Senior Honors Project – Spring 2024 :

Awareness of Multiplicity: Intersections of Identity within the Law

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Intersectionality as an ideology is fraught with contradictions. Coined in 1989 by legal scholar Kimberlé Crenshaw, intersectionality possesses the ability to engage in ideologies that are conceptually intangible but still result in ramifications. Such a mechanism is heady to those whose existence was rendered legally invisible. While rich in ideology, intersectionality has struggled to leave the theoretical realm, despite the commonplace enactment of its principles. Every day people turn on the news or receive notifications of new laws being implemented that will impact their daily lives. Some laws are neutral on their faces, but their impact is one that targets one demographic over the other. This paper argues that the law contains intersectional undertones and due to the multifaceted nature of the individuals to which laws are aimed to apply, the undertones should become overt. By viewing the laws with an intersectional lens from the offset, this paper not only argues that the impact of laws both neutral and ones that are targeted may have been clearer from both the offset and case reasonings but also this impact reveals that the law does indeed contain intersections of identity, and that these intersections can be meaningfully used to further understand the law in its practice and intent. This paper aims not to question whether these laws should still be implemented, but rather to scrutinize the law in a manner that strives to make it transparent. Transparency of the law highlights its foibles not to render it void of purpose and use, but to bolster its function of administering justice to the citizens within its purview. The genesis of this ideology arose from the hesitant dissatisfaction with intersectionality concerning the law. Somewhere along its development intersectionality seemingly diverged from the juridical context from which it arose. This seeming divergence is not one that this paper positions as negative, for intersectionality has traversed many disciplines

of study and these areas of knowledge have been enriched through using intersectionality in their pedagogy.

However, as the theory developed it has become increasingly theoretical and this relationship has made it difficult to connect intersectionality back to its legal origins. This paper aims to highlight that intersectionality has not diverged and its analysis is still present in the law implicitly. The law sees and is aware of identity differences through the creation of not only the 14 Amendments Equal Protection Clause but also through its analysis of intent for cases that possess these identity differences. The action of analyzing intent is a tentatively intersectional practice. Endeavoring to understand the reasoning behind a law that potentially discriminates based on identity requires both an awareness of an identity ‘s positional interactions in society and an understanding of how to engage with these conceptions in the law. While this relationship is present in the law, this paper will highlight instances where the law's understanding of identity closes avenues of intent and remedy. Intent is key in this paper due to the broader theme of intent being unable to stand separately from the law. This has been a heavily debated sentiment but intent for discrimination cases is the linchpin on which these cases turn and cannot be separated from the letter of the law. For if a law impacts one group over the other, then it would be reasonable to ascertain why this relationship exists and to question if intent is present. As this paper will show, intent is a high bar to achieve, and this high bar is why it is paramount to hold intent in mind not only in offset of the law but in the law's practice as well. To build this argument, this paper will begin by drawing on sources that reveal the beginning of laws of general applicability. Such laws apply to all but as intersectionality troubles, such laws may impact one demographic over the other. Laws of general applicability here hold no or neutral intent and as such intent is left unanalyzed. However, laws of general applicability that impact one group over the other may lead to instances of disparate impact, and here is where the tension between intent and identity becomes truly fraught. Disparate impact cases must prove intent but as stated this requirement is not always clear. The continuous frustrations between disparate impact cases in which discriminatory practices are found are what gave rise to intersectionality.

This paper will highlight the origins of intersectionality and connect its origins to the difficulty of intent. Using Title VII of the 1964 Civil Rights Act employee discrimination cases, it will be revealed that the key to this understanding is that intersectionality routinely engages with the intersections of identity to build the complex and complete web that is the existence of

an individual. The problem is intent as the law stands only recognizes discrete and non-intersecting conceptions of identity. Such an oversight leaves out and renders entire groups invisible and for this paper, women of color will be highlighted. This relationship completely denies the avenue of intent due to the discriminated class going unrecognized. Additionally, this relationship highlights a paradoxical component: being a woman and a person of color is protected separately but once these claims are brought together, the plaintiff is essentially forced to choose what identity would be most lucrative to them. Along with plaintiffs being forced to choose, through employing critical feminist articles and cases concerning sexual assault, it will also be revealed that the law engages with and is aware of the explicit intersections of identity, but such engagement uses the victim's identity against them. Thus, women of color are left revictimized by the courts in cases where they should be protected. Merely engaging with parts of one's identity may result in judicial decisions but does not answer the main claim of the plaintiff and thus the plaintiff is left unrepresented. Un-representation is especially difficult for the plaintiff due to the law rendering them invisible and the plaintiff still having to follow it.

Another broader theme of this paper is how the law's pursuit of neutrality frustrates the path of intent. One of the claims made for why multiple protected classes go unrecognized is that it would provide a remedy beyond what the law allows. This is due to disparate impact and discrimination law working toward achieving a neutral landscape for all, regardless of the lived experiences of those who fall under its purview. Neutrality sees a 1:1 comparison in a world that contains multiples. This paper will analyze key feminist scholars that explicitly reveal these relationships and through putting these sources in conversation with legal cases, this paper aims to question how this comparison can leave room for ascertaining intent for plaintiffs that go unrecognized and dispossessed? Woven throughout this paper will be that the law's engagement of identities not only frustrates neutrality but is not only prevalent across areas of law but also that this engagement is covert. It is when analyzing the reasoning behind the cited case opinions and research into this topic that such relationships between the law and identity become crystallized. Such transparency is pivotal due to transparency possessing the ability to lessen the frustrations that reside between intent and discrimination law. Oftentimes intent must be blatant for it to be deemed as present but it would be unreasonable to think that a law would be blatantly discriminatory. As Justice O'Connor notes in *Employment Div., Dept. of Human Resources of*

Ore. v. Smith (1990)[1]," Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such". While Smith concerned a possible breach of the 1st amendment's establishment clause , the same sentiment can be applied to discriminatory law. Due to the development of this area of law, instances of discrimination are becoming increasingly subtle and require a deeper analysis to find the statute's intent. Additionally, intent being present does not resolve the impact of the law which negatively harms one demographic over the other. The areas of law highlighted in this case will show instances in which neutral intent is fashioned as theoretically enough to show discrimination but in practicality for people with multiple marginalized identities deliberate, neutral, or otherwise intent is still not enough. That is what is at stake in this paper. The act of the law failing to use intent in these cases allows disparate impacts and discriminatory practices to go unaddressed . Thus, such a reality leaves the plaintiffs or victims/survivors who possess multiple identities without remedies and are invisible despite the law showing awareness of them.

There is a path forward from this complex relationship. Using feminist scholars and legal officials, this paper aims to reveal that there is a potential avenue to addressing intersections of identity in the law. Such a path first calls for the explicit acknowledgment and willingness to engage with intersections of identity that are divergent from the understood conception of what constitutes identity in discrimination law. Then there is a need to render the categories of protected class more flexible than they currently are. Once these categories become more flexible, they can be put into conversation with one another and traversed. This paper aims to open the possibility of reforming the law in a manner that directly faces its frustrations and tensions. How many individuals be afforded equal protection in the letter of the law if its practices engage in the discriminatory stereotypes from which the need for such laws arose? By its very genesis of being created by people, this paper asserts that the law indeed can address the claims of plaintiffs historically left without a remedy.

To fully sketch the foundation of Intersectionality, it is important to highlight the understandings surrounding the 14th Amendment Equal Protection Clause, as well as laws of general applicability. The 14th Amendment holds that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

[1] *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"[2] Key to this paper is that the protected classes under the 14th amendment, equal protection clause include race and gender. A protected class speaks to special protection being afforded to those who fall within those classes.[3] Oftentimes equal protection violations run counter to laws of general applicability. Shaman, (2011) details the beginnings of the law. Laws of general applicability are written neutrally. Due to this relationship, ideologies of neutrality and general applicability are inextricable with the inability for a law to be general if it is not neutral. Important to this paper is that laws of general applicability coincide with laws concerning equal protection. The equal in equal protection echoes the components of neutrality needed and analyzing laws of general applicability. Under the same line of thinking a law that is not equal and does not afford equal protection is not a neutral law, and it is not a law that is general. Shaman (2011) details that the Supreme Court has stated that "[n]eutrality in its application requires an equal protection mode of analysis."[4] There is an understanding that laws of general applicability are laws that are non-discriminatory and do not run counter to equality. This understanding is echoed in U.S. Supreme Court Justice Harlan's opinion in *Douglas V, California*.

In *Douglas,* impoverished men were recharged with 13 felonies, including the violent charges of armed robbery and assault with an intent to kill. This case was rife with complications; the public defender for the two men petitioned for a continuance due to unpreparedness. As a result, the defendant Douglas wanted his public defender removed and the district complied with his request, but also did not provide Douglas with another public defender, resulting in Douglas being tried and convicted of all 13 counts without counsel. He then appealed to the Second Court of Appeals for California's third district, but the Court of Appeals did not provide him with another attorney. California's Court of Appeals held that an attorney for Douglas would be inconsequential and thus affirmed the lower district court. The case was

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[2] National Archives. 2022. 14th Amendment to the U.S. Constitution: Civil Rights (1868). https://www.archives.gov/milestone-documents/14th-amendment#:~:text=No%20State%20shall%20make%20or,equal%20protection%20of%20the%20 laws

[3] National Archives and Records Administration. (n.d.). *EEO terminology*. National Archives and Records Administration. https://www.archives.gov/eeo/terminology.html#:~:text=Protected%20Class%3A%20The%20groups%20protected, with%20physical%20or%20mental%20handicaps.

[4] Shaman. M Jeffrey. (2011-12). *10 First Amend. L. Rev. 419 (2011-2012). First Amend. L. Rev., 10, 419-464.* https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/falr10&id=429&men_tab=srchresults

further appealed to the Supreme Court, where the court had to answer if the district court and the court of appeals violated Douglas's equal protection by refusing to provide Douglas with counsel. The Supreme Court held yes, that the lower courts' actions violated Douglas's equal protection, and he was thus discriminated against. The reasoning of the lower courts to not provide Douglas with an additional public defender turned on whether the courts believed that the defendant could afford an attorney.[5] Here is a policy or law of general applicability with the opinion of *Douglas* revealing that the Supreme Court had already decided that being afforded counsel for all felonies is a right that is necessary for the equal protection of the law. The right to counsel is enshrined by the 6th Amendment and the Supreme Court ruled that this right was the right to counsel as enshrined by the 6th Amendment [6] incorporated to the states in *Gideon v. Wainwright (1963)* through the 14th Amendment equal protection clause[7]. This right applies to all citizens, but in the lower courts, *Douglas* found no need to apply it. Justice Harlan highlights that due to the letter and application of the equal protection clause, the states are prohibited from discriminating against the rich or poor. This case not only applies to the understanding posed above but also reveals that decisions concerning laws of general applicability that run counter to the equal protection clause have in the past been ruled unconstitutional.

