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## Modernizing Discrimination Law: The Adoption of an Intersectional Lens

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# ARTICLE

## MODERNIZING DISCRIMINATION LAW: THE ADOPTION OF AN INTERSECTIONAL LENS

MARISA K. SANCHEZ\*

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\* I would like to recognize my privileges that allowed me to write this article. To the LGBTQ+ Latinx community, I hope I used my place of privilege to bring light and a voice to you. To my whimsical ray of sunshine, thank you for inspiring me to write this article. On a personal note, I would like to thank my ancestors for paving the path for me and continuing to guide me every day. To all those who fought before me that made it possible for a Brown woman like me to have a published article and be an attorney, thank you for your fight. To my family, partner and friends—your support and love is what drives me every day, thank you! I hope this Article is the start of a much larger conversation and structural changes that reflect the beautiful diversity that exist.

## INTRODUCTION

Discrimination has been part of U.S. history from its conception.<sup>1</sup> Over time, discrimination has become more complicated and has integrated into our larger systems.<sup>2</sup> As society begins to recognize the various subgroups of society—such as the LGTBQ+ community<sup>3</sup>—as legitimate, and as more people engage with people outside of their cultures, discrimination has become even more complicated.<sup>4</sup> There is no longer just White and Black, straight or gay, and woman or man.<sup>5</sup> Identities are more fluid, and binaries are being deconstructed into spectrums.<sup>6</sup> People are composed of multiple sets of identifies that make them who they are.<sup>7</sup> With a multi-faceted identity comes multi-faceted

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1. See generally NEMATTANEW, *THE NORTH AMERICAN GENOCIDE* (2002), <https://www.nj.gov/education/holocaust/curriculum/NorthAmericanGenocide.pdf> [<https://perma.cc/26YP-YCWL>] (analyzing the genocide towards Native Americans by the first American colonizers and illustrating a battle over land and resources caused by racial and religious superiority that ending in violence and devastation); see generally Donald L. Fixico, *When Native Americans Were Slaughtered in the Name of 'Civilization'*, HIST. (Aug. 16, 2019), <https://www.history.com/news/native-americans-genocide-united-states> [<https://perma.cc/B4T8-9Y2Z>] (overviewing the history of genocide against Native Americans by the first American colonizers and explaining how the clash in differences between both groups led to many wars initiated by the U.S. government).

2. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 224 (2020) (articulating the mass incarceration of communities of color as modern-day slavery).

3. Cf. *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (holding same sex marriage must be recognized in the United States).

4. Cf. Gretchen Livingston, *The Rise of Multiracial and Multiethnic Babies in the U.S.*, PEW RSCH. CTR. (June 6, 2017), <https://www.pewresearch.org/fact-tank/2017/06/06/the-rise-of-multiracial-and-multiethnic-babies-in-the-u-s/> [<https://perma.cc/AR6G-GFDF>] (reporting in 2015, 62% of infants were multiracial, more than triple the number of multiracial children in 1980).

5. See Christine E. Kaestle, *Sexual Orientation Trajectories Based on Sexual Attractions, Partners, and Identity: A Longitudinal Investigation from Adolescence Through Young Adulthood Using a U.S. Representative Sample*, 56 J. SEX RSCH. 811, 812 (2019) (describing how sexual orientation is not just straight or gay, but instead is experienced with many gradations along a continuum).

6. See Livingston, *supra* note 4 (reporting one in seven U.S. infants were multiracial or multiethnic in 2015); see also Kaestle, *supra* note 5 (explaining sexuality can be fluid over one's life); see also Sandy James, et al., *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. 6–7, 49 (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/9ZYT-ZEN6>] (reporting 35% of the transgender respondents of the survey are not ready to tell people they identify as nonbinary—“a term . . . used to describe people whose gender identity is not exclusively male or female . . .”).

7. See *Coming Out: Living Authentically as LGBTQ Latinx Americans*, HUM. RTS. CAMPAIGN FOUND. 36 (Nov. 16, 2019), [https://assets2.hrc.org/files/assets/resources/HRC\\_Coming\\_Out\\_Latinx.pdf?\\_ga=2.180090020.1037315069.1573952259-659376760.1573513211](https://assets2.hrc.org/files/assets/resources/HRC_Coming_Out_Latinx.pdf?_ga=2.180090020.1037315069.1573952259-659376760.1573513211)

discrimination based on all or part of one's identity.<sup>8</sup> Thus, there is nuance in why a person is being discriminated against in terms of their multi-faceted identity, which may lead to confusion.<sup>9</sup> While society and discrimination become more complex and socially recognized, the law is still treating discrimination as single-faceted,<sup>10</sup> and those who bring intersectional claims usually fail.<sup>11</sup> Over a thirty-four-year span, researchers who analyzed judicial opinions of plaintiffs who make intersectional claims reported "antidiscrimination lawsuits provide the least protection for those who already suffer multiple social disadvantages, thus limiting the capacity of civil rights law to produce social change."<sup>12</sup> Studies show how subgroups within a protected category experience discrimination differently.<sup>13</sup> For example, White women and Black women experience sex discrimination differently because Black women are discriminated against more harshly for being a

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[<https://perma.cc/SAM5-QN7C>] [hereinafter *Living Authentically*] (extending anecdotal experience of being Latinx and transgender and emphasizing the importance of recognizing how an individual lives should not be impacted by others' beliefs on how someone should live or behave).

8. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 145 (1989) (arguing Black women experience discrimination harsher than White women); see also *Living Authentically*, *supra* note 7, at 28, 33, 60, (describing the unique discrimination faced by Latinx transgender individuals and how they typically face more discrimination than a typical person would).

9. Cf. Crenshaw, *supra* note 8 (depicting the intersectionality and interconnectedness of discrimination for Black women based on race and gender).

10. See *DeGraffenreid v. General Motors Assembly Div.*, 558 F.2d 480, 483 (8th Cir. 1977) (holding Black female plaintiffs must bring a race discrimination claim and a sex discrimination claim separately); see also *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 458, 465 (5th Cir. 1998) (holding Plaintiff may amend her original pleading to change the discrimination claim from sex discrimination to national origin discrimination rather than allowing both claims to be brought together); see also Aubrey Coffey-Urban, *Intersectionality, Diversity and the Legal Profession*, ARIZ. ATT'Y, Apr. 2017, at 38, 40 (explaining how law firms lack intersectionality in their diversity efforts).

11. See Rachel Kahn Best, et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & SOC'Y REV. 991, 991 (2011) (describing how plaintiffs with intersectional claims are less likely to win a case than those who bring claims on a single basis of discrimination).

12. *Id.* at 992 (articulating difficulties and disadvantages faced by plaintiffs who suffer intersecting axes of discrimination).

13. See Crenshaw, *supra* note 8 (contrasting the multidimensionality of Black women's experience with the single-axis analysis that distorts these experiences).

woman *and* Black.<sup>14</sup> I argue that U.S. discrimination laws need to be modernized with the current state of society and oppression by addressing discrimination claims through an intersectional lens.<sup>15</sup> Using an intersectional lens means understanding the basis of discrimination may be caused by part or all of one's identity and having the law reflect this complexity of discrimination.<sup>16</sup>

Section II will explain what the theory of intersectionality is and how it is viewed and treated in the legal system. Using the example of the transgender Latinx community, Section III will analyze the legal issues the transgender community experiences and the legal issues the Latinx community experience.<sup>17</sup> Section III will also show the various intersections of the legal issues experienced by the transgender community and the Latinx community.<sup>18</sup> The intersections of the two

14. *See id.* (recognizing the particularly harsh consequences for Black females that place Black female plaintiffs at odds with White females).

15. *Cf. id.* at 166–67 (stating the status quo is reinforced by the failure to understand and accept complexities of discrimination and categorization of struggles as a singular issue).

16. *Cf. id.* at 141 (“Intersectionality theorists argue [a] one-dimensional, categorical approach to understanding discrimination prevents civil rights law from adequately protecting members of groups that experience more than one axis of prejudice. For example, an employer might be willing to hire [B]lack men and [W]hite women as retail salespeople but unwilling to hire [B]lack women because he thinks that customers will stereotype them in disparaging ways that will harm his business . . . . [E]mployees might make what we call intersectional claims: allegations that they were discriminated against due to more than one ascriptive characteristic. But since these types of discrimination would not affect minority men or [W]hite women, under some interpretations of EEO law, the employer could parry a claim of race discrimination by pointing to the hiring of men belonging to the plaintiffs racial group and deflect a claim of sex discrimination by pointing to his hiring of [W]hite women . . . .”); *see also* *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994) (holding a court must look at the basis of the combination of protected classes when discrimination of the combination is alleged); *see also* *Jeffers v. Thompson*, 264 F. Supp. 2d 314, 326 (D. Md. 2003) (explaining Title VII allows for a discrimination claim based on a combination of protected classes analyzed together); *see also, e.g.*, *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1198 (9th Cir. 2003) (analyzing a discrimination claim based on national origin and religion together); *see also, e.g.*, *O’Regan v. Arb. F. Inc.*, 121 F.3d 1060, 1065 (7th Cir. 1997) (addressing a discrimination claim based on age and gender together).

17. *See generally* *Living Authentically*, *supra* note 7, at 51–60, (discussing the barriers and history of racial discrimination experienced by transgender people of color, specifically Latinx transgender individuals).

18. *See, e.g.*, *Violence Against the Transgender Community in 2019*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2019> [<https://perma.cc/9WDR-Q6V2>] (emphasizing how fatal violence affects transgender women of color at more extreme rates. The intersectionality of victims of fatal violence plays a large role, making them more vulnerable. Whether a victim is Black and a transgender woman, or Latino and a transgender man, their intersectionality creates barriers that deprive them of fair employment,

identities will show why analyzing discrimination claims based on one or more classes separately is an injustice to someone who is a member of both classes by not showing the full picture of why a person is being discriminated against.<sup>19</sup> Justice will be better served when it is determined whether a person is being discriminated against because of their membership in both identities, because of one part of their identity, or all of it combined.<sup>20</sup> Lastly, in Section IV, I highlight how courts, lawyers, and law schools can better reflect and understand the complexities of discrimination by utilizing an intersectional lens.<sup>21</sup>

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housing, healthcare, and other necessities. These deprivations, a byproduct of their intersectionality, fill their lives with seemingly insurmountable legal issues). *See generally* James, *supra* note 6 (laying out a plethora of issues facing transgender individuals. The survey covers all types of issues transgender citizens encounter on the day-to-day, ranging from unequal access to healthcare, to racist, sexist, and transphobic assaults in public restrooms. One example the report gives is how Latinx transgender unemployment rate is four times higher than the national average).

19. *See, e.g.*, Kate Sablosky Elengold, *Clustered Bias*, 96 N.C. L. REV. 457, 458–60 (2018) (utilizing Tametra as an example as a woman of color who was failed by the courts because they approached her identity in separate silos. By assessing Tametra’s claim of race discrimination separate from her claim of sexual discrimination, courts are ignoring how intersectional discrimination, like experienced by Tametra, functions in the real world). *But see* Moore v. Cricket Commc’ns, Inc., 764 F. Supp. 2d 853, 858–63 (S.D. Tex. 2011) (assessing the strength of the claims made by Tametra, the Court determined Tametra’s claims were credible and were presented with sufficient evidence to satisfy the claims. However, the court seems to refuse to acknowledge Tametra’s claims of sexual discrimination and instead analyzes claims of racial discrimination, hostile work environment, and retaliation even though the same statement of facts explicitly outlines the defendant’s sexually discriminatory actions towards Tametra).

20. *See, e.g.*, O’Regan v. Arb. Fs., Inc., 246 F.3d 975, 980 (7th Cir. 2001) (analyzing alleged violations of Title VII and the Age Discrimination in Employment Act (ADEA) which serve as another example of the commonality of legal issues needing to be analyzed through an intersectional lens). *Compare* Crenshaw, *supra* note 8, at 143–45 (emphasizing how Black women, the epitome of intersectional discrimination, are isolated and regularly required to fend for themselves. Black women are the best able to challenge discrimination because they are often seen as just “Black,” only one of their identities. Even when bringing sexual discrimination cases to the courts, the courts regularly choose to look at their race alone, rather than the actual facts of the allegations), *and* Raad, 323 F.3d at 1194–96 (discussing allegations of racial and nationality discrimination by a school district against an employee), *with* Lam, 40 F.3d at 1562 (“[W]hen a plaintiff is claiming race and sex bias, it is necessary to determine whether the employer discriminates on the basis of that combination of factors, not just whether it discriminates against people of the same race or of the same sex), *and* Jeffers, 264 F. Supp. 2d at 323–26 (concluding Title VII prohibits discrimination in the workplace based on any characteristics named in the act, such as race, color, or national origin, whether individually or in combination.).

21. *See, e.g.*, Elengold, *supra* note 19, at 462–63 (proposing to use an intersectional lens, such as race-sex, in claims of sexual discrimination. Doing so would preclude agencies, advocates, and courts from separating aspects of victims’ identity. It will also allow scholars and advocates to finally see relations between different subgroups and discrimination).

## I. WHAT IS INTERSECTIONALITY?

I am a cisgender woman.<sup>22</sup> I am Mexican American. I am a citizen of the United States. I am a law student. I am heterosexual. I am able-bodied. These are my identities, among others. It is understood that every person has a series of identities that make up who they are. I am never just one of these identities, but all these things at once—they are what make me, me. The way society treats and views me is usually not based on just one of my identities, but all or some of them at the same time.<sup>23</sup> This is the essence of intersectionality.<sup>24</sup>

A. *The Theory of Intersectionality*

The term “intersectionality” was first coined in 1989 by Kimberle

22. See *Cisgender*, OXFORD ENG. DICTIONARY (2d ed. 1884), <https://www.oed.com/view/Entry/35015487?redirectedFrom=Cisgender> [perma.cc/Y2J4-52J9] (“Designating a person whose sense of personal identity and gender corresponds to his or her sex at birth; of or relating to such persons. Contrasted with transgender.”); see also Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 AM. ACAD. PEDIATRICS 1, 2 (2018) (“A term that is used to describe a person who identifies and expresses a gender that is consistent with the culturally defined norms of the sex they were assigned at birth . . .”).

23. Compare *The State of the Gender Pay Gap 2020*, Payscale (Mar. 31, 2020), <https://www.payscale.com/data/gender-pay-gap> [https://perma.cc/MAZ5-AJBS] (comparing wages and median salary of all men and women, and showing women, as a general category, earn \$0.81 for every \$1 earned by men. Furthermore, the median salary for women is about 19% lower than that of men), with Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, CTR. FOR AM. PROGRESS (Mar. 24, 2020), <https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/> [https://perma.cc/UF76-EB3T] (compounding the identities of Latina/Hispanic and female to the Census Bureau data and revealing a Latina/Hispanic woman makes \$0.54 for every \$1 a White man makes. Women alone make significantly less on average than men as general categories. Once multiple identities intersect—such as race and sex—the wage gap disparity increases exponentially. In fact, “People living intersectional realities—such as transgender women and immigrant women—also experience the compounding negative effects of multiple biases on their earnings.”).

