CLUSTERED BIAS*

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Agencies, advocates, and courts regularly and repeatedly fail plaintiffs who have experienced intersectional discrimination based on more than one personal identity trait. Nearly thirty years after intersectionality theory was first introduced to legal scholarship, however, its insights have yet to be effectively integrated into antidiscrimination advocacy and doctrine. This Article borrows the contributions of intersectionality theory and explores its critiques to develop a novel "cluster framework" for bridging the divide between the theory and civil rights jurisprudence. Using race-sex discrimination as a lens, the proposed framework relocates intersectional discrimination wholly within a traditionally protected class, illuminating similarities and differences in discrimination across groups and subgroups. This Article concludes with three concrete proposals to implement the cluster framework such that the antidiscrimination doctrine will better recognize and remedy intersectional discrimination.

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INTRODUCTION

In 2009, Tametra Moore sued Cricket Communications, Inc. for sexual harassment, racial harassment, and retaliation in violation of Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment.[1] Tametra is an African American[2] woman.[3] She worked in sales at retail Cricket stores in Tennessee and Texas.[4] In 2008, two years into her employment with Cricket, Tametra was subjected to sexual and racial harassment at the hands

1. Plaintiff's Original Complaint at 7–11, Moore v. Cricket Commc'ns, Inc., No. 4:09-cv-03310 (S.D. Tex. Oct. 13, 2009), ECF No. 1 [hereinafter Moore Compl.]. The assertions related to Tametra Moore set forth in this Introduction and throughout this Article are drawn from publicly-available documents in the federal lawsuit and include Ms. Moore's allegations as stated in her complaint and her deposition. Except where specifically noted, the information asserted herein was not decided as a matter of fact or law by a court. Tametra Moore's case, however, illuminates the failures of advocacy, agencies, and antidiscrimination law to consider and remedy intersectional discrimination regardless of whether each individual allegation was, or could have been, proven.

2. For reasons I set forth in an earlier work, and keeping with the trend of omitting hyphens when using terms that combine ethnicities or nationalities, I employ the term "African American" without a hyphen. I also choose to capitalize the terms "Black" and "White" unless they appear in a quotation. *See* Kate Sablosky Elengold, *Branding Identity*, 93 DENV. L. REV. 1, 6 n.19 (2015).

3. Moore Compl., *supra* note 1, at 2.

4. Plaintiff's Response to Defendant's Motion for Summary Judgment, Exhibit B at 17:11-18:13, Moore v. Cricket Commc'ns, Inc., No. 4:09-cv-03310 (S.D. Tex. Dec. 17, 2010), ECF No. 25-2 [hereinafter Moore Dep.].

of her store manager, Travis.[5] Travis repeatedly made sexually explicit comments to Tametra in the workplace, discussing his sexual prowess and his penis, and stating that he "likes to eat from the ass to the pussy."[6] Travis's sexual vulgarity was connected, in large part, to race. Travis asked Tametra if she had "ever been with a white man" and told her: "It's a myth that white man's have little dicks, because my dick is huge."[7] Travis spoke of Black women in sexual and derogatory ways, asserting "the blacker the berry, the sweeter the juice" and "Black women got better pussy than white women."[8] Travis showed Tametra and her colleague, Dwan (also a Black woman[9]), a naked photograph of himself and invited them to send him naked pictures of themselves.[10] Tametra found Travis's language and behavior to be vulgar[11] and filed a complaint with his superiors.[12] In spite of a Cricket supervisor's stated belief that Travis would not have made those comments to White women,[13] Cricket Communications failed to take Tametra's claims seriously.[14] Tametra hired a lawyer, filed a charge with the Equal Employment Opportunity Commission ("EEOC"), received a right-to-sue letter, and filed suit against Cricket Communications in federal district court.[15] She asserted three claims: sexual harassment, racial harassment, and retaliation.[16] After a significant period of discovery and motion practice, Tametra endured a four-day trial.[17] Having received jury instructions and a jury questionnaire explicitly and unambiguously separating Tametra's sexual harassment and racial

5. Moore Compl., *supra* note 1, at 1–3.

6. Moore Dep., *supra* note 4, at 155:18–156:25.

7. *Id.* at 158:2–9.

8. *Id.* at 248:6–25.

9. *Id.* at 74:14–17.

10. Plaintiff's Response to Defendant's Motion for Summary Judgment Exhibit A at 10–11, Moore v. Cricket Commc'ns, Inc., No. 4:09-cv-03310 (S.D. Tex. Dec. 17, 2010), ECF No. 25-1 [hereinafter Moore EEOC Intake Questionnaire]; Moore Compl., *supra* note 1, at 3.

11. Moore Dep., *supra* note 4, at 157:9–11.

12. Moore Compl., *supra* note 1, at 4.

13. Plaintiff's Response to Defendant's Motion for Summary Judgment, Exhibit C at 25:17–23, Moore v. Cricket Commc'ns, Inc., No. 4:09-cv-03310 (S.D. Tex. Dec. 17, 2010), ECF No. 25-3; Moore Compl., *supra* note 1, at 4.

14. Moore Compl., *supra* note 1, at 4–6.

15. *Id.* at 2.

16. *Id.* at 7–11.

17. *See* Transcript of Trial Day 4 of 4 at 1, Moore v. Cricket Commn'cs, Inc., No. 4:09-cv-03310 (S.D. Tex. Apr. 7, 2011), ECF No. 67.

harassment claims,[18] the jury found for the defendant, Cricket Communications, Inc., on all claims.[19]

Tametra's story is not atypical. Approximately one in five Black women report sex discrimination (including sexual harassment) in the workplace.[20] Black women also report racialized sexual harassment in housing, where their experiences of sexual harassment are infused with racial animus.[21] Those stories of intersectional discrimination—discrimination based on more than one identity trait—are replicated, with different identity characteristics and in different venues—employment, education, and public accommodations—around the country. And yet, Tametra is not alone in her failure to find remedy under the current antidiscrimination laws. Tametra, like other women of color, was failed by courts, by advocates, and by the federal agency tasked with implementing the relevant antidiscrimination statute. Each of those entities approached Tametra's injury, and thus her identity, in separate silos, assessing her claim of race discrimination as isolated from her claim of sex discrimination in the form of sexual harassment. In doing so, each relevant, institutional player ignored the ways in which intersectional discrimination, like that experienced by Tametra, operates in the real world.

Scholars, including critical race scholars, predicted and detailed the failures of courts, advocates, and agencies to fully implement antidiscrimination law for plaintiffs who have identities that cross protected classes. Intersectionality theory, introduced to legal

18. Jury Instructions at 4–6, Moore v. Cricket Commn'cs, Inc., No. 4:09-cv-03310 (S.D. Tex. Apr. 7, 2011), ECF No. 59 [hereinafter Moore Jury Instructions]; Jury Questions at 1–2, Moore v. Cricket Commn'cs, Inc., No. 4:09-cv-03310 (S.D. Tex. Apr. 7, 2011), ECF No. 63 [hereinafter Moore Jury Questions].

19. Moore Jury Questions, *supra* note 19, at 1–3.

20. PEW RESEARCH CTR., ON PAY GAP, MILLENNIAL WOMEN NEAR PARITY - FOR NOW: DESPITE GAINS, MANY SEE ROADBLOCKS AHEAD, 50 (2013), http://www.pewsocialtrends.org/files/2013/12/gender-and-work_final.pdf [https://perma.cc/7E9R-WD54]. Roughly the same percentage of White women report sex discrimination in employment. *Id.* Sexual harassment is a subset of sex discrimination. *See* Joshua F. Thorpe, Note, *Gender-Based Harassment and the Hostile Work Environment*, 1990 DUKE L.J. 1361, 1362 (stating that gender discrimination laws protect employees from employers who "demand[] sexual favors as a condition of employment . . . .").

21. *See* Griff Tester, *An Intersectional Analysis of Sexual Harassment in Housing*, 22 GENDER & SOC'Y 349, 353, 355 (2008) (finding that African American women accounted for fifty-eight percent of the verified claims of sexual harassment filed with the Ohio Civil Rights Commission alleging violations of fair housing laws between 1990 and 2003); *see also* Kate Sablosky Elengold, *Structural Subjugation: Theorizing Racialized Sexual Harassment in Housing*, 27 YALE J.L. & FEMINISM 227, 237–42 (2016) (cataloguing affidavit, deposition, and trial testimony of women experiencing racialized sexual harassment in sex-based discrimination claims brought by the Attorney General of the United States under the federal Fair Housing Act).

academics by Kimberlé Crenshaw in 1989, seeks to explain and analyze the experience of individuals with more than one traditionally subordinated personal identity trait: "intersectionality."[22] As applied to Tametra's case, the discrimination she experienced was intersectional in that it related both to her race (Black-ness)[23] and her sex (female-ness). In that way, Tametra's experience of intersectional discrimination is different from single-axis discrimination based only on one protected category. Crenshaw explains that a Black woman's experience of bias and discrimination is different from a Black man's experience *and* different from a White woman's experience.[24] Nor is a Black woman's experience of discrimination an additive experience; it is not race discrimination like that experienced by a Black man *plus* sex discrimination like that experienced by a White woman.[25]

Some scholars have also challenged the wisdom of relying on rights-based antidiscrimination law for equality advancement, arguing that such laws were neither drafted nor developed to accommodate complex plaintiffs and criticizing the laws for ignoring the actual

22. Kimberle 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, 140.

23. It is worth noting that Tametra could also have proceeded on a colorism complaint or on an allegation that the discrimination was based on color. *See* 42 U.S.C. § 2000e (2012). The relationship between race and color protections in antidiscrimination law is complicated, murky, and outside the scope of this Article. For further reading on the topic, see, Taunya Lovell Banks, *Colorism*: *A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1743 (2000); Elengold, *supra* note 2, at 23–26; Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. REV. L. & SOC. CHANGE 657, 677 (2010).

24. Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1467–68 (1992) ("African-American women by virtue of our race and gender are situated within at least two systems of subordination: racism and sexism. This dual vulnerability does not simply mean that our burdens are doubled but instead, that the dynamics of racism and sexism intersect in our lives to create experiences that are sometimes unique to us.").

25. *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991); Crenshaw, *supra* note 22, at 140. Intersectionality theory is complemented by the work of anti-essentialist scholars, who push back against the notion that there is a single shared experience for any group or subgroup of individuals. Some anti-essentialism scholars have critiqued feminist and anti-racist movements for failing to account for the particular and unique experiences of women of color; *see also* Kathryn Abrams, *The Constitution of Women*, 48 ALA. L. REV. 861, 866–67 (1997); Martha Albertson Fineman, *Feminism, Masculinities, and Multiple Identities*, 13 NEV. L.J. 619, 620 (2013) (citing ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT, at ix (1988)); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 184 (2001); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

needs of subordinated groups in favor of isolated legal rights.[26] These scholars have done important work to raise our collective consciousness about the experiences of women of color and others with intersectional identities facing bias and discrimination.

Intersectionality theory has not, however, been immune from critique. Scholars inside and outside of the legal academy have complained that intersectionality theory is both under inclusive and over inclusive.[27] Intersectionality theory has been critiqued as under inclusive, or reductionist, because it focuses on the unique and incomparable situation of certain intersectional identities to the exclusion of others. Intersectionality theory has also been deemed over inclusive because each individual is comprised of an infinite number of identity traits, crossing an infinite number of axes. Thus, critics contend, there are no logical boundaries or study groups. Both the under inclusive and over inclusive critiques are barriers to the theory's application to antidiscrimination law and doctrine. As such, they represent certain limitations of intersectionality theory to permit or encourage understanding and analogizing discrimination across groups and subgroups. They also predict, at least in part, courts' general rejection of intersectional discrimination in civil rights actions.

This Article proposes a bridge between intersectionality theory and civil rights jurisprudence. Borrowing the insights of intersectionality and post-intersectionality theories, which have continued to evolve Crenshaw's original theory and account for some of its critiques,[28] this Article develops a novel framework to present, analyze, and remedy intersectional discrimination within the current civil rights doctrine. Using race-sex discrimination as the lens, this Article proposes relocating that form of intersectional discrimination

26. *See, e.g.*, Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53, 95–96 (1999) (critiquing the rights-based civil rights model because of its suggestion that it was developed through the lens of a White experience and fails to achieve critical needs for subordinated groups, including social and economic justice); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363–64 (1984) (critiquing rights-based theory for impeding progressive advances). *But see* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356–58 (1988) (acknowledging that the civil rights statutes have both been transformative and risk re-legitimizing institutional structures that have historically subordinated Blacks); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 402–05 (1987) (critiquing Critical Legal Studies scholarship's rejection of rights-based civil rights).

27. *See infra* notes 94–105 and accompanying text.

28. *See infra* notes 106–17 and accompanying text.

wholly within sex discrimination.[29] Relocating the analysis will not only preclude the institutional players—the agencies, advocates, and courts—from separating and siloing strands of victims' identities, but will also allow scholars and advocates to see connections between different subgroup discrimination and overcome the barriers for intersectional plaintiffs asserting civil rights violations.

Part I of this Article sets out the problem—the insights of intersectionality theory have failed to take root in civil rights advocacy and jurisprudence. Part I exposes failures in three specific arenas: antidiscrimination jurisprudence, advocacy, and agencies. Part II details the primary limits of intersectionality theory in application to antidiscrimination law. It draws the connection between those limits and the failures of antidiscrimination doctrine to adequately account for intersectional plaintiffs and intersectional discrimination. Part III applies the insights derived from intersectionality and post-intersectionality theories to propose a novel framework for seeking to remedy intersectional discrimination through antidiscrimination law. Part III proposes (1) reimagining intersectional discrimination through an image of coterminous, rather than overlapping, circles of protected class identity; (2) relocating intersectional discrimination within those coterminous circles and thus, squarely within the definition of any one of the relevant categories of prohibited discrimination; (3) explicitly defining discrimination to include the categorizing, stereotyping, and subjugation of certain subgroups of protected classes, thus accounting for the relationship between individual discrimination and structural inequities;[30] and (4) recognizing the full range of harms that flow from complex discrimination—to the individual, her community, her subgroup and her group. Part III uses race-sex discrimination as the lens to further flesh out the components of the cluster framework. Part IV concludes with recommendations for implementing the cluster framework in the context of the antidiscrimination doctrine. Returning to Tametra's story, Part IV offers three concrete proposals for implementation of the cluster framework in the same arenas that have failed intersectional plaintiffs—advocacy, agencies, and courts. Although

29. For the sake of clarity, this Article frames intersectional discrimination through the lens of discrimination against women of color, specifically Black women. The insights in this Article, however, can easily be applied to intersectional identity outside of race-sex intersectionality.

30. This Article defines "structural inequities" as inequities based not on individual actions or biases, but inequities that arise from the social, cultural, and legal systems that were built on and perpetuate unfair, discriminatory, or disproportionate results for certain subgroups. For a more complete analysis, see *infra* Section III.B.

the proposals do not perfectly mirror the failures identified in Part I, they aim to make inroads toward fixing them.

The idea that "women's rights are human rights"[31] has taken hold nationally and internationally; it is only natural that women of color's rights are clearly identified as both women's rights and human rights. Utilizing the cluster framework, we can reimagine the way that current civil rights protections can be laboring oars in the fight for racial and gender equality. And by implementing a new framework for presenting, analyzing, and remedying intersectional discrimination in civil rights cases, one can identify and utilize analogies between and across subgroup discrimination.

I. THE FAILURES OF ANTIDISCRIMINATION LAW TO ADDRESS INTERSECTIONAL BIAS

The failure of antidiscrimination law to adequately address or remedy intersectional discrimination is well explored in the academic literature. Scholars have shown, in both quantitative and qualitative terms, that the current civil rights jurisprudence does not adequately account for intersectional plaintiffs or intersectional discrimination. In 1994, for example, Kathryn Abrams detailed courts' rejection of and hesitancy about intersectional claims asserted in civil rights actions.[32] Tracing Title VII case law, Abrams explored the failure of the jurisprudence to recognize and remedy complex bias in sex discrimination claims, including claims of sexual harassment.[33] Neither the passage of time nor the further development of intersectionality theory and its progeny[34] have changed the results in the courtroom.[35] Empirical work provides additional support for the

31. Hillary Rodham Clinton, First Lady of U.S., Remarks to the U.N. 4th World Conference on Women Plenary Session (Sept. 5, 1995) (transcript available at http://www.un.org/esa/gopher-data/conf/fwcw/conf/gov/950905175653.txt [https://perma.cc/WX6P-AF9W]).

32. Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2494–2517 (1994).

33. *Id.* at 2498. Abrams uses the term "complex claimant" to include "persons claiming intersectional forms of discrimination, or manifesting identities that are ambivalent in relation to the existing statutory categories . . . ." *Id.* at 2481.

34. *See infra* Part II.

35. Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713, 730 (2015) ("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. . . . There is no robust canon of intersectionality case law." (footnote omitted)).

disconnect between intersectionality theory and civil rights doctrine.[36] A 2011 interdisciplinary study of employment discrimination actions, for example, concluded that the existence of demographic and/or claim intersectionality "dramatically reduce[s the] odds of plaintiff victory."[37] In other words, plaintiffs exhibiting identification with more than one traditionally subordinated group ("demographic intersectionality,"[38] also known as a "complex claimant"[39] or an "intersectional"[40]) and/or plaintiffs who allege discrimination on the basis of overlapping ascriptive characteristics ("claim intersectionality"[41] or "intersectional discrimination"[42]) are less successful in employment discrimination actions.[43]

That failure can be ascribed, in part, to courts, advocates, and agencies, all of whom have neglected intersectional plaintiffs by failing to recognize, advocate for, and remedy intersectional discrimination. This Part details the primary failures of each of those institutions with respect to understanding and remedying intersectional discrimination. It highlights how courts have allowed the structure of antidiscrimination law to limit remedies for intersectional discrimination, how advocates have reinforced the separation of protected classes with a continued use of stock stories, and how agencies' reliance on standard forms limits allegations and prosecution of complex discrimination. The failures of each institution are inseparable as to cause and effect; like the chicken and egg, the failures in one reinforce and perpetuate the failures in the others.

A. Courts: The Failure of the Siloed Claims

Why is it that courts are unwilling to address or remedy complex discrimination? The answer, much like discrimination itself, is

36. *See* Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991, 994–97 (2011); Emma Reece Denny, *Mo' Claims Mo' Problems: How Courts Ignore Multiple Claimants in Employment Discrimination Litigation*, 30 LAW & INEQ. 339, 340 (2012); Mayeri, *supra* note 35 at 714.

37. Best et al., *supra* note 36, at 1013.

38. *Id.* at 991.

39. Abrams, *supra* note 32, at 2503.

40. Gowri Ramachandran, *Intersectionality As "Catch 22": Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 301 (2006) (defining "intersectionals" as "persons who are members of more than one 'low-status' category, such as women of color, queer persons of color, or indigent women").

41. Best et al., *supra* note 36, at 991.

42. Abrams, *supra* note 32, at 2494.

43. Best et al., *supra* note 36, at 991.

complicated. The most obvious roadblock to remedying intersectional discrimination is the way that Congress designed and wrote the antidiscrimination statutes. Antidiscrimination law is designed around the protection of certain "protected classes."[44] To make out a cognizable disparate treatment claim under an antidiscrimination statute, a plaintiff must identify her protected class (e.g., race) and sub-class (e.g., African American), upon which she believes her adverse treatment was based.[45] Because of the statutory design, for much of civil rights analysis, courts look to similarly-situated individuals as a kind of control group to evaluate whether the plaintiff's adverse treatment can be tagged to her protected class status.[46] The structure of the protected class categorization fails intersectional plaintiffs because it sets up false and defeating control groups, creates an unnecessary "but for" test for civil rights plaintiffs, and is vulnerable to a slippery slope critique.

A plaintiff alleging that she was not hired in violation of Title VII, for example, must prove her case under either the *McDonnell Douglas* test[47] or *Price Waterhouse* analysis.[48] To make a *prima facie* case under *McDonnell Douglas*, the plaintiff must establish that (1) she is a member of a protected class, (2) she applied for and was qualified for the job, (3) she was not hired for the job, and (4) the job either remained open or was filled with someone from outside her protected sub-class.[49] Once she makes her *prima facie* case, the burden shifts to the defendant to prove a non-discriminatory reason for the adverse treatment.[50] Then, the burden shifts back to the plaintiff to establish that the defendant's non-discriminatory reason is

44. *See, e.g.*, 42 U.S.C. § 2000e-2 (2012) (prohibiting discrimination in the workplace on the basis of race, color, religion, sex, and national origin); *id.* § 3604 (prohibiting discrimination in housing on the basis of race, color, religion, sex, familial status, disability, and national origin).

45. *See* Elengold, *supra* note 2, at 4. Although civil rights plaintiffs may also seek to remedy disparate impact discrimination, this paper focuses on disparate, or differential, treatment claims.

46. *See, e.g.*, Reinhart v. Lincoln Cty., 482 F.3d 1225, 1229 (10th Cir. 2007) (citing Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995)) (recognizing that a disparate treatment claim under the Fair Housing Act "requires proof of 'differential treatment of similarly situated persons or groups'"); Graham v. Long Island R.R., 230 F.3d 34, 39 (2d Cir. 2000) (cataloguing cases where courts have analyzed Title VII claims of discrimination by assessing whether the employer treated the plaintiff "less favorably than a similarly situated employee outside his protected group").

47. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

48. Price Waterhouse v. Hopkins, 490 U.S. 228, 244–45 (1989).

49. 411 U.S. at 802.

50. *Id.*

pretext for discrimination.[51] The *Price Waterhouse* analysis, as amended for employment actions by the Civil Rights Act of 1991, permits an employee to demonstrate intentional discrimination where her protected class status was a "motivating factor" in the adverse employment action, even if other factors also came in to play.[52]

Both the *McDonnell Douglas* test and the *Price Waterhouse* analysis fail intersectional plaintiffs because they silo the protected classes, rely on false control group(s), and set up a false "but for" analysis. Courts too often cabin claims by protected class. If, for example, a plaintiff alleges discrimination based on her status as a Black woman, in most cases, the factfinder would be asked to consider evidence of race-based discrimination separate and apart from sex-based discrimination. Tametra's case is a clear example. Although her complaint alleged race-sex intersectional discrimination (i.e., "[t]he working environment at Cricket was replete with sexually-charged statements and jokes, racially offensive terms, and insensitivity toward Plaintiff as an African-American woman"),[53] Tametra pled "Sexual Discrimination under Title VII of the Civil Rights Act of 1964" separately from "Racial Discrimination under Title VII of the Civil Rights Act of 1964."[54] The jury instructions similarly charged the factfinders to separately assess her race discrimination and sex discrimination claims.[55] And the jury interrogatories clearly established the separate analysis. The jury interrogatories asked first whether the plaintiff was sexually harassed.[56] The jury answered no.[57] Then the jury interrogatories asked whether the plaintiff was discriminated against because of her race.[58] Once again, the jury answered no.[59] Nowhere was the jury even *permitted* to consider whether Tametra was discriminated against

51. *Id.* at 804.

52. *Price Waterhouse*, 490 U.S. at 244–45 (1989) (developing a "mixed-motive" test for employment discrimination under Title VII and holding that once a plaintiff "shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role" (footnote omitted)); *see also* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1071 (codified at 42 U.S.C. § 1981(a) (2012)).

53. Moore Compl., *supra* note 1, at 3.

54. *Id.* at 7–9.

55. Moore Jury Instructions, *supra* note 18, at 4, 6.

56. Moore Jury Questions, *supra* note 18, at 1.

57. *Id.*

58. *Id.* at 2.

59. *Id.*

because she was a Black woman.[60] That separation is replicated throughout civil rights jurisprudence.[61]

In addition to cabining the evidence, the use of protected classes to govern analysis of alleged discrimination sets up false comparison control groups ("comparators") to establish that the plaintiff's protected class identity or identities was the basis for the adverse employment or housing decision. Other scholars have described this phenomenon by identifying and challenging that White men have become the comparator group for analyzing discrimination of a Black woman.[62] This Article views it through a related, but different lens of siloed claims and cabined evidence. If a Black woman alleges race-sex discrimination, then an employer preferencing a White woman can stymie her sex discrimination claim *or* an employer preferencing a Black man can stymie her race discrimination claim. In other words, an employer can argue that he does not discriminate against women by pointing to the White woman who did not experience adverse treatment. He can similarly defeat the plaintiff's race claim by pointing to the Black man who advanced in the company. While other theorists have focused on white-ness and male-ness as neutral comparators—a critical point in understanding the failures of the antidiscrimination doctrine—this Article's analysis identifies the fundamental methodological flaw in using *McDonnell Douglas* to analyze antidiscrimination claims because it explicitly recognizes that the siloing of the protected classes limits the chances of an intersectional plaintiff's success on two separate axes.

60. *See* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 710–14 (2001) (detailing the failures of antidiscrimination statutes for intersectional plaintiffs through the use of a complex hypothetical of a Black female plaintiff).

61. *See, e.g.*, Daniels v. Brooklyn Estates & Props. Realty, 413 F. App'x 399, 402 (2d Cir. 2011) (alleging race and disability discrimination); Hall v. Meadowood Ltd. P'ship, 7 F. App'x 687, 689 (9th Cir. 2001) (alleging disability discrimination and sexual harassment); Thomas v. Pocono Mtn. Sch. Dist., No. 3:10-CV-1946, 2011 WL 2471532, at *7 (M.D. Pa. June 21, 2011) (alleging race and age discrimination and retaliation); Harmon v. Mattson, Nos. C8-99-132, Co-99-755, 1999 WL 1057236, at *3–4 (Minn. Ct. App. Nov. 23, 1999) (alleging race discrimination and sexual harassment).

62. *See* Denny, *supra* note 36, at 366 ("Most courts require that a comparator be someone who shares none of the protected characteristics of the plaintiff, so that a Black, female plaintiff would have to use a non-Black, male comparator to prove pretext."); *see also* Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1491–92 (2009) (suggesting that claims by Black females have been defeated by application of a White male comparator); Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 934–35 (2014) (lamenting that there "was no one who could serve as a comparator" for a gender-nonconforming lesbian woman).

The separation also sets up a false "but for" analysis. Although claims under Title VII should be excluded from a "but for" analysis because courts have permitted "mixed motive" or "motivating factor" claims under *Price Waterhouse*,[63] factfinders may question the plaintiff's credibility if she asserts multiple rationales for the employer's adverse action. In fact, there is reason to believe that factfinders harshly judge the credibility of one asserting multiple claims of discrimination because it is seen as throwing everything against the wall to see what sticks.[64] This distrust of intersectional claims is connected to the courts' concern about an amorphous slippery slope in intersectional discrimination claims that threatens to overtake the civil rights protections.[65]

Although not the same kind of structural barrier as those addressed above, it is also important to recognize the differential doctrinal treatment for racial harassment and sexual harassment claims. A plaintiff alleging sexual harassment has two potential claim theories; a plaintiff alleging racial harassment has only one. In a sexual harassment claim, a plaintiff may proceed under either or both of two theories: *quid pro quo* or hostile environment.[66] *Quid pro quo* generally requires a showing that the perpetrator conditioned a benefit or limitation (e.g., housing or employment) on a sexual encounter.[67] To prove a hostile environment claim, the plaintiff must establish that the conduct was sufficiently severe or pervasive to "alter the conditions of [the victim's employment or housing] and create an abusive . . . environment."[68] Although racial harassment is a

63. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 228 (1989) (finding that a "mixed motive" Title VII claim is cognizable). *But see* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–77 (2009) (holding that age must be the "but for" cause of discrimination under the Age Discrimination in Employment Act). *Gross* has not (yet) been extended to the Fair Housing Act. *See, e.g.*, Mhany Mgmt., Inc. v. City of Nassau, 819 F.3d 581, 616 (2d Cir. 2016).

64. Michael Bologna, *Judges Warn Employment Lawyers Against Motions for Dismissal, Summary Judgment*, *Empl. Discrimination Rep.*, BLOOMBERG BNA (Dec. 4, 2002), http://www.bloomberglaw.com/document/XBN07BG5GVG0 [https://perma.cc/E4QX-9RV9] (quoting United States District Court Judge Ruben Castillo of the Northern District of Illinois' describing plaintiffs' lawyers as "throwing a plate of spaghetti at the wall to see what sticks").

65. *See* discussion *infra* text accompanying note 103.

66. *See* Shellhammer v. Lewallen, 1 Fair Hous.-Fair Lending (P-H) ¶15,472, 135, 136 (W.D. Ohio 1983), *aff'd*, 770 F.2d 167, 1985 WL 13505 (6th Cir. 1985) (per curiam) (unpublished table decision).

67. *See, e.g.*, Honce v. Vigil, 1 F.3d 1085, 1089 (10th Cir. 1993).

68. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986); *see also Honce*, 1 F.3d at 1090 (applying the "severe or pervasive" standard to the Fair Housing Act).

cognizable claim under traditional civil rights laws,[69] a racial harassment plaintiff can proceed only under one claim—hostile environment. A *quid pro quo* claim does not translate from sexual harassment to racial harassment. A plaintiff alleging racial harassment could not, for example, make out a case that the landlord charged her less rent because she agreed to put up with racist rants on a regular basis.[70] Further, the "severe or pervasive" standard is a difficult standard to achieve and many racial harassment claims have been dismissed for failing to meet the strict standard, making it even more difficult to make out a racial harassment claim.[71] As a normative matter, this differential doctrinal treatment suggests that situating a race-sex discrimination claim in sex discrimination opens more avenues to success than situating the same claim in race discrimination.

B. Advocacy: The Failure of the Stock Story

In part because of the doctrinal concerns detailed above, civil rights advocates have regularly relied on stock stories to explain discrimination in a simplistic, easy-to-understand manner.[72] Stock stories are narratives that advocates use to tell their clients' stories, often in a courtroom. Stock stories invoke standard tropes, themes, and characters that are familiar to the listener and that "resonate with

69. *See, e.g.*, Woodland v. Joseph T. Ryerson & Son, Inc., 302 F.3d 839, 844 (8th Cir. 2002).

70. One could (and probably should) challenge the law's development of such different paths to success for sexual harassment and racial harassment. That, however, is beyond the scope of this Article.

71. Several courts have found racially offensive conduct to not be sufficiently severe or pervasive under Title VII. *See, e.g.*, *Woodland*, 302 F.3d at 844; Jones v. Dallas Cty., 47 F. Supp. 3d 469, 484–85 (N.D. Tex. 2014); Romeo v. APS Healthcare Bethesda, Inc., 876 F. Supp. 2d 577, 594 (D. Md. 2012). The severe or pervasive standard is also difficult under a sexual harassment theory. *See, e.g.*, Saxton v. Am. Tel. & Tel. Co., 10 F.3d 526, 534–35 (7th Cir. 1993) (affirming lower court's grant of summary judgment to employer defendant and affirming that inappropriate behavior toward a subordinate employee was insufficient to rise to the level of severe and pervasive sexual harassment); Weiss v. Coca-Cola Bottling Co. of Chi., 990 F.2d 333, 337 (7th Cir. 1993) (affirming lower court's ruling that plaintiff's allegations that her supervisor asked for dates, called her a "dumb blonde," placed "I love you" signs in her locker, placed his hand on her shoulder, and attempted to kiss her were isolated incidents that did not rise to the level of an actionable claim for hostile environment).

72. Advocates include those lawyers who represent civil rights plaintiffs and those activists (lawyers and others) who support civil rights protections through programming and policy work. This Article focuses primarily on lawyers representing victims of civil rights violations, primarily through litigation.

the values, beliefs and assumptions" of the audience.[73] By relying on familiar themes and characters, stock stories ring true with factfinders because they seem consistent with how the factfinder understands the world to work and thus appear credible.[74] Sometimes, stock stories draw on bias or cultural stereotypes to boil a legal claim down to the simplest and most universally palatable story.[75] Scholars, however, have detailed how stock stories are insufficient to remedy certain harms, especially those harms that are seemingly too complex.[76]

Antidiscrimination advocacy and doctrine have long been influenced by stock stories.[77] While there may be legitimate, strategic reasons to utilize a stock story, including ethical obligations to achieve the client's goals,[78] scholars have explored the dangers of stock stories in venues like housing discrimination and employment discrimination. For example, the "dirty old man" stock story utilized in sexual harassment in housing cases is problematic because, by excluding race from the story and thus from the judicial analysis, the stock story perpetuates the very stereotypes and structural forces that have operated throughout American history to ignore and permit

73. *See* Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U. J. GENDER SOC. POL'Y & L. 117, 122 (2002) (pointing to stock characters like "the heroic firefighter, the Good Samaritan" and "pernicious stories" such as "the helpless woman victim, the crack whore, the lascivious fag").

74. *See* DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS 49 (2002).

75. *See infra* text accompanying notes 77–79.

76. *See, e.g.*, Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J. L. & FEMINISM 75, 76–77 (2008) (recognizing harms flowing from the stock story of a domestic violence victim); Adele M. Morrison, *Changing the Domestic Violence (Dis)course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1078 (2006) (critiquing the domestic violence stock story as one filtered through the White woman's lens and contending that adherence to that narrative silences women of color and ignores their abuse); *see also* Elengold, *supra* note 21, at 240–42 (critiquing the stock story of sexual harassment in housing as ignoring the effect of race on experiences of such harassment).