However, in *Douglas,* Justice Harlan does not go as far as to say that the state is prohibited from creating laws of general applicability that may impact the poor to a greater degree than the rich, revealing a shadow in laws of general applicability jurisprudence. Shaman (2011) highlights that neutral laws of general applicability may at first glance seem non-discriminatory on their faces but do indeed possess certain areas that have an impact that is discriminatory[8]. The relationship between laws of general applicability influencing one demographic over the other is understood as disparate impact. What is important and what

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[5] *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (19) https://scholar.google.com/scholar_case?case=3973384553826466817&q=douglas+v+california&hl=en&as_sdt=6,34 [hereafter *Douglas*]

[6] *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (19) https://scholar.google.com/scholar_case?case=3973384553826466817&q=douglas+v+california&hl=en&as_sdt=6,34

[7] L S Fulton. "NCJRS Virtual Library." *Right to Counsel Clause of the Sixth Amendment | Office of Justice Programs*, www.ojp.gov/ncjrs/virtual-library/abstracts/right-counsel-clause-sixth-amendment#:~:text=In%20the%20Gideon%20v.,both%20Federal%20and%20State%20courts. Accessed 4 Mar. 2024.

[8] Shaman. M Jeffrey. (2011-12). *10 First Amend. L. Rev. 419 (2011-2012). First Amend. L. Rev., 10, 419-464.* https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/falr10&id=429&men_tab=srchresults

separates disparate impact from discrimination is that disparate impact lacks intent. This difference is exemplified in *Alexander v. Sandoval (200*1). In *Sandoval*, the Alabama Department of Public and Safety receives federal funding, thus falling under Title VI of the 1964 Civil Rights Act. The plaintiff, Sandoval, brought a suit alleging that Alabama's license test administration discriminated against non-English speakers due to the test only being administered in English. The Supreme Court here must ascertain if Title VI of the 1964 Civil Rights Act provides the ability for the Justice Department to enforce regulations, prohibiting federal funds from its recipients if they use administrative practices that subject individuals to discrimination based on national origin. The Supreme Court in this case held they could not withhold federal funds, due to a lack of intent by the Alabama Department of Public Safety to explicitly discriminate against non-English speakers. While the test may have had the impact of discriminating based on national origin, that is not enough to show the invidious intent to discriminate [9].

The component of intent has proven to be a difficult threshold for disparate impact cases to achieve. To pass the intent test, the letter of the policy or statute must reveal the deliberate intent to discriminate. *Sandoval* did not meet this bar due to reasons echoed by Justice Harlan in *Douglas.* States and their accompanying administrative organs are not prohibited from instituting policies that merely impact one demographic over the other while outright discrimination is prohibited. This frustration between impact, intent, and the letter of the law is further shown in the preceding cases which comprise the jurisprudence of disparate impact cases. *Griggs v. Duke Energy (1970)*[10] concerned Griggs, who filed a class action lawsuit against Duke Energy Company. Griggs argued that Duke Energy's inside transfer policy which requires employees who want to work in upper-level departments, to pass two tests with a minimum set score, as well as have a high school education violates Title VII of the 1964 Civil Rights Act. The Supreme Court had to answer if Duke Power companies intradepartmental transfer policy, which requires the achievement of a minimum set score on two separate aptitude tests, as well as a high school education violates the act. The Supreme Court held that yes, Duke Energy did violate the act and that their policy had a disproportionate impact on African Americans being restricted

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[9] *Alexander v. Sandoval*, Oyez, [hereafter *Sandoval]* https://www.oyez.org/cases/2000/99-1908 .last visited Dec 4, 2023).

[10] *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971). https://scholar.google.com/scholar_case?case=8655598674229196978&q=griggs+v+duke+power&hl=en&as_sdt=6,34 [hereafter *Griggs*]

from higher-level departments. The court found that there was covert and prohibitive intent in these requirements and that this intent was to protect Duke Energy's policy of referencing white employees over African American employees. Salient to this paper is that the court did not only look at the impact of Duke's policy but also closely analyzed its subtle intent. While the court in *Griggs* found that Congress worded the act so that intent, deliberate or neutral, was less as necessary as it is in standard equal protection, disparate impact cases, the following portions of this paper concerning intersectionality will highlight that intent is still a high bar to achieve in employee discrimination cases.

The case that exemplifies the tensions that reside within standard equal protection, disparate impact cases, and intent is *Washington v Davis (1975)*[11] highlights a case that concerns possible discrimination based on race, an understood area of law that has been historically subject to increased scrutiny. Two African American men were rejected by the District of Columbia Police Department, resulting in these men filing a suit against the mayor. The men stated that the department's hiring practices which required a written personal statement discriminated against racial minorities. They argued that the personal statement was unrelated to job performance and had the impact of excluding a disproportionate amount of African American applicants. The court again had to answer if the recruiting procedures of the District of Columbia violated the 14th Amendment's equal protection clause, and again the court found that it did not. The statute was written racially neutral, and the court asserted that not every case that had the effect of impacting one race over the other alerted to racial discrimination and thus, was unconstitutional.

The court found that the DC police department lacked intent in its hiring practices, failing the first prong of an intent test viewed through the lens of a test that possessed a higher scrutiny than rational basis. While not labeled intermediate scrutiny in Davis, the test applied in this case echoes intermediate scrutiny, or at the very least rational basis with teeth. Deference was not immediately given to the state with the plaintiff bearing the complete burden of having to show cause. [12]Under this increased scrutiny, the statute was scrutinized based on whether it had the

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[11] *Washington v. Davis, oyez, https://www.oyez.org/cases/1975/74-1492 (last visited Dec 4, 2023).* https://scholar.google.com/scholar_case?case=10318991495621925878&q=washington+v+davis&hl=en&as_sdt=6,34 [*hereafter Davis*]

[12] *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979).

intent to discriminate against race, color, or origin; does the state provide a legitimate justification for such discrimination, and are less discriminatory means available? [illegible]. While the plaintiff of *Davis* did not explicitly argue intent, stating such discrimination does not lessen the difficulty of the courts finding it present. This difficulty is seen in *Personal Admin v. Feeney (1979)*[13] *where* the plaintiff alleged such deliberate discrimination. Massachusetts instituted a statute that gave preference to veterans over non-veterans in hiring for state civil service positions. The plaintiff, Helen Feeney, who was a non-veteran, claimed that the law violated the 14th Amendment's equal protection clause due to it being discriminatory against women.

Feeney argued that the intent of the law was not to reward veterans but to discriminate against women. The court had to answer whether the Massachusetts hiring practices did indeed violate the 14th Amendment equal protection clause, and the Supreme Court held that it did not. The Stewart majority stated that the intent of the law was not to discriminate against women, but to support and reward veterans for their service. Males, while benefiting due to males outnumbering females in the military, were not the target of the law. The law was written neutral on its face, meaning that it was written neutrally in its letter, separate from its effect and impact of preferring men over women. In *Feeney,* Stewart laid out an intent test, and the law to stand, must be neutrally written meaning neutral on its face, and it must be analyzed through the lens of purposeful discrimination or intent[14]. While this increased scrutiny was also echoed in *Feeney*, the key to this case was the language of the opinion that held that law was rational in its pursuit of rewarding veterans over non-veterans. The use of rationale is salient to this paper and unsatisfactory reasoning is highlighted in Justice Marshall and Justice Brennan's dissenting opinion. Both justices highlight that the law discriminates based on gender. Additionally, the law would be struck down under the increased scrutiny employed in *Davis* through the intent test rather than being upheld through rational basis. Calling on *Davis,* pointedly the last prong of less

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.https://scholar.google.com/scholar_case?case=453555250629103403&q=Personal+Admin+v.+feeny&hl=en&as_sdt=40006 [hereafter *Feeney*]

[13] P*ersonnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979). .https://scholar.google.com/scholar_case?case=453555250629103403&q=Personal+Admin+v.+feeny&hl=en&as_sdt=40006

[14] *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979). .https://scholar.google.com/scholar_case?case=453555250629103403&q=Personal+Admin+v.+feeny&hl=en&as_sdt=40006

discriminatory means being available is left unanswered in *Feeney*. The third prong being left unanswered lowers the level of scrutiny between *Davis* and *Feeney*. Through the language of rationality and thus by viewing the statute through the lower scrutiny of rational basis, the burden falls on the plaintiff to prove intent, rather than on the government to prove that the disparate impact was not deliberate. Both justices supported that the *foreseeability* of disproportionate impact should be considered when adjudicating the intent of such laws.