24. See *Intersectionality*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/intersectionality> [perma.cc/K533-BVMK] (“[T]he complex, cumulative way in which the effects of multiple forms of discrimination (such as racism, sexism, and classism) combine, overlap, or intersect especially in the experiences of marginalized individuals or groups . . .”); see also *Intersectionality*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/429843?> [https://perma.cc/4MN3-TMGN] (“The interconnected nature of social categorizations such as race, class, and gender, regarded as creating overlapping and interdependent systems of discrimination or disadvantage; a theoretical approach based on such a premise.”).

Crenshaw.<sup>25</sup> Using the example of the Black female, Crenshaw depicts the importance of recognizing the intersections of one's identity in discrimination.<sup>26</sup> Crenshaw uses three cases to depict how antidiscrimination law is viewed in a single-axis model.<sup>27</sup> The way the definition of discrimination is currently defined<sup>28</sup> suggests that a discriminator treats all people within a category similarly, and any variation defeats any attempt to bring a common claim forward.<sup>29</sup> Further, if a plaintiff does bring an intersectional claim, they will most likely lose their case.<sup>30</sup> Thus, it is almost impossible for anyone to bring a successful discrimination claim based on a combination of the categories.<sup>31</sup> An example of this is gender discrimination.<sup>32</sup> The

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25. See Elengold, *supra* note 19, at 460–61 (“Intersectionality theory, introduced to legal academics by Kimberle Crenshaw in 1989, seeks to explain and analyze the experience of individuals with more than one traditionally subordinated personal identity trait: ‘intersectionality.’”); see also *Intersectionality*, *supra* note 24 (“[Kimberlé] Crenshaw introduced the theory of intersectionality, the idea that when it comes to thinking about how inequalities persist, categories like gender, race, and class are best understood as overlapping and mutually constitutive rather than isolated and distinct.”).

26. See Crenshaw, *supra* note 8, at 143–45 (discussing racial and sexual discrimination claims made by Black women in the workplace and how Courts often place Black female plaintiffs at odds with White female plaintiffs); see also, e.g., Elengold, *supra* note 19, at 461 (“As applied to Tametra’s case, the discrimination she experienced was intersectional in that it related both to her race (Black-ness) and her sex (female-ness).”).

27. Crenshaw, *supra* note 8, at 141–50 (illustrating the reoccurring reluctance of the courts to acknowledge intersectionality and allow Black men and women to be class representatives for sex and/or race discrimination claims based solely on the belief that because the claimants are Black, they are over inclusive and cannot appropriately represent White women or men simultaneously); see, e.g., *DeGraffenreid v. General Motors Assembly Div.*, 558 F.2d 480, 482–85 (8th Cir. 1977) (refusing to reject the reasoning of the district court that dismissed two discrimination claims because “a complaint such as this one under Title VII might state a ‘cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.’”); see also *Payne v. Travenol*, 673 F.2d 798, 811 (5th Cir. 1982) (stating there is an insurmountable conflict of objectives between Black males and Black Females; Therefore, Black females cannot adequately represent Black males in a race discrimination claim.).

28. See Crenshaw, *supra* note 8, at 150 (“Discrimination which is wrongful proceeds from the identification of a specific class or category; either a discriminator intentionally identifies this category, or a process is adopted which somehow disadvantages all members of this category.”).

29. *Id.* at 150–51.

30. Best, *supra* note 11, at 992 (acknowledging the difficulty of bringing a successful claim forward that deals with intersectionality of issues, such as gender and racial discrimination).

31. See generally Crenshaw, *supra* note 8, at 145 (illustrating and explaining the low success rates of discrimination cases based on intersectional claims).

32. See, e.g., *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983) (“The court would not allow Moore to represent white females because Moore had never claimed

standard is based on the discrimination against a White female, and anything that departs from this standard is seen as a hybrid and is thus illegitimate.<sup>33</sup> Moreover, although there is discrimination against all women, women of color and other deviations from the “standard” are experiencing harsher consequences of the discrimination.<sup>34</sup>

Using an intersectional lens allows for discrimination fluidity, meaning all or part of one’s identity may be the source or reason for discrimination, or one part may be an area of privilege.<sup>35</sup> In social justice movements, individuals are often silenced in order to remain focused on the objectives of the movement, but a movement must understand the needs of all its members to truly succeed.<sup>36</sup> Movements should begin with “addressing the needs and problems of those who are most disadvantaged and with restructuring and remaking the world where necessary, then others who are singularly disadvantaged would also benefit.”<sup>37</sup> This approach can help movements become not only more inclusive but more effective and

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before the EEOC that she was discriminated against as a female, but only as a black female. The court determined that this raised serious doubts as to Moore’s ability to adequately represent white female employees.”); *see also* Crenshaw, *supra* note 8, at 144 (“One inference that could be drawn from the court’s statement that Moore’s complaint did not entail a claim of discrimination “against females” is that discrimination against Black females is something less than discrimination against females.”).

33. Crenshaw, *supra* note 8, at 145.

34. *Id.*; *see* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245 (1990) (“[T]he ways in which the location of women of color at the intersection of race and gender makes our actual experience of domestic violence, rape, and remedial reform qualitatively different than that of white women.”).

35. *See* Crenshaw, *supra* note 8, at 149 (“[O]ften [Black women] experience double-discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex.”). Extending an example of this one form of discrimination is found in a White gay man. Being a White male is an area of privilege in American society, while being gay is a point of discrimination. *See, e.g.*, András Tilsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC. 586 (2011) (“[Openly] gay job seekers will face discrimination in U.S. job markets.”) *cf.* Marcus Sandifer, *How White Right Can Fight Wrong: The Plight of White Male Privilege*, A.B.A. (May 16, 2019), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/black-to-the-future/white-right-can-fight-wrong/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/white-right-can-fight-wrong/) [<https://perma.cc/XB7R-URZ2>] (explaining the privilege White men inherently have and what they can do to use their privilege to help others).

36. *See, e.g.*, Crenshaw, *supra* note 8, at 153–54 (“The value of feminist theory to Black women is diminished because it evolves from a white racial context that is seldom acknowledged. . . . [W]omen of color [are] in fact overlooked . . .”).

37. *Id.* at 167 (noting the process of movements and how they should properly address social justice issues with those who are disadvantaged and discriminated against).

successful.<sup>38</sup> Other scholars have further clarified or expanded on Crenshaw's work.<sup>39</sup> There are a myriad of categories people can fit into and "intersectionality recognizes that these groups are not homogeneous, but rather multidimensional."<sup>40</sup>

Intersectionality is critiqued for being over-inclusive, as there are an infinite amount of characteristics that make up a single individual, making it nearly impossible to understand groups of people and the boundaries of this theory.<sup>41</sup> On the other hand, intersectionality has been criticized for being under-inclusive because it focuses on those who are multi-burdened or multi-oppressed at the cost of not including those who may experience oppression on a lesser or more singular level.<sup>42</sup> Despite the criticism, intersectionality is relevant now more than ever as society becomes more diverse and complex.<sup>43</sup>

### B. *Intersectional Jurisprudence*

Intersectionality developed out of the legal profession, as Crenshaw—a legal scholar—coined the term during the critical race theory

38. See generally *id.* at 140 ("[P]roblems of exclusion cannot be solved simply by including Black women within an already established analytical structure. Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated. Thus, for feminist theory and antiracist policy discourse to embrace the experiences and concerns of Black women, the entire framework that has been used as a basis for translating "women's experience" or "the Black experience" into concrete policy demands must be rethought and recast.").

39. See Bradley Allan Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. C.R. L.J. 199, 235 (2006) (defining intersectionality as a means of addressing the "complex phenomenon" of a person's identity construction and daily reconstruction by "providing recourse when the basis of discrimination is a conflation of more than one legally protected characteristic."); see also Coffey-Urban, *supra* note 10 ("[I]ntersectionality is the idea that an individual may fall into multiple categories that could be used to oppress, discriminate against, or otherwise disadvantage someone.").

40. Coffey-Urban, *supra* note 10 (acknowledging the dimension of people that are experiencing intersectionality are often seen as multidimensional, rather than homogenous).

41. Elengold, *supra* note 19, at 462.

42. See *id.* at 477 (highlighting critiques of intersectionality as underinclusive due to its ability to only look at people who experience multi-faceted oppression, rather than oppression based on a single identity characteristic).

43. Jane Coaston, *The Intersectionality Wars*, VOX (May 28, 2019, 9:09 AM), <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination> [<https://perma.cc/DQ9B-672S>] (explaining how intersectionality several years later is gaining popularity and is the center of much debate).

movement.<sup>44</sup> Despite the origin of intersectionality, it is not understood as being profoundly within the legal system, whether through law firms, lawyers, or the law itself.<sup>45</sup> Essentialism serves as a possible theoretical reason for the lack of intersectional thought within the legal and social movements.<sup>46</sup> People are forced to choose which identity they want to fight for and channel their efforts to fight against.<sup>47</sup> Legal and social movements work within essentialism in order to unite with one voice instead of multiple diverse ones that can appear weak or disorganized.<sup>48</sup> Intersectionality rejects this idea by recognizing oppressions cannot be dismantled separately, because they mutually reinforce each other.<sup>49</sup> In fact, “[r]acism uses sexism as its enforcer.”<sup>50</sup> Homophobia enforces sexism as it punishes those who reject traditional gender roles.<sup>51</sup> Economic status is used to oppress and subordinate others.<sup>52</sup> Intersectionality is needed within legal and social movements to

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44. Coffey-Urban, *supra* note 10; Kimberle Crenshaw on *Intersectionality, More than Two Decades Later*, COLUM. L. SCH. (June 8, 2017), <https://www.law.columbia.edu/news/archive/kimberle-crenshaw-intersectionality-more-two-decades-later> [<https://perma.cc/B8HA-LXP2>].

45. *See* Coffey-Urban, *supra* note 10, at 38, 40–41 (explaining how diversity in law firms lack intersectionality and although “[f]irms have been recruiting people of color since the 1960s, . . . lawyers are still 88 percent White. Despite decades of women law school graduates, the numbers of women in Big Law are disproportionately low, and only 36 percent of lawyers are women.”).

46. *See* Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 BERKELEY WOMEN’S L.J. 16, 19, 30 (1995) (defining essentialism to mean “that there is a single woman’s . . . experience . . . . An essentialism outlook assumes that the experience of being a member of a group under discussion is a stable one, one with clear meaning . . .”).

47. *See id.* at 27 (recognizing people spend so much time arguing over who suffers from greater pain—causing groups to choose one group over the other—rather than using that time to better “understand the complex ways that race, gender, sexual orientation, and class are related.”).

48. *See id.* at 20 (criticizing how using multiple voices leads to confusion from having to jump from one voice to another because the speaker has multiple parts of themselves that they are forced to separate).

49. *See id.* at 27 (“I would still say today that there is a way in which, in my heart, race trumps gender. But now I understand a little better the anti-essentialist lesson which says I should not permit myself to be pressed, to be made to choose which part of myself is most important to me. The lessons of anti-essentialism and intersectionality are that the oppressions cannot be dismantled separately because they mutually reinforce each other.”).

50. *Id.*

51. *Id.*

52. *See id.* (“And those of us who are middle-class, or members of otherwise privileged elites, can be used as unwitting perpetrators of the subordination of others.”).

dismantle oppressors.<sup>53</sup>

Law firms are not considering multiple axes of discrimination and those being discriminated against on multiple axes, such as women of color, are forgotten and left out in diversifying efforts.<sup>54</sup> Intersectionality should be important to every lawyer and every person because it allows for a better understanding of how society and the world interact with a person.<sup>55</sup> Specifically for lawyers, considering all identity intersections of an individual can help a lawyer identify their own biases, learn how to interact with others, and take a more inclusive and intersectional approach to diversity efforts in the legal profession.<sup>56</sup> Further, not showing the full extent and complexity of discrimination in suits results in losing suits and a lack of intersectional case law.<sup>57</sup>

Jurisprudence of intersectionality is lacking, as claims are under a single-axis model.<sup>58</sup> Moreover, when claimants try to bring an intersectional discrimination claim, they may be forbidden from doing so,<sup>59</sup> resulting in little to no case law regarding intersectional claims.<sup>60</sup>

53. *See id.* at 28 (expanding on the need for intersectionality since not all individuals experience the same oppression).

54. *See, e.g.,* Coffey-Urban, *supra* note 10, (“However, black women were still not getting jobs. They were excluded from the front-office jobs because they were black and from the manual labor jobs because they were women.”).

55. *See id.* at 40–42 (showing that an understanding of intersectionality lends itself to awareness of how different identities experience certain social contexts when considering multiple disadvantages someone may face).

56. *See, e.g., id.* at 38, 42 (“Pauli Murray internalized her desire to eliminate bias and discrimination throughout her life. For example, she recognized that her perception of the Black Revolution as ‘crude’ was actually her feminist reaction to the sexist behavior of the male leaders of the movement. . . . This realization of her own biases and the reasons for her own reactions directly led to her advocating that black women should not subordinate their claims as women to the ‘overriding factor’ of restoring the [B]lack male.”).

57. *See* Best, *supra* note 11, at 992 (reporting plaintiffs who bring intersectional claims are half as likely to win their claims as plaintiffs who bring a single basis of discrimination).

58. *Cf.* Crenshaw, *supra* note 8, at 140 (“[The] single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise privileged members to this group.”).

59. *See, e.g.,* DeGraffenreid v. Gen. Motors Assembly Div., 558 F.2d 480, 483–84 (8th Cir. 1977) (showing an instance where a group of Black female plaintiffs were forced to bring a race discrimination claim and a sex discrimination claim separately rather than together, resulting in a difficulty to fully understand the discrimination they experienced as Black women).

60. *Cf.* Best, *supra* note 11, at 996 (“In some cases, judges have not recognized intersectional claims as being legally cognizable and have dismissed them at the outset.”); *see also* DeGraffenreid, 558 F.2d at 484 (reinforcing the idea of intersectional claims are barred).

A series of Title VII cases show the missed opportunities of courts to begin allowing intersectional discrimination claims.<sup>61</sup>

In *DeGraffenreid v. General Motors Assembly Div.*, a group of Black female employees sued their employer claiming they were discriminated against for being Black women.<sup>62</sup> The court held the women were attempting to “combine statutory remedies” and “create a new ‘super-remedy’” that would give them relief beyond what the drafters intended.<sup>63</sup> For this reason, the women were not allowed to bring a suit based on discrimination for being *Black women* but rather for being a *woman and Black*, separately.<sup>64</sup> This meant the allegations were examined separately as race discrimination and sex discrimination, but not together.<sup>65</sup> The court found since White women were hired, there was no sex-based discrimination and since Black men were hired, there was no race-based discrimination.<sup>66</sup> This shows that Black women were only protected “to the extent that their experiences coincide with those of White women or Black men.”<sup>67</sup> Black women have a unique

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61. See Best, *supra* note 11, at 996 (listing multiple cases where courts considered race and sex claims separately proving intersectional discrimination claims were not covered under Title VII. Those cases included *Degraffenreid v. General Motors* (1976), *Rich v. Marietta* (1975), *Logan v. St. Luke’s Hospital Center* (1977), and *Love v. Alamance County Board of Education* (1984)).

