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Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics

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Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics

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One of the very few Black women's studies books is entitled *All the Women Are White, All the Blacks Are Men, But Some of Us are Brave.*[1] I have chosen this title as a point of departure in my efforts to develop a Black feminist criticism[2] because it sets forth a problematic consequence of the tendency to treat race and gender as mutually exclusive categories of experience and analysis.[3] In this talk, I want to examine how this tendency is perpetuated by a single-axis framework that is dominant in antidiscrimination law and that is also reflected in feminist theory and antiracist politics.

I will center Black women in this analysis in order to contrast the multidimensionality of Black women's experience with the single-axis analysis that distorts these experiences. Not only will this juxtaposition reveal how Black women are theoretically erased, it will also illustrate how this framework imports its own theoretical limitations that undermine efforts to broaden feminist and an-

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[1] Gloria T. Hull, et al, eds (The Feminist Press, 1982).

[2] For other work setting forth a Black feminist perspective on law, see Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights (Voices of Experience: New Responses to Gender Discourse)*, 24 Harv CR-CL L Rev 9 (1989); Regina Austin, *Sapphire-Bound!*, forthcoming in Wisc Women's L J (1989); Angela Harris, *Race and Essentialism in Feminist Legal Theory* (unpublished manuscript on file with author); and Paulette M. Caldwell, *A Hair Piece* (unpublished manuscript on file with author).

[3] The most common linguistic manifestation of this analytical dilemma is represented in the conventional usage of the term "Blacks and women." Although it may be true that some people mean to include Black women in either "Blacks" or "women," the context in which the term is used actually suggests that often Black women are not considered. See, for example, Elizabeth Spelman, *The Inessential Woman* 114-15 (Beacon Press, 1988) (discussing an article on Blacks and women in the military where "the racial identity of those identified as 'women' does not become explicit until reference is made to Black women, at which point it also becomes clear that the category of women excludes Black women"). It seems that if Black women were explicitly included, the preferred term would be either "Blacks and white women" or "Black men and all women."

tiracist analyses. With Black women as the starting point, it becomes more apparent how dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis. I want to suggest further that this single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group. In other words, in race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women.

This focus on the most privileged group members marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination. I suggest further that this focus on otherwise-privileged group members creates a distorted analysis of racism and sexism because the operative conceptions of race and sex become grounded in experiences that actually represent only a subset of a much more complex phenomenon.

After examining the doctrinal manifestations of this single-axis framework, I will discuss how it contributes to the marginalization of Black women in feminist theory and in antiracist politics. I argue that Black women are sometimes excluded from feminist theory and antiracist policy discourse because both are predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender. These problems of exclusion cannot be solved simply by including Black women within an already established analytical structure. Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated. Thus, for feminist theory and antiracist policy discourse to embrace the experiences and concerns of Black women, the entire framework that has been used as a basis for translating "women's experience" or "the Black experience" into concrete policy demands must be rethought and recast.

As examples of theoretical and political developments that miss the mark with respect to Black women because of their failure to consider intersectionality, I will briefly discuss the feminist critique of rape and separate spheres ideology, and the public policy debates concerning female-headed households within the Black community.

I. THE ANTIDISCRIMINATION FRAMEWORK

A. The Experience of Intersectionality and the Doctrinal Response

One way to approach the problem of intersectionality is to examine how courts frame and interpret the stories of Black women plaintiffs. While I cannot claim to know the circumstances underlying the cases that I will discuss, I nevertheless believe that the way courts interpret claims made by Black women is itself part of Black women's experience and, consequently, a cursory review of cases involving Black female plaintiffs is quite revealing. To illustrate the difficulties inherent in judicial treatment of intersectionality, I will consider three Title VII[4] cases: *DeGraffenreid v General Motors*,[5] *Moore v Hughes Helicopter*[6] and *Payne v Travenol*.[7]