Feeney[15] and *Davis*[16] are discussed separately and in tandem to highlight that *Davis* failed under increased scrutiny whether it be intermediate or rational basis with teeth, and *Feeney* failed rational basis. While *Davis* unlike *Feeney* did not explicitly argue intent, intent was read into *Davis*. Additionally, while Feeney was concerned with sex-based discrimination and Davis was concerned with race-based discrimination, the fundamental root of both case issues was the same in that both plaintiffs were understood as protected classes under the 14th Amendment's equal protection clause. While the outcome may not have been different, *Feeney*[17] should have arguably employed a rational basis with teeth, the same test employed by *Davis*. The failure of *Feeney* to use rational basis with teeth, instead relying on standard rational basis as well as *Davis's* use of this increased scrutiny and still failing highlights the high bar of finding intent in disparate impact cases that have discriminatory effects. *Feeney*[18] and *Davis*[19] reveal the tension that pervades laws of general applicability that are written neutrally on their faces but have the impact of preferences one demographic over the other. Such frustration turns on intent, but the intent needs to be explicit; however explicit intent and discriminatory practices would immediately alert legal officials in the courts that the law was discriminatory. The statute in

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[15] [15] *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979). .https://scholar.google.com/scholar_case?case=45355250629103403&q=Personal+Admin+v.+feeny&hl=en&as_sdt=40006

[16] *Washington v. Davis, oyez, https://www.oyez.org/cases/1975/74-1492 (last visited Dec 4, 2023).* https://scholar.google.com/scholar_case?case=10318991495621925878&q=washington+v+davis&hl=en&as_sdt=6,34

[17] [17] *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979). .https://scholar.google.com/scholar_case?case=45355250629103403&q=Personal+Admin+v.+feeny&hl=en&as_sdt=40006

[18] [18] *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979). .https://scholar.google.com/scholar_case?case=45355250629103403&q=Personal+Admin+v.+feeny&hl=en&as_sdt=40006

[19] *Washington v. Davis, oyez, https://www.oyez.org/cases/1975/74-1492 (last visited Dec 4, 2023).* https://scholar.google.com/scholar_case?case=10318991495621925878&q=washington+v+davis&hl=en&as_sdt=6,34

Feeney[20] and the policy in *Davis* take a more subtle approach, and while this paper acknowledges that disparate impact may not be enough to prove intent, explicit intent has proven to be difficult to parse out concretely. This paper argues that the foreseeability invoked by Justice Marshall and Brennan speaks to the ability of those who construct the laws to analyze its effects more concretely as well as those who adjudicate the law to look beyond its letter in ascertaining a law's intent. These cases turning on explicit intent possess the potential to overlook and discount modes of discriminatory practices that are covert. Intersectionality, which will be defined in the following paragraph, highlights the assumed ideologies of neutrality and equality that are prevented in neutral laws. Disparate impact routinely occurs based on the group's identity, and intersectionality is an ideology that studies the impacts on individuals' identities in detail. It gives voice to the real-world ramifications of isolating the identities of individuals into discrete categories in the pursuit of neutrality rather than viewing individuals.

Jennifer C Nash (2021)[21] defines intersectionality as an avenue for revealing how the law's structure turns on the invisibility of black women's experiences of violence. A challenge is posed to black feminists to create a juridical understanding of this relationship that reveals and provides a remedy for its harmful processes. Additionally, intersectionality is a path that makes it possible to reconceptualize discrimination and violence that surround the multiple identities of marginalized peoples in the pursuit of exposing the power structures that surround such discrimination. Coined by Kimberlé Williams Crenshaw in 1989, Crenshaw highlights the limitations of the judicial system concerning adjudicating for plaintiffs with multiple identities through Title VII.[22] The cases invoked are employment cases with policies of general applicability but have the disparate impact of affecting one group over another. Title VII of the Civil Rights Act prohibits employee discrimination based on race color, religion, sex, and national origin. Also, key to this paper is the understanding that violations of Title VII do

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[20] [20] *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979). .https://scholar.google.com/scholar_case?case=4535552506291034 03&q=Personal+Admin+v.+feeny&hl=en&as_sdt=40006

[21] Nash C. Jennifer. 2021. Keywords for Gender and Sexuality Studies Chapter 38: Intersectionality. eds edited by the Keywords Feminist Editorial Collective, Kyla Wazana Tompkins, Aren Z. Aizura, Aimee Bahng, Karma R. Chávez, Mishuana Goeman, and Amber Jamilla Musser,(Vol. 13, pp. 128–133). NYU Press. http://www.jstor.org/stable/j.ctv2tr51hm.41

[22] Crenshaw, Kimberle. 1989. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," University of Chicago Legal Forum: Vol.: Iss. 1, Article 8. Available at: http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8

examine intent, but in a manner slightly dissimilar from standard equal protection clause cases. When ascertaining impact, intent is examined, but neutrality is not required for the intent to be unlawful. This lack of non-neutral intent would conceivably shift the reason of these cases to examine the actual impact rather than the letter of the possible discriminatory policy more closely. While this may be the case, Crenshaw highlights that frustrations between multiple identities and the law concerning intent are still prevalent, even with this neutral intent being unnecessary. This paper argues that Crenshaw's analysis of these cases exposes the law's awareness of multiple identities, while simultaneously engaging with these identities in a manner that is harmful to its plaintiff in its pursuit of neutrality in ascertaining intent.

Crenshaw (1989)[23] begins with *DeGraffenreid v. General Motors (1976)*[24]. This case concerns General Motors Assembly Division's "last hired-first fired" layoff policies. *DeGraffenreid* argued that this policy discriminated against black women, continuing the practice of discrimination from General Motors. Such actions fall under the purview of the 1964 Civil Rights Act and the question the courts had to consider was whether there was a cause of action based on sex race, either or both. The opinion of *DeGraffenreid* revealed that the plaintiffs were suing General Motors due to the plaintiffs arguing that they were discriminated against based on being both black and female and thus the plaintiffs argued for a combination of the two protected classes. The court found that the plaintiffs failed to show any past decisions that position black women as a special class to be protected from discrimination. The plaintiffs were entitled to remedy if they were discriminated against, however, the court found that they could not combine race and sex into a "super-remedy" due to the court finding that such super remedy would afford them relief beyond what the drafters of the 1964 Civil Rights Act intended. The letter of the opinion showed an awareness of the multiple identities possessed by the plaintiff by using the phrase super-remedy. Super-remedy highlights the identities of DeGraffenreid being classified as protected separately but unprotected together. By not allowing the argument of a super-remedy to take form, it closes a path left open by the 1964 Civil Rights Act which held that the policies instituted by employers need not reach the level of deliberate intent, neutral is

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[23] Crenshaw, Kimberle. 1989. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," University of Chicago Legal Forum: Vol.: Iss. 1, Article 8. Available at: http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8

[24] *State v. Degraffenreid, 477 S.W.2d 57 (Mo. 1972). DeGraffenreid v. GENERAL MOTORS ASSEMBLY DIV., ETC., 413 F. Supp. 142 (E.D. Mo. 1976)* https://law.justia.com/cases/federal/district-courts/FSupp/413/142/1660699/ [hereafter *DeGraffenreid*]

enough. Intent-based discrimination against black women could not be analyzed due to the discrimination based on being black and a woman going unrecognized. To further highlight the difficulty of intent for black women in *DeGraffenreid*, the court found the argument of General Motors discriminating based on sex was unsupported. However, there is an implicit understanding of sex-based discrimination encompassing white women, regardless of if these women made this argument or not. Due to the claims of being unable to stand on its own, and unable to stand based on sex, the court urged *DeGraffenreid* to join *Nathaniel Mosley, et al., v. General Motors Corporation*[25], a similar suit that argued discrimination based on race. While such conjoining may have resulted in relief for DeGraffenreid, Crenshaw correctly highlights that DeGraffenreid joining Mosley would defeat the purpose *of DeGraffenreid* arguments. The purpose of their arguments was to challenge the court to answer their claims of discrimination based on two understood protected classes simultaneously, not separately. Arguably if the plaintiff's arguments were allowed to fully form, there could have been seeds that revealed not only neutral but deliberate intent as well. DeGraffenreid sued separately from Mosley, with their own merits. DeGraffenreid concerns were different from those in *Mosley*, but the law engaged the plaintiff's identity in a manner that left them without remedy and without the opportunity to prove intent, deliberate or neutral. The law is aware of disparities and courts are willing to listen to the claim as a matter of race, but such understanding does not encompass the realities of plaintiffs such as DeGraffenreid and thus such plaintiffs are rendered invisible in the legal system.

The rendering of individuals as invisible through the law's awareness of their identity is further crystallized and Crenshaw's analysis of *Moore v. Hughes Helicopters, Inc (1983)*[26] invisibility. *Moore* was concerned case where the courts did not certify black females as being able to be class representatives in race and sex discrimination class action suits. Moreover, the plaintiff complained to Hughes Helicopters stating the company practiced race and sex discrimination when they promoted employees to upper-level aircraft positions as well as supervisory jobs. Moore possessed statistical evidence showing that there are significant differences between the way men and women are treated at the company and the key to this

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[25] *Mosley v. General Motors Corporation*, 497 F.2d 1330 (8th Cir. 1974). [hereafter *Mosley*]

[26] *Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983).* https://scholar.google.com/scholar_case?case=4773357030443403177&q=moore+v+hughes+helicopters+inc&hl=en&as_sdt=6,34 [hereafter *Moore*]

difference is that it is less when compared to how black men and white men are treated. In this data, Moore claimed that her class a black female had been discriminated against in the selection of employees for labor grades 15 to 20. It was due to this that Moore argued that she should be able to represent the suit. However, the Ninth Circuit Court of Appeals affirmed the District Court and its refusal to certify more as being able to represent the suit based on sex discrimination. The court in Moore limited her statistical pool by rendering her unable to use the additional statistical evidence compiled because she was rejected as the representative for the suit based on her sex and race[27].

More concretely, she was unable to use the data including black men and she was unable to employ the data that included white women. She was unable to use this data to draw comparisons between employees to show discrimination, thus upsetting one of her main arguments for discrimination: that data would show discriminatory and dissimilar treatment. This led to the court stating that she could not prove her claims "Prima facie[28]" meaning she could not prove her claims are correct until proven that they were not[29]. She could not state that there was discrimination until proven that there was not. She gave statistical data that showed black women had not been promoted and this claim was correct, but this claim could not be used to show discrimination, the accuracy of the data put forth by Moore could not be used until proven otherwise. It could not be used to show that there was discrimination merely due to the company not proving otherwise[30]. This paper argues that such reasoning places the burden on the plaintiff in a manner that runs counter to understood discrimination jurisprudence. In *Griggs*, the court examined the power company's intent in its policies and the language that placed an unequal burden on the plaintiff was absent. While *Davis* and *Feeney* found no intent, how the court engaged with the facts of the case did not have the component of not being able to prove discrimination until proven otherwise. While the burden did not rest solely on the company or

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[27] [27] *Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983).* https://scholar.google.com/scholar_case?case=4773357030443403177&q=moore+v+hughes+helicopters+inc&hl=en&as_sdt=6,34

[28] Prima Facie. Legal Information Institute. Cornell Law School. Accessed April 15, 2024.

[29] [29] *Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983).* https://scholar.google.com/scholar_case?case=4773357030443403177&q=moore+v+hughes+helicopters+inc&hl=en&as_sdt=6,34

[30] [30] *Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983).* https://scholar.google.com/scholar_case?case=4773357030443403177&q=moore+v+hughes+helicopters+inc&hl=en&as_sdt=6,34

agency, more of it lay with the alleged discrimination party rather than the individual who argued discrimination. This paper argues that this is due to the law's awareness of identities that are understood to be protected but are simultaneously being frustrated by individuals who bring suits based on multiple identities. Such frustrations stall avenues open to such people and frustrate the ability to examine intent in these cases. By throwing out the data brought by more, not because of its inaccuracy but because she argued discrimination until the converse was proven true, whatever intent deliberate or otherwise was left
untroubled.

