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Because I am Black, Because I am Woman: Remedying the Sexual Harassment Experience of Black Women

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BECAUSE I AM BLACK, BECAUSE I AM WOMAN: REMEDYING THE SEXUAL HARASSMENT EXPERIENCE OF BLACK WOMEN

ANDREA L. DENNIS

PROLOGUE

LESLIE'S PLIGHT

Rap-rap. Rap-rap. There is a light knock on your new office door, the nameplate of which reads "Erika Childress, Esq."

"Here goes," you think, "the first potential client of my own law firm! I hope it's an interesting case. I hope she can pay."

"Come in," you respond. A young, Black woman in her mid-twenties pokes her head in the door.

"Yes, come in. May I help you?"

"I'm not sure," she responds, still standing in the doorway.

"Please, sit down. Tell me why you're here."

"I've been having trouble at work. I mean, someone at work has been bothering me. It's this White guy, a co-worker." She pauses. "I'm not sure, maybe I shouldn't be here. Maybe I'm overreacting."

"No, you're here. Since you made the trip, go ahead. Maybe you are right, and there is nothing to worry about. But you won't know unless you tell me."

"Well," she begins slowly, "this guy has been touching me. It makes me uncomfortable. And, he, he's made some comments. Like last week, he came up behind me at my desk and whispered in my ear that he wanted to have sex with me. I just brushed him off and he walked away laughing. And yesterday he asked if I had a boyfriend. When I said, 'Yes,' he asked if he was Black. I told him it was none of his business. He swore at me and said, 'Of course it's my business, nigger.' And finally, I found this note on my chair. I'm not sure, but I think he put it there." She hands the note across the desk.

The author wishes to thank Professor Paulette Caldwell for providing a supporting environment in which to explore the issues raised in this Note.

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The note reads: "I really like Black women. I want to make love to you, you Black bitch."

Sitting back in the chair, you pause for a moment to think. "Ok. Well, I think you were right to come see me. Have you talked to anyone at work about this?"

"No, I didn't think it would help. You see, my boss in my previous department at work made several passes at me. One day in particular, he called me into his office and said to be ready to go away on travel. I was surprised. Although he was my superior, we didn't work together much. As I was leaving, he said with a straight face, 'Why don't I book us a room together? I mean, after all, we're the only Black people in the department. Everyone thinks we're sleeping together already anyways.' I couldn't say anything. I just left and went straight to see Ms. Washington—the Human Resources Representative. She told me I was overreacting. She said, 'Sister, you know how Black men are, and you know that it's hard to find a good woman in the corporate world. He's just interested in you. You should be flattered.'"

"Oh, I see," you reply. "Ok . . . . Let's start again from the beginning."

Though fictional, Leslie's story exemplifies several ways in which Black women may experience sexual harassment. Leslie experienced a form of sexual harassment known as "hostile environment" from both colleagues. Moreover, in both instances, the harassment was infused with racial overtones. The harassers targeted Leslie not only because of her gender but also because of her race. This combination of sexually focused and racially focused

1. Throughout this work, the terms Black and White are used. Although stylistic manuals recommend the use of a lower-case "b," see, e.g., THE CHICAGO MANUAL OF STYLE 7.32-7.33 (13th ed. 1982), the choice to use a capital "B" is the author's personal one based on the need for self-definition. The letter "W" in White is capitalized to maintain consistency. Compare Wendy Brown-Scott, Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?, 43 EMORY L.J. 1, 4 n.4 (1994) (preferring "Black") with Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 586 n.20 (1990) (preferring "black").

2. Sexual harassment law recognizes claims of quid pro quo sexual harassment and "hostile environment" sexual harassment. BARBARA LINDEMANN & DAVID KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 7 (1992). Quid pro quo sexual harassment involves the "proposed exchange of job benefits for sexual favors." Id. Hostile environment sexual harassment involves offensive conduct which is motivated by the victim's sex. Id. at 8. The "hostile environment may or may not be expressed in sexual gestures, language, or activity." Id. Unless otherwise specified, throughout this Note, the term "sexual harassment" refers to hostile environment sexual harassment.
behavior will create problems for Leslie should she seek legal redress under the current sexual harassment law framework.\textsuperscript{3}

Leslie's inability to find an adequate legal remedy began when American society constructed two broad categories for its major social ills: race problems and women's issues:\textsuperscript{4} hence, racism and sexism. When society discusses these matters, the two issues are considered distinct and separate; only rarely does society acknowledge that racism and sexism may, and frequently do, intersect and interact.\textsuperscript{5} Black women, however, have always recognized the intersection of race and gender. In the earliest days, Sojourner Truth declared "ar'n't I a woman?:"

Dat man ober dar say dat woman needs to be lifted ober ditches, and to have de best place every whar. Nobody eber helped me into carriages, or ober mud puddles, or gives me any best place and ar'n't I a woman? Look at me! Look at my arm! I have plowed, and planted, and gathered into barns, and no man could head me—and ar'n't I a woman? I could work as much and eat as much as a man (when I could get it), and bear de lash as well—and ar'n't I a woman? I have borne thirteen chilern and seen mos' all sold off into slavery, and when I cried out with a mother's grief, none but Jesus heard—and ar'n't I a woman?\textsuperscript{6}

Though scholars in other disciplines were quick to study and incorporate into their work the concept of "intersectionality,"\textsuperscript{7} only

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\textsuperscript{3. See discussion infra Part III. Because of the racial element of the sexual harassment, a Black woman could also possibly bring a claim under a theory of racial harassment. See infra note 14 for the elements of a racial harassment claim. This Note does not address whether and under what circumstances a racial harassment claim would be deficient, or provide a solution to the problems highlighted within this Note. Arguably, however, because the standards for sexual harassment and racial harassment are similar, compare infra note 14 with text accompanying notes 80-82, similar problems would result if a Black woman sought to make a racial harassment claim.}

\textsuperscript{4. See Judy Scales-Trent, \textit{Black Women and the Constitution: Finding Our Place; Asserting Our Rights}, 24 Harv. C.R-C.L. L. Rev. 9, 10 (1989).}

\textsuperscript{5. See Kimberle Crenshaw, \textit{Race, Gender, and Sexual Harassment}, 65 S. Cal. L. Rev. 1467, 1467-68 (1992).}

\textsuperscript{6. Sojourner Truth's famous speech made in 1851 at the Akron, Ohio, Women's Rights convention, at which she was treated with boos and hisses, is quoted in Deborah Gray White, Ar'n't I a Woman?: Female Slaves in the Plantation South 14 (1985).}

\textsuperscript{7. See, e.g., bell hooks, Ain't I a Woman: BLACK WOMEN AND FEMINISM (1981); Paula Giddings, When and Where I Enter: The Impact of Black Women on Race and Sex in America (1984); White, supra note 6. By "intersectionality," the author refers to the intersection of race and gender issues.}
recently has the legal academy begun to reflect on the role of intersectionality in the law. Collectively, legal scholars argue that "whenever the legal system has attempted to deal with problems Black women face in the workplace, it has consistently ignored their social history and failed to truly understand their experiences or address their concerns." This Note examines the intersection of race and gender in the context of sexual harassment jurisprudence. Since the arrival in this country of the first female African slaves, Black women have experienced sexual harassment on the job. This Note discusses the failure of sexual harassment theory to acknowledge the unique sexual harassment experience of Black women. From the very earliest discussions of sexual harassment, the impact of the race of the victim on the experience and resulting legal claim was ignored. Feminist legal theorists, leaders in issues affecting women, have been slow to acknowledge and integrate the role of race into their analyses.