1. *DeGraffenreid v General Motors.*

In *DeGraffenreid*, five Black women brought suit against General Motors, alleging that the employer's seniority system perpetuated the effects of past discrimination against Black women. Evidence adduced at trial revealed that General Motors simply did not hire Black women prior to 1964 and that all of the Black women hired after 1970 lost their jobs in a seniority-based layoff during a subsequent recession. The district court granted summary judgment for the defendant, rejecting the plaintiffs' attempt to bring a suit not on behalf of Blacks or women, but specifically on behalf of Black women. The court stated:

> [P]laintiffs have failed to cite any decisions which have stated that Black women are a special class to be protected from discrimination. The Court's own research has failed to disclose such a decision. The plaintiffs are clearly entitled to a remedy if they have been discriminated against. However, they should not be allowed to combine statutory remedies to create a new 'super-remedy' which would give them relief beyond what the drafters of the relevant statutes intended. Thus, this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.[8]

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[4] Civil Rights Act of 1964, 42 USC § 2000e, et seq as amended (1982).

[5] 413 F Supp 142 (E D Mo 1976).

[6] 708 F2d 475 (9th Cir 1983).

[7] 673 F2d 798 (5th Cir 1982).

[8] *DeGraffenreid*, 413 F Supp at 143.

Although General Motors did not hire Black women prior to 1964, the court noted that "General Motors has hired . . . female employees for a number of years prior to the enactment of the Civil Rights Act of 1964."[9] Because General Motors did hire women—albeit *white women*—during the period that no Black women were hired, there was, in the court's view, no sex discrimination that the seniority system could conceivably have perpetuated.

After refusing to consider the plaintiffs' sex discrimination claim, the court dismissed the race discrimination complaint and recommended its consolidation with another case alleging race discrimination against the same employer.[10] The plaintiffs responded that such consolidation would defeat the purpose of their suit since theirs was not purely a race claim, but an action brought specifically on behalf of Black women alleging race *and* sex discrimination. The court, however, reasoned:

> The legislative history surrounding Title VII does not indicate that the goal of the statute was to create a new classification of 'black women' who would have greater standing than, for example, a black male. The prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box.[11]

Thus, the court apparently concluded that Congress either did not contemplate that Black women could be discriminated against as "Black women" or did not intend to protect them when such discrimination occurred.[12] The court's refusal in *DeGraffenreid* to

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[9] Id at 144.

[10] Id at 145. In *Mosley v General Motors*, 497 F Supp 583 (E D Mo 1980), plaintiffs, alleging broad-based racial discrimination at General Motors' St. Louis facility, prevailed in a portion of their Title VII claim. The seniority system challenged in *DeGraffenreid*, however, was not considered in *Mosley*.

[11] Id at 145.

[12] Interestingly, no case has been discovered in which a court denied a white male's attempt to bring a reverse discrimination claim on similar grounds—that is, that sex and race claims cannot be combined because Congress did not intend to protect compound classes. White males in a typical reverse discrimination case are in no better position than the frustrated plaintiffs in *DeGraffenreid*: If they are required to made their claims separately, white males cannot prove race discrimination because white women are not discriminated against, and they cannot prove sex discrimination because Black males are not discriminated against. Yet it seems that courts do not acknowledge the compound nature of most reverse discrimination cases. That Black women's claims automatically raise the question of compound discrimination and white males' "reverse discrimination" cases do not suggest

acknowledge that Black women encounter combined race and sex discrimination implies that the boundaries of sex and race discrimination doctrine are defined respectively by white women's and Black men's experiences. Under this view, Black women are protected only to the extent that their experiences coincide with those of either of the two groups.[13] Where their experiences are distinct, Black women can expect little protection as long as approaches, such as that in *DeGraffenreid*, which completely obscure problems of intersectionality prevail.

2. *Moore v Hughes Helicopter, Inc.*.

Moore v Hughes Helicopters, Inc.[14] presents a different way in which courts fail to understand or recognize Black women's claims. *Moore* is typical of a number of cases in which courts refused to certify Black females as class representatives in race *and* sex discrimination actions.[15] In *Moore*, the plaintiff alleged that the employer, Hughes Helicopter, practiced race and sex discrimination in promotions to upper-level craft positions and to supervisory jobs. Moore introduced statistical evidence establishing a significant disparity between men and women, and somewhat less of a disparity between Black and white men in supervisory jobs.[16]

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that the notion of compoundedness is somehow contingent upon an implicit norm that is not neutral but is white male. Thus, Black women are perceived as a compound class because they are two steps removed from a white male norm, while white males are apparently not perceived to be a compound class because they somehow represent the norm.