Furthermore, the court stated that Moore did not argue discrimination based on sex but based on her identity as a black woman[31]. This led to the courts finding Moore's arguments of being able to be certified for the suit due the finding that she was unable to adequately represent white women. Furthermore, the court opinion reveals that not only was Moore not able to be certified as a representative of all women, but she was unable to be certified as a representative of black people[32]. Moore is also unable to represent the black male employees as a black person for two reasons: (1) the court stated that because of Moore's deposition, they believed that Moore did not think that black males were discriminated against in selection of supervisors, raising questions concerning Moore's ability to adequately represent the black population and (2) the court determined that Moore could not make out a prima facie case of discrimination against black males since the percentage of black males in the Hughes workforce exceeded the percentage of black males and the Los Angeles county workforce[33]. The failure of the appeals court to certify Moore highlights key frustrations that reside within employee discrimination law as well as discrimination law at large for individuals who possess and argue under multiple identities. As stated by Crenshaw[34], "The court rejected Moore's bid to represent all females

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[31] *Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983).* https://scholar.google.com/scholar_case?case=4773357030443403177&q=moore+v+hughes+helicopters+inc&hl=en&as_sdt=6,34

[32] *Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983).* https://scholar.google.com/scholar_case?case=4773357030443403177&q=moore+v+hughes+helicopters+inc&hl=en&as_sdt=6,34

[33] *Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983).* https://scholar.google.com/scholar_case?case=4773357030443403177&q=moore+v+hughes+helicopters+inc&hl=en&as_sdt=6,34

[34] Crenshaw, Kimberle. 1989. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," University of Chicago Legal Forum: Vol.: Iss. 1, Article 8. Available at: http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8

because her attempt to specify her race was seen as being at odds with the standard allegation that the employer simply discriminated "against females." (Crenshaw, p. 144). This highlights how the discrete categories of protected classes render demographics invisible. The court was aware of Moore's intersecting identities through the language of failing to certify her because of them. Unlike in *DeGraffenreid*[35], the court did not fail to recognize Moore, but its recognition of her intersecting identities left her unrepresented and without a remedy. Even if Moore could prove discriminatory intent on the part of Hughes Helicopters, she could not bring her suit as a class action lawsuit based on being both black and a woman as seen in *DeGraffenreid*, which was a preceding case to more. The court *DeGraffenreid* was not going to entertain a "super-remedy" class of individuals who need to be doubly protected. She would have been forced to choose and that again would have defeated the point of the lawsuit.

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 all females. Key in this understanding of all females is the inclusion of white women in the suit. The line of separation between females and females of color has been repeatedly drawn again and again. This stems from a lack of engagement with intersections on race and gender and this can be seen in many areas of law including rape law. There has been routinely dissimilar treatment for women of color in sexual assault cases as highlighted by Canadian Madam Justice L'Heureux-Dubé. In her opinion for the case of *R. v. Mallot*[36] she writes," It is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defense fairly decided." (line 40). She continues to highlight that individuals who may not have their claims adjudicated are women of color due to the conception that women of color are more able to fight off their attackers. Such analysis troubles the notion of reasonableness as highlighted by Madam Justice L'Heureux-Dubé. The reasonable woman is understood to be a white woman and such understanding leads to the continued revictimization of women of color in the legal system. This relationship is the topic of Angela

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[35] [35] *State v. Degraffenreid, 477 S.W.2d 57 (Mo. 1972). DeGraffenreid v. GENERAL MOTORS ASSEMBLY DIV., ETC., 413 F. Supp. 142 (E.D. Mo. 1976)* https://law.justia.com/cases/federal/district-courts/FSupp/413/142/1660699/

[36] Malott, 1998 CanLII 845 (SCC), [1998] 1 SCR 123 *https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1589/index.do*

Allard's (1991)[37]. Reasonableness pervades battered women's cases with the conception that a battered woman is unreasonable because she remains with her abuser. Allard readily highlights that such rigid theories are disrupted by the realities that women face and violent situations. Furthermore, Allard highlights that battered woman syndrome is littered with biases and stereotypes concerning how a woman is expected to react to violence. Key in this understanding is that the battered woman syndrome applies to white women and often women of color claims of battery are not taken as seriously. This reveals a lens that accounts for intersecting identities. The stereotypes that surround women of color show the law's awareness of intersecting identities but in a harmful manner. Such engagement is covert and lies with opinions rather than the written word of the law.

Such rhetoric is not only harmful but also reveals the law's engagement with intersecting identities in a manner that perpetuates racist stereotypes and discriminatory intent. Cynthia Grant Bowman and Laura Rosenbury et al.[38] At the root of the dissimilar treatment of women in a protectionist project to preserve the chastity of white women at the expense of women of color. The fifth edition highlights that historically there has been no institutional effort to regulate black female chastity. Courts in some states have gone as far as to instruct juries that unlike white women, black women and women of color are not presumed to be chaste. Also, while it is true that the attempt to regulate the sexuality of white women placed unchaste women outside the law's protection, racism restored a fallen white woman's chastity when the alleged assailant was a black man with no such restoration becoming available to black women. Chapter 4 Section D: Rape correctly highlights, "the singular focus on rape as a manifestation of male power over female sexuality tends to eclipse the use of rape as a weapon of racial terror[39]" (p. 323). The feminized nature of women and femmes leaves such individuals open to violence but the identity

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[37] Allard. Sharon Angella. 1991 Rethinking Battered Woman: A Black Feminist Perspective. *UCLA Women's LJ*, *1*, 191. .https://heinonline.org/HOL/Page?handle=hein.journals/uclawo1&div=14&g_sent=1&casa_token=T0yqKSybkX8AAAAA:vaC02qtkVibS7Y23PiK8TsuGb6KGWMtYDtxVi9NqPKt37vloabzaKQNwiT2GzMBZKfw1IMOo&collection=journals

[38] Bowman Grant Cynthia. Rosenbury A. Laura. Tuerkheimer. Yuracko A. Kimberly. 2011 Feminist Jurisprudence Cases and Materials
Chapter 4: Violence Against Women. Section D: Rape.
5th edition. ISBN: 978-1-68328-305-8

[39] Bowman Grant Cynthia. Rosenbury A. Laura. Tuerkheimer. Yuracko A. Kimberly. 2011 Feminist Jurisprudence Cases and Materials
Chapter 4: Violence Against Women. Section D: Rape.
5th edition. ISBN: 978-1-68328-305-8

of being feminine bodies of color does not extend protection to these bodies. This relationship was mirrored in both *DeGraffenreid*[40] and *Moore*[41] with both cases concerning women who possess multiple marginalized identities but one was placed over the other. Specifically in *Moore*, the position of the plaintiff's identity essentially canceled the other out. The canceling of identities for multiple marginalized individuals leave them without an avenue for procession as well as revealing the possible intent of the law to uphold untroubled foundations of law.

Sexual Assault crimes are criminal legal codes of general applicability but in practice, they continuously fail to adequately seek a conviction on behalf of women of color. The connection between rape and race can be viewed intersectionality. It has been discussed at length that rape myths rely on racial biases that stems from the perceived differences between white women and women of color[42]. Such laws already prohibit the prosecution from positioning the history of the victim as evidence to prove the defendant's innocence[43]. Judges are already aware of how rape myths can pervade a courtroom and may instruct the jury away from such assumptions. Along with these precautions, giving voice to the fact that these rape myths also have racial undertones further protects the victims of color. This is what it means to view the law with an intersectional lens from the offset, by the judicial system not only acknowledging but addressing the harm caused to women of color because of these myths that target their identity as both women and women of color, the holes in such laws become more apparent and can better be closed. If such stereotypes and conceptions were made overt through an intersectional lens that works to highlight the language and intent of discriminatory practices, there could be an avenue in which individuals with intersecting identities are rendered visible in the law.

In this paper, it has been asserted that the law is aware of intersecting identities and that such awareness should become overt. The need for a transparent and overt lens stems from the

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[40] [40] *State v. Degraffenreid, 477 S.W.2d 57 (Mo. 1972). DeGraffenreid v. GENERAL MOTORS ASSEMBLY DIV., ETC., 413 F. Supp. 142 (E.D. Mo. 1976)* https://law.justia.com/cases/federal/district-courts/FSupp/413/142/1660699/

[41] *Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983).* https://scholar.google.com/scholar_case?case=4773357030443403177&q=moore+v+hughes+helicopters+inc&hl=en&as_sdt=6,34

[42] [42] Bowman Grant Cynthia. Rosenbury A. Laura. Tuerkheimer. Yuracko A. Kimberly. 2011 Feminist Jurisprudence Cases and Materials
Chapter 4: Violence Against Women. Section D: Rape.
5th edition. ISBN: 978-1-68328-305-8

[43] Rule 412. Sex-Offense Cases: The Victim. Legal Institute Information. Cornell Law School. https://www.law.cornell.edu/rules/fre/rule_412

frustration between the law addressing individuals with intersecting identities and the law's intent in this acknowledgment. As stated by Catherine A. Mackinnon (1987)[44], the law has given contradictory instruction in viewing intersecting identities. In Chapter 4: Whose Culture () Mackinnon writes,

"In a society that is anything, but sex blind and color-blind courts insist on color blindness and sex blindness as the rule for discerning inequality and enforcing equality the moment you complain in court about discrimination is probably the first moment in your life when your color race ethnicity or sex becomes irrelevant this is supposed to be a principled in neutral stance (p.65.)"

Interjections of sex and race-based claims are decided based on standards that are based on neutrality. However, these claims are brought in the first place due the presence of dissimilar treatment, and in certain cases, this presumed work to neutrality impedes the plaintiffs that may be seeking remedies. This presumed neutrality has the potential to impede not only neutrality but also the potential to find intent. As seen in *DeGraffenreid*[45], neutrality is what enabled the court to that the plaintiffs did not show enough to prove sex-based discrimination. This neutrality speaks to how the court examined the plaintiff's claims of sex discrimination. The court examined women due to discrimination standards applying to women. The efforts to address women, while invaluable, was not the core argument of *DeGraffenreid*[46]. The plaintiff's argument turned to discrimination against black women and the court. The pursuit of neutrality frustrates the avenue of intent for plaintiffs, also resulting in rulings that result in unanswered claims and dispossession.