10. The conclusions drawn in this Note apply with equal force to all women of color. The analysis of the sexual harassment experience of Black women would have to be modified to reflect the different experiences of other women of color in "White America," yet, the conclusion would still follow that the current sexual harassment framework would not fit their needs because the creation of the framework failed to take into account the role of race. See discussion infra Part II. See Maria L. Ontiveros, Three Perspectives on Workplace Harassment of Women of Color, C989 ALI-ABA 259 for a discussion of the sexual harassment experiences of other women of color who have experienced harassment based upon the interaction of gender and race. See Martha Chamallas, Jean Jew's Case: Resisting Sexual Harassment in the Academy, 6 YALE J.L. & FEMINISM 71 (1994) for an article discussing the case of Jean Jew, a Chinese-American woman who was harassed in a university academic setting. See also Jew v. University of Iowa, 749 F. Supp. 946 (S.D. Iowa 1990). Additionally, though White women are the normative standard in sexual harassment cases, they could also benefit from inclusion of race in some instances, for they too may experience sexual harassment infused with racial overtones.

11. See infra Part I.

This Note explores how intersectionality is ignored in the judicial response to sexual harassment by explaining how Title VII presents an incomplete approach to the problem. Title VII of the Civil Rights Act of 1964, 13 prohibits sexual harassment as a form of gender discrimination and treats racial harassment as a form of prohibited race discrimination. 14 Title VII does not, however, recognize that sexual harassment may in some instances be motivated by and infused with race to create an experience of "interactive harassment."

This Note argues that the existing framework for analysis of sexual harassment claims is inadequate to protect the interests of Black women who experience interactive harassment. As aptly pointed out by Cathy Scarborough, "[t]he very laws designed to eliminate employment discrimination have actually placed new obstacles in front of Black women. In order to challenge employment discrimination, Black women must use legal remedies and strategies that were designed for others." 15 In order to correct this problem, legal scholars argue that sexual harassment law must be changed. 16 This Note posits that either the current rules governing the proof of sexual harassment must be modified to fit the needs of Black women, or a new cause of action, entitled "interactive workplace

13. 42 U.S.C. § 2000e-2 (1995). Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Id. at 1. The Supreme Court first ruled upon the issue of sexual harassment in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). In Meritor, the court held that hostile environment sexual harassment is actionable under Title VII as a form of gender discrimination. See id. at 73.

14. Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), was the first case to recognize a claim of racially hostile work environment. The Sixth Circuit, in Davis v. Monsanto Chemical Co., 858 F.2d 345 (6th Cir. 1988), laid out the routinely accepted standard for proving a claim of racially hostile work environment.

In order to satisfy the first requirement, 'repeated slurs,' the plaintiff must show that the alleged racial harassment constituted an unreasonably abusive or offensive work-related environment or adversely affected the reasonable employee's ability to perform the tasks required by the employer . . . . [T]he plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. The employee need only show that the harassment made it more difficult to do the job.

Id. at 349. The plaintiff must also show that the employer "tolerated or condoned the situation." Id. This requires the plaintiff to "establish that the employer knew or should have known of the alleged conduct and failed to take prompt remedial action." Id.

15. Scarborough, supra note 9, at 1457.

harassment” designed to protect Black women from sexual harassment as a discrete class under Title VII, must be formulated.

Part I of this Note provides a description of the unique sexual harassment experience of Black women. Statistics, historical evidence, anecdotes, and cases are used to provide a practical context and demonstrate the need for a new theory of sexual harassment. Part II critiques the primary academic scholarship on sexual harassment law, Catharine MacKinnon's 1979 book, *Sexual Harassment of Working Women.* MacKinnon's work was chosen because it “has been instrumental in persuading the legal establishment to view sexual harassment as a form of sex discrimination. Moreover, she helped to persuade public policymakers that the Civil Rights Act should be used to remedy . . . 'hostile environment' sexual harassment.” This section argues, however, that in her formulation of a cause of action for sexual harassment, MacKinnon ignores the experiences of Black women.

Part III posits that under the current sexual harassment legal framework, given a certain set of facts, a Black woman may fail to meet her evidentiary burden to prevail on a claim of sexual harassment because she cannot prove the requisite severity level of harassment. Part IV presents the ways in which race, where appropriate, may be incorporated into the analysis of sexual harassment claims. Part IV.A. suggests the aggregation of evidence in determining the severity of the harassment in sexual harassment cases. Part IV.B. proposes the option of recognizing Black women as a discrete class under Title VII in cases of sexual harassment. Within subsection A and subsection B, this Note undertakes a critique of the proposed solution.

This Note closes by applying the methodologies put forth in Part IV to Leslie's plight. This application seeks to apply the theory discussed within this Note to a practical context and to demonstrate how a more inclusive approach to harassment provides a solution that is equitable and gives full relief.

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I

THE BASICS: DEFINING THE SEXUAL HARASSMENT EXPERIENCE OF BLACK WOMEN

The differential experiences of Black women and White women arise from the unique historical experience of Black women in the United States.19 “A historical experience of sexual exploitation and oppression, [and] myths that support perceptions of [the] promiscuity of [B]lack women” contribute to the experiences of Black women.20 The extensive sexual exploitation and rape of Black female slaves is the most extreme example of workplace sexual harassment. Yet even when sexual abuse of female slaves did not rise to the level of rape, the harassment was overt. For example, in one of the few biographical slave narratives written by a woman, Harriet Jacobs (writing under the alias Linda Brent) speaks of the sexual advances of her White owner which began when she turned fifteen:

My master began to whisper foul words in my ear. Young as I was, I could not remain ignorant of their import. I tried to treat them with indifference or contempt . . . . He tried his utmost to corrupt the pure principles my grandmother had instilled. He peopled my young mind with unclean images . . . .21

The notion that Black women were sexually available did not cease with the end of slavery. After slavery, Black women continued to work for White men as sharecroppers, tenant farmers, farmworkers, and domestic servants. In these occupations Black women suffered the same level of sexual harassment, though no longer technically legal, as existed during slavery.22 Additionally, White employers continued to use stereotypes that originated during slavery to justify the sexual treatment of Black women.