77. *See, e.g.*, Elengold, *supra* note 21, at 240–42; Gerald Torres, *Translation and Stories*, 115 HARV. L. REV. 1362, 1367–68 (2002) (recognizing the benefit and risks of stock stories and, using labor organizing as an example, recognizing when stock stories must be changed or challenged); 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, 416–24 (2009) (discussing the stock story of the insertion of sex into Title VII).

78. *See* MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2017) ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.").

continued sexual abuse of Black women in the home.[79] Dependence on stock stories can reinforce, rather than remedy, structural forces and inequities that perpetuate discrimination.

Reliance on a simple stock story is an advocacy choice that ignores intersectional discrimination and eliminates the opportunity for courts to remedy the complex harm. By relying on simplistic tropes or one-dimensional stock characters, advocates do not push factfinders to understand or even seek to remedy intersectional discrimination. In addition to the fact that stock stories are readily available and infused in our cultural consciousness, the way that civil rights statutes are built around rigid protected classes also reinforces the stock story choice. The doctrinal concerns reflected by the courts' unwillingness to explode the rigid silos of the protected classes is both a cause and effect of advocates' adherence to the simplistic stock story.

C. Agencies: The Failure of the Standard Form

Agencies have a significant amount of control and influence in both individual claims of discrimination and development of antidiscrimination doctrine. In Title VII actions, for example, a potential plaintiff in a federal lawsuit must first file a charge with the Equal Employment Opportunity Commission ("EEOC") before suing in federal court.[80] In housing discrimination cases, a potential plaintiff is not required to exhaust her administrative remedies, but the Fair Housing Act provides for inexpensive and relatively efficient adjudication through an administrative process at the Department of Housing and Urban Development ("HUD") and its state corollaries.[81] The problem is that the agencies rely on standard forms that were developed to track the antidiscrimination statutes; statutes that, as described above, provide protection based on rigidly defined protected classes.

79. The "dirty old man" narrative describes an "aberrant bad actor male landlord abusing his authority to take advantage sexually of women who, because of economic circumstances, have no alternatives." *See* Elengold, *supra* note 21, at 229; *see also* Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 552–54 (analyzing *Chambers v. Omaha Girls Club, Inc.* and concluding that use of the stock story of a well-meaning organization exhibiting "sympathy for poor black youngsters and desperation about stemming 'the epidemic' of teenage pregnancy that plagues them" actually "replicate[s] the very economic hardships and social biases that, according to the district court, made the role model rule necessary in the first place").

80. 42 U.S.C. § 2000e-5(f)(1) (2012).

81. *Id.* § 3610.

A plaintiff filing a complaint with the EEOC or HUD fills out a standard form that is designed to be easy for both the (usually *pro se*) complainant and the agency, which must sift through far too many complaints.[82] The forms have boxes to check and demographic data to set forth.[83] The EEOC Intake Questionnaire, for example, is a four-page form.[84] It asks for personal information that includes check boxes for race and sex.[85] It requests fill-in-the-blank style information on the alleged perpetrator of the discrimination, employment data, witnesses for the incidents, and prior charges filed.[86] It asks "[w]hat is the reason (basis) for your claim of employment discrimination" and provides ten check-boxes based on legally protected classes.[87] Neither the form nor the one-page instruction sheet provide any information or guidance on how to determine the basis for a complainant's treatment or the consequences of checking certain boxes and not others.[88] Further, the form provides a one-line fill-in-the-blank style question for the complainant to insert information about the discriminatory action, inviting the complainant to "attach additional pages if needed."[89] Once the complaint is received, agency employees determine what kind of claim to charge, a decision upon which federal courts heavily rely later in the life of the action.[90] In many cases, the choices the claimant makes on the form have a preclusive

82. U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY ANNUAL REPORT TO CONGRESS, FY2014–FY2015, at 10 (stating that HUD and its Fair Housing Assistance Program grantees investigated nearly 8,500 complaints in each of fiscal years 2014 and 2015, which are exclusive of those complaints investigated by state and regional fair housing entities); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, CHARGE STATISTICS, FY1997–FY2016, https://www1.eeoc.gov//eeoc/statistics/enforcement/charges.cfm?renderforprint=1 [https://perma.cc/SL8A-A3S7] (nearly 90,000 charges filed by individuals at the EEOC in fiscal year 2015).

83. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION INTAKE QUESTIONNAIRE, https://egov.eeoc.gov/eas/uniformintakequestionnaire09.pdf [https://perma.cc/2KGB-4LUG]; U.S. DEP'T OF HOUS. AND URBAN DEV., DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT HOUSING DISCRIMINATION COMPLAINT, https://portal.hud.gov/FHEO903/Form903/Form903Start.action [https://perma.cc/KM69-PZDX].

84. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 83.

85. *Id.*

86. *Id.*

87. *Id.* The form also notes, "If you feel you were treated worse for several reasons, such as your sex, religion[,] and national origin, you should check all that apply." *Id.*

88. *Id.* The instruction sheet does offer a website to "find out more information about the laws we enforce and our charge-filing procedures." *Id.* Nowhere on the website does it explain "mixed-motive" discrimination, provide information about multiple claims of discrimination, or the preclusive effect of the charge of discrimination. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov [https://perma.cc/LM87-WMCY].

89. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 83.

90. *See* 42 U.S.C. § 2000e-5(b) (2012).

effect; the boxes the complainant checks can be used by the defendant as a sword to dismiss alternative claims.[91] Because complainants are usually *pro se* at the administrative agency stage,[92] many do not have the legal sophistication to understand the effects of their choices. Nor does the form even suggest that there may be downstream consequences of checking certain boxes.[93] Not only does such a system fail individual complex complainants, but because courts rely so heavily on the formulaic assessment of discrimination, the agency process has a significant influence on the doctrine's development.

II. SCHOLARSHIP: LIMITS OF INTERSECTIONALITY THEORY AS APPLIED TO ANTIDISCRIMINATION DOCTRINE

Intersectionality is often given as an answer to the failures of antidiscrimination law to remedy discrimination for complex plaintiffs. In other words, if only advocates, agencies, and courts would understand intersectionality, antidiscrimination law might respond more adequately to intersectional plaintiffs. But nearly three decades after Crenshaw's path-breaking work, intersectionality theory has not gained a strong foothold in civil rights jurisprudence.[94] This Part focuses on two points of disconnect between intersectionality theory and antidiscrimination jurisprudence and practice that has limited intersectional plaintiffs' success in the courtroom.

91. *See, e.g.*, Miles v. Dell, Inc., 429 F.3d 480, 491–92 (4th Cir. 2005) (affirming dismissal of retaliation claim where the plaintiff "did not check the retaliation box on her charge form, and the narrative explaining her charge made no mention of retaliation"); Luna v. Lockheed Martin Corp., 54 F. App'x 404, 2002 WL 31687698, at *1 (5th Cir. Oct. 22, 2002) (per curiam) (unpublished table decision) (stating that because plaintiff "failed to mark the box indicating his intention to bring a claim of national origin discrimination. . . . [He] failed to exhaust his administrative remedies as to that claim"); Thomas v. Tex. Dep't. of Criminal Justice, 220 F.3d 389, 395 (5th Cir. 2000) (holding that plaintiff could not proceed with a race discrimination claim because her EEOC Charge of Discrimination was limited to sex discrimination); Cohens v. Md. Dep't of Human Res., 933 F. Supp. 2d 735, 743 (D. Md. 2013) (dismissing retaliation claim where the plaintiff "neither checked the 'retaliation' box on her EEOC charge nor alleged retaliation in the charge's factual summary"). Although courts should not apply a rigid exclusion of claims based solely on the check boxes, the forms have a preclusive effect in practice. *See infra* Section IV.C.

92. *See What You Can Expect After You File a Charge*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/employees/process.cfm [https://perma.cc/V27R-GMRJ] (explaining the process of investigation after filing a charge with the EEOC).

93. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 83.

94. *See supra* notes 32–43 and accompanying text.

The first barrier to implementing intersectionality theory in antidiscrimination law is the challenge that the theory is under inclusive, or reductionist. In other words, intersectionality theory simplifies an extremely complex idea (identity and bias associated with another's identity) to the point of distortion.[95] Devon W. Carbado and Mitu Gulati explore the simplicity and reductionism of the "metaphor of intersectionality" by analyzing its application to a traditional Venn diagram.[96] Traditional notions of intersectional identity, as shown on a Venn diagram, are represented by two overlapping circles, one representing a disenfranchised sex group (e.g., female or female-ness)[97] and the other representing a disenfranchised racial group (e.g., Black or Black-ness). The overlap between the circles represents the identity and experience of the intersectional individual (i.e., Black woman).

95. Peter Kwan, *Complicity and Complexity: Cosynthesis and Praxis*, 49 DEPAUL L. REV. 673, 687 (2000).

96. Carbado & Gulati, *supra* note 60, at 705–06. Others have similarly employed a Venn diagram to discuss intersectionality. *See* Arin N. Reeves, *Race as a Red Herring? The Logical Irrelevance of the Race vs. Class Debate*, 88 DENV. U. L. REV. 835, 838–40 (2011) (using the Venn diagram concept to discuss the intersection of race and class inequities); Enrique Schaerer, *Intragroup Discrimination in the Workplace: The Case for "Race Plus,"* 45 HARV. C.R.-C.L. L. REV. 57, 86 (2010) (using the Venn diagram to discuss a "race plus" approach to antidiscrimination law).

97. As anthropologists, sociologists, and legal scholars continue to recognize the complexity of sex, gender, and gender identity, the circle defined as "sex" must encompass more than just "female." *See* Franklin H. Romeo, *Beyond A Medical Model: Advocating for A New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 719–30 (2005) (assessing the biological and medical models of gender within the law and advocating for a model of gender self-determination in the law).

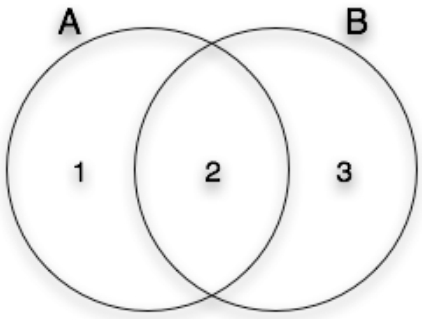

Figure 1: In the traditional intersectionality Venn diagram, circle A represents a subordinated gender group (e.g., female or female-ness) and circle B represents a subordinated racial group (e.g., Black or Black-ness). The overlap, represented by area 2, denotes the intersection.

Carbado and Gulati explicitly note that the Venn diagram is too simplistic and crude of a tool to capture the complexity of Crenshaw's theory of intersectionality,[98] but also recognize that the metaphor of intersectionality is deep-seated and resilient.[99] And intersectionality theory's primary association with women of color provides fuel for the critique of under-inclusivity.[100]

The second barrier to implementing the theory in practice is the challenge that intersectionality theory is over inclusive because it can be applied to an infinite number of identity intersections, with no logical boundaries.[101] Without natural boundaries, critics suggest that

98. *See* Carbado & Gulati, *supra* note 60, at 706 ("The diagram suggests that there are social moments in which race and gender exist apart from each other as 'pure' identities. Although the metaphor of intersectionality conveys this idea, the fully theory of intersectionality, and certainly Crenshaw's conceptualization of this theory, rejects it. Fundamental to intersectionality theory is the notion that race and gender are interconnected; they do not exist as disaggregated identities . . . .").

99. *See id.*

100. Darren Lenard Hutchinson, *New Complexity Theories: From Theoretical Innovation to Doctrinal Reform*, 71 UMKC L. REV. 431, 437 (2002) ("Intersectionality theorists typically have failed to make this positional shift, due to their singular focus on 'women of color' and their failure to theorize the universality of complex subordination.").

101. Kwan, *supra* note 95, at 687 ("[A]s identity categories multiply within any set of circumstances, the ability of intersectionality to provide theoretical insights is correspondingly compromised.").

intersectionality theory provides no defined group to study or protect. Empiricists, for example, assert that it is impossible to theorize about or study a group when each person in that group is "composed of a complex and unique matrix of identities that shift over time, is never fixed, is constantly unstable and forever distinguishable from that of everyone else in the universe."[102] Because of the seemingly infinite reach of intersectionality, courts have complained that introduction of intersectional discrimination into antidiscrimination law causes a slippery slope problem. One court, for example, complained that introduction of intersectional discrimination would create a "many-headed Hydra" that antidiscrimination laws cannot contain.[103]

The concerns of the under-inclusivity and over-inclusivity of intersectionality theory limit the theory's useful application to antidiscrimination doctrine.[104] They also operate to blind us from understanding how the experiences of one group can be analogous to the experiences of another group. The under-inclusive critique suggests that intersectionality theory posits that a single group (usually Black women) has some undefined unique experience that cannot be replicated or understood outside of that group. Similarly, the over-inclusive critique of intersectionality reveals the threat of infinite intersections overtaking the ability to categorize and thus, study and protect. Either one of those lenses then obscures the ability to see how one form of intersectional bias (i.e., discrimination against a Black female) is analogous to and different from other forms of complex bias.[105]

Scholars have recognized the disconnect between intersectionality theory and civil rights doctrine.[106] Further, scholars have pushed on the simple metaphor of intersectionality and

102. Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1277 (1997).

103. Judge v. Marsh, 649 F. Supp. 770, 780 (D.D.C. 1986).

104. I am not sure that intersectionality and post-intersectionality theorists would consider the inapplicability of the theory to antidiscrimination doctrine as a limitation of the theory itself because many believe that the antidiscrimination doctrine is fundamentally flawed and beyond redemption. That is a worthwhile conversation to have, but outside the scope of this Article. *See infra* note 117 and accompanying text. To the extent that one wishes to import the lessons of intersectionality theory to antidiscrimination doctrine, as this Article aims to do, it is necessary to address the critiques of under-inclusivity and over-inclusivity.

105. Kwan, *supra* note 95, at 687 ("[I]ntersectionality's reductionism does not allow us to forge ideological coalitions, political allegiances nor communities of support . . . .").

106. *See supra* notes 32–43 and accompanying text.

reframed the construct through different "post-intersectionality"[107] lenses—identity performance theory,[108] multiple consciousness,[109] and intercategorical comparisons,[110] for instance—and with different names—identity multiplicity,[111] cosynthesis,[112] interconnectivity,[113] and multidimensionality,[114] for example.[115] Scholars, in fact, have expanded the concept of intersectionality to multiple groups and axes of identity.[116] Intersectionality and post-intersectionality theorists have made profound contributions to our understanding of identity and bias. And yet there remains a disconnect between the recognition of intersectional discrimination and the legal remedy of such discrimination.[117]

107. Kwan, *supra* note 95, at 686 (noting that scholars are "moving in the direction of post-intersectional theories").

108. Carbado & Gulati, *supra* note 60, at 701–02.

109. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297, 299 (1992).

110. Elizabeth L. MacDowell, *Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence*, 16 J. GENDER RACE & JUST. 531, 563 (2013); Leslie McCall, *The Complexity of Intersectionality*, 30 SIGNS 1771, 1773–74 (2005).

111. Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1518 (2000).

112. Kwan, *supra* note 95, at 673, 687; Kwan, *supra* note 102, at 1257.

113. Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25, 57–66 (1995).

114. D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FIU L. REV. 333, 338–41 (2013); Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 309–11 (2001) [hereinafter Hutchinson, *Identity Crisis*]; Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 618 (1997) [hereinafter Hutchinson, *Out Yet Unseen*].

115. Many engaged in post-intersectionality theorizing recognize Kimberlé Crenshaw's own statement that her intersectionality theory is a "provisional concept linking contemporary politics with postmodern theory." Crenshaw, *supra* note 25, at 1244 n.9.

116. *See* Berta Esperanza Hernández-Truyol, *Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex*©, 53 U. MIAMI L. REV. 811, 812 (1999); Hutchinson, *Out Yet Unseen*, *supra* note 114, at 563–65; Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars As Cultural Warriors*, 75 DENV. U. L. REV. 1409, 1420 (1998).