Furthermore, Mackinnon's chapter also analyzed the case of the case of *Martinez v. Santa Clara Pueblo (1978)*[47] in which relationships between intent, identity, and dispossession were crystallized. *Santa Clara Pueblo* concerned the native status of children whose mothers (as well as birthing persons) were native. Martinez sued because should she have children outside of

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[44] Mackinnon A. Catharine. 1987. Feminism Unmodified Discourse on Life and Law Chapter 4: Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo. ISBN: 0-674-29873-X

[45] *State v. DeGraffenreid, 477 S.W.2d 57 (Mo. 1972). DeGraffenreid v. GENERAL MOTORS ASSEMBLY DIV., ETC., 413 F. Supp. 142 (E.D. Mo. 1976)* https://law.justia.com/cases/federal/district-courts/FSupp/413/142/1660699/

[46] *State v. DeGraffenreid, 477 S.W.2d 57 (Mo. 1972). DeGraffenreid v. GENERAL MOTORS ASSEMBLY DIV., ETC., 413 F. Supp. 142 (E.D. Mo. 1976)* https://law.justia.com/cases/federal/district-courts/FSupp/413/142/1660699/

[47] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). [hereafter *Santa Clara Pueblo*]

her tribe her children will lose tribal status. Salient to this policy is that these children will be unable to vote in their tribes' elections when they grow into adults. If a man were to have children with a woman from a different tribe or who is non-native, tribal membership passes from him to his children. When the Supreme Court faced this question of tribal status, they deferred to Tribal Law and Mackinnon highlights that this deference is circular due to Congress being the body that imposed that tribal membership passes through the man in the first place. This paper highlights the relationships between *DeGraffenreid*[48] and *Santa Clara Pueblo*[49] to reveal that while different in case matter, both courts showed an awareness of the plaintiff's identities, and the awareness was used in a manner that resulted in both parties being rendered invisible. The Court in *DeGraffenreid*[50] did not recognize intersecting layers of discrimination while the Court in Santa Clara did not recognize tribal status if it flowed from the mother. Such failure resulted in the avenue of intent being simultaneously unattainable and clear: in *DeGraffenreid* it was not an option while in *Santa Clara,* the intent was dispossession. This is the lens that is necessary to ascertain the root of these deep and complex system relationships, for both women were rendered invisible upon the conclusion of their case.

The rendering of people as invisible as previously stated was the genesis from which intersectional legal discourse emerged. Joanne Conaghan (2008)[51] highlights that "feminists contend it is of particular concern in an intersectional context because the 'problem' of intersectionality appears to flow directly from the limits of the relevant categorical structure" (Conaghan 2008 p.8). This frustration between people with multiple identities and the law arose from the very perceived limits of the law and its position as an assumed omnipotent dispenser of truth. The law is assumed to represent an authentic reality and when it fails to do so, or it is difficult to do so, the chance to address such difficulty seems impossible. However, Conaghan highlights that it is the very precarious nature of the law as a landscape of truth, where the truth it upholds can be questioned. This dichotomy draws legal feminists and is the law a place for their claims to be addressed. The law in its essence as both a place of the truth and a place of that

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[48] *State v. DeGraffenreid, 477 S.W.2d 57 (Mo. 1972). DeGraffenreid v. GENERAL MOTORS ASSEMBLY DIV., ETC., 413 F. Supp. 142 (E.D. Mo. 1976)* https://law.justia.com/cases/federal/district-courts/FSupp/413/142/1660699/

[49] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).

[50] [50] *State v. DeGraffenreid, 477 S.W.2d 57 (Mo. 1972). DeGraffenreid v. GENERAL MOTORS ASSEMBLY DIV., ETC., 413 F. Supp. 142 (E.D. Mo*

[51] Conaghan, J. (2008). Intersectionality and the feminist project in law. In *Intersectionality and beyond* (pp. 37-64). Routledge-Cavendish. https://kar.kent.ac.uk/1900/1/Intersectionality_Feminist_Project15NOV07DP.pdf

truths' contention; possesses the capacity to become vehicle for its own reconfiguration and re-imagining. Such re-imagining makes possible the potential for the law's awareness of intersecting identities to be brought to the surface where they may be substantively answered beyond the previous course of non-recognition. While such conceptions of the law as a landscape of both truth and reconstruction seem theoretical, this paper argues that such intangible renderings are no less impactful and possesses the possibility to result in tangible actions. This relationship is further synthesized by Conaghan through highlighting Lise Gotell. Gotell examined the legal strategy for the women's Legal Action in Education Fund (LEAF) concerning the Canadian Charter of Rights and Freedom [52]. Gotell reveals that the organization in the 1990s began to pursue more complex presentations of women's identities. By LEAF presenting complex identities and complex cases to the justice system, the group not only provided a chance for the Canadian justice system to tackle so to speak these issues, but their rulings left the law ripe for "[questioning its] foundationalism through a discursive emphasis on complexity and contingency." (Conaghan p. 9)[53]. If more complex matters of intersections of identity were brought before the court with the aim to overtly acknowledge systems of discrimination, then intent would become clearer to ascertain.

Whether such intent could preclude the law or policy in question from being instituted or constitutional is not the aim of this paper. Nor is the aim to use intent with the purpose of immediately redressing past cases. The aim of this paper is to posit intersectionality as a landscape of opportunity for the transparency of the law. There is contemporary legal scholarship dedicated to shifting discrimination from discrete categories to more flexible and workable pathways. Madam Justice Claire L'Heureux-Dubé as well as scholar Iyiola Solanke of Norway highlights the limits of North American and European law in discrimination cases. The Ontario Human Rights Commission (OHRC)[54] cites Madam Justice L'Heureux-Dubé who has written extensively about discrimination law and its impact on the plaintiff in various opinions. Specifically in *Mossop* she writes on the reality that categories of discrimination possess the

[52] Conaghan, J. (2008). Intersectionality and the feminist project in law. In *Intersectionality and beyond* (pp. 37-64). Routledge-Cavendish. https://kar.kent.ac.uk/1900/1/Intersectionality_Feminist_Project15NOV07DP.pdf
[53] Conaghan, J. (2008). Intersectionality and the feminist project in law. In *Intersectionality and beyond* (pp. 37-64). Routledge-Cavendish. https://kar.kent.ac.uk/1900/1/Intersectionality_Feminist_Project15NOV07DP.pdf
[54] OHRC. (n.d.). The Move Towards an Intersectional Approach: Multiple grounds in equality and human rights jurisprudence

capacity to overlap[55]. There are individuals who exist within the law that experience layered instances of discrimination and that when the law encounters such a dynamic, it should be careful, ” not to characterize the discrimination to deprive the person of any protection. ... One should not lightly allow a characterization which excludes those from the scope of the Act who should legitimately be included[56].” In this assertion, Madam Justice L'Heureux-Dubé explicitly cautions and calls attention to the manner in which the law's rigid understanding of identity characteristics runs the risk of rendering individuals invisible in matters that concern them. The Canadian Supreme court widened the scope of its discrimination law in *Law v. Canada*[57] through widening thew scope of provision 15(1) of the Canadian Charter. 15(1) of the Canadian Charter states,[58]

“ 15. (1) [e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex age or mental or physical disability.” ”

Law[59] held that a discrimination claim can present an intersection of grounds that are a synthesis of those listed in s. 15(1) or are analogous to them and that it is up to the individual who is being discriminated against to advance these claims (ohrc). Such analysis was conceptualized as leaving an avenue to recognize previously untroubled discrimination dynamics as in the case of Corbiére *v. Canada*[60]. *Corbiére* recognized the intersections of identity for Aboriginal people and specifically recognized discrimination on the grounds of “Aboriginal residence”. Madame Justice L'Heureux-Dubé wrote in *Corbiére,* which concerned the Canadian Indian Act's prohibition on off-reservation living band members from voting in Band elections. She highlights that such prohibition particularly harms Aboriginal women due to the history of this demographic's involuntary dispossession of their own and their children's band status.

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[55] OHRC. (n.d.). The Move Towards an Intersectional Approach: Multiple grounds in equality and human rights jurisprudence

[56] OHRC. (n.d.). The Move Towards an Intersectional Approach: Multiple grounds in equality and human rights jurisprudence

[57] [1999] 1 S.C.R. 497 [hereinafter *Law*]

[58] Section 15-Equality rights. Government of Canada. Justice. https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art15.html#:~:text=Provision,or%20mental%20or%20physical%20disability.

[59] [1999] 1 S.C.R. 497 [hereinafter *Law*]

[60] [60] OHRC. (n.d.). The Move Towards an Intersectional Approach: Multiple grounds in equality and human rights jurisprudence

Aboriginal women, who can be said to be *"doubly disadvantaged*[61]**"** on the basis of both sex and race, are among those particularly affected by legislation relating to off-reserve band members because of their history and circumstances in Canadian and Aboriginal society.

Such dynamics of native membership are highlighted in *Santa Clara Pueblo.*[62] However, *Santa Clara Pueblo* was decided differently and 15(1) is broader than United States 14th amendment[63], with the 14 amendment prohibiting states from trespassing on an individual's rights and 15(1) explicitly gives these rights to the individual. Nevertheless, the purpose of each State's provision is to address discrimination and the 14th Amendment has also in some instances been read to recognize the intersecting relationships of identity. Y. N. Pappoe 2019[64] highlights several cases in which the law through the 14th amendment and Title VII of the 1964 Civil Rights Act have been read to expand the scope of protected categories for plaintiffs with multiple identities. Beginning with *Jefferies v. Harris County Community*[65], Jefferies was African American woman who filed a discrimination suit against her employer. Jefferies argued that her employer discriminated against her based on her sex and race due to her applying for several promotions and was subsequently denied the positions. She applied for two vacant positions in 1974 and was denied both, instead the positions went to a white woman and a black man. Similar to *Moore*[66], the lower courts decided in favor of Harris County, stating that due to the position being held by a black man at the time, and the same position being held by a white woman in the past, the county did not discriminate against Jefferies. The case went to the Fifth Circuit Court of Appeals in which the court of appeals explicitly stated,

" when a title VII plaintiff alleges that an employer discriminates against black females, the fact that the black males and white females are not subject to discrimination is irrelevant and must not form any part of the basis for finding that the employer did not discriminate against the black

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[61] OHRC. (n.d.). The Move Towards an Intersectional Approach: Multiple grounds in equality and human rights jurisprudence

[62] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).