The three most pervasive stereotypes of Black women were those of the “Mammy,” the “Jezebel,” and the “Sapphire.”23 The Mammy stereotype was that of an overweight, matronly, do-gooder woman who was asexual.24 The Jezebel was the promiscuous female

20. Id. at 222.
22. See Adams, supra note 19, at 218.
23. Id.
24. See id. For an extended discussion of the Mammy stereotype see White, supra note 6, at 46-61.
with an insatiable sexual appetite. The Sapphire referred to the manipulative troublemaker who had no loyalties.

While the Jezebel stereotype most obviously supported the sexual exploitation of Black women, the other two stereotypes also contributed to this subjugation. The harassment claims of a "Mammy" would fall on deaf ears because no one believed that a man would lust after an asexual woman. Similarly, a "Sapphire's" claims of sexual abuse would be eclipsed by her reputation for deception, lying and lack of loyalty. These stereotypes, which were borne in the slavery experience of Black women, continued to exist after slavery ended and still contribute to the unique harassment experience of Black women today.

Statistics published by the Equal Employment Opportunity Commission ("EEOC") indicate that 14.4% of the women who file sexual harassment claims are Black. 61.9% of the remaining claims are filed by White women and 14.7% by women of other races. These statistics, however, merely indicate the rate at which women—including Black women—report their claims to legal officials, and do not necessarily indicate the actual rate at which Black women experience sexual harassment. A survey of women faculty members at American colleges and universities illuminates this point. Researchers at the University of Michigan conducted a study entitled "Betrayed by the Academy: The Sexual Harassment of Women College Faculty" that revealed that 13% of Black female faculty surveyed felt they had been sexually harassed. Whether these statistics are representative of the experiences of women outside the academic setting is unclear.

The sexual exploitation of Black women has obviously declined since slavery. Yet, the widespread perception of Black women as

25. See Adams, supra note 19, at 218. For an extended discussion of the Jezebel stereotype see White, supra note 6, at 28-46.

26. See Adams, supra note 19, at 218.

27. The modern-day version of this logic is that women who are "plain" or ugly cannot be sexually abused because no one would find them attractive.


29. Id.


31. See id. By comparison, 15% of White women and 6% of Asian American faculty reported harassment. Id. About 20% of Native American and Hispanic women faculty reported harassment. Id.
sexually available remains. The EEOC study also reports that claims filed with the EEOC by Black women were less likely to be found meritorious and more likely to close with a finding of “no reasonable cause” than claims filed by White women.

While the statistical evidence does not describe what effect race has on the likelihood of being sexually harassed, anecdotal and historical evidence indicates that the dynamics of sexual harassment for Black women may be different from that of White women. Black women themselves are often not certain whether they have experienced sexual harassment or racial harassment; however, many Black women who complain of harassment suspect that they are being harassed because of both their race and gender. “This is manifested either implicitly, so that the woman is unsure whether the harassment is racially or sexually motivated, or explicitly where the harasser expressed his sexual interest in terms of her race.” The experience of Black women and White women is similar in that both are referred to and treated like “cunts,” “beavers,” or “piece;” yet, as several cases illustrate, for Black women those insults are sometimes prefaced with “Black,” or “nigger,” or “jungle.”

For example, in Brooms v. Regal Tube Co., the harasser showed his victim “a pornographic photograph depicting an interracial act of sodomy and told her that the photograph showed the ‘talent’ of a [B]lack woman,” and in a later incident, the defendant showed the victim a “racist pornographic picture involving bestiality” and told her that she was going to end up like that. Likewise, in Con-

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33. See supra note 28.
34. See Adams, supra note 19, at 214.
35. See id. at 220.
37. Id.
39. 881 F.2d 412, 417 (7th Cir. 1989).
40. In Brooms, the plaintiff was repeatedly subject to comments and conduct of both a racial and sexual nature. “Most of the incidents involved [the defendant’s] use of racial slurs or a combination of racial slurs and sexual innuendo.” Id. at n.1. Plaintiff filed suit charging sexual harassment or racial harassment. See id. at 416. The jury denied the plaintiff’s claim of racial harassment. See id. The bench awarded judgment in favor of the plaintiff on the sexual harassment claim. See id.
nental Can Co. v. Minnesota, the harasser told the plaintiff that "he wished slavery days would return so that he could sexually train her and she would be his bitch."

These cases demonstrate that for Black women, sexual harassment often involves racial overtones. Legal scholarship which focuses on developing appropriate remedies for sexual harassment, however, does not adequately account for these racialized perceptions of gender.

II
FAILURE TO INCORPORATE RACE INTO THE FORMULATION OF A CAUSE OF ACTION FOR SEXUAL HARASSMENT

In her work Sexual Harassment of Working Women, Catharine MacKinnon forcefully argues that sexual harassment constitutes a remediable form of gender discrimination. MacKinnon published her book at a time when only a few lower courts had ruled on the viability of sexual harassment claims. The Supreme Court had not yet addressed the matter. MacKinnon synthesized the then-existing case law brought by women challenging unwanted sexual advances in the workplace into a coherent theory of sexual harassment as a remediable form of gender discrimination. Her position was more or less adopted in Vinson v. Taylor in which Chief Judge Spottwood Robinson found that a plaintiff could maintain a claim for either quid pro quo or hostile environment sexual harass-

41. 297 N.W.2d 241, 246 (Minn. 1980).
42. Id. Plaintiff solely claimed sexual harassment. Plaintiff was both touched and insulted in a sexual manner. See id. at 243. Although there was racial discrimination in the work environment, see id. at 245, the facts alleged only the one instance of the use of racial slurs.
43. MacKinnon, supra note 17.
44. See id. at 208-13.
45. The book was published in 1979, after the following cases had been brought: Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979); Williams v. Saxbe, 587 F.2d 1240 (D.C. Cir. 1978); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Munford v. James T. Barnes Co., 441 F. Supp. 459 (E.D. Mich. 1977); Tomkinds v. Public Service Electricity & Gas, 422 F. Supp. 553 (D.N.J. 1976); Corne v. Bausch & Lomb, 390 F. Supp. 161 (D. Ariz. 1975). This list is not inclusive of all the lower court cases which had been brought at that time.
46. Meritor Savings Bank, 477 U.S. at 57, was not heard until 1986. See supra note 13.
47. See MacKinnon, supra note 17, at 101-26.
ment. Quid pro quo sexual harassment involves the "proposed exchange of job benefits for sexual favors." Hostile environment sexual harassment involves offensive conduct which is motivated by the victim's sex. The "hostile environment may or may not be expressed in sexual gestures, language, or activity."

This section argues that MacKinnon's work, important to the development of sexual harassment law, is nonetheless problematic for Black women who experience sexual harassment with racialized overtones. Understanding the flaws in MacKinnon's work is important because similar problems arise when sexual harassment is addressed in litigation.

MacKinnon takes a four-step approach to reaching her ultimate conclusion that sexual harassment constitutes a form of gender discrimination. First, she uses empirical evidence to demonstrate that the structure of the employment system makes women vulnerable to sexual harassment because the system places women in traditional and inferior jobs. Second, she provides personal accounts of the experiences of women who have been sexually harassed. Third, she analyzes the few cases which, at the time, raised the issue of sexual harassment. Finally, she confronts and answers the ultimate question: does sexual harassment constitute gender discrimination?