117. Perhaps the reason for the disconnect in scholarship stems from intersectionality theory's position within the critical race theory movement. Critical race theory is "a collection of critical stances against the existing legal order from a race-based point of view." Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER J. 85, 85 (1994). Several critical race theorists have rejected the current antidiscrimination doctrine as a tool to deal with intersectional identity and discrimination. *See* Crenshaw, *supra* note 26, at 1334 (recognizing that some Critical Legal Studies scholars absolutely reject the notion that rights-based approaches to civil rights are compatible with institutional social change). Other race crits have gone even further, questioning whether rights-based antidiscrimination law is a worthwhile tool

This Article recognizes the critically important insights that intersectionality and post-intersectionality theorists have developed over the past thirty years. Such theories and theorists have exposed the failures of feminist and antiracist movements in erasing the experiences of people with intersectional identities, including Black women. Thoughtful scholars have explained how race, sex, and other personal identity traits cannot legitimately be disentangled from one another.[118] Critical race scholars have explored the many ways in which social and cultural privilege is embedded in the White male heteronormative experience.[119] And critical scholars' hesitancy to embrace the rights-based antidiscrimination law structure reveals compelling concerns with the current statutory scheme.[120] This Article recognizes and is shaped by those insights. It borrows those insights to push on antidiscrimination laws and lawyering to shift to a more inclusive, rather than the currently exclusive, approach to assessing discrimination in housing, employment, public accommodations, and more. To do that, Part III introduces a brand-new framework—the cluster framework—as a bridge between the theory and practice, to both address intersectional discrimination in antidiscrimination doctrine and to utilize analogies between and across subgroup discrimination.[121]

III. INTRODUCING THE CLUSTER FRAMEWORK

This Article draws on the insights and critiques of intersectionality theory to propose a new framework for pleading, litigating, and analyzing intersectional claims of discrimination within the antidiscrimination doctrine. The new framework, which this Article calls the "cluster framework," diverges from intersectionality and post-intersectionality theories by centering itself within the current antidiscrimination doctrine. The cluster framework involves (1) reimagining intersectional discrimination through an image of

in pursuing the fight for racial justice. *See, e.g.*, Caldwell, *supra* note 26, at 95–96. While this Article does not ignore the clear drawbacks and failures of antidiscrimination law, it seeks to use the legal tools that we currently have to their fullest scope and strength. *See* Crenshaw, *supra* note 26, at 1356–58 (recognizing both the transformative power of antidiscrimination law and the dangers of the rights-based approach in legitimizing a structure that has traditionally subordinated Blacks).

118. *See, e.g.*, Hutchinson, *Identity Crisis*, *supra* note 114, at 309–10.

119. *See, e.g.*, Valdes, *supra* note 116, at 1415–16, 1416 n.24.

120. *See* Caldwell, *supra* note 26, at 95–96; Crenshaw, *supra* note 26, at 1334.

121. Such an approach certainly does not go as far as many may desire, but absent radical change to the doctrine, it does provide a theory and concrete steps for incremental change to the current system.

coterminous, rather than overlapping, circles of identity; (2) relocating intersectional discrimination within those coterminous circles and thus, squarely within the definition of any one of the relevant protected classes; (3) explicitly defining discrimination to include the categorizing, stereotyping, and subjugation of certain subgroups of the protected class, thus accounting for the relationship between individual discrimination and structural inequities; and (4) recognizing the full range of harms that flow from complex discrimination—to the individual, her community, her subgroup and her group. Such a framework addresses the critiques of intersectionality theory in a civil rights action, allowing for analogies to, and coalitions with, other subgroups experiencing discrimination. For ease of understanding, this Part will use race-sex discrimination as the lens to describe the cluster framework more specifically.

A. Reimagining the Venn Diagram

Return to the Venn diagram of the prevailing metaphor of intersectionality, which imagines one circle symbolizing a subjugated racial group (e.g., Black or Black-ness) overlapped, in some part, by a circle symbolizing a subjugated sex group (e.g., female or female-ness).[122] This Article reimagines the Venn diagram. Similar to the theories of "cosynthesis"[123] and "multidimensionality,"[124] the circles of the revised Venn diagram are layered on top of one another. Under the cluster framework, however, the circles are not defined by a subjugated group; the circles represent the traditionally protected classes in antidiscrimination law.

If considering race-sex discrimination, for example, one might draw a circle representing sex, not female sex or female-ness. That circle encompasses one axis of a graph, represented in the graphic below by horizontal lines. The lines within the circle represent the sex-gender continuum, as externally identified, from male-ness to female-ness.[125] The continuum is understood from an external (rather

122. *See supra* text accompanying notes 96–99.

123. *See* Kwan, *supra* note 102, at 1280–81 (theorizing that categorization—the ways that we identify ourselves and identify others—are multi-layered and not static, such that they create prisms that "multipl[y] the boundaries between categories").

124. *See, e.g.*, Hutchinson, *Identity Crisis*, *supra* note 114, at 309 (theorizing that systems of oppression are inherently complex, such that they account for multiple axes of oppression—"racism, heterosexism, patriarchy, and class oppression," for example—none of which can be disentangled from the social identity categories "around which social power and disempowerment are distributed").

125. See MARTINE ROTHBLATT, THE APARTHEID OF SEX: A MANIFESTO ON THE FREEDOM OF GENDER 13 (1995) (proposing a continuum of sex "along a broad

than internal) perspective because the bias underlying discrimination claims is external, from the perspective of the perpetrator. The continuum lens is particularly useful because a critical part of sex discrimination jurisprudence involves a perpetrator discriminating against a victim who does not comport with the stereotypes or social constructions of gender, which sit along a continuum.[126] Then, because all persons, regardless of sex, are identified with race,[127] one might draw another circle coterminous with the first. The second circle represents race and encompasses another axis of a graph, represented by vertical lines. Like the sex circle, the race circle is also a continuum. Understanding that race is socially constructed,[128] we must also recognize that race is assigned, often based on "phenotype, skin color, and eye/hair/other physiological aspects that often define[] Blacks in the United States."[129] Taking discrimination against an African American, for example, the continuum would gradate from white-ness to black-ness, based on those visual cues of race.[130] As with

continuum of possibilities"). That is not to say that the antidiscrimination law recognizes a gender continuum; the very thrust of this paper is that the protected class categories are rigid and distinct. Further, there is a distinction between sex and gender, which must be acknowledged. The continuum, however, conflates the two. It does so consciously. The language of the antidiscrimination statutes use the term "sex," so they prohibit "sex discrimination." The courts, however, have recognized sex stereotyping and gender stereotyping to create cognizable claims of sex discrimination. *See infra* note 126. Because the cluster framework theory is only useful when applied to the state of the law as it exists, it is necessary to understand the continuum this way.

126. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 257–58 (1989) (finding that plaintiff's allegation that she faced adverse employment consequences because she was overly aggressive and did not act or present as feminine enough was cognizable as a sex discrimination claim under Title VII); Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 200–01 (2d Cir. 2017) (recognizing a gender stereotyping claim under Title VII's prohibition against sex discrimination); Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) (finding that plaintiff sufficiently pleaded claims of sex stereotyping and gender discrimination under Title VII).

127. There is strong evidence that race is socially, not biologically constructed. *See, e.g.*, EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1026–28 (11th Cir. 2016) (recognizing that the EEOC, certain courts, and the dictionary have determined that race is recognized as a social, rather than biological, construct); Ho *ex rel.* Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854, 863 (9th Cir. 1998) (stating "[t]hat race is a social construct"). That fact, however, does not change the analysis for purposes of the law. Under the law, race is an identifiable trait and one that is protected under both the Constitution and civil rights laws. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1028 ("But our possible current reality does not tell us what the country's collective zeitgeist was when Congress enacted Title VII half a century ago.").

128. See *supra* note 127.

129. Salvador Vidal-Ortiz, *People of Color*, *in* ENCYCLOPEDIA OF RACE, ETHNICITY, & SOCIETY 1037 (Richard T. Schaefer ed., 2008).

130. It is worth recognizing here that this Part consciously conflates the protected classes of race and color. The relationship between those categories is complicated and has

the sex-gender continuum, the race continuum is understood from an external (rather than internal) perspective because the bias underlying discrimination claims is external. Those coterminous circles could be replicated for any number of protected characteristics and additional axes could layer on top.[131]

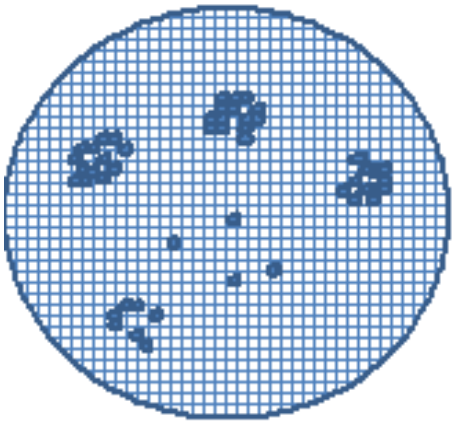

Figure 2: Under the cluster framework, there are two coterminous circles. One circle, marked with vertical lines, represents race. The other circle, marked with horizontal lines, represents sex. The overlap between the two is complete. Each dot in the coterminous circles represents an individual intersectional identity. The individual identities then create clusters.

led to scholarly debates. *See supra* note 23. While it might muddy the waters to conflate the two protected classes, the fact of the matter is that race is generally identified by the color of one's skin and other racially-ascribed physical traits. It is also true that there is a recognized relationship between the shade of skin tone and bias or discrimination. *See* Cynthia E. Nance*, Colorable Claims: The Continuing Significance of Color Under Title VII Forty Years After Its Passage*, 26 BERKELEY J. EMP. & LAB. L. 435, 445–59 (2005) (citing a number of studies evidencing the relationship between a darker skin tone and adverse reactions).

131. This Article limits the application of the cluster framework to the currently-identified protected classes in the various civil rights laws. Because the goal of this Article is to consider how scholars and advocates may use the current antidiscrimination tools to more adequately remedy intersectional discrimination, it is natural to begin the analysis within the bounds of the current laws. That is not to say, however, that the current protected classes are correct or sufficient. Changing or adding to the protected classes, however, is outside the scope of this Article.

Once the coterminous circles are drawn, one can imagine tiny dots representing individual intersectional identities. Each person is represented by a dot in the coterminous circles, representing the intersection of his/her individual race and sex. As dots fill in the larger circles, multi-dimensional clusters will develop symbolizing groups of individuals with similar identities along the continuums. For example, a cluster will develop that represents Black women.

The concept of coterminous circles more explicitly recognizes the inextricable nature of categories or statuses of identity and bias.[132] And pulling the circles back to represent the entire protected class (e.g., sex), rather than limiting the circle to subordinated subgroup of the class (e.g., female), does work toward answering the critiques of intersectionality theory as applied to civil rights jurisprudence in two specific ways. First, it explicitly recognizes that every individual is intersectional and that those intersections cross innumerable axes to create individuals who experience life and bias in individual ways. Second, it provides a plane on which we can begin to see the connections between subgroups, rather than utilizing a unique Venn diagram for each intersection. The sections below will further draw out those benefits.

B. Connecting the Venn Diagram to Structural Inequities

The recast Venn diagram, by itself, will likely suffer the same critiques as the traditional intersectionality Venn diagram when applied in civil rights jurisprudence. For courts, it does not provide an explanation for why certain subgroups should be protected under the antidiscrimination statutes. In other words, it does not answer the "many-headed Hydra" concern.[133] For that reason, the cluster framework adds an additional dimension—that of structural inequities. It is the relationship between certain subgroups (clusters of individuals) and the structural inequities suffered by that cluster that explain why certain subgroups should be studied and protected as a group, even if their individual experiences are not identical.

What are structural inequities? For purposes of this Article, structural inequities are based not on individual actions or biases, but arise from the social, cultural, and legal systems that were built on and perpetuate unfair, discriminatory, or disproportionate results for

132. *See* Carbado & Gulati, *supra* note 60, at 705–06; Hutchinson, *Identity Crisis, supra* note 114, at 309–10; Kwan, *supra* note 102, at 1277.

133. *See* Judge v. Marsh, 649 F. Supp. 770, 780 (D.D.C. 1986). For the same reasons, it also fails to answer theorists' and empiricists' questions about why certain subgroups or intersectional groups should be studied.

certain subgroups.[134] While there are innumerable inequities in our society, to provide a concrete explanation, this Article identifies three that prominently and adversely affect women of color, particularly Black women. One is the effect of laws that have operated to Black women's detriment. For example, the Fair Labor Standards Act, the National Labor Relations Act, the National Industrial Recovery Act, and the Agricultural Adjustment Act—the major New Deal welfare programs—explicitly or implicitly excluded African Americans.[135] Although legal protections were later extended, vestiges of the exclusion remain deeply ingrained in our legal psyche and culture.[136] Exclusionary laws and policies exacerbate the second structural inequity, which is intergenerational wealth disparity.[137] In America

134. *See* Elengold, *supra* note 21, at 232 (arguing that adoption of a standard narrative about sexual harassment in housing "disregards the way that [structural] factors have operated throughout American history to institutionalize the disempowerment of Black women, especially in the domestic sphere"); Cassandra Jones Havard, *Democratizing Credit: Examining the Structural Inequities of Subprime Lending*, 56 SYRACUSE L. REV. 233, 240 (2006) (including the decades-long disinvestment in urban cities and the "role of law in configuring relations of power and in marginalization of class structures" in assessment of the structural inequities underlying economic subordination).

135. Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1678 (2001) ("[A] political compromise Franklin Roosevelt had made with southern Dixiecrats left agricultural and domestic workers—the two occupational categories to which most African Americans in the South belonged—without redress in the New Deal labor legislation. They were excluded from the benefits of the National Labor Relations Act, the Fair Labor Standards Act, and other labor and social welfare legislation. Despite its basis in the Commerce Clause and its aspirations for comprehensive regulation and labor market unity, the New Deal's nationalizing project was, therefore, only partial."); William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 4 (2012) ("Take the original exclusion of agricultural and domestic workers from eligibility for Social Security benefits in 1935. Because they could not collect old-age or unemployment benefits, field hands, sharecroppers, maids, and nannies—constituting the bulk of the black labor force in the New Deal South—were shut out from even the most modest opportunity that whites enjoyed for wealth accumulation and survival assistance in economic downturns. In this example, blacks were not explicitly excluded, but the proxy phrase 'agricultural and domestic workers' did the job effectively. Nor was this anomalous: African Americans were excluded implicitly or through administrative fiat from all major New Deal welfare programs, including the National Labor Relations Act, the Fair Labor Standards Act, the National Industrial Recovery Act, and the Agricultural Adjustment Act.").

136. *Cf.* Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, And Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 43 (2006) (recognizing that "[t]he influence of slavery and racism on criminal prosecutions and punishments cannot be overemphasized" and noting that "the centuries-long history of disparate treatment of Black rape victims continues today").

137. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (exposing how the legacy of *de jure* structural segregation at all levels of government created and promoted wide-spread neighborhood racial segregation that persists today); Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071, 1081 (2017) ("The

today, Black women experience poverty at nearly double the rate of White women, are more than twice as likely to live in inadequate housing, and "have less education and higher rates of underemployment, poverty, disease, and isolation than white women."[138] The wealth gap is generational: it is rooted in the history of the long-standing racial hierarchy in America,[139] and its effects will snowball into the future.[140] Finally, the third structural inequity is the existence of cultural stereotypes that create particularized vulnerability to certain kinds of discrimination and harassment. Black women, for example, are habitually subjected to three primary myths or stereotypes—Mammy, Jezebel, and Sapphire[141]—which make them vulnerable to sex discrimination and sexual harassment. The Mammy image, born in the post-slavery South, is characterized as an asexual, obese, dark-skinned, subordinate domestic worker "with large breasts and a broad grin."[142] The Jezebel myth describes Black women as sexually insatiable and promiscuous.[143] Finally, the Sapphire stereotype, stoked by Daniel Patrick Moynihan's 1965 widely-circulated report on "The Negro Family: The Case for National Action,"[144] is characterized as outspoken, tenacious, emasculating, loud, brash, nagging, and acting outside her proper role in society.[145]

20:1 wealth gap between Blacks and Whites in the United States is not a manifestation of cultural or individual differences, but the product of a long history of discriminatory laws and policies that inscribed racial disparities into society." (footnote omitted)).

138. MELISSA V. HARRIS-PERRY, SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA 46 (2011).

139. *Id.* at 206.

140. *See, e.g.*, Paul Kiel and Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods [https://perma.cc/5WCG-2FZ6] (investigating the way that the inter-generational wealth gap between Black and White communities leads to increased debt in Black communities and a further increase in the wealth gap across generations).

141. HARRIS-PERRY, *supra* note 138, at 33 ("Mammy, Jezebel, and Sapphire are common and painful characterizations of black women and . . . each has a long history in American social and cultural life.").

142. Carolyn M. West, *Violence*, *in* 3 BLACK WOMEN IN AMERICA 281 (Darlene Clark Hine ed., 2d ed. 2005).

143. *See* HARRIS-PERRY, *supra* note 138, at 54–68; Austin, *supra* note 79, at 570; Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 11–12 (1993).

144. OFF. OF POL'Y PLAN. & RES., U.S. DEP'T OF LAB., THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 9–14 (1965), https://www.dol.gov/oasam/programs/history/webid-meynihan.htm [https://perma.cc/L2HP-PFQW].