[63] 14th Amendment to the U.S. Constitution: Civil Rights (1868), archives.gov. Milestone Documents

[64] Pappoe, Y. N. (2019). The shortcomings of Title VII for the Black female plaintiff. *U. Pa. JL & Soc. Change*, *22*, 1. https://heinonline.org/HOL/Page?handle=hein.journals/hybrid22&div=5&g_sent=1&casa_token=Ckkp9e4H3WkAAAAA:QoxN1JVZK2ZEtsdSWLWAEeP5g83QzRrIUbX4cxARJjSkTqWf8NGgj6F-aGzL8vHhQv3egQ3q9w&collection=journals

[65] *Jefferies v. Harris Cty. Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980).[hereafter *Jefferies*]

[66] [66] *Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983).* https://scholar.google.com/scholar_case?case=4773357030443403177&q=moore+v+hughes+helicopters+inc&hl=en&as_sdt=6,34

plaintiff"[67].

The court here brought Crenshaw's reasoning to a point[68]. If the court continued to conceptualize black female plaintiffs in the manner modeled by *Moore* [69] and *DeGraffenreid*[70] then these plaintiffs would be left without remedy under Title VII Act. *Jefferies* employed a "sex-plus" (Pappoe .2019 p.13) model that viewed the plaintiff intersectionality from the offset. Additionally, *Jefferies* read into the legislative intent of the act rather than the specific letter. The court conceptualized that by the act stating the "or" in Title VII's prohibition of employee discrimination based on race, sex, or national origin, show the legislative intent to prohibit discrimination on the basis of any or all listed categories.

Following Jefferies, the case of *Lam v. University of Hawaii(1994)*[71] had to contend with a discrimination claim on the basis of sex, race, and national origin. The case centered on Dr. Maivan Clech Lam, a professor who taught at the University of Hawai'i. Lam was a woman of Vietnamese descent who claimed that the university of Hawai'i's Richardson School of Law discriminated against her on the basis of her sex, race, and nationality. The discrimination stemmed from Lam applying for a directorship during the law school's 1987-1988 hiring search. This was the first search that the university conducted, and she subsequently became a finalist in this search. However, the faculty cancelled the search without appointing anyone to the position . Lam then again applied in the year 1 1989-1990 but the law school offered the position to another candidate, in which this candidate declined the position and again the university canceled the search. Lam also claimed that the cancellation of the search was unlawful retaliation against her for the proceedings that took place in both searches[72].

Lam applied to be the director of the Pacific Asian Legal Studies Program(PALS) . Over 100 applicants applied for this position and as stated previously, Lam was a finalist. The

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[67] *Jefferies v. Harris Cty. Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980).

[68] Crenshaw, Kimberlé. 1989. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," University of Chicago Legal Forum: Vol.: Iss. 1, Article 8. Available at: http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8

[69] *Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983).* https://scholar.google.com/scholar_case?case=4773357030443403177&q=moore+v+hughes+helicopters+inc&hl=en&as_sdt=6,34

[70] *State v. DeGraffenreid, 477 S.W.2d 57 (Mo. 1972). DeGraffenreid v. GENERAL MOTORS ASSEMBLY DIV., ETC., 413 F. Supp. 142 (E.D. Mo. 1976)* https://law.justia.com/cases/federal/district-courts/FSupp/413/142/1660699/

[71] *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994). [hereafter *Lam]*

[72] *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994).

individuals who appointed this position were a part of a committee and one of the committee chairs stated that Lam was her first choice. The committee chair in question had to vacate her position and another professor dubbed Professor A. took her place. this professor and Lam had a hostile relationship and Professor A. subsequently did not vote for Lam. It was proposed that this search would end with only one applicant being nominated and this applicant was a white male. Another fellow professor in favor of Lam told her of the applicant proceedings and Lam went to the Dean and revealed her misgivings, including informing the Dean of hostile dynamics between her and Professor A.[73] Rather than asking for this professor's resignation Lam asked that 10 original names be put back forth for consideration. The Dean countered with an offer of canceling the search altogether and reopening it to accommodate an Asian male who had been missed in the application deadline. The Dean reasoned that this action had the double benefit of eliminating any strife caused by Professor A. Lam disagreed stating that it would be unfair to the other applicants reopen the search. There was heated debate concerning the continued inclusion of Lam's application for this search with Professor A. disparaging Lam's character including finding Lam's criticism of another applicant who was a white male to be inappropriate. Two fellow chairs for this committee went to the Dean concerning Professors A's behavior and language towards Lam. At the same time Lam spoke to the campuses' EEOC officer and urged the officer to dissuade the Dean from reopening the search. This resulted in the Dean not reopening the search and Lam was considered for the position. Due to the proceedings of this search, a consensus could not be reached. Thus Professor A. resigned from the chair position and the committee voted and cancelled the search[74].

The search was reopened in 1989 in which Lam again applied with over 50 other applicants. In this search, Lam was not considered on any of the committee members list's and neither Lam nor her application was ever discussed at any of the meetings. When the final list of candidates was rendered, it comprised almost entirely of people born in the United States. This was in stark contrast to the significant number foreign candidates on the first list. The faculty met with six of the top candidates, half of whom received lower ratings from the other chair committee professors than Lam in the first search. The faculty in the second, search as previously stated appointed an individual who was a white woman, but this individual declined

[73] *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994).
[74] *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994).

the offer and rather than continue this search the faculty cancelled it. As a result of this continued denial, Lam filed a suit in 1989 against the University of Hawai'i, the Dean of the School of Law, and the president of the university stating that there was discrimination on the basis of race, sex, and national origin as well as retaliation from the events that occurred during the searches. The District Court filed a summary judgment siding with the University of Hawai'i. Lam then appealed this decision in the Ninth Circuit Court of Appeals[75]. Unlike in *Moore*[76] the court for Lam found that Lam had established a *prima facie* case of discrimination. Citing the holding case for *prima facie*, *McDonnell Douglas Corp v. Green (1973)*[77], the court held that to have such a case 1.) she belongs to a protected class which Lam did is on the basis of her sex, race, and national origin; 2.) she applied for and was qualified for the job for which the employer was seeking an applicant, and she was due to her becoming a finalist for the first search ; 3.) despite being qualified she was rejected and this was also true on both counts with both searches being cancelled and in the second search she was not even considered; finally 4.) after her rejection the position remained open and the employer continued to seek applicants from people of comparable qualifications and this is also true, the first search was cancelled and the university proceeded with a second search choosing applicants who performed less satisfactorily than Lam in the first search followed by both searches being cancelled. searches were canceled[78]. Once *prima facie* is established the burden then shifts to the employer to prove nondiscrimination for its policies. The court explicitly cites *Jeffries*[79] and states that the District Court erred in its separation of treatment between race and sex discrimination. Other courts including *Jeffries* have stated that sex and race cannot be neatly separated into two distinct components. More explicitly "rather than aiding the decisional process the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences (Lam, 1994)[80].

This reasoning directly cites and answers *Moore*[81] in which *Moore* found that black women could not represent a class action lawsuit because they do not represent the interests of black

[75] *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994).
[76] *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1983).
[77] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).
[78] *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994).
[79] *Jefferies v. Harris Cty. Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980).
[80] *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994).
[81] *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1983).

males and white females. The *Lam* court refutes this reasoning stating that Asian women are subject to other stereotypes and are neither represented by Asian men or white woman. Thus, the appointing of these demographics to university positions bear no weight to the discriminations faced by Asian women[82]. *Lam* agrees with *Jeffries*[83] and that in order to adequately adjudicate Lam's claims, the court must consider her claims on the basis of both race and sex. A combination is needed and not merely whether the employer discriminate on the separation of the two[84]. This case concludes with the 9th Circuit Court of Appeals reversing the summary judgment granted to the defendant and remanding the case back to the District Court for further deliberation[85]. While extensive, this paper goes into great detail concerning Lam the highlight the complex, identity-centered dynamics that exist for individuals with multiple marginalized identities. Merely viewing Lam as an Asian individual and as a woman would not have resulted in the case fully understanding her as an individual nor the possible intent the underlie the University of Hawai'i decisions. This lack of understanding would have missed the core of Lam's argument and thus her matter would not have been adjudicated properly.

Such dynamics between intersections of identity and how they may be used in the beyond *Moore*[86] and *DeGraffenreid*[87] is precisely the subject matter that Iyiola Solanke (2009)[88] analyzes. Solanke examines the history and current frameworks of western courts concerning plaintiffs who possess multiple marginalized identities. Sighting the manner in which right wing extremists' politics in Europe leave marginalized bodies particular vulnerable, Solanke highlights two frameworks that courts employ to handle these matters. First is an additive approach which *Jeffries* and *Lam* conceptualized as a race or sex plus framework. Such a framework was exemplified by Solanke is *Nwoke v. Government Legal Service*[89]. This case concerned a Nigerian woman who was discriminated against on the basis of her race and sex. The government agency that she worked for employed a ranking system in which E was the lowest and A was the highest. It was discovered out of all white applicants both male and female

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[82] *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994).
[83] *Jefferies v. Harris Cty. Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980).
[84] *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994).
[85] *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994).
[86] *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1983).
[87] *State v. Degraffenreid*, 477 S.W.2d 57 (Mo. 1972).
[88] Solanke, I. (2009). Putting race and gender together: A new approach to intersectionality. *The Modern Law Review*, *72*(5), 723-749.
[89] Solanke, I. (2009). Putting race and gender together: A new approach to intersectionality. *The Modern Law Review*, *72*(5), 723-749.

,Nwoke was graded lower than these applicants even if they had a lower degree class than Nwoke. Also, it was discovered that the female applicants on a whole were less likely to be hired and when they were, female employees were paid less. It was due to these facts that Nwoke successfully argued both race and sex discrimination, thus fulfilling the race and sex plus additive framework. This additive framework is an aggregated one and is different from an intersectional framework which calls for a relation of the layers that exists between identities. A more intersectional lens was applied in Britain in *Lewis v. Tabard Gardens*[90]. Lewis was a black woman who worked for Tabard Gardens as an administrator. the plaintiff (Lewis) criticized a fellow colleague who was Nigerian man in front of their manager who was a white man. Their manager informed Lewis that she should not speak to her colleague like that because as a Nigerian man he should not take advice from a woman. When the case went before the employment tribunal, it was found with that the manager had treated Lewis unfairly and that this treatment was unreasonable. The manager's treatment of Lewis was based in part on her sex and race, thus the court found that he would not have treated a white or male employee in this manner[91]. Such a framework is intersectional due to it both highlighting the positionality of Lewis as both black and woman, as well as her positionality in relation to a white male in her position. This conception reveals how this dissimilar treatment is unreasonable and is thus discriminatory. There is a layering effect in this case that highlights that such dissimilar treatment would be absent if the marginalized identities were also absent.