62. *DeGraffenreid*, 558 F.2d at 480, 482.

63. Areheart, *supra* note 39, at 199; see *DeGraffenreid v. Gen. Motors Assembly Div.*, 413 F.Supp. 142, 143–45 (E.D. Mo 1976) (claiming no discrimination occurred at General Motors because the defendant provided evidence of previously hiring women and Black men, proving there was no discrimination even though there were no Black women who were hired. The court refused to allow an intersectional claim and choose to view each claim separately).

64. See *DeGraffenreid*, 558 F.2d at 483 (explaining how the district court determined that black women did not constitute as a special class protected by Title VII); see also Areheart, *supra* note 39, at 200–01 (pinpointing the real issues when a court applies a Title VII singular approach, especially when individuals are being forced to sue under only one discriminatory practice. “Under this view, [B]lack women are only protected to the extent that their experiences coincide with those of white women or [B]lack men. Moreover, this one-dimensional view of discrimination makes it easier for defendants to prevail over claimants while constraining [B]lack women’s and others’ self-identification.”).

65. *DeGraffenreid*, 558 F.2d at 483; see Areheart, *supra* note 39, at 200 (“The *DeGraffenreid* decision pinpoints the dilemma that individuals face when they are forced to bring their suit under only one protected characteristic [under Title VII].”).

66. *DeGraffenreid*, 413 F. Supp. 142, 144 (E.D. Mo. 1976); see Areheart, *supra* note 39, at 200–01 (providing the court’s interpretation that because White women were hired, the employer was not committing sex discrimination is evidence there is a need of adapting intersectionality in the court).

67. Areheart, *supra* note 39, at 201.

discrimination experience,<sup>68</sup> so not categorizing Black women into their own category disregards their unique placement in society that is the root of much of their discrimination.<sup>69</sup>

In *Sanchez v. Standard Brands, Inc.*, Cecilia Sanchez was permitted to amend her EEOC complaint but only in regards to one of the discrimination claims.<sup>70</sup> Cecilia's original complaint stated her boss spanked her on her buttocks which she said was discrimination based only on her sex.<sup>71</sup> In her amended charge of discrimination, Cecilia added that Mexican and Black women were treated differently than the White women in the company and this time based the claim on sex *and* national origin.<sup>72</sup> The Court reasoned that Cecilia, and others filing EEOC complaints, might amend due to a series of reasons.<sup>73</sup> The Court suggested those filing the complaint might not understand the reason they

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68. See, e.g., Yolonda Wilson, *Why Black Women's Experiences of #METOO Are Different*, THE CONVERSATION (June 14, 2018, 6:45 AM), <http://theconversation.com/why-black-womens-experiences-of-metoo-are-different-96091> [<https://perma.cc/Z5ML-R3FS>] (recognizing the differences of treatment between White women and Black women from the slave trade to the modern day #MeToo movement include blatant disregard for the bodily privacy of Black women in contrast to White women); see also, e.g., *Women in Black & White Survey*, LESLIE MORGAN STEINER, <https://www.lesliemorgansteiner.com/women-in-black-white-survey/> [<https://perma.cc/3DQB-MC4G0>] (observing the differences between the life Black women live versus the life of White women including findings that Black women are "more conscious of race's impact on their lives and more concerned about prejudice and negative effects" of racial stereotyping).

69. Cf. Jewel Woods, *The Black Male Privilege Checklist*, RENAISSANCE MALE PROJECT (2008), [https://www.deanza.edu/faculty/lewisjulie/The Black Male Privilege Checklist.pdf](https://www.deanza.edu/faculty/lewisjulie/The%20Black%20Male%20Privilege%20Checklist.pdf) [<https://perma.cc/TMV5-Z5YX>] ("Male privilege is more than just a "double standard", because it is based on attitudes or actions that come at the expense of women. Just as white privilege comes at the expense of African Americans and other people of color, gender double standards come at the expense of women.").

70. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460 (5th Cir. 1970) (Plaintiff amend the original pleading to change the discrimination claim from sex discrimination to national origin discrimination).

71. *Id.* at 459.

72. See *id.* ("[Defendant] offers a series of arguments in the present case which are premised on nothing more than legal technicalities. In essence Standard Brands advances two principal contentions. First, it is Standard Brands' position that since plaintiff checked only the box labeled 'sex' when she executed her original charge of discrimination, she is barred from including in her complaint allegations of national origin discrimination.").

73. See *id.* at 462 (discussing the technical reasons the Court allowed the plaintiff to amend the complaint: (1) failure to check the right box is a mere technical defect; and (2) not protecting a party's rights based on failure to articulate correctly the legal conclusion of their current situation at work is inconceivable).

were discriminated against or may lack sophistication in form filing.<sup>74</sup> Further, the Court reasoned the charging party might be so “unlettered” or “inarticulate” that they do not understand the distinction between discriminatory acts based on sex or based on national origin.<sup>75</sup> To suggest someone does not understand why they are discriminated against or the distinction between two protected category discrimination demonstrates the need for intersectional understanding in discrimination claims.<sup>76</sup> The Court blatantly states those who have been discriminated against might not know why they are discriminated against, which further emphasizes the complexities of discrimination.<sup>77</sup> For people like Cecilia, whose identities have a series of intersections where one or all of her identities could be the basis of discrimination, it can be confusing and limiting to allow a claim based on just one of the protected categories.<sup>78</sup> The EEOC form Cecilia filled out had the protected categories listed and instructed charging parties to check only *one* box.<sup>79</sup> Cecilia felt discriminated against for being Mexican *and* a woman, as stated in her amended complaint.<sup>80</sup> She was forced to choose one rather than being

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74. *See id.* at 462–63 (“The charging party may simply be unschooled and unsophisticated in the use of forms. Should a charging party forfeit his cause of action for reasons such as these? We think not.”).

75. *Id.*

76. *See* Areheart, *supra* note 39, at 206–08 (demonstrating the failure to find a uniform way of applying the word *or* in Congress and the courts reluctance to find a uniform approach to intersectional claims).

77. *See Sanchez*, 431 F.2d at 462–63 (“[T]he charging party may be so unlettered and inarticulate that he does not fully comprehend the distinction between an act motivated by ‘sex discrimination’ and an identical act motivated by ‘national origin discrimination.’”).

78. *See id.* at 458–59 (sharing Cecilia’s multiple filings are evidence to the confusing nature of filing a complaint that restricts discrimination to just one category, when the complaining party has multiple identities that are considered minority groups or disadvantaged groups).

79. *Compare id.* at 458 (“Another part of the form calls for the complainant to specify whether the discrimination alleged was ‘because of’ (a) ‘race or color,’ (b) ‘religious creed,’ (c) ‘national origin’ or (d) ‘sex’; a row of boxes is provided—one for each category of discrimination—and the complainant is asked to ‘please check one.’”), *with Charge of Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, [https://www.eeoc.gov/sites/default/files/migrated\\_files/eeoc/foia/forms/form\\_5.pdf](https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/foia/forms/form_5.pdf) [<https://perma.cc/4U66-K5TP>] (showing current EEOC form now reads to “[c]heck appropriate box(es)” which is a great stride towards allowing individuals bring intersectional discrimination suits).

80. *Sanchez*, 431 F.2d at 459 (“I was discriminated against by Standard Brands, Inc. because of my national origin and sex. . . . My supervisor seemed most (sic) abrupt and vengeful against Negro and Mexican American women than with Anglo women.”).

given an opportunity to bring a claim based on both.<sup>81</sup> The lower court reveals its inability to comprehend discrimination not only as distinct parts, but also as combinations of protected categories.<sup>82</sup> Rather than considering the possibility of an intersectional claim, the lower court only allowed the plaintiff to bring a sex discrimination claim because that was the only form of discrimination she marked on her original charge, claiming it was a “technical defect.”<sup>83</sup> Intersectionality provides a theoretical framework through which those who suffer “multiple” forms of discrimination can identify and seek remedies for each of those forms, instead of forcing them to condense their discrimination into one singular claim.<sup>84</sup> The legal system needs to understand and embrace the complexity of discrimination claims to bring true justice to claimants.<sup>85</sup>

Although intersectionality is still lacking in jurisprudence, some courts have embraced and recognized intersectional discrimination claims.<sup>86</sup>

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81. *Id.* at 457, 460 (emphasizing the lower court refused to allow the amended complaint because it contained two different forms of discrimination instead of just one).

82. *Id.* at 464 (reversing the lower court and holding “in the present case, plaintiff’s failure to check the box labeled ‘national origin’ when she executed her original charge of discrimination was an amendable defect. In accordance with the provisions of 29 C.F.R. § 1601.11(b), her act of checking the ‘national origin’ box on March 18, 1967, related back to the filing of her original charge on January 3, 1967. It follows, therefore, that she is not barred from including in her judicial complaint allegations concerning national origin discrimination.”). It not necessarily the lower court’s fault, society, as a whole, needs to change in order to change the way we think about discrimination. I think justice system can be the catalyst to a bigger societal change.

83. *Id.* at 460, 462 (“We reject this contention because we conclude that her failure to check the box labeled ‘national origin’ was a mere ‘technical defect or omission’ within the meaning of the second sentence of the Commission’s regulation.”).

84. Areheart, *supra* note 39, at 201 (acknowledging intersectional claims can help ensure a plaintiff’s case is not distorted by pigeonholing their experiences into a specific class and thus evaluating them separately).

85. *See, e.g., Sanchez*, 431 F.2d at 459–60 (discussing the lower court’s decision to dismiss plaintiff’s discrimination claim because the plaintiff did not confine her allegations of discriminations to sex—her original charge—and instead opted to stand by her allegations based on sex and national origin); *see also, e.g., DeGraffenreid v. General Motors Assembly Div.*, 413 F.Supp 142, 144 (E.D. Mo 1976) (forbidding a group of Black females to bring a suit based on race and sex together).

86. *See Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1188, 1192–98 (9th Cir. 2003) (discussing a discrimination claim based on national origin and religion together); *see also Lam v. Univ. of Haw.*, 40 F.3d 1551, 1561–62 (9th Cir. 1994) (recognizing a court must look at the basis of the combination of protected classes when discrimination of the combination is alleged); *see also O’Regan v. Arb. Fs., Inc.*, 121 F.3d 1060, 1065 (7th Cir. 1997) (analyzing a discrimination claim based on age and sex together). *See generally Jeffers v. Thompson*, 264 F. Supp. 2d 314, 326 (D. Md. 2003) (explaining Title VII allows for a discrimination claim based on a combination of protected classes analyzed together).

The Ninth Circuit has shown itself to have a progressive understanding of intersectionality and the complexities of Title VII discrimination lawsuits before it.<sup>87</sup> In *Lam v. Univ. of Haw.*, an Asian woman brought a discrimination suit against her employer on the basis of sex and race in response to her rejection for a position, and the courts evaluated each claim separately rather than as a unit.<sup>88</sup> The Ninth Circuit rejected the district court's analyzation of looking at race and sex separately rather than them together in this instance.<sup>89</sup> The Ninth Circuit recognized that when discrimination based on a combination of the protected classes is alleged, the court must look at whether the employer discriminated on the basis of the combination of protected classes, not the protected classes separately.<sup>90</sup> In *Raad v. Fairbanks N. Star Borough Sch. Dist.*, Plaintiff, Nada Raad, brought a suit against a school for discrimination against her for being Lebanese and Muslim.<sup>91</sup> Raad tried to obtain a full-time position at the school, but she was not hired because of her accent.<sup>92</sup> Later, when Raad was discussing her rejection with her superintendent, the superintendent misunderstood Raad's use of the phrase "blow up," to indicate a bomb threat rather than the intense emotions Raad was experiencing.<sup>93</sup> Raad sued under Title VII for discrimination on the basis of national origin and religion, and the Ninth Circuit reviewed the claims together through an intersectional lens.<sup>94</sup> In previous discrimination cases, the courts analyzed the elements for national origin and religion individually; but, here, the Court acknowledged the superintendent's misunderstanding of the plaintiff's use of the phrase "blow up" to mean

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87. See, e.g., *Raad*, 323 F.3d at 1193 (illustrating how the 9th Circuit has been able to differentiate complex discrimination issues in Title VII cases with ease).

88. *Lam*, 40 F.3d at 1554–55.

89. See *id.* at 1562 (arguing viewing two classes separately can misrepresent the specific nature of the discrimination occurring by stating, "[a]t least equally significant is the error committed by the court in its separate treatment of race and sex discrimination. As other courts have recognized, where two bases for discrimination exist, they cannot be neatly reduced to distinct components.").

90. *Id.*

91. *Raad*, 323 F.3d at 1188.

92. *Id.* at 1190.

93. See *id.* at 1195 (implicitly contextualizing the cultural bias the plaintiff faced because of her ethnicity and religion).

94. *Id.* at 1192.

a bomb threat as a blending of her Lebanese and Muslim identities, not based on the protected classes separately.<sup>95</sup>

In *Jeffers v. Thompson*, a Maryland District Court was able to demonstrate its competency in adjudicating intersectionality in this Title VII discrimination case.<sup>96</sup> A plaintiff, Helaine Jeffers, sued her employer for denying her a promotion which she alleged was based on her race, gender, and *a combination* of race, gender, and age.<sup>97</sup> The employer tried to argue the clear language of Title VII allowed discrimination on race, color, religion, sex, *or* national origin so Jeffers could not bring suit on the basis of more than one protected class.<sup>98</sup> The Court rejected this argument stating: “Some characteristics, such as race, color, and national origin, often fuse inextricably. Made flesh in a person, they indivisibly intermingle. The meaning of the statute is plain and unambiguous. Title VII prohibits employment discrimination based on any of the named characteristics, whether individually or in combination.”<sup>99</sup>

The Court explained Black women experience a distinct discrimination: there are stereotypes and assumptions about Black females which Black men or White women are not subject to.<sup>100</sup> Furthermore, one should look at a combination of factors to properly analyze a Title VII claim on the basis of a combination of protected classes—not just if an employer discriminates against people of the same

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95. *See id.* at 1196 (affirming the Court’s ability to discern the discrimination was not based on the protected classes being viewed separately, but a blending of the two by stating, “[f]urther, Raad presented evidence that the staff members may have misunderstood what she said because of their preconceptions regarding her religion and national origin.”).

96. *See Jeffers v. Thompson*, 264 F. Supp. 2d 314, 325–26 (D. Md. 2003) (illustrating the court’s interpretation of existing law should be based on common sense, especially when a plaintiff brings an action concerning more than one protected class identities; in other words, if the plaintiff bringing the action has more than one protected class, then that should be accounted for).

97. *Id.*

98. *Id.* at 326 (arguing interpretation of the law indicates only one class can be chosen, therefore, the claim brought against the employer was legally invalid).