The second step of MacKinnon's argument is the part of her work that is problematic for Black women. MacKinnon believes that "[w]omen's lived-through experience, in as whole and truthful a fashion as can be approximated . . . should begin to provide the starting point and context out of which is constructed the narrower forms of abuse that will be made illegal on their behalf." In other words, MacKinnon believes that creating a legal cause of action for sexual harassment necessarily requires examining the experiential dimensions of the problem which is sought to be rectified through

49. Vinson, 753 F.2d at 144-46.
50. Lindemann & Kadue, supra note 2, at 7.
51. See id. at 8.
52. Id.
53. See Wall, supra note 18, at 17 arguing that in Vinson, Chief Judge Robinson adopted MacKinnon's rationale.
54. Hereinafter termed "interactive harassment."
55. See MacKinnon, supra note 17, at 4.
56. See id.
57. See id.
58. See id.
59. Id. at 26.
the law. Her beliefs are supported by psychological theory on sexual harassment:

Definitions of concepts and terms such as "hostile environment," "unwelcome advances," or "sexual intentions," which are common in definitions of sexual harassment, are heavily dependent on people's perceptions, labeling, attributions, judgments, and interpretations of incidents . . . . Investigating and understanding these conceptions and processes of sexual harassment are highly important because . . . they are directly related to legal definitions, considerations, and rulings.61

The task of framing the experience must be undertaken with care to present the story in a factually correct manner and in a way which takes into account women's wide range of experiences. If such care is not taken, the resulting cause of action will not meet the needs of women who are subject to sexual harassment. This shortcoming is exactly the problem with MacKinnon's work.

MacKinnon's analysis is incomplete because the accounts upon which she bases her formulation of a sexual harassment cause of action do not adequately discuss the possibility of racial overtones to sexual harassment. Thus, her cause of action does not sufficiently protect Black women.

MacKinnon has previously been criticized for failing to incorporate race into her analysis. In Race & Essentialism in Feminist Legal Theory, Professor Angela Harris criticizes MacKinnon's "dominance theory" for engaging in, what Professor Harris terms, "gender essentialism." Gender essentialism is defined as the notion that the experience of women can be "described independently of race, class, sexual orientation, and other realities of experience." Gender essentialism silences the voices of Black women such that the "woman's" experience is defined to encompass mostly "[W]hite, straight, and socioeconomically privileged" people. This one-di-

60. See id. at 31.
62. Briefly, "dominance theory" argues that "the idea of gender difference helps keep the reality of male dominance in place" and that "the social relation between the sexes is organized so that men may dominate and women must submit and this relation is sexual—in fact, is sex." Catharine A. MacKinnon, Introduction: The Art of the Impossible, in Feminism Unmodified 3 (1987).
63. Harris, supra note 1. Professor Harris' work is the leading work on gender essentialism.
64. Id. at 585.
65. Id. at 588.
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dimensional characterization thus excludes from the gender discourse the voices of many women with affiliations other than gender.

MacKinnon also relies upon gender essentialism in Sexual Harassment of Working Women. This reliance is demonstrated by MacKinnon’s belief that the fact that “sexual harassment does occur to a large and diverse population of women supports an analysis that it occurs because of their group characteristic, that is, sex.” Although MacKinnon notes that each woman’s experience is different because of certain variables such as age, marital status, class, and race, she goes no further to examine this notion in detail. Thus, she loses the chance to anti-essentialize her theory and locate it in a context which includes the experiences of all women. MacKinnon gives only cursory acknowledgment to racial factors by mentioning that sexual harassment of Black women by White men may “reflect a sense of impunity that resounds of slavery and colonization,” and asking whether White women feel more sexually degraded by a Black male harasser. MacKinnon’s discussion of the impact of race on sexual harassment, unfortunately, goes no further.

MacKinnon does try to soften her failure to explore the effect of variables on the sexual harassment experience by stating that “[f]requency and type of incident may vary with specific vulnerability of the woman, or qualities of the job, employer, situation, or workplace, to an extent so far undetermined.” MacKinnon, however, claims that she cannot delve into the argument further because of the lack of information available at that time regarding sexual harassment.

MacKinnon’s claim is troubling in three respects. First, if the individual experiences of sexually harassed women are critical to creating a sexual harassment cause of action, as MacKinnon so clearly believes, then MacKinnon should have made every effort to have a broader victim’s story be an integral part of her cause of

66. See MacKinnon, supra note 17.
67. Id. at 27.
68. Id. at 28.
69. Id. at 30. MacKinnon discusses the case of Munford v. Barnes, 441 F. Supp. 459 (E.D.Mich. 1977), in which a Black woman was harassed by a White colleague. MacKinnon states: “Apparently, sexual harassment can be both a sexist way to express racism and a racist way to express sexism . . . . Although racism is deeply involved in sexual harassment, the element common to these incidents is that the perpetrators are male, the victims female.” MacKinnon, supra note 17, at 30-31.
70. See MacKinnon, supra note 17, at 30-31.
71. Id. at 28.
72. See id.
action. By failing to do this, she ultimately creates a cause of action which only provides a remedy for women who fit her model, that is, White women.

Second, MacKinnon’s unwillingness to address issues of race implies that the matter is better left to a separate discourse—a result of gender essentialism Professor Harris calls “bracketing.” Bracketing forces Black women to choose gender over race, thereby distorting their experiences. In order to utilize MacKinnon’s framework to redress her injury from harassment, a Black woman must cast off her race and assume the perspective of a White woman. If a Black woman chooses not to do so, she must look to other discourses which focus exclusively on race. This separation creates a presumption that one discourse cannot address both gender and race.

Third, MacKinnon’s failure to consider the greater implications of race lead her to conclude that race is simply “an intensifier: If things are bad for everybody (meaning [W]hite women), then they’re even worse for [B]lack women.” For example, when MacKinnon addresses the question of what causes women to file sexual harassment lawsuits, she points out that Black women brought a disproportionate number of the first sexual harassment lawsuits. She reasons that this is so because “Black women’s least advantaged position in the economy is consistent with their advanced position on the point of resistance . . . . [S]ince [B]lack women stand to lose the most from sexual harassment, by comparison they may see themselves as having the least to lose by a struggle against it.” In other words, because the situation is so much worse for Black women than White women, Black women are more likely to pursue legal claims. The notion of intensifying is problematic, as Professor Harris points out, because implicit in this concept is that the experiences of women which differ from the White norm are only variations on the White “woman’s experience.” Thus, White women are the norm and Black women are simply White women who have it worse.