Solanke also analyzes American law and directly invokes *DeGraffenreid*[92], *Jeffries*[93] and *Lam*[94]. *Jeffries*[95] and *Lam*[96] highlight instances where the decisions of the lower court have been remanded back by the higher courts on appeal. Specifically, in *Jefferies,* the federal court stated that African American women could be discriminated against even in the absence of discrimination against black men or white women. As stated, this directly answers *Moore*[97] who previously rejected the claim of African American women being discriminated against on the

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[90] Solanke, I. (2009). Putting race and gender together: A new approach to intersectionality. *The Modern Law Review*, *72*(5), 723-749.
[91] Solanke, I. (2009). Putting race and gender together: A new approach to intersectionality. *The Modern Law Review*, *72*(5), 723-749.
[92] *State v. Degraffenreid*, 477 S.W.2d 57 (Mo. 1972).
[93] *Jefferies v. Harris Cty. Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980).
[94] *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994).
[95] *Jefferies v. Harris Cty. Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980).
[96] *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994).
[97] *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1983).

basis of being both black and women, in which the reasonings of its court turned on the fact that Hughes Helicopters had not discriminated against black men nor white women. Such reasonings diverged in *Lam* and *Jeffries* with *Lam* following *Jefferies,* stating that the absence of discrimination on the basis of sex *or* race does not eliminate a claim of discrimination on the basis of *both* sex and race. By continuing to view women of color separate from both race and sex, the law ran the risk of rendering these individuals in invisible when faced with discrimination on the basis of both those claims.

Solanke argues that a primary obstacle that keeps intersectionality from the law is the current conception of the law which turns on what grounds a plaintiff may bring their claims. This is also highlighted by *DeGraffenreid*[98] and *Moore* [99]in which for both of those cases, the plaintiff had difficulty proving discrimination on the basis of their race and sex; in other words, they had a difficulty in proving the grounds in which they brought their suit. Solanke posits a framework that turns on stigma rather than discrimination in order to expand the grounds in which individuals with multiple marginalized identities may bring such suits[100]. By shifting from a lens discrimination to a lens of stigma it allows these discrete categories of identity protection to become more flexible. Stigmas would include immutable characteristics such as sex and race, but these characteristics would not pose as a limit[101]. Such a flexible limit would allow for both additive and intersectional conceptions. This paper argues that a lens of stigmas would be akin to the letter of the law versus the intent of the law. The current understandings of identity differences turn on the literal existence of the individual who possesses that identity when oftentimes it is the relationship of that person with the world that gives rise to that discrimination. A lens of stigma would aid in finding this intent as well as finding the root of such discrimination.

Solanke highlights that there have been Supreme Court cases in which the justices of the United States have taken this sort of approach. Rather than explicitly stating the framework of stigmas, Supreme Court opinions analyze such relationships in relation to how the marginalized

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[98] *State v. Degraffenreid*, 477 S.W.2d 57 (Mo. 1972).
[99] *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1983).
[100] Solanke, I. (2009). Putting race and gender together: A new approach to intersectionality. *The Modern Law Review*, *72*(5), 723-749.
[101] Solanke, I. (2009). Putting race and gender together: A new approach to intersectionality. *The Modern Law Review*, *72*(5), 723-749.

individual interacts with society. Solanke termed this as a 'social framework analysis'[102]. This framework is the practice of," [constructing] a frame of reference or a set of background context for deciding factual issues crucial to the resolution of a specific case"(Solanke 2009 p.742) . Such an example is given by Solanke through citing the psychologist Susan Fiske who employs the case of *Price Waterhouse v Hopkins(1989).*[103] *Price Waterhouse* concerned a sex discrimination claim lodged by Ann Hopkins. Price Waterhouse possessed an open partnership position and Ann Hopkins applied to attain this position twice. Hopkins was the only female applicant for the partnership position and was denied for two years in a row even though her application was more than comparable to the other male candidates[104].

Solanke, through Fiske highlights that such dynamics reveal gender stereotyping and stigmas that accompany the gender of women in male dominated spaces. The Brennen court in *Price Waterhouse* analyzed such stereotypes and thus resulted in the Supreme Court remanding this case back to the lower courts. The burden was on Price Waterhouse to prove that Hopkins would have been denied the position should she have been a man.[105] Such conceptions parallel Nwoke in which the employee tribunal found that Nwoke's manager treated her unfairly and found that she would not have been treated thus if she were a white man. The social framework as conceptualized by Solanke and modeled by *Price Waterhouse* aims to name the stereotyping practices that occur in these cases. The social framework calls for examining how these stereotyping practices influence the decision-making process of these companies and could aid in revealing the intent of the company policies. Whether the intent of this company is found to be discriminatory or not is not this paper's purpose but that the explicit recognition of stereotypes can reveal key underlying dynamics for people with marginalized identities. Such frameworks would require an intersectional lens from the offset to find the underlying stigma that drives the behavior and examine what societal mechanisms make such behaviors possible. This would not call for a complete upheaval of discrimination law as it stands but would call for the law to be more flexible in its conceptions and reasoning[106].

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[102] Solanke, I. (2009). Putting race and gender together: A new approach to intersectionality. *The Modern Law Review*, *72*(5), 723-749.
[103] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). [hereafter Price *Waterhouse*]
[104] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989).
[105] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989).
[106]Solanke, I. (2009). Putting Race and Gender Together: A New Approach to Intersectionality. *The Modern Law Review*, *72*(5), 723–749. http://www.jstor.org/stable/27755202

This paper readily acknowledges the challenges posed to attempting to employ an intersectional lens to the law. The law already has made attempts to address identity differences within the law through different level of legal scrutiny. To begin, strict scrutiny is often cited in 14th Amendment equal protection cases, Strict scrutiny is the highest-level scrutiny, thus, to violate strict scrutiny a law must be passed that violates the rights of suspect classes and they include race, national origin religion, and alienage[107]. Such dynamic is reamplified in *Loving v Virginia (1967)*[108]. Loving concerned an interracial couple comprised of a white man and a black woman who married and moved to Virginia. Virginia at the time had anti-miscegenation laws which essentially prohibited white people and African Americans from marrying. The Loving couple faced a year and jail and were told they could not settle in Virginia. Loving argued that such penalizations violated the privileges and immunities clause, equal protection clause, and the due process clause of the 14th amendment. The privileges and immunities clause were said to be violated due to Virginia attempting to restrict Loving's movement and such movement was a privilege held by a citizen of the United States[109]. Equal protection was violated due to the uneven distinctions drawn between African American and Caucasian people[110]. Due process was said to be violated due to the matters of marriage being the domain of the individual and the state infringed on this domain by attempting to restrict it. Strict scrutiny requires a compelling governmental interest and the means taken to address these need to be least restrictive, meaning that the avenue taken by the government must be the only path to achieve their compelling interest[111]. As such the court did not find that Virginia had satisfied the component of having a legitimate governmental interest let alone a compelling one. Due to the court finding that Virginia did not have a compelling interest, the means taken could not have been least restrictive due to there being no accepted interest[112]. *Loving*[113] turned on the court recognizing the identity differences that existed between African Americans and Caucasians. These differences were used

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[107] Strict Scrutiny. Legal Information Institute. Cornell Law School. https://www.law.cornell.edu/wex/strict_scrutiny#:~:text=Strict%20scrutiny%20will%20often%20be,origin%2C%20religion%2C%20and%20alienage.
[108] *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). [hereafter *Loving*]
[109] *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).
[110] Loving v. Virginia." *Oyez,* www.oyez.org/cases/1966/395. Accessed 11 Apr. 2024.
[111] Strict Scrutiny. Legal Information Institute. Cornell Law School. https://www.law.cornell.edu/wex/strict_scrutiny#:~:text=Strict%20scrutiny%20will%20often%20be,origin%2C%20religion%2C%20and%20alienage.
[112] *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).
[113] *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).

as the court stated to bolster the history of white purity and such goals were not supported by the 14 Amendment.

The next relevant level of scrutiny that addresses discrimination based on identity is intermediate scrutiny. A lower level of scrutiny than strict, intermediate called for 1.) an important government interest, 2.) the means taken to address such interest should be narrowly fit, and 3.) there must be an exceedingly persuasive justification for the class difference[114]. Such a test is shown *in U.S. v Virginia (1996)*[115]. Virginia was concerned the Virginia Military Institute (VMI) possessed a h a history of being a male-only military school. The U.S. brought a suite against the VMI, arguing that a male-only public school violated the 14th Amendment's equal protection clause. The District court ruled in favor of the VMI citing that the institution had proposed to create the Virginia Women's Institute for Leadership (VWIL) to act as a female-accepting counterpart to VMI. VMI argued that the quality of education between the schools was comparable while staying only institution. The court had to answer if the VMI's male-only admission violated the 14th Amendment equal protection clause; and if so, does the creation of the VWIL act an adequate remedy for this violation. The court through intermediate scrunty found that the VMI did violate the 14th amendment's equal protect clause; and no, the creation of the VWIL does not act as an adequate remedy for this violation. The court in this case cites Frontiero and highlights that the U.S. a long and unfortunate history of sex discrimination" (*Virginia*[116]). As such, the opinion highlights that the exclusion of women from VMI and the creation of the VWIL is rooted in stereotypes about the inherent differences between men and women. It advances its important objective as wanting to preserve the adversarial atmosphere of the VMI and that such an atmosphere would be hindered by the presence of women. The opinion aptly states that there are women who exist in adversarial environments such as the military and the assumption of women beginning unable to thrive in such conditions is itself a stereotype. As such the court found the important governmental interest prong unsatisfied. The means take did not fit enough due to the opinion discussing the creation of the VWIL at length. The VWIL when compared to the VMI required a less rigorous test score, received decreased funding, and did not possess the history that comes with graduating from VMI[117].

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[114] *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982).
[115] *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). [hereafter *Virginia*]
[116] *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996).
[117] *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996).

