at 102-04.

<sup>83</sup> 527 F. Supp. 229, 233 (S.D.N.Y. 1981).

<sup>84</sup> 708 F.2d. 475, 480 (9th Cir. 1983).

<sup>85</sup> Trent Ellis, *supra* note 75, at 39-44 (describing the reluctance of courts to allow black women to claim discrimination under Title VII based on both racial and sexual harassment); Judy Scales-Trent, *Comparable Worth: Is This a Theory for Black Workers?*, 8 WOMEN'S RTS. L. REP. 51, 53-54 (1984); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 16-20 (1989) (discussing black women's intersectional Title VII claims). For an early analysis of the difficulty of bringing race-plus-sex discrimination class action claims, see Elaine W. Shoben, *Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination*, 55 N.Y.U. L. REV. 793 (1980).

antidiscrimination law's essentialist, exclusionary, and one-dimensional approach to identity and to subordination. Crenshaw's foundational 1989 article, *Demarginalizing the Intersection of Race and Sex*, critiqued *DeGraffenreid* and two other Title VII cases in which courts rejected African American women as representative plaintiffs in class actions involving black men and white women.<sup>86</sup> The centerpiece of Regina Austin's classic *Sapphire Bound!*, published the same year, was *Chambers v. Omaha Girls Club*<sup>87</sup>—Crystal Chambers' Title VII challenge to her termination for a non-marital pregnancy.<sup>88</sup> Paulette Caldwell's *A Hair Piece*, published in 1991, famously dissected *Rogers v. American Airlines* and placed employers' discriminatory grooming policies in the larger context of black women's denigration and subordination in and out of the workplace.<sup>89</sup>

Title VII attracted the attention of intersectionality theorists for several reasons. First and perhaps foremost, the anti-canon included court opinions that seemed spectacularly oblivious to the realities of black women's workplace experiences.<sup>90</sup> In addition, the categorical language of the provision—banning discrimination “because of such individual's race, color, religion, sex, or national origin”<sup>91</sup>—and the relative paucity of officially recognized legislative history provided little guidance on how to address complex or multiple claims. Perhaps most obviously, Title VII cases forced courts to address directly what was often an unspoken subtext in other kinds of cases—the racial and gender dynamics of human behavior.<sup>92</sup>

The intersectional critique of Title VII doctrine that emerged in the late 1980s and early 1990s had several dimensions. Many anti-canonical opinions made the basic error of dismissing black women's complaints of discrimination because white women and black men had not suffered

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<sup>86</sup> Crenshaw, *supra* note 1, at 140 (describing how the “single-axis framework” for viewing discrimination claims “erases Black women in the conceptualization, identification and remediation of race and sex discrimination”).

<sup>87</sup> 629 F. Supp. 925 (D. Neb. 1986), *aff'd sub nom.*, *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987).

<sup>88</sup> Austin, *supra* note 2, at 550-58.

<sup>89</sup> Caldwell, *supra* note 2, at 366-72. Other early articles on intersectionality and Title VII include Peggie R. Smith, *Separate Identities: Black Women, Work, and Title VII*, 14 HARV. WOMEN'S L.J. 21 (1991); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CALIF. L. REV. 775 (1991); and Cathy Scarborough, Note, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457 (1989).

<sup>90</sup> See *supra* notes 82-84 and accompanying text.

<sup>91</sup> 42 U.S.C. § 2000e-2(a) (2012).

<sup>92</sup> On the difficulty of unearthing the dynamics of race, gender, and class in legal fields such as torts and contracts, see Austin, *supra* note 2, at 546-48 (describing the challenges of conducting research based on legal problems specific to black women because judicial opinions often pay “no attention to race, sex, and class”).



discrimination.<sup>93</sup> Others baldly denied the reality of American cultural practices and their social meaning by, for example, deeming policies that prohibited traditional African American hairstyles race- and sex-neutral.<sup>94</sup> Some opinions reflected the reluctance of courts to allow black women to represent non-black women or black men in class actions, or, as Crenshaw put it, judges' preferences for "pure" sex discrimination claims uncomplicated by racial hierarchy or bias.<sup>95</sup>