[13] I do not mean to imply that all courts that have grappled with this problem have adopted the *DeGraffenreid* approach. Indeed, other courts have concluded that Black women are protected by Title VII. See, for example, *Jefferies v Harris Community Action Ass'n.*, 615 F2d 1025 (5th Cir 1980). I do mean to suggest that the very fact that the Black women's claims are seen as aberrant suggests that sex discrimination doctrine is centered in the experiences of white women. Even those courts that have held that Black women are protected seem to accept that Black women's claims raise issues that the "standard" sex discrimination claims do not. See Elaine W. Shoben, *Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination*, 55 NYU L Rev 793, 803-04 (1980) (criticizing the *Jefferies* use of a sex-plus analysis to create a subclass of Black women).

[14] 708 F2d 475.

[15] See also *Moore v National Association of Securities Dealers*, 27 EPD (CCH) ¶ 32,238 (D DC 1981); but see *Edmondson v Simon*, 86 FRD 375 (N D Ill 1980) (where the court was unwilling to hold as a matter of law that no Black female could represent without conflict the interests of both Blacks and females).

[16] 708 F2d at 479. Between January 1976 and June 1979, the three years in which Moore claimed that she was passed over for promotion, the percentage of white males occupying first-level supervisory positions ranged from 70.3 to 76.8%; Black males from 8.9 to 10.9%; white women from 1.8 to 3.3%; and Black females from 0 to 2.2%. The overall male/female ratio in the top five labor grades ranged from 100/0% in 1976 to 98/1.8% in 1979. The white/Black ratio was 85/3.3% in 1976 and 79.6/8% in 1979. The overall ratio of men to women in supervisory positions was 98.2 to 1.8% in 1976 to 93.4 to 6.6% in 1979; the Black to white ratio during the same time period was 78.6 to 8.9% and 73.6 to 13.1%

For promotions to the top five labor grades, the percentages were worse. Between 1976

Affirming the district court's refusal to certify Moore as the class representative in the sex discrimination complaint on behalf of all women at Hughes, the Ninth Circuit noted approvingly:

> . . . Moore had never claimed before the EEOC that she was discriminated against as a female, *but only* as a Black female . . . . [T]his raised serious doubts as to Moore's ability to adequately represent white female employees.[17]

The curious logic in *Moore* reveals not only the narrow scope of antidiscrimination doctrine and its failure to embrace intersectionality, but also the centrality of white female experiences in the conceptualization of gender discrimination. One inference that could be drawn from the court's statement that Moore's complaint did not entail a claim of discrimination "against females" is that discrimination against Black females is something less than discrimination against females. More than likely, however, the court meant to imply that Moore did not claim that *all* females were discriminated against *but only* Black females. But even thus recast, the court's rationale is problematic for Black women. The court rejected Moore's bid to represent all females apparently because her attempt to specify her race was seen as being at odds with the standard allegation that the employer simply discriminated "against females."

The court failed to see that the absence of a racial referent does not necessarily mean that the claim being made is a more inclusive one. A white woman claiming discrimination against females may be in no better position to represent all women than a Black woman who claims discrimination as a Black female and wants to represent all females. The court's preferred articulation of "against females" is not necessarily more inclusive—it just appears to be so because the racial contours of the claim are not specified.

The court's preference for "against females" rather than "against Black females" reveals the implicit grounding of white female experiences in the doctrinal conceptualization of sex discrimination. For white women, claiming sex discrimination is simply a statement that but for gender, they would not have been disadvantaged. For them there is no need to specify discrimination as *white*

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and 1979, the percentage of white males in these positions ranged from 85.3 to 77.9%; Black males 3.3 to 8%; white females from 0 to 1.4%, and Black females from 0 to 0%. Overall, in 1979, 98.2% of the highest level employees were male; 1.8% were female.