145. *See* Melissa N. Stein, *Race as a Social Construction, in* 3 BLACK WOMEN IN AMERICA 1, 8 (Darlene Clark Hine ed., 2d ed. 2005) ("Sapphire is represented as less than a woman, and thus undeserving of the protections afforded to proper ladies, yet not a man,

Those stereotypes operate to explain and permit sexual abuse and sex discrimination of Black women.[146]

Considering the relationship between complex identity, complex bias, and structural inequities is one answer to the related critiques (reductionism and infiniteness) of intersectionality theory as applied to the civil rights rubric. Imagine, once again, the race-sex Venn diagram, reconstructed under a cluster framework. For purposes of civil rights doctrine, it offers courts an explanation of why protecting certain subgroups will not overrun the antidiscrimination statutes or Congress' intent in enacting them because it limits protection to the loci of clusters. For purposes of advocacy, it offers a lens through which to explain to the factfinder why comparator groups must be thoughtfully construed. For example, in a case of discrimination against a Black female, one might argue that a comparator should be any non-Black person or any male. That is because if a Black female is fired for being a Black female, she should be able to point to anyone who is not a Black female as a comparator. And, although it is outside the scope of this Article, it offers a potential framework for a legislature to consider why certain subgroups currently unprotected under civil rights statutes should, perhaps, gain protection.

Imagine, also, a cluster of individuals representing Black women. Imagine further that, by expanding the coterminous circles beyond race and sex, we could place a handful of dots in our diagram representing upper-class lesbian White veterinarians from Indiana. Intersectionality has failed to take hold in civil rights legislation and doctrine in part because of the failure to explain why civil rights laws should specifically protect Black women and not upper-class lesbian

despite her masculine persona, affording her none of the rights associated with (white) manhood.").

146. Different stereotypes, biases, and cultural tropes are applied to different subgroups of women. For example, the "separate spheres" ideology, which has been a mainstay of feminist thought, more aptly and appropriately defines the stereotyping that White women face in our culture. *See* Crenshaw, *supra* note 22, at 154–56; *see also* Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 181 (1997) (discussing "how converging racial and gender stereotypes of [Asian Pacific American] women help constitute what I refer to as 'racialized (hetero)sexual harassment'"). It is useful to think of the different stereotypes and other structural inequities that are applied to different groups of women to truly recognize the different burdens that different subgroups of women have borne throughout our society. *See* Crenshaw, *supra* note 22, at 155 ("Feminists have attempted to expose and dismantle separate spheres ideology by identifying and criticizing the stereotypes that traditionally have justified the disparate societal roles assigned to men and women. Yet this attempt to debunk ideological justifications for *women's* subordination offers little insight into the domination of *Black* women." (citation omitted)).

White veterinarians from Indiana. The answer lies in the structural inequities that make Black women particularly vulnerable to discrimination and therefore, an appropriate subgroup to study and protect.[147] When considering the individuals who identify as upper-class lesbian White veterinarians from Indiana, that group of individuals suffers no structural inequities unique to the group.[148] The cluster framework preserves the ability to recognize structural inequities as applied to varied groups of individuals beyond Black women while at the same time recognizing a break in the slippery slope.[149]

C. Relocating Complex Race-Sex Discrimination in Antidiscrimination Law

With an eye toward avoiding the pitfalls of pleading multiple claims of discrimination,[150] the cluster framework is best situated wholly within a singular protected class. For race-sex discrimination, this Article suggests conceptualizing the intersectional discrimination as sex discrimination. Recognizing the mistreatment of subgroups of women as sex discrimination is not new to feminist advocacy. Rather, it draws on a feminist framework that defines sex discrimination to include the categorization,[151] stereotyping, and subjugation of certain subgroups of women.

147. *See* Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without A Difference?*, 82 CAL. L. REV. 787, 832 (1994) ("Intersectionality posits that African American women share unique life experiences that differ from those of either African American men or white women."); Crenshaw, *supra* note 22, at 152–60 (recognizing that feminist theory has ignored the unique combination of race and gender issues faced by African American women).

148. That is not to say that a woman who falls into this identity category cannot seek protection under antidiscrimination law, even when applying the cluster framework. She may, for example, seek a remedy for sex discrimination because of bias she experienced as a lesbian. *See* Hively v. Ivy Tech Cmty. College, 853 F.3d 339, 346–47 (7th Cir. 2017) (en banc) (recognizing sexual orientation as a subset of sex discrimination under Title VII). The point of this example is to say that Title VII does not offer protection for her membership in a group of upper-class lesbian White veterinarians from Indiana under the cluster framework.

149. The cluster framework operates within and subscribes to the traditional group/subgroup analysis of Title VII and other antidiscrimination statutes. Not all scholars agree that such a framework is appropriate to remedying race and/or sex discrimination. *See supra* text accompanying notes 106–17. *See generally* Kramer, *supra* note 62 (arguing that the traditional group-based approach to identifying and remedying sex discrimination does not account for modern sex discrimination and proposing a model adopting a reasonable accommodation framework).

150. *See supra* text accompanying notes 32–43.

151. Categorization, by itself, is not necessarily problematic; it is a necessary way that we make sense of the complicated world around us. ANTHONY G. AMSTERDAM &

Throughout our nation's history, women have been separated and categorized. Women are married or unmarried. Women are childless or mothers. Women work inside the home or outside the home. And those categories of women have faced different challenges, different biases, and different experiences. And yet, each of those categories of women has been the subject of feminist scholarship and advocacy. In the Seneca Falls Declaration of Sentiments, the drafters spoke of the rights of women who, when married, were stripped of civil legal rights and subjected to abuse by their husbands,[152] as well as the rights of women who were members of the church but who were excluded from the ministry.[153] In those passages, one can see the seeds of defining sexism to include circumstances where women—based on their identities, choices, and circumstances—are categorized, stereotyped, and subjugated. Nineteenth century feminists Elizabeth Cady Stanton and Susan B. Anthony similarly critiqued marriage as connected to concerns about domestic violence, marital rape, and forced pregnancy, even though not all women were married and not all married women experienced domestic violence.[154] Second-wave feminists took up different torches, sown from the same seeds of thought. Aileen Clarke Hernandez, then president of the National Organization for Women ("NOW"), declared lesbian rights to be women's rights.[155] Although not all women are lesbians, Hernandez recognized that the categorization

JEROME BRUNER, MINDING THE LAW 21–26 (2000) (identifying the critical functions of categorizing: maximizing mental economy, achieving pragmatic utility, providing reference group relevance, a sense of communal power, and personal gratification, and regulating risk). Categorization is derived from our society and culture. *Id.* at 27 ("For the most part, our categories do not derive from the shape of the world but create it. . . . [M]ost of our category systems are inherited not from our genetic makeup but from our culture . . . ."). Where category systems are "used hegemonically, as instruments of power," however, especially when derived from race-based and sex-based stereotyping, categorization carries great risk. *Id.* at 24.

152. DECLARATION OF SENTIMENTS, SENECA FALLS (July 19, 1848), *reprinted in* FEMINISM: THE ESSENTIAL HISTORICAL WRITINGS 76, 76–77 (Miriam Schneir ed., 1972) ("He has made her, if married, in the eye of the law, civilly dead. . . . In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement.").

153. *Id.* ("He allows her in Church as well as State, but a subordinate position, claiming Apostolic authority for her exclusion from the ministry, and, with some exceptions, from any participation in the affairs of the Church.").

154. Lucinda N. Finley, *Putting "Protection" Back in the Equal Protection Clause: Lessons from Nineteenth Century Women's Rights Activists' Understandings of Equality*, 13 TEMP. POL. & C.R. L. REV. 429, 446 (2004).

155. *See* SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 46 (2011).

and mistreatment of certain groups of women was an issue for all women to take up, supporting a NOW resolution to that effect. Second-wave feminists applied a similar analysis to pregnancy, asserting that the stereotyping and mistreatment of pregnant women is sex discrimination that constrains all women.[156] Third-wave feminists have applied the same concepts to identify transgendered persons' rights[157] and rights for women in the military,[158] deeming rights for those subgroups to be women's rights. Each has been the subject of advocacy around legal rights. And each has stood as representative of the female experience such that subjugation related to their particular grouping has been deemed a "women's issue" or a "women's rights issue."

The same theory should be applied to Black women as a subgroup of women. The discrimination against Black women is sex discrimination. Situating race-sex intersectional discrimination wholly within the sex discrimination framework, however, is subject to the same critiques that gave rise to intersectionality theory in the first place—claims that Black women should not have to subordinate their race to their gender and claims that advocacy regarding sex discrimination has focused on White women and their particular needs. That is why this Article puts the client's voice at the center of any antidiscrimination claim.[159] Through client-centered lawyering and thoughtful narrative, the cluster framework can draw on the feminist history of protecting subgroups of women without losing sight of the unique experiences of Black women.

The purpose of situating race-sex discrimination wholly in sex discrimination is two-fold. First, because intersectional claims are statistically less successful,[160] claims situated wholly within a single protected class have better chances of success.[161] Second, framing

156. *See id.* at 63–69.

157. *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 3–4 (1995); Demoya R. Gordon, *Transgender Legal Advocacy: What Do Feminist Legal Theories Have to Offer?*, 97 CALIF. L. REV. 1719, 1754–61 (2009).

158. *See* Jamie R. Abrams*, Debunking the Myth of Universal Male Privilege*, 49 U. MICH. J.L. REFORM 303, 325–31 (2016); Diane H. Mazur, *A Call to Arms*, 22 HARV. WOMEN'S L.J. 39, 43 (1999).

159. *See infra* Section IV.B.

160. *See supra* text accompanying notes 32–43.

161. One could argue for relocating race-sex discrimination wholly in race discrimination. Because of the groundwork laid by earlier feminists about subgroup discrimination, *see supra* text accompanying notes 152–58, and because of the differential doctrinal treatment of racial harassment and sexual harassment, *see supra* text

race-sex discrimination within sex discrimination allows us to see how race-sex discrimination is similar to (and different from) other forms of sex discrimination. It responds to the critique of intersectionality theory that race-sex intersection (primarily with respect to Black women) is a unique kind of discrimination that cannot be analogized to other forms of complex discrimination. And, by relocating the analysis wholly inside of sex discrimination, it allows us to draw parallels to other moments in feminist advocacy where the categorization, stereotyping, and subjugation of particular subgroups of women has been identified as sex discrimination.[162] Redrawing the Venn diagram and relocating intersectional discrimination within traditional protected classes provides a plane on which we can see the connections between the experiences of subgroups, rather than treating each subgroup as separate and distinct.

This is not to say, of course, that the experience of discrimination against a woman who works outside the home is the same as discrimination against a Black woman. The insights of intersectionality theory clearly teach us that they are vastly different.[163] In fact, this Article may well draw criticism from critical race scholars and others concerned that it might, like feminist proposals before it, operate to erase Black women's experiences. That is not the intent of this Article; the intent, rather, is to push on the current doctrine to become more, rather than less, inclusive. This Article recognizes, however, that intent is not always what carries the day. It also recognizes that there is a political and cultural cost for those with intersectional identities, including Black women, to fit their identities and experiences into a framework that was neither built nor developed to consider, respect, or accommodate complex identity and experience. The proposed framework, however, is an effort to bridge the divide between intersectionality theory and antidiscrimination law. And the concrete proposals set forth in Part IV are designed to elevate, rather than erase, the stories and experiences of complex victims of discrimination. For some critics, the proposals will not go far enough or answer the critiques applied to White feminism. In the absence of a new statutory design for redressing discrimination through the law, however, a framework that allows us to identify analogous subgroups and potential coalitions will

accompanying notes 66–71, this Article suggests that the sex discrimination lens enjoys a greater chance of success.

162. In fact, women of color were at the helm of some of the most important expansions of the definition of sex discrimination. *See* Mayeri, *supra* note 35, at 722–23.

163. *See supra* notes 22–26 and accompanying text; *infra* notes 184–87.

open up tools, strategies, and developed law to fight complex violations of civil rights.

D. Recognizing Direct and Indirect Harms Under a Cluster Framework

The cluster framework also recognizes that categorizing, stereotyping, and subjugating subgroups of women harms the individual woman, her community, her subgroup, and all women. Just as the Venn diagram provides a visual of the relationship between individuals, clusters, and the whole, this Article suggests that the harm of race-sex discrimination begins with the individual victim and then emanates to her community, her subgroup, and the entire group. In other words, when a Black woman is the victim of discrimination, she is injured, her community (i.e., family, neighborhood) is injured, her subgroup (Black women) is injured, and the entire group (women) is injured.

Complex race-sex discrimination clearly harms the individual victim. Courts recognize that a victim of discrimination may seek damages for actual, economic, or out-of-pocket costs[164] and also for the embarrassment, humiliation, and shame experienced due to the defendant's discriminatory conduct.[165] Discrimination against a Black woman also injures her community, including her family, immediate friends, and neighbors. If discrimination causes loss of employment or housing, for example, she may fall into debt that will have long-lasting generational effects on her children and grandchildren.[166] Or it may

164. *See, e.g.*, Rivera v. Inc. Vill. of Farmingdale, 29 F. Supp. 3d 121, 134 (E.D.N.Y. 2013).

165. The Civil Rights Act of 1991 and the Lilly Ledbetter Fair Pay Act of 2009 extended compensatory damages to plaintiffs establishing intentional discrimination under Title VII. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a (2012)); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 6 (codified at 42 U.S.C. § 2000e-5(e)(3)(B) (2012)); *see also* Lilly Ledbetter Fair Pay Act, § 2, 123 Stat. at 5 (codified at 42 U.S.C. § 2000e-5 note). The Americans with Disabilities Act of 1990 and the 1978 amendments to the Rehabilitation Act of 1973 similarly allow plaintiffs to recover compensatory damages. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 107(a), 104 Stat. 327, 336 (codified at 42 U.S.C. § 12117 (2012)); Amendments to the Rehabilitation Act of 1973, Pub. L. No. 95-602, sec. 120, § 505, 92 Stat. 2955, 2982–83 (1978) (codified as amended at 29 U.S.C. § 794a (2012)). This Article concentrates on compensatory, rather than punitive damages. For thorough analysis of punitive damages under the Fair Housing Act, see generally Timothy J. Moran, *Punitive Damages in Fair Housing Litigation: Ending Unwise Restrictions on a Necessary Remedy*, 36 HARV. C.R.-C.L. L. REV. 279 (2001).

166. *See* M. William Sermons, *America's Household Balance Sheet: The State of Lending in America & its Impact on U.S. Households*, CTR. FOR RESPONSIBLE LENDING 6

decrease her ability to pay for food, which has long-term consequences for children's education and learning, a key component in overcoming intergenerational poverty.[167] Injury also flows beyond the victim's immediate family. In lead poisoning cases, for example, defendant housing authorities and landlords often know that victims of lead poisoning are disproportionately young, poor, typically African American or Hispanic children, to whom juries will award lower damages based on lifetime earnings potential tables.[168] Therefore, "there is less incentive for defendants to take measures to clean up toxic hazards in the neighborhoods most affected by lead paint," which has a more pernicious long-term effect on low-income minority neighborhoods.[169]

Complex discrimination also injures the entire subgroup; discrimination against a Black woman injures Black women. The most obvious injury is in the perpetuation of stereotypes that negatively define "otherness" and are used to permit and ignore discrimination against Black women. The Mammy stereotype, for example, has been used by those engaging in racialized sexual harassment to debase and humiliate Black women experiencing such an assault.[170] The Sapphire trope blames Black women for the emasculation of Black males, along with poverty, crime, and unemployment,[171] and gives support for violence, sexual and otherwise against Black women.[172] And the myth of the Black Jezebel, which rose out of the tension between the Victorian notions of chastity and weakness and the commoditization of Black female slaves, operates to permit sexual abuse against Black women and then

(Dec. 2012), http://www.responsiblelending.org/sites/default/files/uploads/2-americas-household-balance-sheet.pdf [https://perma.cc/39CU-VK2A].

167. *See Too Hungry to Learn: Food Insecurity and School Readiness, Children's Healthwatch Research Brief*, CHILDREN'S HEALTHWATCH (Sept. 3, 2013), http://www.childrenshealthwatch.org/wp-content/uploads/toohungrytolearn_report.pdf [https://perma.cc/7V6V-CBXJ].

168. *See* Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1440 (2005) (citing Jennifer Wriggins, *Genetics, IQ, Determinism, and Torts: The Example of Discovery in Lead Exposure Litigation*, 77 B.U. L. REV. 1025 (1997); Laura Greenberg, Note, *Compensating the Lead Poisoned Child: Proposals for Mitigating Discriminatory Damage Awards*, 28 B.C. ENVTL. AFF. L. REV. 429 (2001)).