This reasoning is what led to the court finding that the VMI did not satisfy the second prong. Finally, they gave no exceeding justification for these class distinctions[118]. There were women who existed who could conceivably thrive at VMI and the exclusion stemmed from assumptions that surround women's mental and physical capabilities.[119] *Virginia* states that the court in the past has explicitly named that cause for such sex discrimination are stereotype based differences between the sexes and thus reveal a willingness to engage with these differences.

However, while the levels of scrutiny provide some relief to discrimination claims based on different identities, the level of scrutiny do not leave room for an individual who possess multiple identities to bring discrimination claims. This is due to the conception of the protected classes of the law. As previously stated, these classes include race, religion, nationality etc. , but this avenue of relief has stood firmly closed. There has not been a classification added to strict scrutiny since the conception of the 14th amendment in 1868. This fact has led to a narrow and rigid reading of the protected classes, leaving no room for overlap. Furthermore, in *Frontiero*[120], the first case that elevated sex-based discrimination ,Justice Brennan explicitly wrote "sex…like race" is a suspect classification. This language equates race to sex discrimination and thus Justice Brennan stated that sex is a suspect classification and should be subject to strict scrutiny. Justice Powell in contrast reasoned that such a reading would be activist, a practice the Supreme Court is wary of and held that the courts should leave such decisions to the legislature who were deliberating sex discrimination at that very moment[121]. S. M. Wadhwa (2020) details that such deliberation took place through the Equal Rights Act (ERA). The ERA would have elevated sex-based discrimination regardless of gender to strict scrutiny. The ERA ultimately failed and sex-based discrimination was not elevated to strict scrutiny[122]. Such event reveals the continued push to elevate sex-based discrimination, but such effort has failed at each turn. This left intermediate scrutiny as the highest level of scrutiny that sex-based discrimination could achieve. The strongest instance of intermediate scrutiny for sex-based discrimination was employed in

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[118] *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996).
[119] *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996).
[120] 103 *Frontiero* v *Richardson* 411 US 677 (1973).
[121] [121] [121] 103 *Frontiero* v *Richardson* 411 US 677 (1973).

[122] Wadhwa, M. S. (2020, December 30). *Bringing sex discrimination under strict scrutiny: The need for an equal rights amendment*. Columbia Undergraduate Law Review. https://www.culawreview.org/journal/bringing-sex-discrimination-under-strict-scrutiny-the-need-for-an-equal-rights-amendment

Virginia[123] with the inclusion of 3rd prong of the test. However subsequent cases following *Virginia* have selectively applied the exceeding persuasive requirement, thus resulting in an even lower bar for sustaining sex discrimination. These events reveal the struggle that exist within law. Even if the law does contain avenues to address identity differences, contemporary dynamics show that current standards do not show nor result in the neutrality that the law strives for.

The manner in which the legal landscape operates, including the inclusion of the levels of scrutiny is highly standardized. This standardization is to promotes unity and certainty. Such dynamics are analyzed by Conaghan (2008). Conaghan cites Emily Grabham who states that such concepts of legal standardization or as Conaghan conceptualizes legal cartography are employed in legal discourse, "infusing processes of legal categorization and functioning as techniques for reducing the messiness of people's lives into 'intelligible legal frameworks' (Conaghan, 2008, p. 4)[124]. Similarly, Pierre Schlag a legal theorist, in his analysis of the role of aesthetics in shaping our perception and apprehension of law, highlights the continued grip of what he calls the 'grid aesthetic' in legal thought. This aesthetic frame the law as a field of territory with a two-dimensional space that can be mapped and charted. While acknowledging the early twentieth century to be the historical high point of this particular aesthetic, such ideology manifests in formalist/ 'scientific' approaches the legal grid aesthetic[125]. "This grid continues to leave its mark on modern jurisprudence, encouraging the demarcation of law into bounded legal spaces whose proximity and interrelation can be comprehensively charted and explored."[126]

This paper acknowledges that this stance is understandable. Oftentimes the law must adjudicate many cases and by keeping the spheres of the law separate, it lends itself to a practice of predictability and bolsters the laws reliance on jurisprudence. If a case falls into a certain block of the grid so to speak then it should be treated according to the other cases that reside within that block of the grid. There are no surprises, there is no anxiety that can

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[123] *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996).
[124] Conaghan, J. (2008). Intersectionality and the feminist project in law. In *Intersectionality and beyond* (pp. 37-64). Routledge-Cavendish.
[125] Conaghan, J. (2008). Intersectionality and the feminist project in law. In *Intersectionality and beyond* (pp. 37-64). Routledge-Cavendish.
[126] Conaghan, J. (2008). Intersectionality and the feminist project in law. In *Intersectionality and beyond* (pp. 37-64). Routledge-Cavendish.

accompany uncertainty. However, the grid doctrine of legal theory does not preclude the introduction of intersectionality. The grid structure while extremely useful in organizing the body and landscape of the law is not without its blind spots. Within these blind spots are individuals that intersectionality aims to address. The grid of law renders such individuals invisible. Individuals like Moore who as a black woman does not fit neatly into either grid of black nor white and by extension does not fit neatly into sex-based or race-based discrimination. As stated, the inability of the law in this proposed grid structure to fully recognize all that it applies to should not be seen as only a failure. Within this failure resides opportunity. This is the opportunity to examine foundationally what the law can do and what the people that it applies to need it to do.

This legal cartography ideology has also led to another difficulty posed to intersectionality. If here is a willingness in the law to consider intersection of identity on the offset, engaging with these concepts is difficult. Madam Justice L'Heureux-Dubé states that where both discriminations are prohibited, the court can merely pick one[127] (ohrc). The OHRC highlights however that such distinctions would still not answer the claims of these individuals who possess multiple identities[128]. Furthermore, in current American law, this framework would have conflicting decisions with race possessing a stricter than gender. Such dynamics were highlighted in the *DeGraffenreid*[129] in which the court did not dispute that there were not actual claims of discrimination. However, to claim that such discrimination happened based on both sex and race, the court argued such reasoning would have devolved into categories with subcategories thus resulting in unworkable solutions. As analyzed previously, the courts found no evidence that the defendant had engaged in discrimination based on sex for women had been historically hired and continue to do so. This is why *Degranfried* was conjoined with *Mosley because* there was a claim with merit that the company engaged in discriminatory hiring practices based on race. However, such a combination does not meaningfully advance the claims of people who bring them. This framework of choosing one protected class over the other does not allow or intersections of identity and ultimately leaves people without remedy such as

[127] OHRC. (n.d.). The Move Towards an Intersectional Approach: Multiple grounds in equality and human rights jurisprudence

[128][128] OHRC. (n.d.). The Move Towards an Intersectional Approach: Multiple grounds in equality and human rights jurisprudence

[129] *State v. Degraffenreid, 477 S.W.2d 57 (Mo. 1972). DeGraffenreid v. GENERAL MOTORS ASSEMBLY DIV., ETC., 413 F. Supp. 142 (E.D. Mo*

the plaintiffs in *DeGraffenreid*[130]. But while this paper admits intersectionality cannot be a legal category on its own and acknowledges that courts would find this unpersuasive, Madam Justice L'Heureux-Dubé[131], Solanke[132] and Pappoe[133] shows that some courts are willing to use its lens when contemplating cases where individuals possess multiple identities. The ideologies that surround discrimination law and sexual assault law were discussed at length reveal that there are entire classes of individuals who claims go unaddressed because of contemporary rigid standards. The arguments of intersectionality inviting inconsistency in the law are not strictly accurate. Conaghan highlights that the current limits of the law invite the possibility of challenging the law with complexity in order to bolster contingency[134]. This paper argues that contingency in this sense does not refer to the literal predictability of the law but refers to attaining and implementing a framework that could continuously adjudicate complex and layered identities.

Intersectionality as a lens and a mechanism can change the law. While some individuals state that intersectionality is too modest[135], taking its doctrine further and actively endeavoring to employ it within the law would extend further than merely superficially engaging with the identity of an individual as shown in employee discrimination cases. Others state that intersectionality would result in a cascade of categories and subcategories, thus rendering the engagement between intersectionality in the law unworkable. ? It is worth noting that the same ideologies once steeped in anti-14th amendment rhetoric. Many individuals before the codification of race-based discrimination and sex-based discrimination did not believe that race and sex could adequately addressed by the law, but this has proven to be a false

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[130] *State v. Degraffenreid, 477 S.W.2d 57 (Mo. 1972). DeGraffenreid v. GENERAL MOTORS ASSEMBLY DIV., ETC., 413 F. Supp. 142 (E.D. Mo*

[131] OHRC. (n.d.). The Move Towards an Intersectional Approach: Multiple grounds in equality and human rights jurisprudence

[132]Solanke, Iyiola. "Putting race and gender together: A new approach to intersectionality." *The Modern Law Review* 72.5 (2009): 723-749.

[133] Pappoe, Y. N. (2019). The shortcomings of Title VII for the Black female plaintiff. *U. Pa. JL & Soc. Change*, *22*, 1. https://heinonline.org/HOL/Page?handle=hein.journals/hybrid22&div=5&g_sent=1&casa_token=Ckkp9e4H3WkAAAAA:QoxN1JVZK2ZEtsdSWLWAEeP5g83QzRrIUbX4cxARJjSkTqWf8NGgj6F-aGzL8vHhQv3egQ3q9w&collection=journals

[134] Conaghan, J. (2008). Intersectionality and the feminist project in law. In *Intersectionality and beyond* (pp. 37-64). Routledge-Cavendish.

[135] Conaghan, J. (2008). Intersectionality and the feminist project in law. In *Intersectionality and beyond* (pp. 37-64). Routledge-Cavendish.

assumption. Additionally, the law as it stands in pursuit of neutrality, places a high bar for those who possess multiple identities. This bar manifests as both the rigid classification of protected classes and the requirements to prove intent in discrimination cases. This paper aims to solidify that intent cannot be found for groups that the law does not engage with. This is not to completely abandon the ascertaining of intent but to trouble the foundations from which intent arises for individuals who are rendered invisible in the law. This paper does not seek to undermine how difficult an undertaking such as engaging with intersectionality in the law would be. Holding multiple conceptions at once is difficult but difficulty has not stopped the progression of law in America in the past and it does not stop it now. Whether a lens of intersectionality from the offset should preclude laws from being enacted is again, not the aim of this paper. This paper aims to highlight how intersectionality has the ability to crystalize the foibles of the law and that these flaws can be used to progress the world towards a clearer reality no matter how many there are.

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