[17] 708 F2d at 480 (emphasis added).

females because their race does not contribute to the disadvantage for which they seek redress. The view of discrimination that is derived from this grounding takes race privilege as a given.

Discrimination against a white female is thus the standard sex discrimination claim; claims that diverge from this standard appear to present some sort of hybrid claim. More significantly, because Black females' claims are seen as hybrid, they sometimes cannot represent those who may have "pure" claims of sex discrimination. The effect of this approach is that even though a challenged policy or practice may clearly discriminate against all females, the fact that it has particularly harsh consequences for Black females places Black female plaintiffs at odds with white females.

Moore illustrates one of the limitations of antidiscrimination law's remedial scope and normative vision. The refusal to allow a multiply-disadvantaged class to represent others who may be singularly-disadvantaged defeats efforts to restructure the distribution of opportunity and limits remedial relief to minor adjustments within an established hierarchy. Consequently, "bottom-up" approaches, those which combine all discriminatees in order to challenge an entire employment system, are foreclosed by the limited view of the wrong and the narrow scope of the available remedy. If such "bottom-up" intersectional representation were routinely permitted, employees might accept the possibility that there is more to gain by collectively challenging the hierarchy rather than by each discriminatee individually seeking to protect her source of privilege within the hierarchy. But as long as antidiscrimination doctrine proceeds from the premise that employment systems need only minor adjustments, opportunities for advancement by disadvantaged employees will be limited. Relatively privileged employees probably are better off guarding their advantage while jockeying against others to gain more. As a result, Black women—the class of employees which, because of its intersectionality, is best able to challenge all forms of discrimination—are essentially isolated and often required to fend for themselves.

In *Moore*, the court's denial of the plaintiff's bid to represent all Blacks and females left Moore with the task of supporting her race and sex discrimination claims with statistical evidence of discrimination against Black females alone.[18] Because she was unable to represent white women or Black men, she could not use overall

[18] Id at 484-86.

statistics on sex disparity at Hughes, nor could she use statistics on race. Proving her claim using statistics on Black women alone was no small task, due to the fact that she was bringing the suit under a disparate impact theory of discrimination.[19]

The court further limited the relevant statistical pool to include only Black women who it determined were qualified to fill the openings in upper-level labor jobs and in supervisory positions.[20] According to the court, Moore had not demonstrated that there were any qualified Black women within her bargaining unit or the general labor pool for either category of jobs.[21] Finally, the court stated that even if it accepted Moore's contention that the percentage of Black females in supervisory positions should equal the percentage of Black females in the employee pool, it still would not find discriminatory impact.[22] Because the promotion of only two Black women into supervisory positions would have achieved the expected mean distribution of Black women within that job category, the court was "unwilling to agree that a prima facie case of disparate impact ha[d] been proven."[23]

The court's rulings on Moore's sex and race claim left her with such a small statistical sample that even if she had proved that there were qualified Black women, she could not have shown discrimination under a disparate impact theory. *Moore* illustrates yet another way that antidiscrimination doctrine essentially erases Black women's distinct experiences and, as a result, deems their discrimination complaints groundless.

3. *Payne v Travenol.*

Black female plaintiffs have also encountered difficulty in

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[19] Under the disparate impact theory that prevailed at the time, the plaintiff had to introduce statistics suggesting that a policy or procedure disparately affects the members of a protected group. The employer could rebut that evidence by showing that there was a business necessity supporting the rule. The plaintiff then countered the rebuttal by showing that there was a less discriminatory alternative. See, for example, *Griggs v Duke Power*, 401 US 424 (1971); *Connecticut v Teal*, 457 US 440 (1982).

A central issue in a disparate impact case is whether the impact proved is statistically significant. A related issue is how the protected group is defined. In many cases a Black female plaintiff would prefer to use statistics which include white women and/or Black men to indicate that the policy in question does in fact disparately affect the protected class. If, as in *Moore*, the plaintiff may use only statistics involving Black women, there may not be enough Black women employees to create a statistically significant sample.