99. *Id.* (“Discrimination against African–American women necessarily combines (even if it cannot be dichotomized into) discrimination against African–Americans and discrimination against women—neither of which Title VII permits.”).

100. *Id.* (“Like other composite classes under Title VII, African–American women are subject to stereotypes and assumptions shared neither by African–American males nor by Caucasian females. Consequently, they may suffer a distinct, but no less invidious, discrimination.”).

race or sex.<sup>101</sup> A relevant, but not end-all, analysis is the regular Title VII prima facie case legal analysis for this gender and race discrimination case.<sup>102</sup>

The Seventh Circuit has recognized sex *and* age as a viable discrimination claim.<sup>103</sup> In *O'Regan v. Arb. Fs., Inc.*, a middle-aged woman named Mary Anne O'Regan brought suit against her employer for terminating her for failure to sign a non-competition agreement.<sup>104</sup> O'Regan alleged the President of the company favored young, good-looking men who lacked experience over middle-aged women who had more experience.<sup>105</sup> O'Regan argued the non-competition agreement was a way to push out older women to hire young men to take their places.<sup>106</sup> The trial court dismissed the age-sex discrimination claim, but the Seventh Circuit recognized there were enough facts to withstand a motion to dismiss the age-sex discrimination claim; Thus, there could be a discrimination claim based on sex and age together.<sup>107</sup>

It is not only the courts who lack an understanding of intersectionality; the law itself perpetuates and encourages single-axis model claims.<sup>108</sup>

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101. *Id.* at 327 (“Accordingly, to apply Title VII as written when a plaintiff claims race-and-gender bias, the court must determine ‘whether the employer discriminates on the basis of that combination of factors, not just whether it discriminates against people of the same race or the same sex.’”).

102. *See id.* (“Relevant—though not dispositive—evidence of such a claim includes evidence of discrimination against African Americans (regardless of gender) and evidence of discrimination against females (regardless of race).”).

103. *Cf. O'Regan v. Arb. F. Inc.*, 121 F.3d 1060, 1065 (7th Cir. 1997) (concluding the employee’s evidence of sex and age discrimination is enough to overcome the employer’s motion to dismiss).

104. *Id.* at 1062–63.

105. *See, e.g., id.* at 1065.

106. *See id.* (“O'Regan believes the non-competition agreement was proposed as a pretext for firing these female managers and replacing them with younger males.”).

107. *See id.* (“O'Regan’s argument is that Weaver, since she became President of AF, has favored young men over older women. Weaver has allegedly engaged in a variety of practices over three years (e.g., taking business trips with men, soliciting favors and errands from men, forcing women managers out and replacing them with younger men and fostering personal relationships with male employees) culminating in her proposal of the noncompetition agreement. O'Regan alleges that Weaver axed 7 [middle-aged females from AF management positions] . . . and she axed another 4, including O'Regan . . .”).

108. Bradley Allan Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. C.R. L.J. 199, 208, 212 n.89, 230 n.229 (2006) (“However, the law’s dependence on a single-axis approach to antidiscrimination is more aptly seen as enshrining the White male as the standard from which deviation is measured.”); *see* John A. Powell, *The Multiple*

Analyzing Title VII’s language, “race, color, religion, sex, or national origin,” can help us understand why some courts interpret Title VII to mean a plaintiff must choose one protected class to bring a suit under.<sup>109</sup> The incorporation of the word “or” creates a loophole allowing the employer to avoid the fullest extent of the law seen in the previous case.<sup>110</sup> Also, it reinforces privileges of the “prototype” “American white Anglo-Saxon Protestant male” because it provides a remedy only for those claimants who deviate from the prototype in one respect rather than recognizing the myriad of aspects causing discrimination.<sup>111</sup>

## II. TRANSGENDER LATINX COMMUNITY

Discrimination in American society is complicated—the best way to understand the need for intersectionality within the legal system is to use a modern example.<sup>112</sup> This Article will analyze and depict the complexity of discrimination experienced by transgender Latinx people.<sup>113</sup>

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*Self: Exploring Between and Beyond Modernity and Postmodernity*, 81 MINN. L. REV. 1481, 1482–83 (1997) (criticizing the dominant narrative of Western society that denies recognition of intersectionality).

109. See Areheart, *supra* note 108, at 208 (“Much of the confusion for intersectionality centers around Congress’s use of the word “or” in the Text of Title VII . . .”); see also, e.g., *Jefferies v. Harris Co. Cmty. Action Ass’n*, 615 F.2d 1025, 1032 (5th Cir. 1980) (“The use of the word ‘or’ evidences Congress’s intent to prohibit employment discrimination based on any or all of the listed characteristics.”).

110. *Jefferies v. Thompson*, 264 F. Supp. 2d 314, 326 (D. Md. 2003) (“Title VII, [Defendant] points out, proscribes employment discrimination based upon ‘race, color, religion, sex, or national origin.’ 42 U.S.C. § 2000e–2(a)(1)(emphasis added). Because the text poses classes “in the alternative,” [Defendant] concludes, classes cannot be defined by combination of the named classes.”).

111. See Areheart, *supra* note 108, at 211 (emphasizing the privilege of American White Anglo-Saxon Protestant males and how it differs from those who have intersectional biographies—women of color, men of color, class, sexual preference, age, physical abilities).

112. See Coaston, *supra* note 43 (“Intersectionality was a prism to bring to light dynamics within discrimination law that weren’t being appreciated by the courts. . . . In particular, courts seem to think that race discrimination was what happened to all [B]lack people across gender and sex discrimination was what happened to all women, and if that is your framework, of course, what happens to [B]lack women and other women of color is going to be difficult to see.”).

113. See Tanisha Love Ramirez & Zeba Blay, *Why People Are Using the Term ‘Latinx’* HUFFINGTON POST (July 5, 2016, 5:33 PM), [https://www.huffpost.com/entry/why-people-are-using-the-term-latinx\\_n\\_57753328e4b0cc0fa136a159](https://www.huffpost.com/entry/why-people-are-using-the-term-latinx_n_57753328e4b0cc0fa136a159) [<https://perma.cc/89C8-XCJ2>] (expanding on the linguistic term that has gained popularity as it becomes understood among a spectrum rather than binary. “Latinx [(pronounced “lah-teen-ex”)] is the gender-neutral alternative to Latino, Latina, and even Latin@.”). See generally *Living Authentically*, *supra* note 7, at 7 (“[W]e use

### A. *Legal Issues Faced by Transgender People*

To begin, sex and gender are different.<sup>114</sup> Sex is an assignment made at birth based on external genital anatomy; sometimes, the assignment may be made on chromosomal analysis or hormone levels.<sup>115</sup> Gender identity is one's internal sense of "being female, male, a combination of both, somewhere in between, or neither" as a result of the interaction of a myriad of different "biological traits, environmental factors, self-understanding, and cultural expectations."<sup>116</sup> Someone who identifies as transgender is someone who does not identify with the sex they were assigned at birth, which remains generally "persistent, consistent, and insistent over time."<sup>117</sup> A misconception is that gender identity determines a certain sexual orientation, and while they are interrelated constructs, they are different and distinct.<sup>118</sup>

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Latinx as a gender-inclusive term to refer to those who hold Latin American and/or Hispanic cultural or racial identities, including Latinos and Latinas but also individuals with non-binary or gender-expansive identities.”).

114. See Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 AM. ACAD. PEDIATRICS 1, 2–3 (2018) (distinguishing between sex and gender by displaying the science and social aspects of the two); see also *Gender and Sexuality*, AM. SOCIO. ASS'N, <https://www.asanet.org/topics/gender-and-sexuality> [https://perma.cc/66AE-QRMR] (“Like gender, sexuality is not just biologically constructed, but is shaped by social and cultural factors.”); see also *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCH. ASS'N. 832, 836 (2015) (“[T]he articulation of sexual orientation is made more complex when sex assigned at birth is not aligned with gender identity. A person’s sexual orientation identity cannot be determined by simply examining external appearance or behavior, but must incorporate a person’s identity and self-identification . . .”). See generally Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 JOHN HOPKINS UNIV. PRESS THEATRE 519, 520 (1988) (“In distinguishing sex from gender, feminist theorists have disputed causal explanations that assume that sex dictates or necessitates certain social meanings for women’s experience . . . [and] any gender, is an historical situation rather than a natural fact.”).

115. See Rafferty, *supra* note 114, at 1–2 (providing multiple definitions related to gender care for the purpose of providing suggestions for pediatric providers who are focused on the health and development of those who self-identify to help eliminate discrimination).

116. *Id.* (defining gender identity and its differentiation from gender expression, gender perception, gender identity disorder, sexual orientation, and other stigmatized terms).

117. See, e.g., *id.* (describing what the term “transgender” is reserved for, what subsets of youth use it to identify themselves, and how its use does not delineate a “diagnosis” but a personal experience).

118. See *id.* at 1, 3 (defining “sexual orientation” to mean the gender a person is “sexually and romantically” attracted to in relation to their own gender, whereas “gender identity” is the specific gender a person identifies with).

In 2018, only eighteen states and the District of Columbia had laws that prohibited discrimination based on gender expression when it comes to employment, housing, public accommodations, and insurance benefits.<sup>119</sup> Since then, there have been efforts to gain federal protection for the transgender community.<sup>120</sup> The United States Supreme Court has heard arguments from an employment discrimination case to answer the question of whether Title VII's protected category of sex covers transgender people.<sup>121</sup> A funeral home fired an employee, Aimee Stephens, after she told her boss she was going to identify and dress as a woman rather than the sex she was assigned at birth: male.<sup>122</sup> The boss blatantly told her she was fired for not dressing and identifying as a male but argued that this was not sex-based discrimination because he would have done the same to a transgender male.<sup>123</sup> The petitioner argued that discrimination against transgender people is based on sex because if not for their sex assigned at birth, they would not be discriminated against for identifying as a different sex.<sup>124</sup> They argued people create sex stereotypes, and being transgender rejects all the sex stereotypes of their assigned sex; so, any discrimination against them for being transgender

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119. *Id.* at 9 (acknowledging 200 cities have legislation prohibiting discrimination based on a person's gender expression).

120. *See* Reply Brief for Respondent Aimee Stephens at 1, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm'n, 139 S. Ct. 1599 (2019) (No. 18–107) (“[B]oth Petitioner and the Government concede, Title VII protects transgender employees, just as it protects all employees, from discrimination because of sex.”).

121. *Id.*; Pete Williams, *Supreme Court Appears Divided Over LGBTQ Job Discrimination*, NBC N.Y. (Oct. 8, 2019, 5:03 PM), <https://www.nbcnewyork.com/news/politics/Supreme-Court-Takes-Up-Cases-Over-LGBT-Rights-562501011.html> [<https://perma.cc/WF62-Q69P>].

122. Reply Brief for Respondent Aimee Stephens, *supra* note 120, at 1 (chastising the defendant for attempting to reframe Ms. Stephens's firing as a sex-specific dress code issue and noting the defendant fired Ms. Stephens without ever discussing the dress code issue).

123. *See id.* at 5 (illustrating how subtle changes to the facts reveal “sex” as the “but-for” cause” for Ms. Stephens's firing as well as all cases when a person is fired for being transgender. For example, if Ms. Stephens had transitioned earlier in life and applied to Harris Funeral Homes as a woman, then if the employer subsequently fired her when it “learned that she was assigned a male sex at birth, her sex would plainly have been a but-for cause of her discharge. The only difference here is that Harris Homes became aware of her sex assigned at birth first, and her intention to live openly as a woman second—but in both instances sex assigned at birth would be a but-for cause of discharge.”).

124. *Id.* at 1–2, (supporting Ms. Stephens's argument by citing the Sixth Circuit which “flatly rejected the argument that the dress code, rather than Mr. Rost's sex stereotypes and Ms. Stephens's transgender status, led to Ms. Stephens's discharge, and the record fully supports that holding.”).

is based on sex stereotypes and thus discrimination on the basis of sex.<sup>125</sup> At the time of this Article, the Supreme Court has not decided on this issue yet,<sup>126</sup> but it seems reluctant to expand Title VII's protected class of sex to gender identity because they say it is the job of the legislature to amend and update the law.<sup>127</sup> Even if the Supreme Court decides to expand Title VII to gender identity, history shows that laws take a while to actually affect societal change and for fair treatment of marginalized groups.<sup>128</sup> There is another opportunity for transgender peoples to get federal protection through the legislative process by enacting the Equality Act.<sup>129</sup>

The Equality Act recognizes states have different levels of protection for the LGBTQ+ community, is a piece of bipartisan legislation that has been introduced to prohibit discrimination based on an individual's sexual orientation or gender identity in employment, housing, credit, education, jury service, federally funded programs, health care, and businesses that serve the public.<sup>130</sup> The Act will achieve this goal by

125. *Id.* at 5, 13 (stating as a practical matter that if an employer fires an employee for being a transgender person, there is no way that the firing was "at least in part" motivated by "the person's sex assigned at birth."). *But see* *Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding an utterance of a stereotypical remark at work "do[es] inevitably prove that gender played a part in a particular employment decision." The burden is on the plaintiff to show the employer "relied" on the employee's gender in their decision. If proven, the Supreme Court would treat it as "evidence that gender played a part" in the employer's decision making).

126. *But see* *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731 (2020) (deciding this issue before the Supreme Court on June 15, 2020 in favor of Amiee Stephens). It is now recognized that an employer violates Title VII when an employee is fired based in part on sex. Unfortunately, Ms. Stephens did not live to see the favorable decision. She will be remembered as a central figure in the fight for LGBTQ+ rights and may she rest in peace.

127. *See generally* Transcript of Oral Argument at 58–61, *R.G. & G.R. Harris Funeral Homes, Inc., v. Equal Emp. Opportunity Comm'n* 140 S. Ct. 1731 (2019) (No. 18–107) (illustrating the legislative process argument decreed by the Solicitor General of the United States to the Court and showing how some justices question how long "invidious discrimination" against groups believed to be protected by Title VII of the Civil Rights Act" will be permitted by the Court).

128. *Cf.* Yuki Noguchi, *Sexual Harassment Cases Often Rejected by Courts*, NPR (Nov. 28, 2017), <https://www.npr.org/2017/11/28/565743374/sexual-harassment-cases-often-rejected-by-courts> ("In a 1986 decision, the Supreme Court said the behavior needs to be "severe or pervasive" in order to qualify as harassment, whether it's on the basis of sex or race. . . . [J]udges' interpretations of what qualifies are out of step with common sense and standard office policies.").

129. *See* Equality Act, S. 788, 116th Cong. (as passed by House, May 17, 2019) (stating the purpose of the bill is "to prohibit discrimination on the basis of sex, gender identity, and sexual orientation, and for other purposes.").