Though groundbreaking, Catharine MacKinnon’s construction of a sexual harassment cause of action fails to adequately pro-

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73. Harris, supra note 1, at 592-93.
74. See id. at 595.
75. See id. at 588-89.
76. Id. at 596.
77. See MacKinnon, supra note 17, at 53.
78. Id.
79. Harris, supra note 1, at 593.
tect the interests of Black female victims of sexual harassment. MacKinnon's analysis of the problem omits the experiences of Black women who suffer from sexual harassment infused with racial epithets. The cause of action she creates does not leave room for the discussion of race in sexual harassment claims; thus, sexual harassment claims are viewed from the normative perspective of a White female victim.

III
HOW RACE FUNCTIONS IN THE SEXUAL HARASSMENT LEGAL CLAIMS OF BLACK WOMEN

As discussed in Part II, Catharine MacKinnon does not adequately consider race in her legal framework for sexual harassment and thus she leaves Black women's experiences out of her formulation of the sexual harassment cause of action. This section addresses the parallel omission of Black women's stories in the judicial arena. This section argues that, because race is not a factor in the analysis of a plaintiff's sexual harassment claim, Black female plaintiffs may fail to meet the requisite showing of severity required to prevail on such claims.

To sustain an actionable claim of hostile environment sexual harassment against an employer, a plaintiff must demonstrate: (1) that the employee belongs to a protected group; (2) that the sexual or sex-based conduct was unwelcome to the employee, based upon the employee's sex, and affected a term, condition, or privilege of employment; and (3) that the employer directly engaged in the conduct or was legally responsible for the actions of someone who engaged in the conduct.\(^80\)

With respect to the unwelcome conduct, in order to prevail on a claim of sexual harassment, the plaintiff must demonstrate a sufficiently severe level of harassing conduct to warrant protection.\(^81\) Because the current construction of sexual harassment law presumes that sexual harassment occurs solely because of gender,

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\(^81\) See infra note 109 and accompanying text for a greater explanation of the severity requirement.
and is not influenced by the race of the victim, only gender-directed behavior is considered in calculating the severity level.82

Thus, in the case of a Black woman who has experienced interactive harassment, the offending conduct must first be divided into two categories: those actions based on race and those based on gender. The gender-based offensive conduct is then analyzed to determine whether it contributes independently to the required level of severity.83 The racial components are generally not considered in the ultimate calculation of severity. The problem with this method of analysis is that it requires a court to separate two wholly intertwined characteristics of Black women without any standard for doing so and may prevent a Black woman from recovering simply because she is both Black and female.84

If Black women themselves have trouble deciding what harm they have experienced,85 then courts, as outsiders, are ill-equipped to engage in the task of dividing comments and behavior. For example, how should the following case have been decided? In Jones v. Chicago Research & Trading Group,86 plaintiff was subjected to continuous racial slurs, sexual slurs, and combinations of both.87 Plaintiff alleged that "she was the victim of racial and sexual harassment."88 After determining that under Title VII plaintiff could maintain independent claims of racial harassment and sexual harassment, the court proceeded to delineate certain comments as racial and others as sexual.89 The court divided the conduct into the following groupings: (1) those racial in nature: "she continuously faced inappropriate comments and jokes about race, was called a 'slave' by one of her supervisors, was ordered to 'fetch' drinks for others in the work place, and was referred to as 'Washington' by another supervisor [a reference to the late, former Black mayor of Chicago, Harold Washington]";90 and (2) those sexual in

82. Sexual harassment claims are analyzed under a but-for causation scheme. “[A]ny harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII.” McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985).
83. But see discussion of aggregation methodology infra Part IV.A.
84. Assuming, of course, that she was able to prove all other elements of the claim.
85. See supra text accompanying notes 36-37.
87. See id. at *1.
88. Id. at *4.
89. See id. at *5-6.
90. Id. at *5.
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nature: "women should be barefoot and pregnant," and that she and other women were treated like servants by the men in the department during the weekly card games."\(^{91}\) The court neglected to classify such comments as it "was disgraceful" that [B]lack women didn’t shave their legs, and . . . jokes about the ‘dress and walk’ of [B]lack women."\(^{92}\) Either the court failed to classify the insults due to an oversight or purposefully declined to do so. Ultimately, defendant’s motion for summary judgment on the sexual harassment claim was granted.\(^{93}\) Defendant’s motion for summary judgment on the racial harassment claim, though, was denied.\(^{94}\)

The court could have divided the comments differently. For example, the slave references could have been deemed to be references to gender, or at least references to the interaction of race and gender. Though slavery was premised on racial inferiority, and all slaves were treated differently from Whites simply because of their race, Black female slaves and Black male slaves were treated differently because of their differing genders.\(^{95}\) Additionally, the comments regarding shaving and Black female dress and walk could be interpreted as both gender and race based. Consider the following logic: all women should shave their legs; White women shave their legs; Black women do not shave their legs. This logic relies upon the stereotypes that women are different from men and Black women are different from White women. Thus, combination of gender and race may be viewed as the bases for the harassment.

Because no set of guidelines aids courts in dividing harassing conduct, inappropriate division may occur and result in Black women receiving no protection. If the level of severity of the comments categorized as sexual is not enough to support a claim of sexual harassment, then a plaintiff may not recover for her harms. \(Hicks v. Gates Rubber Co.\)^{96}\) demonstrates this phenomenon. In \(Hicks I,\) a Black woman alleged that she was subjected to sexual harassment and racial harassment by White male co-workers.\(^{97}\) "Gates' employees testified that an atmosphere existed in which racial slurs and jokes were tolerated."\(^{98}\) Supervisors referred to Blacks as "nig-

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91. Id. at *6.
92. Id. at *2.
93. See id. at *6.
94. See id. at *5.
95. Whirre, supra note 6, at 62.
96. 833 F.2d 1406 (10th Cir. 1987) (hereinafter “Hicks I”).
97. See id.
98. Id. at 1409.
ggers" and "coons." Plaintiff herself was referred to as "Buffalo Butt." Additionally, one harasser grabbed the plaintiff's "breasts and [the plaintiff] fell over, and he got on top of [her]."

The trial court determined that plaintiff was subjected to neither racial harassment nor quid pro quo sexual harassment. After a bench trial, the court concluded that "there was no evidence to support plaintiff's claim that defendant maintained and permitted a work environment openly hostile to [B]lack employees. The only evidence suggestive of this was disputed." With respect to the quid pro quo sexual harassment claim, the court determined that "the incident of patting [plaintiff's] thigh ... was an isolated incident in which there was no sexual advance intended ... [and] that there was a 'dispute as to the degree of the violation.'" Thus, the judge found the harassing conduct either lacking in credibility or insignificant, leaving the plaintiff with no remedy.

On appeal, the circuit court upheld the trial court findings with respect to racial harassment, stating that "[t]he evidence shows incidents that were essentially occasional and incidental." The court remanded the case for a new determination as to whether plaintiff was sexually harassed, however, because the lower court had failed to consider the recently recognized hostile environment theory of sexual harassment. The court also held that, on remand, the evidence of racial treatment, in conjunction with the sexual treatment, should be considered for the purpose of determining whether there was a pervasive discriminatory atmosphere.