[20] Id at 484.

[21] The court buttressed its finding with respect to the upper-level labor jobs with statistics for the Los Angeles Metropolitan Area which indicated the there were only 0.2% Black women within comparable job categories. Id at 485 n 9.

[22] Id at 486.

[23] Id.

their efforts to win certification as class representatives in some race discrimination actions. This problem typically arises in cases where statistics suggest significant disparities between Black and white workers and further disparities between Black men and Black women. Courts in some cases[24] have denied certification based on logic that mirrors the rationale in *Moore*: The sex disparities between Black men and Black women created such conflicting interests that Black women could not possibly represent Black men adequately. In one such case, *Payne v Travenol*,[25] two Black female plaintiffs alleging race discrimination brought a class action suit on behalf of all Black employees at a pharmaceutical plant.[26] The court refused, however, to allow the plaintiffs to represent Black males and granted the defendant's request to narrow the class to Black women only. Ultimately, the district court found that there had been extensive racial discrimination at the plant and awarded back pay and constructive seniority to the class of Black female employees. But, despite its finding of general race discrimination, the court refused to extend the remedy to Black men for fear that their conflicting interests would not be adequately addressed;[27] the Fifth Circuit affirmed.[28]

Notably, the plaintiffs in *Travenol* fared better than the similarly-situated plaintiff in *Moore*: They were not denied use of meaningful statistics showing an overall pattern of race discrimination simply because there were no men in their class. The plaintiffs' bid to represent all Black employees, however, like Moore's attempt to represent all women employees, failed as a consequence

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[24] See *Strong v Arkansas Blue Cross & Blue Shield, Inc.*, 87 FRD 496 (E D Ark 1980); *Hammons v Folger Coffee Co.*, 87 FRD 600 (W D Mo 1980); *Edmondson v Simon*, 86 FRD 375 (N D Ill 1980); *Vuyanich v Republic National Bank of Dallas*, 82 FRD 420 (N D Tex 1979); *Colston v Maryland Cup Corp.*, 26 Fed Rules Serv 940 (D Md 1978).

[25] 416 F Supp 248 (N D Miss 1976).

[26] The suit commenced on March 2, 1972, with the filing of a complaint by three employees seeking to represent a class of persons allegedly subjected to racial discrimination at the hands of the defendants. Subsequently, the plaintiffs amended the complaint to add an allegation of sex discrimination. Of the original named plaintiffs, one was a Black male and two were Black females. In the course of the three-year period between the filing of the complaint and the trial, the only named male plaintiff received permission of the court to withdraw for religious reasons. Id at 250.

[27] As the dissent in *Travenol* pointed out, there was no reason to exclude Black males from the scope of the remedy *after* counsel had presented sufficient evidence to support a finding of discrimination against Black men. If the rationale for excluding Black males was the potential conflict between Black males and Black females, then "[i]n this case, to paraphrase an old adage, the proof of plaintiffs' ability to represent the interests of Black males was in the representation thereof." 673 F2d at 837-38.

[28] 673 F2d 798 (5th Cir 1982).

of the court's narrow view of class interest.

Even though *Travenol* was a partial victory for Black women, the case specifically illustrates how antidiscrimination doctrine generally creates a dilemma for Black women. It forces them to choose between specifically articulating the intersectional aspects of their subordination, thereby risking their ability to represent Black men, or ignoring intersectionality in order to state a claim that would not lead to the exclusion of Black men. When one considers the political consequences of this dilemma, there is little wonder that many people within the Black community view the specific articulation of Black women's interests as dangerously divisive.

In sum, several courts have proved unable to deal with intersectionality, although for contrasting reasons. In *DeGraffenreid*, the court refused to recognize the possibility of compound discrimination against Black women and analyzed their claim using the employment of white women as the historical base. As a consequence, the employment experiences of white women obscured the distinct discrimination that Black women experienced.