Even decisions that ostensibly recognized the possibility of intersectional claims proved to be of limited utility to plaintiffs, scholars charged. The Fifth Circuit opinion in *Jefferies v. Harris County Community Action Association*,<sup>96</sup> for instance, contained encouraging language allowing black women to bring combined race/sex discrimination claims, but employed an awkward "sex-plus" analysis.<sup>97</sup> In *Chambers*, the court recognized the viability of a pregnant, unmarried, black woman's Title VII claim only to find that the employer's desire to provide positive "role models" for young black girls was a business necessity.<sup>98</sup> In *Hicks v. Gates Rubber Co.*,<sup>99</sup> the court allowed African American women to "aggregate" evidence of racial and sexual harassment, but implied that race and sex discrimination were "additive" rather than inextricably intertwined, mutually reinforcing, and manifest in particular stereotypes, epithets, and abuses directed toward female employees of color.<sup>100</sup>

These Title VII decisions informed broader critiques of anti-discrimination law and of anti-racist and feminist movements—critiques that contained echoes of earlier generations even as they broke new ground. Crenshaw's 1989 article, for instance, sounded familiar themes about black women's marginalization within anti-racist and feminist movements and agendas, about interpretations of Title VII that undermined potential coalitions and pitted subordinated subgroups against one another, and about the lasting impact of the Moynihan Report on the American political imagination.<sup>101</sup>

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<sup>93</sup> *DeGraffenreid* is the main exemplar. 413 F. Supp. 142, 144 (E.D. Mo. 1976), *aff'd in part, rev'd in part*, 558 F.2d 480 (8th Cir. 1977).

<sup>94</sup> See, e.g., *Rogers v. American Airlines*, 527 F. Supp. 229, 233 (S.D.N.Y. 1981).

<sup>95</sup> See Crenshaw, *supra* note 1, at 143-50 (discussing *Moore v. Hughes Helicopter*, 708 F.2d 475 (9th Cir. 1983), and *Payne v. Travenol*, 416 F. Supp. 248 (N.D. Miss. 1976)).

<sup>96</sup> 615 F.2d 1025 (5th Cir. 1980).

<sup>97</sup> *Id.* at 1032-33. For an in-depth discussion of the shortcomings of "sex-plus" analysis for intersectional cases, see Kotkin, *supra* note 6, at 1463-81. For more on *Jefferies*, see MAYERI, REASONING FROM RACE, *supra* note 8, at 197-98.

<sup>98</sup> *Chambers v. Omaha Girls Club*, 834 F.2d 697, 703 (8th Cir. 1987).

<sup>99</sup> 833 F.2d 1406 (10th Cir. 1987).

<sup>100</sup> *Id.* at 1416-17.

<sup>101</sup> See Crenshaw, *supra* note 2, at 140, 163-166 (discussing how focus on "race- and class-privileged women" in sex discrimination cases "contributes to the marginalization of Black women in feminist theory and antiracist politics," and the "latest versions of a Moynihanesque analysis").

By the Civil Rights Act's thirtieth anniversary, a rich body of intersectionality legal scholarship, prominently featuring Title VII cases as nemeses, had emerged.<sup>102</sup> Although a number of courts had, by the early 1990s, recognized the viability of combined race/sex discrimination claims, legal scholar Kathryn Abrams concluded in 1994 that judges' application of Title VII to "complex" claims and identities sorely lacked the depth, nuance, and sophistication of the growing interdisciplinary body of scholarship on intersectionality.<sup>103</sup> Even decisions ostensibly friendlier to intersectional plaintiffs than the anti-canonical rulings often equivocated about the viability of complex claims, or simply failed adequately to analyze their legal, historical, and moral basis.<sup>104</sup>

Twenty years later, judicial opinions containing thoughtful analysis of intersectional claims remain few and far between; legal theory and scholarship on intersectionality continue to vastly outpace actual Title VII doctrine.<sup>105</sup> To this day, there is no robust canon of intersectionality case law.<sup>106</sup> Moreover, recent studies of how claims of "complex bias" fare in court reflect a difficult climate for plaintiffs who claim multiple or intersectional forms of employment discrimination.<sup>107</sup> Class actions of any sort are even more difficult to bring,<sup>108</sup> and disparate impact theories increasingly come under attack.<sup>109</sup>

The picture is not entirely bleak, however, especially if we look beyond doctrine. African American women and other women of color continue to play leading roles as plaintiffs, attorneys, policymakers, and legal strategists, and to sustain enduring and effective coalitions between civil rights and feminist

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<sup>102</sup> See sources cited *supra* note 2.