169. Chamallas, *supra* note 168, at 1441.

170. Carolyn M. West, *Violence*, *in* 3 BLACK WOMEN IN AMERICA 281, 281 (Darlene Clark Hine ed., 2d ed. 2005).

171. MAYERI, *supra* note 155, at 25.

172. West, *supra* note 142, at 281–82 (noting that violence was an "appropriate punishment for their 'emasculating' behavior").

silence their resistance.[173] Just like the other structural inequities identified above, stereotyping—which is employed regardless of whether it actually applies to an individual woman[174]—operates as the bridge between institutional bias and individual subjugation.[175]

Just as categorization, stereotyping, and subjugation injures the victim, her community, and her subgroup, it also has a negative effect on all women. Paulette Caldwell explains:

> Stereotypes and negative images of black women serve many functions. They separate black and white women from each other, and limit all women's choices by perpetuating competing ideologies of womanhood based on race. . . . The black woman's invisibility serves to blind all women and all blacks to the interactive relationship between race and gender, leads to the development of legal theories and social policies directed at either race or gender without fully considering the implications of such theories and policies, and ultimately assures the perpetuation of domination on the basis of race and gender for all women and members of subordinated race.[176]

Compounded stereotypes—another way to define intersectional discrimination rooted in stereotypes—negatively affect all women and perpetuate gender inequality.[177] Of course, it should also be said that when a Black woman endures discrimination, all Blacks are injured. And one could apply the cluster framework to assert a race-sex discrimination claim wholly within race discrimination. For the

173. For a full discussion of the relationship between the Jezebel myth and racialized sexual harassment in housing, see Elengold, *supra* note 21, at 236–45.

174. *See* REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES 10 (2010).

175. *See id.* at 9 ("All the dimensions of personality that make that individual unique are consequently filtered through the lens of a generalized view or preconception of the group with which the individual is identified." (footnote omitted)). A stereotype operates to conceal, or at least dull, each individual's unique attributes, traits, and characteristics. The concealment, rooted in stereotype, occurs regardless of whether individual members of the group possesses the attributes of the stereotype, *id.*; in that way, all individuals in a group become subjected to institutionalized and structural bias rooted in the stereotypes of that group.

176. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 395.

177. COOK & CUSACK, *supra* note 174, at 29 (asserting that compound stereotypes "impede the elimination of all forms of discrimination against women and the realization of substantive equality"); *see also* Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) (discussing both the difficulty and necessity of coalition-building, "[a]s we look at these patterns of oppression, we may come to learn, finally and most importantly, that all forms of subordination are interlocking and mutually reinforcing").

reasons already discussed herein, this Article uses the sex discrimination claim to illustrate the cluster framework.

Clare Dalton's exposition on contract doctrine is instructive in understanding that binary categorization is harmful to both the in-group and the out-group.[178] Dalton identifies dualities present in the development of contract law to explore the ways that structuring law and legal analysis in dualities operates to mask, rather than solve, the problems of unequal access to power and knowledge in contract.[179] Drawing on feminist theory, Dalton calls attention to the images of women and relationships in the cases she analyzes. She discusses how contract cases embed the image of a woman as either an angel or a whore.[180] That dichotomy operates to distribute power and is a force that is hidden behind the traditional dualities of contract doctrine. Dalton exposes the way that images and stereotypes (i.e., angel or whore) are implicated in the way that laws and doctrine develop over time.[181] Analogizing Dalton's work to antidiscrimination doctrine, it is clear that the interaction of categorization and stereotyping in sex discrimination cases operates to both directly subjugate certain categories of women and indirectly keep all women in their stereotyped boxes. A woman is either a mother or not a mother. She is a woman of color or she is White. If she is not an angel, she must be a whore; if she is not a whore, she must be an angel. Both categorizations, while different, place women in impossible and unfair boxes.[182] Because each of these categorizations is, itself, a binary separation, each category is defined as related to one another.[183]

178. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 95 YALE L. J. 997, 1000 (1985).

179. *Id.*

180. *Id.* at 1110–12.

181. *Id.*

182. *See* Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 541–43 (Cal. 1971) (overturning liquor licensing law that excluded women bartenders and recognizing that "[t]he pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage"). Stereotypes do not have to be objectively negative to lead to subjugation. *See* Peggy Li, *Hitting the Ceiling: An Examination of Barriers to Success for Asian American Women*, 29 BERKELEY J. GENDER L. & JUST. 140, 149 (2014) (recognizing that "history [has] shaped the perception of Asian American women as outsiders, ultra-feminine lotus blossoms, dragon ladies, and model minorities" and that "[t]hese stereotypes, both positive and negative, have contributed to discrimination against Asian American women").

183. In reality, identities are not binary. Not every mother had a child by vaginal birth or cesarean section; she might have adopted or used a surrogate. And one need only look at the various identifications for gender or race or color to realize that identity (and reaction to identity) is not binary. The import of this discussion is that identities are regularly pitted against each other in a binary fashion. Much has been written about the ubiquitousness, power, and danger of the Black/White binary in law and society. *See, e.g.*,

Because of that oppositional relationship, categorization and categorical stereotypes operate to constrain both the in-group and out-group categories in the binary.

As previously noted, discrimination based on a racial subgroup of women (e.g., Black women) is different than discrimination based on another subgroup of women (e.g., mothers).[184] The difference is due, in part, to America's history of subordination of women based on race and the systemic perpetuation of White supremacy and Black subjugation.[185] In fact, we must be cognizant that those in the "in-group" may benefit from the stereotyping of or bias against those in the "out-group."[186] Not all women bear the burden of categorization, stereotyping and subjugation equally; women of color, and Black women in particular, have carried the burden of sexual violence, sex discrimination, and forced silence across our nation's history.[187] The

Roy L. Brooks & Kirsten Widner, *In Defense of the Black/White Binary: Reclaiming A Tradition of Civil Rights Scholarship*, 12 BERKELEY J. AFR.-AM. L. & POL'Y 107, 112–15 (2010); Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1214–16 (1997). More recently, scholars have exposed a slightly different binary understanding of race—minority/White. Carlos Hiraldo, *Arroz Frito with Salsa: Asian Latinos and the Future of the United States*, 15 ASIAN AM. L.J. 47, 50 (2008); Imani Perry, *Of Desi, J. Lo and Color Matters: Law, Critical Race Theory the Architecture of Race*, 52 CLEV. ST. L. REV. 139, 140 (2005).

184. *See supra* notes 22–26 and accompanying text; *infra* notes 184–87.

185. *See* Elengold, *supra* note 21, at 258–69 (identifying the "structural forces inherent in residential sexual harassment that have operated [throughout American history], together with the myth of the Black Jezebel, to perpetuate the sexual subjugation of Black women in the private sphere").

186. *See, e.g.*, Robert J. Smith, Justin D. Levinson & Zoe Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 891 (2015) (recognizing the positive effects of implicit bias on members of privileged groups, i.e., "implicit white favoritism," in the criminal justice system). Although White women may, in fact, benefit from the stereotyping and subjugation of Black women, an injustice remains in the way that stereotypes limit women's control and autonomy. COOK & CUSACK, *supra* note 174, at 20 (explaining that although the process of categorization is a necessary way to make sense of the complicated world, categorization carries great risk, especially when stereotyping "operates to ignore individuals' characteristics, abilities, needs, wishes, and circumstances in ways that deny individuals their human rights and fundamental freedoms and when it creates gender hierarchies").

187. HARRIS-PERRY, *supra* note 138, at 162–63 (2011) (discussing the historical use of sexual assault and sexual harassment of Black women as a form of "social terrorism"). As a White woman writing in this sphere, I am particularly cognizant of the dangers of co-opting the voices of women of color. I have previously disclosed the following:

> As a former civil rights lawyer who litigated [residential sexual harassment cases], this [Article] is meant to highlight the importance of remaining client-centered in legal representation. For a discussion on the history and development of the client-centered representation model, see Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006). There is a reality of White men and women litigating discrimination cases on

import of the harm analysis therefore is not in recognizing the injuries themselves, but is in (1) illuminating the way that approaches to remedying race-sex discrimination can draw on strategies, tools, and favorable case law analyzing other subgroup discrimination,[188] and (2) harnessing the political power for justice "when we recognize that we all have a stake" in striking down patterns of oppression, "including the illegitimate use of categories."[189] The final Part of this Article applies the lessons of intersectionality theory, post-intersectionality theories, and the insights of the cluster framework to an antidiscrimination case.

IV. APPLYING THE INSIGHTS OF INTERSECTIONALITY THEORY TO SHIFT THE CIVIL RIGHTS DOCTRINE

Returning to Tametra Moore's story, remember that Tametra is Black and she is female.[190] Recall that Tametra sued her employer for race discrimination and sex discrimination under Title VII, based on the sexual harassment she experienced at the hands of her supervisor.[191] Part and parcel of the harassment was racial animus, exposed in the stereotyping of the Black women her supervisor harassed.[192] And then, remember that Tametra lost her suit. Using Tametra's story and experience in court to provide perspective, this Part proposes means of implementing the insights of intersectionality

> behalf of people of color, as I have done throughout much of my career. While I take issue with the historical and structural forces that have created that disparity, this Article attempts to remind all lawyers, and most specifically White lawyers, to listen to their clients' stories and goals and not ignore the impact of race, even in the face of a standard stock story that excludes race.

Elengold, *supra* note 21, at 238 n.48. I am concerned that this Article could be misconstrued as something of an "All Lives Matter" reaction to racialized sexual harassment. That is not my intention. Rather, I envision a scenario where the presentation of a race-sex discrimination claim as sex discrimination, if done with the client at the forefront, will give voice to a woman experiencing intersectional discrimination and an opportunity to seek compensation that recognizes and remedies the burden she bears in her individual experience of race-sex discrimination. For a further explanation of how to lift up the voices of the affected women, see *infra* Section IV.B.

188. *See* Carbado, *supra* note 111, at 1496–97 (noting that comparability arguments can be useful, but dangerous and recognizing that "[f]acial comparisons of race and sexual orientation obscure important history").

189. Kwan, *supra* note 102, at 1280–81 ("[C]osynthesis offers the view that political emancipation and the achievement of justice are realizable only when we recognize that we all have a stake in finding ways to seize control over the legal and cultural forces that shape and maintain systems of oppression, including the illegitimate use of categories.").

190. Moore Compl., *supra* note 1, at 1–2.

191. *Id.*

192. *See id.* at 3.

theory, through the cluster framework, to shift antidiscrimination doctrine in a way that can better account for complex plaintiffs and intersectional discrimination. It offers three concrete implementation proposals for shifting the civil rights doctrine—for courts, advocates, and agencies. Specifically, this Part proposes that courts look beyond the "sex plus" doctrine, that advocates think critically about the role of race in developing case theory and making damages demands, and that agencies take a less formulaic approach to assessing discrimination claims.

A. Courts: Intersectional Discrimination is More Than "Sex Plus"

This Article suggests that shifting to a cluster framework can do some work toward overcoming the barriers that have existed for civil rights plaintiffs asserting intersectional bias. Specifically, bringing intersectional discrimination claims wholly within a single discrimination rubric will thwart the courts' instinct to silo claims and evidence of discrimination. It will also avoid the false "but for" test sometimes applied to multiple claims of discrimination. And if plaintiffs seek damages commensurate with the full extent of their injuries, the law can develop with a respect for the disproportionate burden that certain subgroups have carried historically and today.

Some may wonder why the cluster theory is different from or better than the existing "sex plus" doctrine. The "sex plus" doctrine, first recognized by the Supreme Court in the 1971 *Phillips v. Martin Marietta Corp.*[193] decision, recognizes a Title VII violation where an employer discriminates against a subclass of women because of their sex *plus* another characteristic.[194] "Sex plus" claims are generally seen in employment discrimination actions but have also been asserted in claims arising under the Equal Protection Clause,[195] Title IX,[196] and state statutes.[197] Although at one point the "sex plus" doctrine

193. 400 U.S. 542 (1971) (per curiam).

194. *Id.* at 544. The Supreme Court in *Phillips* did not explicitly call the discrimination "sex plus" and that terminology has never been adopted by the highest court. *See* E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 474 (1998).

195. *See, e.g.*, Back v. Hastings On Hudson Union Free Sch. Dist., 365 F.3d 107, 118–19, 121 (2d Cir. 2004).

196. *See, e.g.*, Tingley-Kelley v. Trs. of the Univ. of Pa., 677 F. Supp. 2d 764, 774–75 (E.D. Pa. 2010).

197. *See, e.g.*, Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428, 431–32 (6th Cir. 2004); Johnston v. U.S. Bank Nat'l Ass'n, No. 08–CV–0296, 2009 WL 2900352, at *8–10 (D. Minn. Sept. 2, 2009); Schmittou v. Wal-Mart Stores, Inc., No. Civ.011763, 2003 WL 22075763, at *8 (D. Minn. Aug. 22, 2003); Pullar v. Indep. Sch. Dist. No. 701, Hibbing, 582 N.W.2d 273, 276–78 (Minn. Ct. App. 1998).

provided some hope for a more holistic, intersectional analysis to discrimination,[198] the doctrine is confused and confusing.[199] Courts have both recognized and rejected the "sex plus" doctrine in cases involving sex plus motherhood,[200] sex plus marital status,[201] sex plus race,[202] and sex plus age.[203] As such, it provides little guidance to courts on how to interpret and address complex discrimination.

In addition to its practical flaws, the "sex plus" doctrine is fundamentally flawed as an answer to the insights of Crenshaw's intersectionality theory. Defining race-sex discrimination (or other forms of intersectional discrimination) under "sex plus" ignores the insights of intersectionality theory that intersectional identity is not an additive experience; intersectional discrimination, in other words, cannot be broken into its component parts and added to one another. Therefore, courts should be careful to avoid viewing race-sex discrimination under the "sex plus" doctrine. The cluster framework offers an alternate approach.

Returning to our race-sex discrimination example, the cluster framework specifically defines sex discrimination to include the categorization, stereotyping, and subjugation of particular subgroups of women. That definition is squarely within the standard antidiscrimination laws.[204] When a landlord targets Black women for

198. *See, e.g.*, Shazor v. Prof'l Transit Mgmt., Ltd., 744 F.3d 948, 957 (6th Cir. 2014) (recognizing that plaintiff's sex bias claim "cannot be untangled from her claim for race discrimination"); s*ee also* Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1034 (5th Cir. 1980); Johnson v. Dillard's Inc., C/A No. 3:03-3445-MBS, 2007 WL 2792232, at *3–5 (D.S.C. Sept. 24, 2007); Berndt v. Cal. Dep't of Corrs., No. C03-3174, 2005 WL 2596452, at *7–8 (N.D. Cal. Oct. 13, 2005).

199. *See* Cunningham, *supra* note 194, at 473–77.

200. *Compare* Towers v. State Univ. of N.Y. at Stony Brook, No. CV-04-5243, 2007 WL 1470152, at *1 (E.D.N.Y. May 21, 2007) (recognizing gender plus motherhood claim), *with* Guglietta v. Meredith Corp., 301 F. Supp. 2d 209, 214 (D. Conn. 2004) (holding that child-rearing was not a "sex-plus" characteristic to be considered under Title VII).

201. *Compare* Rauw v. Glickman, No. CV-99-1482-ST, 2001 WL 34039494, at *7–9 (D. Or. Aug. 6, 2001) (evidence of sex plus marital status raised a genuine issue of material fact), *with* Fisher v. Vassar Coll., 70 F.3d 1420, 1433–34 (2d Cir. 1995) (rejecting a sex-plus-marital status claim), *rev'd en banc*, 114 F.3d 1332 (2d Cir. 1997).

202. *Compare* Johnson v. Dillard's Inc., C/A No. 3:03-3445-MBS, 2007 WL 2792232, at *6 (D.S.C. Sept. 24, 2007) (recognizing a sex-plus-race claim on behalf of a Black woman), *with* Judge v. Marsh, 649 F. Supp. 770, 779–81 (D.D.C. 1986) (rejecting a sex plus claim on behalf of a Black woman).

203. *Compare* Gorzynski v. Jetblue Airways Corp., 596 F.3d 93, 109–10 (2d Cir. 2010) (recognizing that a sex-plus-age claim under Title VII and the Age Discrimination in Employment Act is cognizable), *with* Flaherty v. Metromail Corp., 59 F. App'x. 352, 354–55 (2d Cir. 2002) (rejecting a sex-plus-age claim under Title VII).

204. *See, e.g.*, United States v. Starrett City Ass'n, 840 F.2d 1096, 1098, 1101–03 (2d Cir. 1988) (finding racial distribution quotas illegal under the federal Fair Housing Act).

sexual harassment but does not target White women, that is sex discrimination.[205] When an employer fails to promote a woman who acts too aggressively, that is sex discrimination.[206] When a company refuses to hire a woman because she is pregnant, that is sex discrimination.[207] The language of "sex plus" obscures the reality of sex discrimination and sexism. The definition and implementation of the cluster framework, as discussed herein, treats discrimination against a subset of women as "pure" sex discrimination—no plus needed. Such a construction better encompasses the purpose and meaning behind the antidiscrimination statutes and will avoid falling prey to the varied whims of local courts in determining what should or should not count as a "plus" factor. If a woman is treated differently because she is a woman, that is sufficient to find sex discrimination. If a subgroup of women is treated differently because they are women, that is sex discrimination. Tametra was the victim of sex discrimination. From the beginning, feminists have taught us to understand sex discrimination broadly and inclusively, even when the bad action does not negatively affect all women; it is time we, as a group, apply such principles consistently and emphatically to women of color.