130. *Id.*; *see The Equality Act: What Transgender People Need to Know*, NAT'L CTR. FOR TRANSGENDER EQUAL. (June 9, 2019), <https://transequality.org/blog/the-equality-act-what->

amending the Civil Right Act of 1964 and the Fair Housing Act of 1968 to explicitly prohibit discrimination on the basis of sexual orientation and gender discrimination.<sup>131</sup> This Act would require states to recognize that transgender people have federal protection, thus removing the need for a judge to interpret whether protection for transgender people exists under state law.<sup>132</sup> The Equality Act was passed in the House of Representatives by a bipartisan vote of 236–173 on May 17, 2019.<sup>133</sup> There is a worry the Act will not be voted on by the Senate, for it is unclear whether Senate Majority Leader Mitch McConnell intends to bring it up for Senate vote.<sup>134</sup> Moreover, if the Act gets voted on in the Senate, which is majority Republican,<sup>135</sup> there is a worry that it will not get passed, as Republicans are historically anti-LGTBQ+.<sup>136</sup> Further, many worry that if it were to pass in the Senate, President Donald Trump

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transgender-people-need-to-know [<https://perma.cc/QLG7-RBKD>] (explaining the details of the Equality Act which would “prohibit discrimination against women and girls in public accommodations for the first time in federal law. . . . [T]he bill also expands the list of protected places of public accommodations to include retail stores, transportation services like airports, taxis and bus stations, and service providers like accountants, for all groups covered.”).

131. Equality Act, S. 788 (modifying the 1968 Fair Housing Act to include “sexual orientation” and “gender identity.”); see NAT’L CTR. FOR TRANSGENDER EQUAL., *supra* note 129 (“The Equality Act adds explicit protections from discrimination based on sexual orientation and gender identity in housing.”).

132. Equality Act, S. 788 (“[T]o limit the protection against an unlawful practice on the basis of sex available under any provision of Federal law other than that covered title, prohibiting a practice on the basis of sex.”); see NAT’L CTR. FOR TRANSGENDER EQUAL., *supra* note 129 (celebrating the historic first-time federal protections for women and girls against discrimination in public accommodations).

133. See *The Equality Act*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/the-equality-act> [<https://perma.cc/GTP2-VCTS>] (last updated June 18, 2020) (“The bill was introduced with 287 original cosponsors—the most congressional support that any piece of pro-LGBTQ legislation has received upon introduction.”).

134. Tal Axelrod, *Schumer Calls on McConnell to Hold Vote on Equality Act*, THE HILL (May 17, 2019), <https://thehill.com/homenews/senate/444341-schumer-calls-on-mcconnell-to-hold-vote-on-equality-act> [<https://perma.cc/GWX6-KWAZ>].

135. See Jennifer E. Manning, *Membership of the 116th Congress: A Profile*, CONG. RES. SERV., <https://fas.org/sgp/crs/misc/R45583.pdf> [<https://perma.cc/45Z6-KEMB>] (last updated June 7, 2019) (reporting the demographic of the U.S. Senate: fifty-two Republicans, forty-six Democrats, and two Independents).

136. See *Republican Views on Gay Rights*, REPUBLICAN VIEWS ON THE ISSUES (Mar. 5, 2016), <https://www.republicanviews.org/republican-views-on-gay-rights/> [<https://perma.cc/93BL-RRMH>] (explaining historically, the Republican party has been opposed to LGBTQ rights). See generally Tatyana Lewis, *The Most Anti-Gay US Politicians*, RANKER (Apr. 3, 2019), <https://www.ranker.com/list/the-most-anti-gay-us-politicians/ballerina-tatyana> [<https://perma.cc/JK8C-63CU>] (providing most anti-LGBTQ+ politicians are Republican).

would never sign off on it as he has outwardly spoken against the Act.<sup>137</sup> As long as the Act is pending and lawyers are still not fighting for explicit federal protection for transgender individuals in court, the transgender community is vulnerable and at risk.<sup>138</sup> As stated before, the passing of this Act would be a great win for the transgender and LGBTQ+ community, but the discrimination faced by these communities will not go away overnight and the fight for equal treatment will continue.<sup>139</sup>

The law creates hurdles for transgender people to live as their authentic selves.<sup>140</sup> For transgender individuals to get their gender changed on any government-issued identification or document, many states require a series of legal steps.<sup>141</sup> For example, in Travis County, Texas, any individual who wants to change their name must file a petition for the change.<sup>142</sup> For a transgender individual to change their name and

137. Axelrod, *supra* note 134; see Tim Fitzsimons, *Trump Opposes Federal LGBTQ Nondiscrimination Bill, Citing 'Poison Pills,'* NBC NEWS (May 14, 2019, 2:25 PM), <https://www.nbcnews.com/feature/nbc-out/trump-opposes-federal-lgbtq-nondiscrimination-bill-citing-poison-pills-n1005551> [<https://perma.cc/W5WC-T3YN>] (“However, this bill in its current form is filled with poison pills that threaten to undermine parental and conscience rights.”).

138. See generally Eric Levenson, *All the Ways the Trump Administration Has Rolled Back Protections for Transgender People*, CNN (Oct. 22, 2018, 5:27 PM), <https://www.cnn.com/2018/10/22/politics/transgender-trump-protection-rollback-trnd/index.html> [<https://perma.cc/6RHW-ZU4M>] (providing examples of the many ways the Trump administration withdrew Obama-era protections for the transgender community).

139. Axelrod, *supra* note 134.

140. See Sandy James, et al., *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. 7 (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/9ZYT-ZEN6>] (“As the national conversation about transgender people continue to evolve, public education efforts to improve understanding and acceptance of transgender people are crucial.”). *But Cf.* Levenson, *supra* note 138 (exploring the different ways the Trump administration has hindered the transgender community).

141. See, e.g., *What Are the Steps to Change My Name and Sex Gender Marker in Travis County, Texas?*, TRAVIS CTY. L. LIBR. (Mar. 2017), [https://lawlibrary.traviscountytexas.gov/docs/GenderMarker\\_and\\_NC\\_Kit\\_March\\_2017.pdf](https://lawlibrary.traviscountytexas.gov/docs/GenderMarker_and_NC_Kit_March_2017.pdf) [<https://perma.cc/32CV-W46C>] (providing the steps a transgender person must take to change their sex/gender marker in Travis County, Texas). See generally *ID Please!: A Guide to Changing California & Federal Identity Documents to Match Your Gender Identity*, TRANSGENDER L. CTR. 5 (Jan. 2019), <http://transgenderlawcenter.org/wp-content/uploads/2019/02/ID-Please-Final-January-2019.pdf> [<https://perma.cc/LPE4-WPS4>] (“Many People are surprised to discover that there is no ‘one stop’ process for getting a name and/or gender marker updated to match their gender identity. This is because the agencies that issue identity documents or keep records of your identity have separate (but increasingly networked) systems and there is no central government agency which coordinates all of these databases. For each of these agencies, there is a different process and set of required documents a person needs to gather in order to update their name and gender information on record.”).

142. TRAVIS CTY. L. LIBR., *supra* note 141.

gender, their petition must include a letter from a mental health professional and/or doctor that says they have examined the individual and determined a diagnosis of gender dysphoria,<sup>143</sup> and that granting a change of gender/sex marker is in the individual's best interest.<sup>144</sup> After a hearing, if the judge grants the change, they may then use the order to change their social security card, birth certificate, driver's license, passport, and other legal documents.<sup>145</sup> The process for a cisgender individual to change their name does not require any sort of medical diagnosis, meaning transgender individuals are responsible for meeting extra steps and requirements.<sup>146</sup> Moreover, some find the diagnosis requirement of gender dysphoria offensive.<sup>147</sup> Gender dysphoria is a term that replaced "gender identity disorder," but the new term still generalizes the experience of transgender individuals.<sup>148</sup> The grouping of all transgender people under one diagnosis ignores the unique and extremely individualized identities they experience.<sup>149</sup> Also, medicalizing the identity of a person as a disorder rather than a valid identity stigmatizes the transgender community.<sup>150</sup> The American

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143. *Id.*; see Ranna Parekh, *What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N (Feb. 2016), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/6LXJ-JEKV>] ("Gender dysphoria involves a conflict between a person's physical or assigned gender and the gender with which he/she/they identify. People with gender dysphoria may be very uncomfortable with the gender they were assigned, sometimes described as being uncomfortable with their body (particularly developments during puberty) or being uncomfortable with the expected roles of their assigned gender. People with gender dysphoria may often experience significant distress and/or problems functioning associated with this conflict between the way they feel and think of themselves (referred to as experienced or expressed gender) and their physical or assigned gender.").

144. TRAVIS CTY. L. LIBR., *supra* note 141.

145. *Id.*

146. *I Want to Change My Name*, TEX. L. HELP (Oct. 15, 2019), <https://texaslawhelp.org/toolkit/i-want-change-my-name> [<https://perma.cc/NEP7-5PFH>] (outlining the five requirements a cisgender individual must meet to change one's name as a cisgender individual).

147. Sam Dylan Finch, *Not All Transgender People Have Dysphoria—And Here Are 6 Reasons Why that Matters*, EVERYDAY FEMINISM (Aug. 13, 2015), <https://everydayfeminism.com/2015/08/not-all-trans-folks-dysphoria/> [<https://perma.cc/PKL5-HNME>] (emphasizing how the terms "gender identity disorder" and "gender dysphoria" are used interchangeably in the medical realm and stigmatize the identities of trans people).

148. *Id.*

149. *Id.* ("Transgender' as an umbrella is so diverse and complex that it's best to avoid generalizations altogether, and allow people to name their own experiences.").

150. *See id.* ("Trans people were "treated" by being told to conform and accept their assigned gender rather than transitioning. Medicalizing the lives of trans people hurt us for a long, long time—it meant that we were treated as having a psychological disorder rather than a valid

Psychiatric Association's definition of gender dysphoria says that it is a conflict "between the way they feel and think of themselves . . . and their physical or assigned gender."<sup>151</sup> This definition can cause those who do not understand gender and sex to think gender is just in their head and is thus not valid or real.<sup>152</sup> In addition, the word dysphoria itself suggests the gender one identifies with is because they are not happy with their sex assigned at birth rather than understanding they were always the gender they identify as, regardless of the sex they were assigned at birth.<sup>153</sup> Furthermore, not all transgender people experience gender dysphoria, so requiring this diagnosis ignores and potentially prevents them from changing their gender on government identifications.<sup>154</sup>

Another difficulty the transgender community face when trying to live their authentic lives is in regard to public accommodations such as bathrooms and other public spaces.<sup>155</sup> In 2017, President Donald Trump

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identity. . . . The medical model disempowered trans people. Trans people were treated as deviants with a shameful mental disorder, and language like "gender identity disorder" and "gender dysphoria" is tied to that history. The medicalization of trans people was a major source of oppression and harm.").

151. Parekh, *supra* note 143 ("Gender dysphoria is not the same as gender nonconformity, which refers to behaviors not matching the gender norms or stereotypes of the gender assigned at birth. Examples of gender nonconformity (also referred to as gender expansiveness or gender creativity) include girls behaving and dressing in ways more socially expected of boys or occasional cross-dressing in adult men. Gender nonconformity is not a mental disorder. Gender dysphoria is also not the same being gay/lesbian.").

152. *Cf.* Finch, *supra* note 147 ("When we allow other people to make the rules, we strip away the rights of trans people to self-identify. If we tell trans people that their identities don't belong to them, we uphold a culture where the naming of gender identities belongs to outsiders instead of ourselves.").

153. *See Dysphoria*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/dysphoria> [<https://perma.cc/MF26-VDMY>] (defining dysphoria as "a state of feeling very unhappy, uneasy, or dissatisfied.").

154. *See* Sam Dylan Finch, *These 5 Myths About Body Dysphoria in Trans Folks Are Super Common—But Also Super Wrong*, EVERYDAY FEMINISM (June 15, 2017), <https://everydayfeminism.com/2015/06/these-5-myths-about-body-dysphoria-in-trans-folks-are-super-common-but-also-super-wrong/> [<https://perma.cc/3RNS-HZC5>] (deconstructing the myth that all trans people experience gender dysphoria. Some trans people experience social dysphoria, a discomfort with the way their gender is perceived and misgendered by others, while some trans people experience no dysphoria at all; the myth that all trans people experience dysphoria is a stereotype because of society's misperception that gender and sex are one in the same).

155. *See* James, *supra* note 140, at 16–17 (reporting more than half of survey participants (59%) avoided using public restrooms because they were afraid of confrontations or other problems they may experience); *see also, e.g., Transgender Women, Gay Men Aggressively Removed from Bar*, FOX 5 SAN DIEGO (Aug. 24, 2019, 10:39 PM), <https://fox5sandiego.com/2019/08/24/transgender-women-gay-men-aggressively-removed-from-bar/> [<https://perma.cc/K4F6-LJNE>]

withdrew the federal guidelines regarding school and locker room procedures that allowed students to use facilities that match their gender identities.<sup>156</sup> U.S. Secretary of Education, Betsy DeVos, said this decision was motivated by the desire to have states and local governments decide what is best for their communities, schools, and families.<sup>157</sup> Rather than expanding and trying to figure out a way to extend federal protections to the transgender community, the Trump Administration has outwardly displayed their lack of interest to try and protect this vulnerable group.<sup>158</sup> This encouraged some school districts to follow the President's example by reversing their established protections for transgender students.<sup>159</sup> There are no federal protections for the transgender community regarding public accommodations at this time.<sup>160</sup> The Trump Administration also put a ban on transgender people

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(overviewing an event where a group of transgender women were aggressively approached and called transphobic slurs while attempting to use a public accommodation).

156. See generally Maria Danilova & Sadie Gurman, *Trump Administration Lifts Federal Transgender Bathroom Guidelines*, CHI. TRIB. (Feb. 22, 2017, 8:31 PM), <https://www.chicagotribune.com/nation-world/ct-trump-transgender-bathroom-guidelines-20170222-story.html> [<https://perma.cc/WJA5-KZYR>] (summarizing the Trump administration's rationale for withdrawing the Obama administration's guidance that allowed children to use locker rooms and restrooms matching their gender identity.).

157. *Id.* (“‘This is an issue best solved at the state and local level,’ Education Secretary Betsy DeVos said. ‘Schools, communities, and families can find—and in many cases have found—solutions that protect all students’”).

158. See *id.* (examining the Trump Administration's decision to give state and local governments the sole authority to interpret federal anti-discrimination law and whether students have the right to access restrooms based on their gender identity).

159. See, e.g., Madeline Holcombe, *Georgia School District Reverses Transgender-Friendly Bathroom Policy After Death Threats*, CNN (Oct. 17, 2019, 3:06 AM), <https://www.cnn.com/2019/10/17/us/georgia-transgender-bathroom-policy-reversal-death-threats/index.html> [<https://perma.cc/P7KJ-BLAR>] (“A Georgia school district has reversed its transgender-friendly bathroom policy after board members, staff and students were threatened . . .”).