Conversely, in *Moore*, the court held that a Black woman could not use statistics reflecting the overall sex disparity in supervisory and upper-level labor jobs because she had not claimed discrimination as a woman, but "only" as a Black woman. The court would not entertain the notion that discrimination experienced by Black women is indeed sex discrimination—provable through disparate impact statistics on women.

Finally, courts, such as the one in *Travenol*, have held that Black women cannot represent an entire class of Blacks due to presumed class conflicts in cases where sex additionally disadvantaged Black women. As a result, in the few cases where Black women are allowed to use overall statistics indicating racially disparate treatment Black men may not be able to share in the remedy.

Perhaps it appears to some that I have offered inconsistent criticisms of how Black women are treated in antidiscrimination law: I seem to be saying that in one case, Black women's claims were rejected and their experiences obscured because the court refused to acknowledge that the employment experience of Black women can be distinct from that of white women, while in other cases, the interests of Black women were harmed because Black women's claims were viewed as so distinct from the claims of either white women or Black men that the court denied to Black females representation of the larger class. It seems that I have to say that Black women are the same and harmed by being treated differ-

ently, or that they are different and harmed by being treated the same. But I cannot say both.

This apparent contradiction is but another manifestation of the conceptual limitations of the single-issue analyses that intersectionality challenges. The point is that Black women can experience discrimination in any number of ways and that the contradiction arises from our assumptions that their claims of exclusion must be unidirectional. Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.

Judicial decisions which premise intersectional relief on a showing that Black women are specifically recognized as a class are analogous to a doctor's decision at the scene of an accident to treat an accident victim only if the injury is recognized by medical insurance. Similarly, providing legal relief only when Black women show that their claims are based on race or on sex is analogous to calling an ambulance for the victim only after the driver responsible for the injuries is identified. But it is not always easy to reconstruct an accident: Sometimes the skid marks and the injuries simply indicate that they occurred simultaneously, frustrating efforts to determine which driver caused the harm. In these cases the tendency seems to be that no driver is held responsible, no treatment is administered, and the involved parties simply get back in their cars and zoom away.

To bring this back to a non-metaphorical level, I am suggesting that Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double-discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women—not the sum of race and sex discrimination, but as Black women.

Black women's experiences are much broader than the general categories that discrimination discourse provides. Yet the continued insistence that Black women's demands and needs be filtered

through categorical analyses that completely obscure their experiences guarantees that their needs will seldom be addressed.

B. The Significance of Doctrinal Treatment of Intersectionality

DeGraffenreid, *Moore* and *Travenol* are doctrinal manifestations of a common political and theoretical approach to discrimination which operates to marginalize Black women. Unable to grasp the importance of Black women's intersectional experiences, not only courts, but feminist and civil rights thinkers as well have treated Black women in ways that deny both the unique compoundedness of their situation and the centrality of their experiences to the larger classes of women and Blacks. Black women are regarded either as too much like women or Blacks and the compounded nature of their experience is absorbed into the collective experiences of either group or as too different, in which case Black women's Blackness or femaleness sometimes has placed their needs and perspectives at the margin of the feminist and Black liberationist agendas.

While it could be argued that this failure represents an absence of political will to include Black women, I believe that it reflects an uncritical and disturbing acceptance of dominant ways of thinking about discrimination. Consider first the definition of discrimination that seems to be operative in antidiscrimination law: Discrimination which is wrongful proceeds from the identification of a specific class or category; either a discriminator intentionally identifies this category, or a process is adopted which somehow disadvantages all members of this category.[29] According to the dominant view, a discriminator treats all people within a race or sex category similarly. Any significant experiential or statistical variation within this group suggests either that the group is not being discriminated against or that conflicting interests exist which de-

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[29] In much of antidiscrimination doctrine, the presence of intent to discriminate distinguishes unlawful from lawful discrimination. See *Washington v Davis*, 426 US 229, 239-45 (1976) (proof of discriminatory purpose required to substantiate Equal Protection violation). Under Title VII, however, the Court has held that statistical data showing a disproportionate impact can suffice to support a finding of discrimination. See *Griggs*, 401 US at 432. Whether the distinction between the two analyses will survive is an open question. See *Wards Cove Packing Co., Inc. v Atonio*, 109 S Ct 2115, 2122-23 (1989) (plaintiffs must show more than mere disparity to support a prima facie case of disparate impact). For a discussion of the competing normative visions that underlie the intent and effects analyses, see Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn L Rev 1049 (1978).

feat any attempts to bring a common claim.[30] Consequently, one generally cannot combine these categories. Race and sex, moreover, become significant only when they operate to explicitly *disadvantage* the victims; because the *privileging* of whiteness or maleness is implicit, it is generally not perceived at all.