B. Advocates: Tell Her Story and Demand Damages

Just because Tametra was a victim of sex discrimination does not mean that she must ignore the clear effect of race on her experience of sex discrimination. Civil rights jurisprudence has failed intersectional plaintiffs because it artificially silos evidence of discrimination into protected classes and relies on stock stories to explain and understand the discrimination. Advocates can break that cycle by using the power of legal storytelling—a concept embraced by

205. In the related cases of *United States v. Gumbaytay*, 757 F. Supp. 2d 1142 (M.D. Ala. 2010), and *Boswell v. Gumbaytay*, No. 2:07-CV-135-WKW, 2009 WL 1515872 (M.D. Ala. June 1, 2009), several of the victims of the sex discrimination claim asserted that the sexual harassment was race-motivated. *See* Plaintiff United States' Memorandum of Law in Opposition to Defendant Gumbaytay's Motion to Dismiss for Lack of Evidence at Julian Declaration, at 1, United States v. Bahr, No. 2:08-cv-00573 (M.D. Ala. Oct. 28, 2009); *id.* at Kemp Declaration, at 1; *id*. at Williams Declaration, at 2. The same is true in the housing and lending discrimination case of *United States v. First National Bank of Pontotoc*, No. 3:06–cv–00061 (N.D. Miss. Sept. 19, 2008), where at least twenty-seven victims complained of race-motivated sexual harassment. *See* Joint Stipulation Regarding Distribution of Settlement Fund at Affidavit Nos. 2–9, 11–24, 26–30, United States v. First Nat'l Bank of Pontotoc, No. 3:06-cv-00061 (N.D. Miss. Sept. 19, 2008).

206. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250–52 (1989).

207. 42 U.S.C. § 2000e(k) (2012) (including "pregnancy" within the definition of sex discrimination).

scholars across legal disciplines[208]—to peel back the cover of stereotype and expose the plaintiff's unique attributes, experience, and damages. This Part posits that, at every critical step along the litigation path—complaint, answer, discovery, motion practice, opening statement, trial testimony, closing statement, and, where applicable, a settlement agreement or consent decree[209]—a victim of intersectional discrimination can tell a story of sex discrimination that does not ignore or subjugate the effect of race on that experience of sex discrimination.[210]

1. Personalizing Case Theory

Case theory is the "storyline" of the case; "the short version of the lawyer's story of the case that takes into account the context in which it is told."[211] In cases like Tametra's, where race is part and parcel of her experience of sex discrimination and sexual harassment,

208. In both feminist and critical legal studies' scholarship, scholars have used stories to humanize, personalize, explain, augment, or supplant traditional legal discourse. *See* Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 982 (1991) (stating that varied feminist narrative approaches share "a preference for the particularity of description, a belief that describing events or activities 'from the inside'—that is, from the perspective of a person going through them—conveys a unique vividness of detail that can be instructive to decisionmakers"); Caldwell, *supra* note 176, at 365–71 (applying a similar approach in critical race theory scholarship).

209. I recognize that the majority of women who experience sex discrimination do not litigate and, when they do litigate, do not bring cases all the way to trial. Many do not report the abuse, many have no access to lawyers, and, even when filed in a court of law, most civil cases settle. Thinking about discrimination in this way, however, has broader transformational effect. For example, consent decrees often include equitable relief that affect every woman coming through the defendant's business and public scrutiny may lead to policy change, attitude shift, or general public education. *See* Kramer, *supra* note 62, at 947 ("[W]e should not think of antidiscrimination law only as a means to right wrongs. In addition to remedying specific cases of discrimination, antidiscrimination law also facilitates a critical conversation about identity and difference—a conversation that takes place in workplaces, in courts, in the media, and in people's daily lives.").

210. This is not an endorsement for creating a new stock story. Rather, the power of narrative in the courtroom is that the lawyer and the client can work together to develop the case theory that works best for the client. *See* Ahmad, *supra* note 73, at 122 (recognizing that legal narratives are "flexible and contingent, subject to the choices that lawyers and clients make as to what to include and what to exclude, what to foreground and what to background" (citing Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1303 (1995)). Whether or not to utilize stock stories or even subordinating narratives to the benefit of the client is a complicated decision and requires appropriate counseling and ethical assessment. *See id.* This Article does not suggest that a lawyer should force her client into telling a story of race-sex discrimination if that is not the path that the client chooses. Rather, it challenges lawyers to have those conversations with their clients and, as part of the collaborative strategizing around case theory, to think about both the narrow and broad implications of ignoring race in a case of race-sex discrimination, including cases of racialized sexual harassment.

211. Binny Miller, *Teaching Case Theory*, 9 CLINICAL L. REV. 293, 298 (2002).

her case theory must succinctly define the characters, relationships, and motivations.[212] In doing so, she could choose to push back on the stock story and explain how her subgroup (Black women) made her particularly vulnerable to and affected her experience of sex discrimination and sexual harassment.[213]

In Tametra's case, her attorney proposed and agreed to a siloed approach to assessing race discrimination and sex discrimination.[214] In the lawyer's closing statement, for example, the sole connection between his client's sex and race discrimination claims he drew for the jury was: "I do believe that the evidence has shown that she was sexually harassed; that it was to a certain extent racially motivated."[215] There was no discussion of the specifics of the sexual harassment and no discussion of the way that race was part and parcel of the harassment.[216] While it is impossible to know the thought process behind such a strategy without an honest conversation with Tametra's lawyer,[217] perpetuating a story that silos the evidence ignores that Tametra's experience of sexual harassment was intricately connected to her experience as a Black woman. Not only does the choice constrain Tametra, but, by failing to push back on the racialized aspect of her experience, it reinforces the separation between race and sex, ignores harmful stereotyping, and perpetuates case law devoid of an understanding of complex discrimination.

Tametra's lawyer could have considered alternate case theories, including telling a complex discrimination story through a sex discrimination claim. Considering the place of intersectional discrimination—the role of racial animus in sex discrimination

212. *Id.* (discussing case theory through the narrative, rather than analytical lens, "provides an explanation for what happened, and in doing so, shapes what happened").

213. Not every client will want to tell the story of racialized sexual harassment or racialized sex discrimination. In following a client-centered approach, a lawyer should discuss the pros and cons of moving forward with an alternate storyline. STEPHEN ELLMAN ET AL., LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING 22 (2009); MODEL RULES OF PROF'L CONDUCT r. 1.4(a)(2) (AM. BAR ASS'N 2017) ("A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished . . . .").

214. *See* Joint Proposed Pretrial Order, Exhibit E at 14–17, Moore v. Cricket Commc'n, Inc., No. 4:09-cv-03310 (S.D. Tex. Mar. 28, 2011), ECF No. 48-5.

215. Transcript of Trial Day 4 of 4 at 28:23–25, Moore v. Cricket Commc'n, Inc., No. 4:09-cv-03310 (S.D. Tex. Apr. 7, 2011), ECF No. 67.

216. *Id.*

217. The public record did not include trial transcripts from the first three days of trial, which included all of the live testimony. Without that information, it is impossible to know which facts and allegations did or did not come into evidence. The lawyer may have been hamstrung by the evidence. Another possibility is that the lawyer and his client chose to focus on the sexual harassment to the exclusion of race for strategic reasons.

cases—at all stages in the investigation and litigation of the action would operate as a constant reminder to advocates and attorneys not to ignore the intersectional experience of their clients. Tametra's lawyer, for example, might have considered the following case theory: *Tametra's manager, Travis, discriminated against Tametra based on her sex, using every vulnerability he could identify against her to intimidate and harass her, including his status as her supervisor and racialized stereotyping. Tametra's experience of sexual harassment, both because she had to endure the harassment and because of Travis's reliance on historical legacies of racism and sexual abuse of Black women to excuse his conduct, caused Tametra great emotional distress.* Should Tametra want to proceed with such a case theory, at every critical locus—as represented in the factual sections of the complaint, briefing, opening statement, trial testimony, closing argument, damages demand, and, where applicable, settlement agreement—the attorney should articulate a viable sex discrimination claim of subgroup discrimination without losing sight of the effect of race on her client's experience.

Narrative has long been part of sex discrimination claims and litigation strategy.[218] Individualized narrative is a tool to push back on stock stories and stock characters that are rooted in stereotype and universal experience. Leigh Goodmark, for example, challenges advocates to avoid distilling complicated domestic violence stories down to the stock story for the sole purpose of attaining a protection order.[219] She calls for a rewriting of the victim narrative, a willingness to tell a counter-narrative story with confidence and in collaboration with client.[220] And Regina Austin has issued a parallel call to action of Black women and other women of color to push back on standard tropes and recast stock characters. In *Sapphire Bound!*, Austin challenges her female colleagues of color to "get truly hysterical" and to "take on the role of 'professional Sapphires' in a forthright way. . . ."[221] She also recasts the central character in *Chambers v. Omaha Girls Club*[222] from a Black feminist perspective, naming the motivating stereotypes in the case and retelling the story from a different perspective. Civil rights advocates and scholars can learn a lesson from Austin's willingness and ability to push against stereotype

218. AMSTERDAM & BRUNER, *supra* note 151, at 21–26.

219. Goodmark, *supra* note 76, at 76–77.

220. *Id.* at 127–29.

221. Austin, *supra* note 79, at 542.

222. 629 F. Supp. 925, *aff'd*, 834 F.2d 697 (8th Cir. 1987), *reh'g denied*, 840 F.2d 583 (1988).

and offer a parallel narrative with characters recast. By viewing sex discrimination as the categorization, stereotyping, and subjugation of subgroups of women, we open a door for scholars and advocates to tell a story of race-sex discrimination. Through storytelling and "restorying,"[223] claimants, advocates, and scholars can introduce and ingrain civil rights jurisprudence with a deeper understanding of complex discrimination. With each telling and retelling of stories of race-sex discrimination and racialized sexual harassment, we may begin to explode the silos of the civil rights statutes. We may make inroads with the court, individual jury members, the media, the client, and/or with ourselves to better understand intersectionality and complex bias and discrimination.

2. Damages Implementation: Connecting Individual Story to Individual Damages

Considering that one thrust of this Article is to recast the stock story of sex discrimination to account for intersectional discrimination, advocates should also consider recasting the role of damages as a tool in that project. Because civil rights remedies contemplate and permit damages arising directly from the individual plaintiff's experience of discrimination, plaintiffs like Tametra should be fully compensated for their experiences of sexual harassment, including any injury that arose from the racialized nature of the harassment.

Courts have found that a victim of discrimination may seek damages for actual, economic, or out-of-pocket costs,[224] and also for

223. Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—Latcrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1631–32 (1997). Espinoza challenges scholars and advocate to tell and retell stories with new voices, rhythms, and characterizations, posting that, through such stories, the legal community can begin to defy the dominant racial paradigm. She explains that "[with] each telling and retelling, both listener and speaker are better able to construct a meaning for their own individual life and to sort through false visions of our individual stories and of the cultural stories that constrain us." *Id.* at 1632.

224. The Fair Housing Act, for example, explicitly recognizes that persons aggrieved by the perpetrator's discrimination may be awarded relief, including actual damages, injunctive, or other equitable relief. 42 U.S.C. § 3612(g)(3) (2012). Section 3612(g)(3) arises under an administrative law forum in which the aggrieved person is seeking relief. Section 3612(o) applies that same remedy analysis to actions brought on behalf of the United States under § 3612(a). *Id.* § 3612(o); *see also id.* § 3613(c) (in a civil action brought directly in state or federal court under the Fair Housing Act, the plaintiff may be awarded "actual and punitive damages"); *id.* § 3614(d)(1)(B) (court may award monetary damages to aggrieved person harmed by pattern or practice of discrimination established in an action brought under the Fair Housing Act pursuant to § 3614). The Fair Housing Act defines "aggrieved person" as "any person who—(1) claims to have been injured by a

the embarrassment, humiliation, and shame experienced due to the defendant's discriminatory conduct.[225] In *Broome v. Biondi*,[226] a case of race discrimination in housing, for example, plaintiff Shannon Broome testified she felt "embarrassed" and "humiliated" by the approval process and the denial of her application to sublet an apartment[227] and plaintiff Gregory Broome testified that he felt "angry" and "demoralized" by the hostile manner in which he was treated, including his submission to an "interrogation" by the co-op board.[228] The jury awarded the plaintiffs $230,000 in compensatory damages, primarily for emotional distress, and $410,000 in punitive damages.[229] Upholding the damages awards, the *Broome* court catalogued emotional distress damages in similar discrimination cases and determined that, in assessing emotional distress damages, courts "must rely primarily on case-specific facts relating to the severity of the discriminatory behavior and duration of the resulting emotional damage."[230] The court also recognized that "the genuine emotional pain associated with such discrimination should not be devalued by unreasonably low compensatory damage awards, especially when one

discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." *Id.* § 3602(i). Analog state statutes similarly permit damages awards to individual victims of housing discrimination. *See, e.g.*, N.C. Gen. Stat. § 41A-7 (2015). The Civil Rights Act of 1991, extended the protections of Title VII of the Civil Rights Act of 1964 to include the right to sue for compensatory and punitive damages in cases of intentional discrimination. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 102, §1977A, 105 Stat. 1071, 1072–74 (codified as amended at 42 U.S.C. § 1981(b)(2012)).

225. *See, e.g.*, United States v. Balistrieri, 981 F.2d 916, 930 (7th Cir. 1992) (affirming damages award to fair housing "testers," who experienced upset, humiliation, embarrassment, and shame when they discovered, after their interaction with defendants, that they had been treated less favorably because of their race); Littlefield v. McGuffey, 954 F.2d 1337, 1348–49 (7th Cir. 1992) (affirming a jury award of $50,000 in compensatory damages and $100,000 in punitive damages based on a finding that defendant rejected Ms. Littlefield as a tenant because of her boyfriend's and daughter's races, crediting plaintiff's testimony about the negative effect of racially-animated death threats); Sec'y, U.S. Dept. of Hous. & Urban Dev. *ex rel.* Herron v. Blackwell, 908 F.2d 864, 872–73 (11th Cir. 1990) (upholding a jury award for actual economic losses and emotional distress, for plaintiffs unable to purchase a home because of their race, recognizing the relationship between the "humiliation and embarrassment" plaintiffs suffered and the compensatory damages award); Woods-Drake v. Lundy, 667 F.2d 1198, 1203 (5th Cir. 1982) (reversing the district court's finding of no liability or damages when defendant landlord conditioned plaintiffs' tenancy on an agreement to no longer accept Black guests and directing the lower court to "award plaintiffs an amount which will fairly compensate them for [their] emotional distress," including "embarrassment and humiliation they suffered").

226. 17 F. Supp. 2d 211 (S.D.N.Y. 1997)

227. *Id*. at 223–28 (citing Transcript at 190–91).

228. *Id.* (citing Transcript at 89–90, 92–93, 177, 168, 189–90).

229. *Id.* at 223–28.

230. *Id.* at 225.

considers the difficulty a plaintiff faces in establishing that he or she was a victim of housing discrimination."[231] Courts around the country have similarly acknowledged the individual nature of emotional distress and compensatory damages for discrimination, as well as the necessity of sufficient compensatory awards.[232]

The greater the distress, the greater the damages.[233] The individual experiences of humiliation, shame, or degradation should be directly proportional to the award of compensatory, or emotional distress, damages.[234] Because the civil rights statutory schemes and related case law assess a victim's evidence of humiliation, degradation, and shame to award emotional distress damages, victims of sex discrimination, based on racial subgroup, should be compensated accordingly.[235] Tametra should be compensated for the humiliation, shame, and degradation she experienced at Travis's hands. Tametra may have experienced feelings of humiliation and

231. *Id.* at 226.

232. *See* AMSTERDAM & BRUNER, *supra* note 151, at 21–26.

233. United States v. Balistrieri, 981 F.2d 916, 932 (7th Cir. 1992) ("The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action; consequently, somewhat more conclusory evidence of emotional distress will be acceptable to support an award for emotional distress.").