160. See Rafferty, *supra* note 114, at 1 (contrasting the significant progress made in public awareness of the disparities the LGBTQ community face with the minimal expansion of legal protections available to them, especially in regard to transgender youth); see also, e.g., *Know Your Rights, Public Accommodations*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Oct. 17, 2019), <https://transequality.org/know-your-rights/public-accommodations> [<https://perma.cc/Z7T8-UEJW>] (“Despite some advances in public awareness and legal protections, youth who identify as LGBTQ continue to face disparities that stem from multiple sources, including inequitable laws and policies, societal discrimination, and a lack of access to quality health care, including mental health care.”).

joining the military and reiterated that Title VII does not protect gender identity.<sup>161</sup>

The transgender community is a vulnerable group in our society that has yet to receive any real protection from the federal government and all fifty states.<sup>162</sup> This lack of protection has caused a myriad of issues, with the 2015 National Transgender Survey reporting the series of issues the transgender individuals experience.<sup>163</sup> There are large percentages of poverty within the transgender community due to the 15% unemployment rate, which is three times higher than the total U.S. population unemployment rate of 5%.<sup>164</sup> Nearly 30% of the transgender community will experience homelessness at some point in their lifetime.<sup>165</sup> Of that 30%, 12% reported their homelessness was due to being transgender.<sup>166</sup> The suicide rates among the transgender community are alarmingly high as 40% of people who participated in this survey reported they have attempted suicide in their lifetime; this is about nine times the U.S. total population rate of attempted suicide.<sup>167</sup> Even if they are not suicidal, about 39% of respondents reported they experience serious psychological distress.<sup>168</sup> The participants also reported they suffered negative experience with the healthcare system, including negative experiences

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161. Levenson, *supra* note 138 (detailing the ways the Trump Administration has continued to attempt to block transgender people from serving in the military, and expanding on the ways the administration's definition of "sex" will potentially affect the recognition of Americans who identify as a gender different than the one they were biologically assigned).

162. See Rafferty, *supra* note 114, at 3 ("Being Transgender or gender variant implies no impairment in judgment, stability, reliability, or general social or vocational capabilities; however, these individuals often experience discrimination due to a lack of civil rights protections for their gender identity or expression . . ."). See generally *Understanding the Transgender Community*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/understanding-the-transgender-community> [<https://perma.cc/P8BK-KY2A>] (outlining the disparities the transgender community faces, specifically as related to lack of legal protection, poverty, stigma, harassment, and discrimination, violence, lack of healthcare coverage, and barriers to obtaining identification documents).

163. See generally James, *supra* note 140, at 4 (highlighting the historical and contemporary, self-reported obstacles faced by transgender individuals, including financial, employment, housing, and healthcare insecurities).

164. *Id.* at 5.

165. *Id.* at 5, 13.

166. *Id.* at 13 ("In the past year, one in eight (12%) of respondents experienced homelessness because of being transgender.").

167. *Id.* at 5.

168. *Id.* (commenting on the harmful effects transgender people face in regard to their mental and physical health).

with insurance companies related to being transgender,<sup>169</sup> such as insurance companies refusing to cover transition-related surgeries<sup>170</sup> and avoiding the doctor for fear of being mistreated for being transgender.<sup>171</sup>

Transgender individuals are further discriminated against by simply living their authentic lives and going out in public.<sup>172</sup> In August 2019, a group of transgender women were celebrating a local LGBTQ+ festival when a cisgender man and woman aggressively approached the group and began shouting transphobic slurs at them.<sup>173</sup> When the group of transgender women tried to calm the aggressors down, the aggressors threatened to kill them.<sup>174</sup> Unfortunately, this threat of death is often carried out.<sup>175</sup> In 2018, the Human Rights Campaign reported there were

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169. *Id.* at 10 (“One in four (25%) respondents” had a negative experience with insurance companies, such as denial of coverage for “routine care because they were transgender,” or denial of coverage for care related to their transition).

170. *See, e.g., id.* at 10, 95 (“More than half (55%) of those who sought coverage for transition-related surgery in the past year were denied.” Additionally, “[t]ransgender men (57%) were more likely to be denied surgery coverage compared to transgender women (54%) and non-binary people . . .”).

171. *See id.* at 5, 10, 97–98, 167, 171 (“23% of respondents did not see a doctor when they needed to because of fear of being mistreated as a transgender person . . . . Negative experiences with doctors and other health care providers varied by race and ethnicity. American Indian respondents (50%) reported the highest level of negative experiences, and rates among Middle Eastern (40%) and multiracial (38%) respondents were also higher . . . . Negative experiences with health care providers also varied by gender identity. Transgender men (42%) were more likely to report negative experiences than transgender women (36%) and non-binary respondents (24%).”).

172. *See Violence Against the Transgender Community in 2019*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2019> [https://perma.cc/7WSV-BTM8] (“Sadly, 2019 has already seen at least 27 transgender or gender non-conforming people fatally shot or killed by other violent means. We say at least because too often these stories go unreported—or misreported.”); *see also, e.g.,* FOX 5 SAN DIEGO, *supra* note 155 (telling the story of a group of transgender women who were harassed, called transphobic slurs, threatened with the threat of death, and violently removed from the bar they were at to celebrate a local LGBTQ festival).

173. FOX 5 SAN DIEGO, *supra* note 155.

174. *Id.*

175. *See* Karma Allen, *Attacker Yelled Anti-LGTBQ Slurs Before Shooting Transgender Woman: Police*, ABC NEWS (Sept. 23, 2019, 10:35 PM), <https://abcnews.go.com/US/attacker-yelled-anti-lgbtq-slurs-shooting-transgender-woman/story?id=65813394> [https://perma.cc/YQE9-8QP7] (depicting the hate crime and murder of a transgender woman who was called transphobic slurs before being shot “multiple times in the chest and arm. . . . Since 2013, [The Human Rights Campaign] has tracked at least 145 transgender deaths due to fatal violence, with most victims being black transgender women.” The true amount of victims could even be higher given that the numbers are hard to track “due to misgendering—incorrectly applying gender labels—and transphobia.”).

at least twenty-six deaths of transgender or gender non-conforming people in the United States.<sup>176</sup> In Dallas, in 2019, a transgender woman was walking home when a man pulled his car over to yell transphobic slurs before shooting her multiple times.<sup>177</sup> These are just a few of the many examples of what transgender people experience when attempting to be their true selves in public.<sup>178</sup> The transgender community is at a significant risk in society and must be viewed as vulnerable to reinforce societal efforts to protect them.<sup>179</sup>

### B. *Legal Issues Faced by the Latinx Community*

The Latinx community has a long history of discrimination within American society.<sup>180</sup> However, in recent years, possibly due to President

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176. *Violence Against the Transgender Community in 2019*, *supra* note 172 (noting most of the deaths in the transgender community were Black transgender women. Sadly, some of these victims were killed by acquaintances, or even partners. While others were killed by strangers. While some crimes were motivated by clear anti-transgender bias, in other instances it was “the victim’s transgender status that may have put them at risk in other ways, such as forcing them into poverty, unemployment, or homelessness.”); Allen, *supra* note 175.

177. Allen, *supra* note 175.

178. *Violence Against the Transgender Community in 2019*, *supra* note 172 (remembering the names of twenty-seven transgender or gender non-conforming victims of fatal attacks in 2019).

179. *See id.* [<https://perma.cc/7WSV-BTM8>] (“While the details of these cases differ, it is clear that fatal violence disproportionately affects transgender women of color, and that the intersections of racism, sexism, homophobia, biphobia, transphobia and unchecked access to guns conspire to deprive them of employment, housing, healthcare and other necessities, barriers that make them vulnerable.”). *See generally* James, *supra* note 140 (outlining the discriminatory practices and issues facing the Transgender community. The survey goes into depth describing issues the transgender community face, including their family life, dealing with health providers, education experiences, handling insurance companies, discriminatory employment practices, underground work including sex work, military service, interactions with the police, incarceration, immigration detention, using public restrooms, airport security, and the overall harassment and violence they face).

180. *See generally* Erin Blakemore, *The Brutal History of Anti-Latino Discrimination in America*, HIST. (Aug. 29, 2018), <https://www.history.com/news/the-brutal-history-of-anti-latino-discrimination-in-america> [<https://perma.cc/3PC4-JEYA>] (“The story of Latino-American discrimination largely begins in 1848 . . . . Anti-Latino sentiment grew along with immigration. Latinos were barred entry into Anglo establishments and segregated into urban barrios in poor areas. Though Latinos were critical to the U.S. economy and often were American citizens, everything from their language to the color of their skin to their countries of origin could be used as a pretext for discrimination. Anglo-Americans treated them as a foreign underclass and perpetuated stereotypes that those who spoke Spanish were lazy, stupid and undeserving. In some cases, that prejudice turned fatal.”).

Trump's rhetoric,<sup>181</sup> the Latinx community has become a more targeted group.<sup>182</sup> Furthermore, racism still exists and is prevalent in American society, though its expression has become far more subtle and sophisticated.<sup>183</sup> Rather than outwardly banning Latinx or Black Americans, race-neutral terms and provisions created a discriminatory effect among Black and Brown communities.<sup>184</sup> Hispanics make up

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181. See, e.g., Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <https://time.com/4473972/donald-trump-/> [<https://perma.cc/579V-CVNU>] (listing all the times Donald Trump used negative rhetoric against Latinx people. The list compiles statements made by Trump on both his Twitter account and through other statements before and during his presidential campaign. He commonly referred to the Latinx community as enemies of the United States, drug dealers, rapists, criminals, cartel members, and terrorists—all the while flouting his idea of a border wall to his supporters. Trump's rhetoric and claims that Mexico would build his border wall became too much for even former Mexican President Vicente Fox, who went as far as to compare Trump to Hitler).

182. See, e.g., German Lopez, *FBI: Reported Hate Crimes Increased by 17 Percent in 2017*, VOX (Nov. 13, 2018, 1:10 PM), <https://www.vox.com/policy-and-politics/2018/11/13/18091646/fbi-hate-crimes-2017> [<https://perma.cc/D5U9-KBPU>] (reporting anti-Hispanic and Latinx hate crimes rose by more than 24% from 2016 to 2017. “[A]lthough the FBI’s report is the most comprehensive look at the nation’s hate crimes released every year, it is known to be woefully inadequate—because other federal surveys suggest it may undercount the number of hate crimes by the hundreds of thousands.”); cf. Suzanne Gamboa, *Racism, Not a Lack of Assimilation, Is the Real Problem Facing Latinos in America*, NBC NEWS (Feb. 26, 2019, 7:41 AM), <https://www.nbcnews.com/news/latino/racism-not-lack-assimilation-real-problem-facing-latinos-america-n974021> [<https://perma.cc/TLQ2-RTJK>] (explaining American-born Latinos are deemed to not be from the country because of their skin color and are praised when they can speak English as if it is odd for a brown person to speak English; whereas if a non-Latino person were to speak Spanish, it is an accomplishment and beneficial to them).

183. See, e.g., Jasmine B. Gonzales Rose, *Race Inequity Fifty Years Later: Language Rights Under the Civil Rights Act of 1964*, 6 ALA. C.R. & C.L. L. REV. 167, 170 (2014) (“One example of these racially discriminatory but purportedly race-neutral exclusions is English-language requirements. Under current ‘colorblind’ jurisprudence, a sign outside a restaurant stating, ‘No Mexicans or Dogs Allowed’ (as was prevalent in the Southwest in the 1950s and 1960s) would be unlawful and condemned by the majority of Americans. However, a sign stating, ‘English only,’ even when the common understanding is that in practice it means ‘No Spanish’ and hence ‘No Latinos,’ may survive legal scrutiny and even be celebrated by many Americans as patriotic.”).

184. See *id.* (“Today, English-language requirements, although race-neutral on their face, are often prompted by racial animus against Latinos. English-only laws are habitually brought about in response to popular movements driven” by a mission of race betterment, and a “fear of a Hispanic takeover. “However, despite racist, nativist, and xenophobic beginnings, legislative history and statutory language do not mention Latinos or the Spanish language. . . . Nonetheless, there is frequently a common understanding that, in both original intent and application, ‘English-only’ rules and statutes are often intended to be ‘No-Spanish’ restrictions. These rules are generally less about a genuine preference for English than a means to limit Spanish usage, exclude Spanish speakers, and make Latinos of all linguistic backgrounds feel unwelcome.”).

18.1% of the U.S. population,<sup>185</sup> and Latinos are the largest racial minority in the United States.<sup>186</sup> Despite this, Hispanic workers have made less than White men since 2000.<sup>187</sup> Hispanic men make about 15% less in hourly wages than White men and Hispanic women make about 33% less than White men.<sup>188</sup> Having a college degree does not close the gap between White men and Hispanic women, for Hispanic women with a college degree make 36% less than a White man with a college degree.<sup>189</sup> The unemployment rate for Hispanic women—5.7%—is much higher than the unemployment rate for all women, 4.3%.<sup>190</sup> Hispanic women also receive lower wages than White women.<sup>191</sup> The Latinx community face both a wage gap and underrepresentation in film, high tech jobs, and the federal government workforce.<sup>192</sup> Further, within

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185. *Facts for Features: Hispanic Heritage Month 2018*, U.S. CENSUS BUREAU (Sept. 13, 2018), <https://www.census.gov/newsroom/facts-for-features/2018/hispanic-heritage-month.html> [https://perma.cc/X545-HM6T]; cf. Taylor Pittman, *A Quick Breakdown of the Difference Between Hispanic, Latino and Spanish*, HUFFPOST (Mar. 14, 2017), [https://www.huffpost.com/entry/difference-between-hispanic-latino-and-spanish\\_n\\_55a7ec20e4b0c5f0322c9e44](https://www.huffpost.com/entry/difference-between-hispanic-latino-and-spanish_n_55a7ec20e4b0c5f0322c9e44) [https://perma.cc/N637-APCT] (breaking down the differences and similarities between Hispanic and Latino); cf. Nicki Lisa Cole, *The Difference Between Hispanic and Latino*, THOUGHTCO. (June. 30, 2019), <https://www.thoughtco.com/hispanic-vs-latino-4149966> [https://perma.cc/4EPX-6BWV] (“Hispanic refers to people who speak Spanish and/or descend from Spanish-speaking populations, while Latino refers to people who are from or descended from Latin America.”). People from Spain are not considered Latino, but they are considered Hispanic. Brazilians are not Hispanic but are Latino. As most Latinos are Hispanic, this Article will analyze and use studies about Hispanic people and Latinx people.

186. Rose, *supra* note 183, at 169 (“In 2014, Latinos are the largest racial minority. Racial discrimination persists today but is less conspicuous. Rather than hanging signs that say, ‘No Negros’ or ‘No Mexicans,’ racial exclusions are doled out in ‘race-neutral’ code.”).

187. See Marie T. Mora & Alberto Dávila, *The Hispanic-White Wage Gap Has Remained Wide and Relatively Steady*, ECON. POL’Y INST. (July 2, 2018), <https://www.epi.org/publication/the-hispanic-white-wage-gap-has-remained-wide-and-relatively-steady-examining-hispanic-white-gaps-in-wages-unemployment-labor-force-participation-and-education-by-gender-immigrant/> [https://perma.cc/4R94-MWSG] (examining and explaining the wage gap between White and Hispanic workers).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*; see Ariane Hegewisch et al., *The Gender Wage Gap: 2018 Earning Differences by Race and Ethnicity*, INST. FOR WOMEN’S POL’Y RSCH. (Mar. 2019), [https://iwpr.org/wp-content/uploads/2020/08/C478\\_Gender-Wage-Gap-in-2018.pdf](https://iwpr.org/wp-content/uploads/2020/08/C478_Gender-Wage-Gap-in-2018.pdf) [https://perma.cc/4GQ8-HDDW] (providing statistics illustrating the wage gap between women of different races and ethnicities).