This case demonstrates how the race-gender dichotomy that exists in MacKinnon's work on sexual harassment has been re-
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peated in the judicial context. The narrow analysis MacKinnon conducted, which deems injurious only one dimension of harassing conduct, prevents Black women from meeting the requisite showing of severity to recover under Title VII for sexual harassment. When Black women experience interactive harassment, the treatment based upon race and gender may be separated out because it is not solely based on gender, and is thus deemed not violative of sexual harassment law. This is an unfair result which can only be remedied by factoring race into the analysis of sexual harassment claims.

IV
IMPORTING RACE INTO THE ANALYSIS OF
SEXUAL HARASSMENT CLAIMS

The current sexual harassment legal framework does not appropriately take race into account and, thereby, poses problems for Black women who experience interactive harassment. In order to protect Black women from interactive harassment, two readily identifiable options exist. Courts may either permit plaintiffs to aggregate evidence of racial harassment with evidence of sexual harassment in order to determine the severity level of the harassment, or courts may create a new cause of action which protects Black women as a discrete class in Title VII cases of sexual harassment.

A. Aggregation Methodology

To prevail upon a claim of hostile environment sexual harassment, the unwelcome conduct complained of must be sufficiently pervasive or severe to alter the victim's employment and create an abusive working environment. In the case of a Black woman who experiences interactive harassment, the sexual comments would normally be divided out and independently evaluated to determine whether the work environment was sufficiently hostile to merit re-

108. See supra Part III.
109. See Meritor Savings Bank, 477 U.S. at 67. The severity or pervasiveness of conduct is a matter of perspective. Courts and the EEOC apply an objective standard. That is, they view the harassment from the perspective of the "reasonable person." Although legal commentators have pressed for use of the reasonable woman standard, courts have rejected this standard. In Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), the Supreme Court refused to adopt a subjective standard. "The Court described its objective test as a generic reasonable person examination and left the lower courts and the EEOC to fine-tune methods of factoring the plaintiff's membership in a protected category into the inquiry." Burns, supra note 80, at 392.
covery. Such a practice may adversely affect the claims of Black women plaintiffs. An alternative option exists, however. A court could apply the "aggregation methodology," where racial incidents of harassment are combined with sexually harassing behavior to determine whether the work environment was sufficiently hostile.

Only one circuit court has adopted the aggregation methodology. In *Hicks v. Gates Rubber Co.*, the Court of Appeals for the Tenth Circuit specifically addressed the question of "whether, in determining the pervasiveness of the harassment against a plaintiff, a trial court may aggregate evidence of racial hostility with evidence of sexual hostility." In *Hicks I*, the plaintiff alleged both sexual harassment and racial harassment. The trial court had previously determined that the incidents alleged to support plaintiff's claim of racial harassment were insufficient to sustain a claim. Although the circuit court affirmed the insufficiency of the racial harassment claim, it explicitly authorized the use of aggregation. The court held that incidents of racial harassment, even though insufficient to maintain a racial harassment claim when judged alone, could be "combined with incidents of sexual harassment to prove a pervasive pattern of discriminatory harassment in violation of Title VII." The court then remanded the case and directed the trial court to "determine whether there was a pervasive discriminatory atmosphere, combining the racial and sexual harassment evidence, so that a hostile work environment harassment claim may have been established."

Support for the Tenth Circuit's use of aggregation stemmed from two different sources. First, the court cited *Meritor Savings*

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110. See supra Part III.


112. 833 F.2d 1406 (10th Cir. 1987).

113. *Hicks I*, 833 F.2d at 1416.

114. See id. at 1408.

115. See id. at 1411.

116. See id. at 1413.

117. See id. at 1416.

118. Id. at 1415-16.

119. Id. at 1416-17. On remand, the plaintiff did not prevail. *Hicks II*, 928 F.2d at 973. "Hicks failed to persuade the district court that evidence of racial and sexual harassment—taken together—created a work environment heavily polluted with discrimination." Id. (internal citation omitted). The circuit court affirmed the decision of the trial court. Id.
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Bank v. Vinson, in which the Supreme Court explicitly adopted the “totality of circumstances” approach that the EEOC employs in sexual harassment administrative proceedings. The EEOC’s interpretation of sexual harassment law recognizes that racial harassment can contribute to a hostile work environment. The Tenth Circuit in Hicks I likewise concluded that racial harassment may be considered when determining severity. Second, in deciding Hicks I, the Tenth Circuit sought to effectuate Title VII's goal of removing employment discrimination based on any or all of its listed characteristics. The court was persuaded by the holding in Jefferies v. Harris County Community Action Ass'n. Jefferies held “that discrimination against Black females [could] exist even in [the] absence of discrimination against [B]lack men or [W]hite women.”

The aggregation methodology is, however, subject to several criticisms. First, as pointed out by Judge Seth, the lone dissenter in Hicks I, cases employing aggregation evaluate “the impact of the overall working conditions arising from whatever cause rather than try[ing] the case as a sexual harassment case under Meritor.” Judge Seth argues that aggregation, as it stands in the case, “is not a combination of statutorily protected characteristics advanced as a subclass as in Jefferies, nor as a ‘plus’ case.”

This criticism, though valid, merely points out that the majority in Hicks I was being intellectually disingenuous. The majority required aggregation of the harassment, but, in effect, fashioned a general remedy for harassing conduct in the workplace and labeled it a sexual harassment claim. The resulting claim, however, is the functional equivalent of the interactive workplace harassment claim, discussed below in Part IV.B. Assuming the validity of the rationale underlying the creation of an interactive workplace harassment claim, the actions of the majority, though circuitous, are acceptable.

Second, critics may argue that the aggregation methodology unfairly affords a remedy in situations where other plaintiffs (e.g., those who did not experience sexual harassment fused with race,

120. 477 U.S. at 57.
121. Id. at 69. “In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances.” 29 C.F.R. Sec. 1604.11(b) (1996).
122. See Hicks I, 833 F.2d at 1416.
123. 615 F.2d 1025 (5th Cir. 1980).
124. Id. at 1032. See infra Part IV.B. for further discussion of Jefferies.
125. Hicks I, 833 F.2d at 1420 (Seth, J., dissenting).
126. Id.
127. See id. at 1415-16.
whether Black or not) would not recover. However, as the court in Hicks I mentioned, Title VII has been interpreted to provide a remedy for any combination of listed characteristics. Therefore, the results achieved by aggregation are not unfair because they comport with the mandate of Title VII.

A third possible criticism of the aggregation technique put forth by the court in Hicks I is that it is an ambiguous standard. The court gives no guidelines as to the requisite number or severity of the racial comments which, when added to the sexually-focused behavior, will raise the severity of the sexual conduct to the level required to warrant a remedy. This problem, however, is not unique to aggregation. The standard of evaluation used in other cases that do not employ aggregation to examine whether a situation is sufficiently hostile likewise suffer from ambiguity because no bright-line rule exists for making this determination. In these cases, the matter is left to the discretion of the trier of fact to be made on a case-by-case basis. Consequently, it is neither unusual nor unacceptable that the Hicks I court did not explicitly delineate a clear standard.