<sup>103</sup> Abrams, *supra* note 2.

<sup>104</sup> See, e.g., *Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980).

<sup>105</sup> The literature on intersectionality is far too various and voluminous to do it justice here. For a small sampling of recent theoretical and interdisciplinary work on intersectionality, see Symposium, *Intersectionality: Theorizing Power, Empowering Theory*, 38 SIGNS 785 (2013).

<sup>106</sup> The scholarly consensus seems to be that *Lam v. University of Hawaii*, a 1994 Ninth Circuit case, was the "high water mark" for intersectionality doctrine. Kotkin, *supra* note 6, at 1475 (discussing *Lam v. Univ. of Haw.*, 40 F.3d 1551 (9th Cir. 1994)). MacKinnon also praises *Jefferies v. Thompson*, a 2003 federal district court case recognizing that "sex and race can 'fuse inextricably' so that 'made flesh in a person, they indivisibly intermingle.'" Catharine A. MacKinnon, *Intersectionality as Method: A Note*, 38 SIGNS 1019, 1020 (quoting *Jefferies v. Thompson*, 264 F. Supp. 2d 314, 326 (D. Md. 2003)).

<sup>107</sup> See *supra* note 6 and accompanying text.

<sup>108</sup> See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2557 (2011) (rejecting female plaintiffs' argument for class certification on commonality grounds).

<sup>109</sup> See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (holding that before an employer can take a race-conscious action to avoid disparate impact, the employer must have a "strong basis in evidence" to believe it will be subject to disparate-impact liability if it fails to do so); *id.* at 594 (Scalia, J., concurring) (questioning the constitutionality of Title VII's disparate impact provision).

organizations. Latinas, Asian-American women, LGBTQ individuals, and others have joined African American women at the forefront of intersectional advocacy as well as theory.<sup>110</sup> And, of course, litigation success is but one measure of political and legal efficacy. Legislative lobbying, public education campaigns, workplace initiatives, and other forms of advocacy increasingly feature spokespersons and causes that reflect the insights of intersectionality.

#### CONCLUSION

In contrast to the relative silence about intersectionality in employment discrimination jurisprudence, intersectionality played a central role in the early development of Title VII and in the later emergence of critical legal scholarship on anti-discrimination law. Pauli Murray's own complex identity and insider/outsider status led her—and other black feminist leaders such as Eleanor Holmes Norton and Aileen Hernandez—to believe that a civil rights-feminist coalition was crucial to African American women's advancement. Their pioneering advocacy helped Title VII become the glue that held this crucial alliance together in the 1970s. The intersectional experiences of women of color also contributed mightily to important expansions of Title VII's coverage. For instance, early cases challenging employment bans on unmarried mothers often featured women of color claiming race and sex discrimination, and African American women played an integral role in the early litigation and enforcement of sexual harassment law. Intersectionality's triumph was double-edged, however, as race and other complex identities often faded from legal advocacy in favor of "pure" sex discrimination and racially non-specific women as standard-bearers.

The marginalization of intersectional claims by social movements and legal decision-makers helped to inspire scholarly breakthroughs in the 1980s, 1990s, and beyond. Much as the feminist reaction to the Moynihan Report proved productive in crystallizing a powerful critique of the male-breadwinner/female-homemaker model as a prerequisite for racial progress, the critical race feminist response to courts' skepticism about intersectional claims catalyzed an influential and field-changing scholarly movement that resonated far beyond the realm of employment discrimination law or even legal doctrine itself. But a half-century after Pauli Murray promoted an intersectional Title VII, the law has yet to reciprocate.

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<sup>110</sup> For a contemporaneous assessment of the politics of coalition, see, for example, Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183 (1991). For a study of intersectional advocacy in one feminist legal organization, see Judy Scales-Trent, *Equal Rights Advocates: Addressing the Legal Issues of Women of Color*, 13 BERKELEY WOMEN'S L.J. 34 (1998). Intersectionality and related concepts have also influenced European law and scholarship. For a critical perspective on recent developments in EU law, see Jess Bullock & Annick Masselot, *Multiple Discrimination and Intersectional Disadvantages: Challenges and Opportunities in the European Union Legal Framework*, 19 COLUM. J. EUR. L. 57 (2012-13).