192. Gamboa, *supra* note 182 (“And yet, Latinos—even those whose roots in this land stretch back to before the nation’s origins—still face overt and subtle racism and discrimination. Hate crimes against them are rising, and they are underrepresented in film, in high-tech jobs and in

workplace, school, social, and public settings, Latinx people are ridiculed for speaking Spanish and shamed for not assimilating—a practice rooted in racism.<sup>193</sup> Many people assume that someone who is Brown or has a name that sounds Latino does not speak English.<sup>194</sup> Further, some employers have “English-only” rules which has led to the termination, humiliation, and exclusion of Latinx employees *and* customers.<sup>195</sup> The Equal Employment Opportunity Commission (EEOC) established that an employer who forbids workers from speaking their native language at any time or place at work amounts to national origin discrimination.<sup>196</sup> The EEOC further stated English-only rules at the workplace can create a hostile work environment.<sup>197</sup> Despite the EEOC deeming “English-only” rules in the workplace national origin discrimination,<sup>198</sup> employers

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the federal government workforce. And when they advocate for equal treatment and representation—or even when they just speak Spanish in public—they hear over and over that they need to assimilate.”). *See generally* Mora & Dávila, *supra* note 187 (depicting the wage gap between Hispanic and White workers, while providing explanations as to why those gaps exist today).

193. *See, e.g.*, Gamboa, *supra* note 182 (“Two U.S.-born Latino women were detained by a Border Patrol agent last May for simply speaking Spanish in a convenience store. . . . When it comes to language, many Latinos see a double standard. ‘It is a deficit when you speak Spanish, but it’s an asset to whites and white Americans when they speak it . . . .’”); *see also* Rose, *supra* note 183, at 173–74 (“Racism steps into play when the use of Spanish is perceived to hold innately negative qualities, such as being “dirty,” un-American, abusive, foul, threatening, uneducated, or offensive. These racist perceptions about the negative qualities of Spanish are then used as a justification for imposing English-only rules.”).

194. Gamboa, *supra* note 182; *see, e.g.*, Rose, *supra* note 183, at 172 (“I am a native English speaker who grew up in Oregon in an English-speaking household and learned Spanish primarily through classes and work abroad. However, throughout my life people have frequently assumed I am LEP or speak English with a Spanish accent. . . . As an adult, in several professional settings, colleagues have described me as a person with a “heavy Spanish accent,” though I speak English with an Oregon/Pacific Northwest accent that is a rather standard American accent unassociated with Hispanic background. This phenomenon of misperceiving an accent or English-language limitation based solely upon a Latina’s physical appearance, surname, or ancestry indicates the close relationship between race and language for Latinos.”).

195. Rose, *supra* note 183, at 174.

196. *Id.* at 177 (explaining that the Equal Employment Opportunity Commission has recognized that discrimination based on language constitutes national origin discrimination under Title VII).

197. *See id.* (“The EEOC presumes that rules requiring employees to speak English at all times in the workplace . . . violate Title VII because such rules . . . can foster a hostile work environment.”).

198. *See, e.g.*, Equal Emp. Opportunity Comm’n v. Premier Operator Servs., Inc., 113 F.Supp.2d 1066, 1070, 1073 (N.D. Tex. 2000) (holding one company failed to establish a business necessity in enacting an English-only policy, further violating Title VII); *see also e.g.*, Saucedo v.

have argued English-only rules that are only applied at certain times are justified by business necessity.<sup>199</sup> The Fifth Circuit has held a bilingual employee speaking Spanish to a Spanish-speaking employee was actively choosing to defy the English-only rule because he could speak English but decided not to.<sup>200</sup> The employer had an English-only rule, unless employees were speaking to a Spanish-speaking customer.<sup>201</sup> The Fifth Circuit reasoned the English-only rule served a legitimate business purpose because it enabled supervisors to better oversee subordinates, helped employees improve their English, and because customers objected to communications between employees which they could not understand.<sup>202</sup> This shows the lack of understanding of bilingualism because, for many bilingual people, they respond in the language that is being spoken to them and it is more of a reflex than a choice.<sup>203</sup> Further, the desire to improve a Spanish speaker's English proficiency exemplifies the inherently racist motive of assimilation.<sup>204</sup> Lastly,

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Bros. Well Serv., Inc., 464 F. Supp. 919, 922 (S.D. Tex. 1979) (holding a business failed to establish that it was necessary to enact an English-only policy and citing the EEOC rule that English-only policies in the absence of a business necessity constitute national origin discrimination); *see also*, e.g., Press Release, U.S. Equal Emp. Opportunity Comm'n, La Cantera Resort and Spa to Pay Over \$2.5 Million to Settle EEOC National Origin Discrimination Suit (Oct. 31, 2019) (providing an example of how one business's failure to show a business necessity for its English-only policy resulted in a large settlement and reaffirmed that English-only policies constitute national origin discrimination).

199. *See, e.g.*, *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1171 (10th Cir. 2007) (holding a English-only rule in the hospital did not violate Title VII because of the business necessity of ensuring cleaning staff understand operating nurses' instructions and to ensure compliance with health and safety codes); *see also, e.g.*, *Equal Emp. Opportunity Comm'n*, 113 F.Supp.2d at 1070 (noting the company's purported reason for an English-only policy was invalid as the policy created more disruption than harmony within the workplace); *see also, e.g.*, *Saucedo*, 464 F. Supp. at 921 (holding that although the defendant provided justification for an English-only rule during business operations, the violation of the rule in this case did not occur during the course of business operations and thus the discharge was unlawful).

200. *Garcia v. Gloor*, 618 F.2d 264, 266 (5th Cir. 1980).

201. *Id.*

202. *Id.*

203. *See Rose, supra* note 183, at 174, 178–79 (“The EEOC acknowledges that “[i]t is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language.”).

204. *See Assimilate*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/assimilate#h1> [<https://perma.cc/7Y7S-SJG2>] (defining the process of assimilating as “to absorb into the cultural tradition of a population or group”); *see also Rose, supra* note 183, at 184 (arguing modern racism consists of racial and racist code words, providing an example wherein a restaurant owner placed a sign in their establishment stating, “This is America: When Ordering

customers preferring employees who speak English to each other is implicitly racist as it is coded to mean non-Latino, English-speaking workers only.<sup>205</sup>

Language discrimination also infiltrates public accommodations, as many Latinx people are ridiculed and harassed for speaking Spanish in public.<sup>206</sup> In 2019, in West Virginia, two men eating in a Mexican restaurant were approached by a woman who yelled at them for not speaking English and told them to “get the fuck out of my country.”<sup>207</sup> Even after the manager tried to diffuse the situation, one of the men, whom the woman harassed, offered to pay for her food and requested she leave, but the woman continued to call the manager and the other men “fucking rapists” and other offensive terms.<sup>208</sup> The manager is an American citizen.<sup>209</sup> Almost two months later, in California, an employee and a customer were speaking Spanish in a gas station when they were interrupted by a woman<sup>210</sup> telling them they needed to speak English

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Speak English.” Signs such as these are an example of coded racism where assimilation is encouraged).

205. Cf. Rose, *supra* note 183, at 187 (“[W]hile I don’t mind black people, my customers do’ attitude is itself discriminatory because the business owner is supporting and propagating societal prejudice. Conformity to discriminatory customer preference is not a legally permissible basis upon which to discriminate against employees or customers.”).

206. See, e.g., Ali Gostanian, *Videos of California Gas Station Worker Yelling at Woman for Speaking Spanish Goes Viral*, NBC NEWS (Apr. 4, 2019, 7:16 PM), <https://www.nbcnews.com/news/latino/videos-california-gas-station-worker-yelling-woman-speaking-spanish-went-n991171> [<https://perma.cc/JCL5-AP8V>] (discussing how a gas station employee in California harassed and threatened a customer for speaking Spanish with another employee); see also, e.g., Alexandra Deabler, *Woman Yelling at Mexican Restaurant Manager for Speaking Spanish Goes Viral*, FOX NEWS (Feb. 19, 2019), <https://www.foxnews.com/food-drink/woman-yelling-at-mexican-restaurant-manager-for-speaking-spanish-goes-viral> [<https://perma.cc/KCJ9-K6FY>] (overviewing an incident at a restaurant in West Virginia where a woman screamed, “English is our first language, so you need to speak English,” at two customers who were eating and having a conversation in Spanish).

207. Deabler, *supra* note 206.

208. *Id.*

209. *Id.* (“The fact that I’m a US Citizen just like her and still receiving hateful words, it’s clearly telling you that something is wrong with our society nowadays and with our main leaders that need to lead by example.”).

210. Gostanian, *supra* note 206. It is important to note that neither of these media sources release the names of the harassers. I think that this also shows inherent racism as we see the names of Black and Brown wrongdoers plastered all over the news with their pictures. See Trina T. Creighton, et al., *Coverage of Black Versus White Males in Local Television News Lead Stories*, 4 J. MASS COMM’N & JOURNALISM 1, 1–2 (2014) (highlighting how news outlets tend to show White adults in more positive roles as compared to Black adults’ roles); see also Elizabeth Sun,

because “this is America.”<sup>211</sup> The woman also assumed the customer was not an American citizen, and when the customer corrected her assumption, she told the customer to “prove it motherfucker.”<sup>212</sup> Federal authorities have also discriminated against Spanish speakers, as two U.S. citizens were detained by Customs and Border Protection for speaking Spanish.<sup>213</sup> These are just a few examples of language discrimination in public that have happened and been reported on; however, many of these incidents go unreported.<sup>214</sup>

Further, the Latinx community is especially vulnerable to domestic terrorism and hate crimes.<sup>215</sup> In August of 2019, a White man killed

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*The Dangerous Racialization of Crime in the U.S. News Media*, CTR. FOR AM. PROGRESS (Aug. 29, 2018, 9:03 AM), <https://www.americanprogress.org/issues/criminal-justice/news/2018/08/29/455313/dangerous-racialization-crime-u-s-news-media/> [<https://perma.cc/84FU-XHL9>] (“Black Americans, and black men in particular, are overrepresented as perpetrators of crime in U.S. news media. This is especially true when looking at the incidence of violent crime. . . . Latinos are similarly maligned in the news media. A study found that 66 percent of the time, news coverage between 1995 and 2004 showed Latinos in the context of either crime or immigration rather than in other contexts.”).

211. Gostanian, *supra* note 206.

212. *Id.*

213. See Emily Wax-Thibodeaux, *Two U.S. Citizens Claim in Lawsuit that Feds Detained Them for Speaking Spanish*, WASH. POST (Feb. 15, 2019, 6:55 AM), [https://www.washingtonpost.com/national/two-us-citizens-claim-in-lawsuit-that-feds-detained-them-for-speaking-spanish/2019/02/14/b47c037a-308b-11e9-8ad3-9a5b113ecd3c\\_story.html](https://www.washingtonpost.com/national/two-us-citizens-claim-in-lawsuit-that-feds-detained-them-for-speaking-spanish/2019/02/14/b47c037a-308b-11e9-8ad3-9a5b113ecd3c_story.html) [<https://perma.cc/4E28-C572>] (“‘Ma’am, the reason I asked you for your ID is because I came in here, and I saw that you guys are speaking Spanish, which is very unheard of up here,’ the agent says in the video. . . . The women allege that the agent then detained them for 45 minutes instead of letting them go when they identified themselves as U.S. citizens. . . . ACLU’s Immigrants’ Rights Project, said the unlawful detention amounts to a violation of the Fourth Amendment’s bar on unreasonable searches and seizures. ‘Speaking Spanish is not against the law. Americans speak hundreds of different languages. . . .’ ‘This is really a sign of local agents’ abuse of power, which has only been emboldened during the Trump administration.’”).

214. See generally Gostanian, *supra* note 206 (explaining similar incidents in New York, Montana, and West Virginia that occurred in the past few years and that have gained wide publicity); see generally Emily Moon, *Hate Crimes Are on the Rise. Why Do Many Still Go Unreported?*, PAC. STANDARD (Feb. 21, 2019), <https://psmag.com/news/hate-crimes-are-on-the-rise-why-do-many-still-go-unreported> [<https://perma.cc/9XK7-FGL8>] (expanding on the inaccuracies of law enforcement data as it relates to hate crimes. Fear of retaliation, inaction on the part of police, discrepancies in the definition of what constitutes a hate crime, mistrust of law enforcement, and victims’ belief that the hate crime they experienced is ‘normal’ all lead to underreporting of hate crimes).

215. See Brad Brooks, *Victims of Anti-Latino Hate Crimes Soar in U.S.: FBI Report*, REUTERS (Nov. 12, 2019, 3:27 PM), <https://www.reuters.com/article/us-hatecrimes-report/victims-of-anti-latino-hate-crimes-soar-in-u-s-fbi-report-idUSKBN1XM2OQ> [<https://perma.cc/6NBK-C6>]

twenty-two people and injured twenty-four people at a Walmart in El Paso, Texas where about 83% of the city is Latino.<sup>216</sup> An El Paso Police Detective, Adrian Garcia, in his affidavit stated the shooter told him he was specifically targeting Mexicans.<sup>217</sup> The investigation showed the shooter wrote a document describing a desire to put a stop to “Hispanic invasion” of Texas, which was posted about twenty minutes before the shooting.<sup>218</sup> The document further described a hatred of “race mixing” and told immigrants to return to their home countries.<sup>219</sup> This shooting was one of the top ten deadliest in modern U.S. history.<sup>220</sup>

The Latinx community is a vulnerable and targeted group that experiences discrimination in multiple ways.<sup>221</sup> While discrimination law generally protects the Latinx community under the protected class of race and national origin,<sup>222</sup> Latinx people whose identities intersect with other vulnerable groups may not be fully protected or recognized under

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LG] (“Attacks against Muslims peaked around 2016 when terrorism was the concern. Now immigration is the No. 1 issue and Latinos are being targeted.”).

216. See Ed Lavandera & Jason Hanna, *El Paso Suspect Told Police He Was Targeting Mexicans, Affidavit Says*, CNN (Aug. 9, 2019, 5:15 PM), <https://www.cnn.com/2019/08/09/us/el-paso-shooting-friday/index.html> [<https://perma.cc/ZQR6-RCWF>] (noting the defendant “drove about 11 hours from his home in Allen, Texas, to the Walmart in El Paso” to conduct the shooting). See generally *Quick Facts El Paso County, Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/elpasocountytexas/PST045219> [<https://perma.cc/C3LJ-SWX5>] (outlining the demographics of residents in El Paso, Texas as provided by July 2019 estimates).

217. Lavandera & Hanna, *supra* note 216 (“The defendant stated his target were Mexicans,” according to the affidavit obtained by CNN).