234. *See* AMSTERDAM & BRUNER, *supra* note 151, at 21–26. This is also true in sexual harassment cases. *See, e.g.*, Banai v. Sec'y, U.S. Dep't of Hous. & Urban Dev., 102 F.3d 1203, 1207 & n. 4 (11th Cir. 1997) (holding that "anger, embarrassment, and emotional distress are clearly compensable injuries under th[e] [FHA]," which permits recovery of "actual damages" including "compensation for the victim's injuries"); Boswell v. GumBayTay, No. 2:07-CV-135, 2009 WL 1515912, at *7 (M.D. Ala. June 1, 2009) (citing 42 U.S.C. § 3613(c)(1) (2012)); Tafoya v. State Human Rights Comm., 311 P.3d 70, 79 177 (Wash. Ct. App. 2013) (recognizing that the plaintiff "suffered emotional distress because of David's conduct, which embarrassed and humiliated her and made her afraid in her own home"). It is also in keeping with traditional tort remedies, where compensatory damages are designed to compensate a person for a legally recognized loss and courts explain to a defendant that he must "take the plaintiff as he finds him." DAN B. DOBBS, LAW OF REMEDIES 210 (2d ed. 1993).

235. This Article is not advocating for a hierarchy of damages awards based on race or any other factor. This Article focuses its attention on race-sex discrimination because race has often been ignored in the context of sex discrimination, because racial stereotypes have motivated and infected sex discrimination, including sexual harassment, and because there is a history of depressed awards to Black plaintiffs. The idea of individualized story-telling, combined with a thoughtful and unique approach to damages demands, can be applied in other contexts. If a woman in a wheelchair is sexually harassed by her landlord and, as part of the sexual harassment, the landlord refuses to consider giving the woman a first-floor apartment, her lawyer could apply the concepts in this Article to present an intersectional disability-sex case through the lens of a sex discrimination claim. Further, her lawyer may argue that her client's experience of sexual harassment caused her to feel shame, degradation, and emotional distress at a heightened level because of the landlord's abuse of her disability and that she should be duly compensated.

shame when her supervisor made sexually explicit comments to her or showed her a photograph of his exposed penis in his office. She may have also experienced a sense of degradation when Travis asked her if she had ever been with a White man, discussed the size of his penis relative to other White men, and told her "Black women got better pussy than white women." Those feelings of degradation, humiliation, and shame are wrapped up in Tametra's individual experience of racialized sexual harassment, her personal history, and America's national history of perpetuating a stereotype of Black women as lascivious Jezebels.[236]

Developing individual case theories and asking for damages commensurate with a story of complex discrimination breaks down stereotypes and pushes back on a system that has too often measured damages by the valuation of the recipient, grounded in race- and sex-based stereotypes.[237] In criminal and civil cases, quantitative and qualitative evidence establishes that women and minorities fare worse than men and Whites.[238] That is true even where race is not explicitly

236. *See* HARRIS-PERRY, *supra* note 138, at 53–69; Austin, *supra* note 79, at 570; Roberts, *supra* note 143, at 11–12. Black women, of course, are not the only women subjected to cultural myths that increase their vulnerability to harassment or subjugation. *Cf.* Llezlie Green Coleman, *Exploited at the Intersection: A Critical Race Feminist Analysis of Undocumented Latina Workers and the Role of the Private Attorney General*, 22 VA. J. SOC. POL'Y & L. 397, 404 (2015) ("Latina immigrant workers may also experience subjugation based upon cultural narratives that inform their experiences both at home and at work.").

237. *See* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 1, 2–5 (2010) ("[W]hen viewed though a wider cultural lens, the basic structure of contemporary tort law still tends to reflect and reinforce the social marginalization of women and racial minorities and to place a lower value on their lives, activities, and potential."); AUDREY CHIN & MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS, WHO WINS IN COOK COUNTY JURY TRIALS 3, 26, 32 (1985) (studying 9,000 civil cases in Cook County, Illinois between 1960 and 1979 and finding that Black litigants had a lower chance of success in jury trials, and that Black plaintiffs received smaller awards than non-Black plaintiffs, averaging less than half of the median award and only 40 percent of the average award for non-Black plaintiffs); 3 DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, THE LAW OF TORTS § 479 (2d ed. 2011).

238. In rape and sexual assault cases, prosecutors, judges, and juries appear to value the social harm resulting from the rape of a Black woman less than the social harm resulting from the rape of a White woman. *See* Pokorak, *supra* note 136, at 38–43; *cf.* Crenshaw, *supra* note 25 at 1269 (citing *Race Tilts the Scales of Justice. Study: Dallas Punishes Attacks on Whites More Harshly*, DALL. TIMES HERALD, Aug. 19, 1990, at A1); Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 998 (2003) (citing DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 143 (1990) (discussing a study finding that defendants in more than 2,000 Georgia capital murder cases were 4.3 times more likely to receive the death penalty if the victim was White than if the victim was Black)).

part of the case.[239] Certain scholars have suggested that race-conscious discourse in the law may actually break the application of negative racial stereotypes. In part because the evidence suggests that race and gender stereotypes seep into the outcomes of cases regardless of express discussion, this Part posits that such research offers hope to plaintiffs willing to explicitly allege, argue, and demand damages commensurate with their experience of race-sex discrimination. By using "race-conscious talk," rather than "race-neutral" or "race-coded"[240] talk, legal actors may "exploit, and at times . . . thwart, bias . . . ."[241] Addressing race explicitly can recast ideas about race and racial identity and might interrupt the factfinder's instinct to apply racial stereotypes and biases without thinking.[242] Explicitly discussing the injury of the racialization of sex discrimination may also create a cultural bridge between the judge or juror and the victim of race-sex discrimination.[243]

Advocates representing intersectional plaintiffs can take concrete steps to tell the client's story of racialized sex discrimination in court and to ask for damages commensurate with her story. For example, in investigating a case like Tametra's, the lawyer could ask her client questions about how her race was a part of her sexual

Similar results accrue in studies of sentencing disparities. *See* Sommers & Ellsworth, *supra* note 238, at 1006 (citing Kitty Klein & Blanche Creech, *Race, Rape, and Bias: Distortion of Prior Odds and Meaning Changes*, 3 BASIC & APPLIED SOC. PSYCHOL. 21 (1982)).There are similar accounts in civil tort cases. *See* CHAMALLAS & WRIGGINS, *supra* note 237, at 2–5.

239. *See* CHAMALLAS & WRIGGINS, *supra* note 237, at 33; CHIN & PETERSON, *supra* note 237, at 3, 26, 32.

240. *See* Anthony V. Alfieri, *Objecting to Race*, 27 GEO. J. LEGAL ETHICS 1129, 1137 (2014) (defining race-conscious talk as discourse that "discerns extant racial consciousness in law and in the social and political construction of color among individuals, groups, and communities").

241. *Id.* (looking specifically at criminal law trials).

242. *See id.* at 1157 ("The integration of race-conscious reasoning into civil rights . . . advocacy . . . requires confronting and naming race in the lawyering and criminal justice process, and recasting racial identity . . . ."); Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761, 797 (1996) ("[T]alking about race can defeat rather than promote racism.").

243. *See* Victor M. Goode & Conrad A. Johnson, *Emotional Harm in Housing Discrimination Cases: A New Look at a Lingering Problem*, 30 FORDHAM URB. L.J. 1143, 1174–75 (2003) (relying on psychological studies that suggest that Whites are driven by cultural biases, known and unknown to them, Goode and Johnson come to several conclusions, including that "even reluctant whites can be brought around to non-racist behavior through an institutional approach that vigorously and actively promotes those values and carefully monitors transgressions"); *cf.* Hutchinson, *Out Yet Unseen*, *supra* note 114, at 602–03 (relying on Marc Fajer's proposal to "'re-tell' personal narratives of gay and lesbian people in order to 'counter and demonstrate' homophobic stereotypes" and "offer 'new perspectives' into legal discourse").

harassment and how she felt about all parts of her experience with her supervisor. Her lawyer could draft a complaint that includes factual allegations representative of her client's experience and injury, not just the facts sufficient to make out a pure sex discrimination claim. She could ask about her client's emotions on the stand and consider putting on an expert witness to discuss the history of racial stereotyping around sex and sexuality and its emotional toll on individuals and communities. In drafting the jury instructions on damages, her lawyer could use the case law on individual damages to step outside of model jury instructions. And in closing argument, her lawyer might pull the case theory together for the jury, explaining why her client's injury based on the sexual assault cannot be separated from the racial animus embedded in the assault.

C. Agencies: The Form as a Starting, not Ending Point

Finally, agencies have a role in adequately understanding and analyzing claims and charges of complex discrimination. Tametra Moore's experience with the EEOC is representative and instructive. As required, she filed an Intake Questionnaire with the EEOC.[244] Unrepresented by counsel, Tametra provided her personal information, checking the "African-American" race box.[245] In responding to the question about the basis for her discrimination, she checked the boxes for "sexual harassment" and "harassment."[246] Although Tametra included fourteen handwritten pages detailing her experience of discrimination, calling attention to aspects of racial harassment and sexual harassment, Tametra did not check the "race discrimination" box.[247] The EEOC issued Tametra a notice-to-sue letter charging sexual harassment and retaliation.[248] Based on Tametra's decision not to check the "race discrimination" box on her EEOC Intake Questionnaire, the defendant sought summary judgment on her Title VII race discrimination claim.[249] The defendant argued that Tametra failed to exhaust her administrative remedies, a requirement to proceed under Title VII.[250] Citing a string of

244. Moore EEOC Intake Questionnaire, *supra* note 10. The EEOC form has changed marginally since 2009, when Ms. Moore filled out her questionnaire. For the current form, see U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 83.

245. Moore EEOC Intake Questionnaire, *supra* note 10, at 3.

246. *Id.*

247. *Id.*

248. Moore Compl., *supra* note 1, at 2.

249. Defendant's Motion for Summary Judgment at 13–14, Moore v. Cricket Communications, Inc., No. 4:09-cv-03310 (S.D. Tex. Aug. 25, 2010), ECF No. 14.

250. *Id.*

analogous cases, the defendant argued that "[a] Title VII claim may only be based on the specific complaints in the Charge submitted to the EEOC," with the exception of "claims that are 'like or related to the [C]harge's allegations,' limited by the 'scope of the EEOC investigation which can reasonably be expected to grow out of the [C]harge of Discrimination."[251] The defendant explained:

> Plaintiff did not include a claim of race discrimination on her EEOC Intake Questionnaire, checking only the boxes for sex discrimination and retaliation. Consistent with Plaintiff's limited allegations of sex discrimination and retaliation, the Notice of Charge of Discrimination to Cricket states the issues of the Charge are Harassment and Sexual Harassment and does not discuss any race discrimination claim or mention the word 'race.' Under such circumstances, Plaintiff's race discrimination claim is not related to her sex harassment claim or retaliation claim and was not within the scope of the EEOC's investigation of Plaintiff's complaint. Plaintiff failed to exhaust her administrative remedies as to her race discrimination claim. Accordingly, this Court does not have jurisdiction over the claim and it must be dismissed as a matter of law.[252]

The *Moore* court denied defendant's motion for summary judgment.[253] The court found that Tametra was *not* limited to the types of discrimination expressly checked in her Intake Questionnaire.[254] The *Moore* court explicitly recognized that the procedure set forth in Title VII was "not designed for the sophisticated or the cognoscenti, but to protect equality of opportunity among all employees and prospective employees."[255]

Although the *Moore* court ultimately recognized the claim of race discrimination in Tametra's EEOC Intake Questionnaire,[256] courts do not uniformly excuse discrepancies between the administrative forms and claims of discrimination.[257] Further, the

251. *Id.* at 13 (citing DeJesus-Harris v. Blockbuster Video, No. SA-04-CA-1099-XR, 2006 WL 262051, at *10 (W.D. Tex. Sept. 5, 2006)).

252. *Id.* at 14.

253. Moore v. Cricket Commc'ns, Inc., 764 F. Supp. 2d 853 (S.D. Tex. 2011).

254. *Id.* at 859.

255. *Id.* at 860 (citing Sanchez v. Standard Brands, Inc., 431 F.2d 455, 463 (5th Cir.1970)).

256. *Id.*

257. *See, e.g.*, Miles v. Dell, Inc., 429 F.3d 480, 491–92 (4th Cir. 2005) (affirming dismissal of retaliation claim where the plaintiff "did not check the retaliation box on her charge form, and the narrative explaining her charge made no mention of retaliation"); Luna v. Lockheed Martin Corp., 54 F. App'x 404, 2002 WL 31687698, at *1 (5th Cir. Oct. 22, 2002) (per curiam) (unpublished table decision) (stating that because plaintiff "failed

summary judgment briefing underscores the problem with the procedure at its origination—the administrative agency. Defendants are relying on the administrative exhaustion requirement, which is rigidly formulaic, to escape otherwise meritorious discrimination actions. The most obvious solution would be to eliminate the exhaustion requirement in Title VII to mirror the administrative process in the Fair Housing Act.[258] In the absence of a legislative change, there is another simple solution. The form should eliminate the check boxes with respect to the reason or basis for the complainant's claim of discrimination. And complaints should be further encouraged to describe their evidence of discrimination in a narrative. Taken together with the personal demographic information already sought on the form, the agency will be tasked with investigating and charging the discrimination. Because the investigators presumably have more familiarity with the law of employment or housing discrimination, they will be better situated than *pro se* complainants to assess the bases on which a discrimination action might be pursued.[259] Then, the complainant can decide upon which basis or bases to proceed.

The proposed solution is a simple change to the form. It is in keeping with the statutory scheme, which contemplates that EEOC and HUD investigators will consider, at a substantive level, the

to mark the box indicating his intention to bring a claim of national origin discrimination. . . . [He] failed to exhaust his administrative remedies as to that claim"); Thomas v. Tex. Dep't. of Criminal Justice, 220 F.3d 389, 395 (5th Cir. 2000) (holding that plaintiff could not proceed with a race discrimination claim because her EEOC Charge of Discrimination was limited to sex discrimination); Cohens v. Md. Dep't of Human Res., 933 F. Supp. 2d 735, 743 (D. Md. 2013) (dismissing retaliation claim where the plaintiff "neither checked the 'retaliation' box on her EEOC charge nor alleged retaliation in the charge's factual summary").

258. *See* 42 U.S.C. § 3610 (2012) (providing for an administrative resolution but not requiring administrative exhaustion prior to filing a private action in state or federal court).

259. While this might cause some additional burden on the government, it is the kind of burden and expense that is contemplated in the statutory scheme. The HUD Fair Housing Enforcement Office manual, for example, states: "The investigation of a complaint filed under Title VIII of the Civil Rights Act of 1968 . . . consists of gathering and analyzing facts regarding a complainant's allegations and the respondent's defenses with respect to the alleged discriminatory housing practice or policy to determine whether there is reasonable cause to believe that the respondent violated the Fair Housing Act." TITLE VIII COMPLAINT INTAKE, INVESTIGATION, AND CONCILIATION HANDBOOK (8024.1), Ch. 7, https://www.hud.gov/sites/documents/80241C7FHEH.PDF [https://perma.cc/CA8N-W9VB]. *But see* DEP'T OF HOUS. & URBAN DEV., EVALUATION OF FHEO HOUSING DISCRIMINATION COMPLAINT PROCESSING AND COMPLIANCE (2008), https://www.hudoig.gov/sites/default/files/documents/IED-07-001.pdf [https://perma.cc/9XMA-9QXW] (identifying problems with HUD's fair housing investigations pursuant to complaints filed).

complainant's allegations.[260] It does not prejudice the potential defendant or defendants because they are on notice of the alleged events and can foresee the potential claims that arise from the allegations. It is also in keeping with the traditional requirements of the federal rules[261] and the Supreme Court's jurisprudence on pleading.[262]

In addition to, and certainly in the absence of, implementing the revised form, the agencies should provide additional information to complainants about the relationship between the standard intake forms, the charge of discrimination, and any resulting federal claims. That information is currently absent.

CONCLUSION

Rights-based antidiscrimination law has failed to achieve equality on many fronts. One front is the failure to integrate the insights of intersectionality theory in any meaningful way. But rights-based antidiscrimination law remains the primary tool for fighting discrimination in the workplace, housing, the classroom, the bank, and hotels across this country. It is with that understanding that this Article considers how to use the current antidiscrimination scheme to best address and remedy intersectional discrimination. With our consciousness raised by the insights and critiques of intersectionality theory, the door is now open to a new perspective for understanding and addressing intersectionality and intersectional discrimination within the traditional confines of antidiscrimination law. The cluster framework—by refining the vision of intersectional discrimination, relocating intersectional discrimination within that vision, defining discrimination in a way that accounts for the categorization, stereotyping, and subjugation of subgroups of protected classes, and understanding the injuries of complex discrimination—acts as a roadmap for people of all colors to take up the cause of fighting intersectional discrimination.

260. § 2000e-5 (requiring investigation for Title VII charges); *id.* § 3610 (requiring investigation of a Fair Housing Act complaint).

261. Federal Rule of Civil Procedure 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2).

262. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding that a complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007) (holding that notice pleading does require enough factual allegations to "raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true").