Yet another shortcoming of aggregation is that while aggregation potentially provides protection for Black women plaintiffs, aggregation does not allow for the recognition of the unique harassment experiences of Black women. Because the aggregation approach is applied within the context of the current sexual harassment framework, Black women are still simply a variation on the White norm. This mode of analysis marginalizes the fact that race has played a role in a Black woman's sexual harassment experience. Racial hostility is only aggregated where a plaintiff can allege some minimum level of sexually harassing conduct; thus, in the absence of conduct occurring but-for her gender, a Black woman may not recover. If the goal of reforming sexual harassment law is merely to provide a remedy to Black women where they otherwise may not have one, however, this deficiency does not present an important weakness in the methodology.

Aggregating sexual and racial conduct to determine the severity level of the harassing behavior provides one viable option for

128. See supra text accompanying notes 122-24.
129. See 29 C.F.R. Sec. 1604.11(b).
130. See discussion supra Part II.
131. See Jones, 1994 WL 583153 at *5-6.
132. Of course, as stated previously, a Black female may claim racial harassment. The point, however, is that she may not be able to recover under a theory of racial harassment, either, because her gender undercuts the racial nature of the harassment.
accounting for the racialized sexual harassment of Black women. Moreover, because aggregation works within the existing framework for Title VII sexual harassment claims, it is also a natural and logical option.

B. Formulation of a Workplace Harassment Claim

In an effort to acknowledge the role race may play in sexual harassment claims, recognition of an "interactive workplace harassment" claim in lieu of the traditional sexual harassment framework may be appropriate. Courts have already fashioned an interactive employment discrimination claim in the context of Title VII.\textsuperscript{133} The interactive workplace harassment claim would be another species of that claim. Furthermore, some legal scholars have argued that Black women should be protected as a discrete class.\textsuperscript{134} The interactive workplace harassment claim would be an effective substitute for the existing sexual harassment framework because it comprehensively redresses the harms suffered by a broad class of persons who suffer harassment due to the combination of race and gender.

\textit{Jefferies v. Harris County Community Action Ass'n}\textsuperscript{135} was the first circuit court case in which a Title VII claim of discrimination based on the interaction of race and gender was recognized. Plaintiff argued that if "a Title VII plaintiff alleges that her employer discriminated against [B]lack females, the only statistics relevant to that claim of discrimination would be the number of [B]lack females hired or promoted by the employer."\textsuperscript{136} The circuit court agreed, holding that Black women were a discrete class entitled to protection.\textsuperscript{137} Many cases since \textit{Jefferies} have likewise recognized an inter-

\textsuperscript{133} See \textit{Jefferies}, 615 F.2d at 1025. See \textit{infra} text accompanying notes 135-38 for an explanation of the interactive employment discrimination claim as identified in \textit{Jefferies}.

\textsuperscript{134} See, e.g., Scales-Trent, \textit{supra} note 4.

\textsuperscript{135} 615 F.2d at 1025. In \textit{Jefferies}, the plaintiff alleged that her employer, Harris County Community Action Association ("HCCAA"), discriminated against her on the basis of race, or sex, or, in the alternative, race and sex, in failing to promote her and in terminating her employment. \textit{See id.} at 1028. "Jefferies' undisputed testimony established that every position for which she had applied had been filled by males or non-[B]lack females." \textit{Id.} at 1029. The District Court's opinion, which held that Jefferies failed to prove either a claim of race discrimination or sex discrimination, was reversed on appeal. \textit{See id.} at 1032-35. Additionally, the appellate court determined that the district court failed to address Jefferies' claim of discrimination on the basis of both race and gender. \textit{See id.} at 1032.

\textsuperscript{136} \textit{Id.} at 1032 (emphasis in original).

\textsuperscript{137} \textit{See id.} at 1034.
active discrimination claim\textsuperscript{138} which accepts the proposition that Black women, as a group, face discrimination separate and apart from men and White women, and therefore Black women merit enhanced judicial protection.

Because both sexual harassment and racial harassment are forms of discrimination prohibited by Title VII,\textsuperscript{139} the holding in \textit{Jefferies} should be extended to recognize Black women as a discrete class in Title VII sexual harassment cases. This Note argues that the principles underlying the legal requirements for proving racial harassment\textsuperscript{140} and sexual harassment\textsuperscript{141} may be combined to create a Title VII prima facie case based on an interactive workplace harassment framework.

The proposed interactive workplace harassment framework consists of the following elements: (1) plaintiff's status is protected under Title VII; (2) plaintiff was subject to unwelcome conduct because of her status; and (3) the employer is responsible.

With respect to the first element, "'[s]tatus' is a term which sociologically identifies one's position in society . . . [Thus, in the case of Black women, they] . . . possess two statuses which derive from attributes over which they have no control: membership in the [B]lack race and membership in the female sex."\textsuperscript{142} The combination of these two statuses creates a new status, which should be protected under Title VII. The second element, whether the conduct is sufficiently harmful to warrant a remedy, should be determined by the same barometer that currently measures hostile environment sexual harassment cases,\textsuperscript{143} except that all harassing conduct, regardless of which protected status motivated it, should be considered in determining whether the severity requirement is met. Finally, the employer's responsibility for an employee's harassing behavior should likewise be determined according to the rules of other hostile environment sexual harassment cases.\textsuperscript{144}

\textsuperscript{139} 42 U.S.C.\textsuperscript{superscript}§ 2000e-2 (1996).
\textsuperscript{140} See supra note 14 for the elements of a racial harassment claim.
\textsuperscript{141} See supra text accompanying note 80 for the elements of a sexual harassment claim.
\textsuperscript{142} Scales-Trent, supra note 4, at 13 (citations omitted).
\textsuperscript{143} See supra note 109 and accompanying text.
\textsuperscript{144} The applicable standard is outlined in 29 C.F.R. \textsuperscript{superscript}§§ 1604.11(c)-(d) (1996). Generally, an employer is liable for its acts and those of its agents regardless of whether the employer authorized or prohibited the harassment and
Once the plaintiff meets this three-part burden, the defendant may dispute one of the prima facie elements or argue that the conduct was based on factors other than the interaction of race and gender. Generally, however, once a plaintiff establishes the prima facie case, the burden shifts and liability will follow unless the employer can argue that it is not legally responsible because it neither knew nor should have known of the misconduct or because, once it had learned of the misconduct, the employer acted immediately and effectively to remedy the situation.