Underlying this conception of discrimination is a view that the wrong which antidiscrimination law addresses is the use of race or gender factors to interfere with decisions that would otherwise be fair or neutral. This process-based definition is not grounded in a bottom-up commitment to improve the substantive conditions for those who are victimized by the interplay of numerous factors. Instead, the dominant message of antidiscrimination law is that it will regulate only the limited extent to which race or sex interferes with the process of determining outcomes. This narrow objective is facilitated by the top-down strategy of using a singular "but for" analysis to ascertain the effects of race or sex. Because the scope of antidiscrimination law is so limited, sex and race discrimination have come to be defined in terms of the experiences of those who are privileged *but for* their racial or sexual characteristics. Put differently, the paradigm of sex discrimination tends to be based on the experiences of white women; the model of race discrimination tends to be based on the experiences of the most privileged Blacks. Notions of what constitutes race and sex discrimination are, as a result, narrowly tailored to embrace only a small set of circumstances, none of which include discrimination against Black women.

To the extent that this general description is accurate, the following analogy can be useful in describing how Black women are marginalized in the interface between antidiscrimination law and race and gender hierarchies: Imagine a basement which contains all people who are disadvantaged on the basis of race, sex, class, sexual preference, age and/or physical ability. These people are stacked—feet standing on shoulders—with those on the bottom being disadvantaged by the full array of factors, up to the very top, where the heads of all those disadvantaged by a singular factor brush up against the ceiling. Their ceiling is actually the floor above which only those who are *not* disadvantaged in any way reside. In efforts to correct some aspects of domination, those above the ceiling admit from the basement only those who can say that "but for" the ceiling, they too would be in the upper room. A hatch

[30] See, for example, *Moore*, 708 F2d at 479.

is developed through which those placed immediately below can crawl. Yet this hatch is generally available only to those who—due to the singularity of their burden and their otherwise privileged position relative to those below—are in the position to crawl through. Those who are multiply-burdened are generally left below unless they can somehow pull themselves into the groups that are permitted to squeeze through the hatch.

As this analogy translates for Black women, the problem is that they can receive protection only to the extent that their experiences are recognizably similar to those whose experiences tend to be reflected in antidiscrimination doctrine. If Black women cannot conclusively say that "but for" their race or "but for" their gender they would be treated differently, they are not invited to climb through the hatch but told to wait in the unprotected margin until they can be absorbed into the broader, protected categories of race and sex.

Despite the narrow scope of this dominant conception of discrimination and its tendency to marginalize those whose experiences cannot be described within its tightly-drawn parameters, this approach has been regarded as the appropriate framework for addressing a range of problems. In much of feminist theory and, to some extent, in antiracist politics, this framework is reflected in the belief that sexism or racism can be meaningfully discussed without paying attention to the lives of those other than the race-, gender- or class-privileged. As a result, both feminist theory and antiracist politics have been organized, in part, around the equation of racism with what happens to the Black middle-class or to Black men, and the equation of sexism with what happens to white women.

Looking at historical and contemporary issues in both the feminist and the civil rights communities, one can find ample evidence of how both communities' acceptance of the dominant framework of discrimination has hindered the development of an adequate theory and praxis to address problems of intersectionality. This adoption of a single-issue framework for discrimination not only marginalizes Black women within the very movements that claim them as part of their constituency but it also makes the illusive goal of ending racism and patriarchy even more difficult to attain.

II. Feminism and Black Women: "Ain't We Women?"

Oddly, despite the relative inability of feminist politics and theory to address Black women substantively, feminist theory and