The propriety of protecting Black women as a discrete class under Title VII was previewed in a pre-Jefferies case, Degraffenreid v. General Motors Assembly Division.\textsuperscript{145} In Degraffenreid the court found that Black women were not a special class to be protected from discrimination.\textsuperscript{146} The court based its conclusion on three points. First, the court found no precedent for such a claim.\textsuperscript{147} Second, the court articulated the belief that the plaintiffs "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."\textsuperscript{148} Third, the court believed that allowing combination claims would open a Pandora's box of myriad claims based on multiple statuses.\textsuperscript{149}

The concerns of the court in Degraffenreid were unsupported, however. The Jefferies court provided ample rationale for the protection of Black women. First, precedent for the holding in Jefferies\textsuperscript{150} was derived from the Supreme Court decision in Phillips v. Martin Marietta Corp.\textsuperscript{151} which put forth the "sex-plus" theory of discrimination.\textsuperscript{152} In Jefferies, the Court relied upon the sex-plus the-

\begin{footnotesize}
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  \item 145. 413 F. Supp. 142, 143 (E.D. Mo. 1976). The plaintiffs claimed that the "'last hired-first fired' lay off policies of the defendants discriminate[d] against them as [B]lack women" in violation of Title VII. \textit{Id.}
  \item 146. \textit{See id. at 143.}
  \item 147. \textit{See id.}
  \item 148. \textit{Id.}
  \item 149. \textit{See id. at 145.} For this same reason, in \textit{Judge v. Marsh}, 649 F. Supp. at 780, the court limited the \textit{Jefferies} holding to cases involving two characteristics protected under Title VII—such as race and gender.
  \item 150. 615 F.2d at 1025.
  \item 151. 400 U.S. 542 (1971).
  \item 152. \textit{Id.} In Phillips, the Supreme Court recognized "that disparate treatment of a subclass of women could constitute a violation of Title VII." \textit{Id. at 544.}
\end{itemize}
\end{footnotesize}
ory, stating that unlawful discrimination occurs where "sex plus an immutable characteristic or a constitutionally protected activity such as marriage or child-rearing regulations... 'present obstacles to employment of one sex that cannot be overcome.'"153

Second, the Degraffenreid court was wrong in claiming that the formulation of a new claim created a "super-remedy" for Black women. Black women are seeking protection where Title VII "already protects [B]lacks and women against discrimination under the prohibition against discrimination based on race or sex, and where such a reading [as that in Degraffenreid] would allow discrimination to go unremedied."154 Title VII protects people from employment discrimination on the basis of gender or race. An employer should not escape liability for discriminating against Black females by showing that it neither discriminates against Blacks nor discriminates against females.155 Congress' use of the disjunctive in Title VII demonstrates its intent to prohibit discrimination based on any or all of the characteristics listed in Title VII.156 In the absence of a clear indication that Congress deliberately sought not to protect Black women, the law cannot be construed to leave them without a remedy.157 Thus, such protection is clearly within the ambit of the statute.

Third, recognizing Black women's distinct claims would not open a Pandora's box of endless claims because any claim would be limited to combinations of those groups already protected under Title VII. Nevertheless,

[c]ourts that are willing to allow other groups' race-sex claims, based upon the same principles as Black women's race-sex claims, may be uncomfortable recognizing that Title VII claims can be based upon as many as three, four, or five of the protected categories—race, color, religion, sex, and national origin. . . .158

This fear should not block the path to justice. Courts are not in the business of solving problems only when the solution is easy to

153. Jefferies, 615 F.2d at 1033. Many commentaries have criticized Jefferies' analogy to "sex-plus" methodology because sex-plus is ideologically and methodologically constraining for Black women. See Peggie R. Smith, Separate Identities: Black Women, Work, and Title VII, 14 HARV. WOMEN'S L.J. 21, 40 (1991); Scarborough, supra note 9, at 1471.
154. Scales-Trent, supra note 4, at 38 n.139.
155. See Jefferies, 615 F.2d at 1032.
156. See id.
157. See id.
158. Scarborough, supra note 9, at 1476.
determine. Courts routinely address difficult questions. Their task is to sift through all the evidence presented on the various components of the discrimination claim, and draw a reasoned conclusion.

Like aggregation, protecting Black women as a discrete class is also a viable option for recognizing claims of interactive harassment. Although it does not work within the existing framework under which sexual harassment claims are analyzed, it is an enticing option because it is a more narrow species of the already-recognized interactive discrimination claim outlined in Jeffries.

CONCLUDING THOUGHTS

As they are neither White nor male, Black women stand at the intersection of race and gender. Many times, their experiences of racism and sexism are blended into an inseparable whole. Sexual harassment is a prime example: on occasion, race and culture interact with gender to form a type of sexual harassment that is infused with race. Because Black women do not fit neatly into sexual harassment legal frameworks, they may be adversely affected when they are victims of sexual harassment in the workplace. To remedy this discrepancy, two options are possible. One method is to view evidence of racial hostility conjunctively with sexual hostility, while a second option is to protect Black women, through the formulation of a workplace harassment claim, as a discrete class because of their distinct status as Black women. Which methodology should ultimately be adopted is unclear. What is clear is that some change in the current construct of sexual harassment law must be made. The current framework is too rigid and confining to encompass the range of women's experiences. Practitioners must push the boundaries of the law to provide greater protection to a broader group of injured people.

EPILOGUE

REVISITING LESLIE IN LIGHT OF OUR DISCUSSION

It has been a week or so since Leslie came to you for help. After doing some preliminary factual investigation and legal research, you have chosen to represent Leslie. Her case presents interesting issues. As you begin to think about drafting a complaint, the question immediately arises: What is the theory of the case? How does Leslie's race factor into what intuitively seems to be a sexual harassment claim?

You think to yourself that you have three possible claims: hostile environment sexual harassment, racial harassment, and workplace discrimin-
Thinking quickly through the framing of each claim and the probability of success with each, here is what you come up with.

Prevailing on a traditional hostile environment sexual harassment claim would be difficult for two reasons. First, with respect to the White co-worker, it is unclear whether his conduct was motivated by Leslie's race or Leslie's gender. Clearly, his conduct has sexual overtones, but a court may determine that race was the overriding factor. Second, the actions of the Black co-worker, because he is Black, may be deemed to have been motivated solely by gender. The one incident, however, probably does not meet the severity requirement.

Maybe you could get the court to aggregate the racial elements with the sexual conduct. That would probably help meet the severity level, but this circuit has not endorsed aggregation. You may have to place your client in the uncomfortable, but ground-breaking, position of serving as the test case.

A racial harassment claim might also fail because the gender-directed conduct could undercut a claim that the harassing behavior was racially focused. You are between a rock and a hard place: you may not prevail on the hostile environment claim because gender may be seen as the motivating factor and you may not prevail on the sexual harassment claim because of the racial element. You could allege both sexual harassment and racial harassment. You hope that a court would not be so unthinking as to knock out both claims. But you never know, stranger things have happened.

In the best of all worlds, you would be able to claim simply that Leslie was subjected to workplace harassment. This would allow you to allege simply that she was harassed because she is a Black woman. Because it is a more holistic approach, you would not have to try to bisect Leslie's experiences into some based on gender and some based on race. Such interactive discrimination is already recognized in the general context of employment discrimination. There is no reason why it should not apply here.

What to do? What to do?