218. *Id.* (“Police previously said the shooting appeared to be a hate crime. Investigators believe Crusius wrote a document filled with hatred of immigrants and Latinos . . . [and] published [the document] on the online messaging board 8chan about 20 minutes before the shooting . . .”).

219. *Id.*

220. Saeed Ahmed, *4 of the 10 Deadliest Mass Shootings in Modern US History Have Taken Place in Texas*, CNN (Aug. 3, 2019, 10:18 PM), <https://www.cnn.com/2019/08/03/us/texas-el-paso-walmart-shooting-among-deadliest-trnd/index.html> [<https://perma.cc/5KED-6BF3>].

221. See generally Sandy E. James, et al., *The 2015 U.S. Transgender Survey Report on the Experiences of Latino/a Respondents*, NAT’L CTR. FOR TRANSGENDER EQUAL. 2 (Nov. 2017), <https://www.transequality.org/sites/default/files/docs/usts/USTSLatinReport-Nov17.pdf> [<https://perma.cc/7FAJ-N5NA>] (reporting Latino/a’s face disparities and discrimination in many areas that include employment, housing, family, education, and health).

222. See, e.g., *Sabala v. W. Gillette, Inc.*, 362 F. Supp. 1142, 1147 (S.D. Tex. 1973) (holding Title VII applies to Mexican Americans discriminated against for their ethnicity); see also, e.g., *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 467 (5th Cir. 1970) (stating Plaintiff has a valid claim for discrimination on the basis of national origin under Title VII in the employment context).

discrimination law.<sup>223</sup> Latinx people who are transgender have a unique place in society as they experience multi-burdened oppression and discrimination in society.<sup>224</sup> This community will greatly benefit if laws against discrimination had an intersectional lens, as the next section will describe.<sup>225</sup>

### C. *Intersections of Race and Gender Identity*

As explained above, the Latinx and transgender communities separately have high rates of unemployment, poverty, and issues with public accommodations.<sup>226</sup> For people who are members of both communities, there exists a unique kind of discrimination against the intersection of their identity as a person of color and transgender, as depicted by the 2015 U.S. Transgender Survey Report on the Experiences of Latino/a Respondents.<sup>227</sup> The unemployment rate for Latinx transgender people is four times higher than the unemployment rate in the U.S. population as a whole and three times the rate among the U.S. Latinx population.<sup>228</sup> The unemployment rate for Latinx transgender women is 27%, with a higher likelihood of unemployment compared to Latinx transgender men.<sup>229</sup> Unsurprisingly, given the unemployment rates and lower wages, 43% of the Latinx transgender respondents said

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223. See Rachel Kahn Best, et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & SOC'Y REV. 991, 992 (2011) (explaining Plaintiffs that brings intersectional claims usually lose); cf. *DeGraffenreid v. Gen. Motors Assembly Div.*, 413 F.Supp. 142, 143 (E.D. Mo. 1976) (holding Black female plaintiffs must bring a race discrimination claim and a sex discrimination claim separately). See generally Aubrey Coffey-Urban, *Intersectionality, Diversity and the Legal Profession*, ARIZ. ATT'Y, Apr. 2017, at 38, 40 (explaining how diversity efforts in law firms lack intersectionality in their efforts).

224. See, James, et al., *supra* note 221, at 22 (overviewing the discrimination Latinx transgender people experience). See generally *Living Authentically*, *supra* note 7 (advising Latinx individuals on how to come out to their parents taking into account cultural factors).

225. See Rose, *supra* note 183, at 212 ("Civil rights laws need to be sufficiently adaptable to contend with ever-changing manifestations and expressions of racial subordination.").

226. James, et al., *supra* note 221, at 3, 8, 15.

227. See generally *id.* (examining the experiences transgender Latinx individuals in the United States face while taking into account factors such as location, age educational attainment, and disability, etc.).

228. *Id.* at 8.

229. *Id.*

they were living in poverty at the time of the survey.<sup>230</sup> Further, 33% of Latinx transgender people experienced some sort of housing discrimination or insecurity, such as being evicted from their home or being rejected for a home or apartment because of their gender identity.<sup>231</sup> As stated earlier, Latinx people experience language discrimination in the workplace and in public,<sup>232</sup> which compounds with being transgender as 15% of Latinx transgender people reported losing their job, being denied a promotion, or not getting hired.<sup>233</sup> Although there is no report that language had anything to do with this data, the information provided suggests a Latinx transgender person who speaks Spanish could experience multi-faceted discrimination for being Latinx, transgender, and bilingual.<sup>234</sup> Additionally, the Latinx transgender community experiences high levels of public harassment.<sup>235</sup> Nearly one-half of respondents reported being verbally harassed and/or physically attacked in the past year.<sup>236</sup> Further, 48% of Latinx respondents reported they had been sexually assaulted.<sup>237</sup> A Latinx transgender person could be subject to verbal harassment and even assaulted for being transgender,

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230. *Id.* (“The poverty rate was higher among transgender women (45%) and non-binary people (43%) than among transgender men (36%).”). *See generally* Mora & Dávila, *supra* note 186 (reporting unemployment rates are higher for Hispanic men and women).

231. James, et al., *supra* note 221, at 14.

232. *See* Rose, *supra* note 183, at 168, 174, 176 (detailing how Latinos face language discrimination that “is not simply a linguistic issue; it is frequently a form of discrimination on the basis of race and national origin.”); *see also, e.g.*, Gostanian, *supra* note 206 (reporting about a woman who harassed and threatened a customer for speaking Spanish); *see also, e.g.*, Deabler, *supra* note 206 (overviewing an event where a woman went up to a table and began harassing two men who were speaking Spanish while eating at a restaurant).

233. *See* James, et al., *supra* note 221, at 11 (recognizing transgender women on average were more likely to experience being fired, denied a promotion, or denied a position they applied for in comparison to transgender men and non-binary people).

234. *Cf.* Rose, *supra* note 183, at 172, 174 (explaining how Latinos suffer from language discrimination since Spanish is perceived as a negative quality and English-only requirements place barriers in employment, healthcare, and public accommodations); *see also* James, et al., *supra* note 220, at 2 (describing how the Latinx transgender community may face more heightened scrutiny if additional factors are present—such as language barriers).

235. James, et al., *supra* note 221, at 11–13, 15 (“Respondents reported being denied equal treatment or service, verbally harassed, or physically attacked at many places of public accommodation—places that provide services to the public, like retail stores, hotels, and government offices.”).

236. *Id.* at 15 (“Fifteen percent (15%) were denied equal treatment or service in a public place and 45% were verbally harassed in the past year because of being transgender. Nearly one in ten (9%) were physically attacked in the past year because of being transgender.”).

237. *Id.* at 3.

using a restroom that is not congruent with their sex assigned at birth, and speaking Spanish.<sup>238</sup> This multi-faceted discrimination may be important in understanding why 45% of Latinx respondents reported they attempted suicide at some point in their lives.<sup>239</sup> Other discrimination experienced by the Latinx transgender community is not having their preferred gender and name on their IDs,<sup>240</sup> leaving their religious communities because they were rejected,<sup>241</sup> and instances that impede the completion of college.<sup>242</sup>

The Latinx transgender community is just one example of why discrimination laws must have an intersectional framework.<sup>243</sup> Our society consists of a plethora of individuals and communities who have multi-faceted identities.<sup>244</sup> Discrimination law and the legal system have the potential to modernize with the current state of our society in a series of ways, some of which I will propose in the next section.<sup>245</sup>

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238. *Id.* at 12, 15; James, *supra* note 140, at 12–13, 17; *see, e.g.*, Gostanian, *supra* note 206 (acknowledging there are many language related incidents in the United States against Latinx individuals); *see also, e.g.*, Deabler, *supra* note 206 (overviewing language related incidents against Latinx individuals who were causally eating at a restaurant and conversing in Spanish); *see also, e.g.*, Allen, *supra* note 175 (illustrating how violent language related incidents can become against Latinx transgender individual).

239. James, et al., *supra* note 221, at 21.

240. *Id.* at (“Only 10% of respondents reported that all of their identity documents (IDs) had the name and gender they preferred, while 71% reported that none of their IDs had the name and gender they preferred. The cost of changing IDs [is] one of the main barriers respondents faced . . .”).

241. *Id.* at 7.

242. *Id.* at 5.

243. *Id.* at 2 (“Among the most important findings was that many respondents were impacted by the compounding effects of multiple forms of discrimination, and transgender people of color . . . experienced deeper and broader forms of discrimination than White . . . respondents and people in the U.S. population overall.”).

244. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 224 (2020) (arguing people of color are disproportionately incarcerated as a way to continue racial segregation through mass incarceration of people of color); *see also* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 145 (1989) (depicting how women of color experience discrimination differently than White women in similar employments: Black women suffer discrimination for both their gender and their race, while White woman put forth claims of gender-based discrimination only); *see also* James, et al., *supra* note 221, at 15 (reiterating how transgender Latinx people enter our society and experience unique and harsh discrimination simply being transgender).

245. *Cf.* Best, *supra* note 223, at 992, 994–95 (“Federal equal employment opportunity (EEO) laws attempt to prevent and redress discrimination in employment, a major source of

### III. SOLUTIONS

Society is becoming increasingly more diverse in a myriad ways.<sup>246</sup> Despite this increase in diversity, the law and legal system do not recognize or reflect this change.<sup>247</sup> Researchers who analyzed judicial opinions of plaintiffs and who made intersectional claims over thirty-five-years reported civil rights laws do not adequately protect people with multiple social disadvantages.<sup>248</sup> The goal of the suggested solutions is to remedy this by updating the law and how it is taught to law students and lawyers to better reflect society.<sup>249</sup> Lawyers and the next generation of lawyers must learn how to best represent their clients who have complex social identities that can play a role in how they will be treated in court and by the law.<sup>250</sup> The legal system must recognize the

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economic and social inequality. A growing body of literature analyzes the capacity and limitations of EEO law to ameliorate inequality in the workplace. . . . A large body of legal and sociolegal literature highlights the many limitations of civil rights law in redressing inequalities at work. . . . Although a substantial and rich literature describes the nature of intersectionality and demonstrates how intersectionality has penalized plaintiffs in particular cases, there has been no systematic effort to determine the extent to which intersectionality penalizes plaintiffs in litigation generally.”)

246. See Christine E. Kaestle, *Sexual Orientation Trajectories Based on Sexual Attractions, Partners, and Identity: A Longitudinal Investigation from Adolescence Through Young Adulthood Using a U.S. Representative Sample*, 56 J. SEX RSCH. 811, 812 (2019) (considering sexuality can be fluid over one’s life and stating that periods from adolescence to young adulthood can be periods of experimentation with sexuality); see also, e.g., Gretchen Livingston, *The Rise of Multiracial and Multiethnic Babies in the U.S.*, PEW RSCH. CTR. (June 6, 2017), <https://www.pewresearch.org/fact-tank/2017/06/06/the-rise-of-multiracial-and-multiethnic-babies-in-the-u-s/> [<https://perma.cc/AR6G-GFDF>] (outlining one in seven U.S. infants were multiracial or multiethnic in 2015); see also James, *supra* note 140, at 45 (pointing out how thirty-five percent of the transgender respondents of the survey did not identify as either male or female, but as nonbinary).

247. See, e.g., *DeGraffenreid v. Gen. Motors Assembly Div.*, 558 F.2d 480, 483 (8th Cir. 1977) (noting the lower courts holding that Black female plaintiffs must bring a race discrimination claim and a sex discrimination claim separately); see also, e.g., *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460–61 (5th Cir. 1970) (noting the lower courts holding that Plaintiff may amend her original pleading to change the discrimination claim from sex discrimination to national origin discrimination rather than allowing her to bring both claims together); see also, e.g., Coffey-Urban, *supra* note 223, at 38, 41 (delineating how diversity efforts in law firms lack intersectionality in their efforts as eighty-eight percent of lawyers are still White).

248. Best, *supra* note 223, at 992 (showing plaintiffs who make intersectional claims are only half as likely to win their employment discrimination claims compared to other demographic groups).

249. See generally Coffey-Urban, *supra* note 223, at 38, 42 (discussing intersectionality discussions as a way to diversify in law firms).

250. Cf. Aastha Madaan, *Cultural Competency and the Practice of Law in the 21st Century*, A.B.A. (Mar. 1, 2017), [https://www.americanbar.org/groups/real\\_property\\_trust\\_estate/publications/probate-property-magazine/2016/march\\_april\\_2016/2016\\_aba\\_rpte\\_pp\\_v30\\_2\\_article\\_](https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2016/march_april_2016/2016_aba_rpte_pp_v30_2_article_)

increasingly diverse society that it is supposed to protect and bring justice to everyone.<sup>251</sup> The legal system cannot bring and promote justice if it does not promote an understanding of who needs that justice.<sup>252</sup> The suggested solutions below are a start to a long journey of change in the legal system that will hopefully be the catalyst to larger, meaningful societal change.<sup>253</sup>

#### A. Title VII Modernization

There is a simple but potentially revolutionary suggestion for Congress to add “or any combination thereof” at the end of Title VII to give legitimization to intersectionality and intersectional claims.<sup>254</sup> This would permit claimants to have a legal framework that reflects their identities because they could have the opportunity to show a court the full extent of the discrimination they face.<sup>255</sup> Congress needs to understand the complexities of identity that inevitably make discrimination more

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madaan\_cultural\_competency\_and\_the\_practice\_of\_law\_in\_the\_21st\_century/ [https://perma.cc/68DJ-MDSV] (explaining ABA Model Rule 1.1 includes “cultural competency” which reinforces and “embraces the principles of equal access and non-discriminatory practices in service delivery” and “has been defined more specifically as “the ability to adapt, work and manage successfully in new and unfamiliar cultural settings.”).

251. See generally Max Radin, *The Goal of Law*, 1951 WASH. U. L. REV. 1, 1 (1951) (stating the goal of law is justice and exploring its meaning).

252. Cf. *DeGraffenreid*, 558 F.2d at 483–84 (“The legislative history surrounding Title VII does not indicate that the goal of the statute was to create a new classification of ‘black women’ who would have greater standing than, for example, a black male. The prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora’s box.”). The Black women in this case were not made whole because they were not allowed to bring a claim based on being Black women; they were forced to bring separate discrimination claims which did not reflect the unique discrimination they experienced. Since Black men were treated fairly, the employers were not racist. Since White women were treated fine, the employers were not sexist. This erases the experience the claimants experienced for being Black women.

253. Cf. Best, *supra* note 223, at 992 (“[A]ntidiscrimination lawsuits provide the least protection for those who already suffer multiple social disadvantages, thus limiting the capacity of civil rights law to produce social change.”).

254. Bradley Allan Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. C.R. L.J. 199, 224 (2006); cf. Best, *supra* note 223, at 992, 1018 (finding that intersectional claims brought under Title VII fail at a higher rate because judges do not consider intersectionality under Title VII). See generally Civil Rights Act of 1964, Pub. L. No. 88-352, § 7, 78 Stat. 241, 255 (explaining Title VII’s impact on discrimination due to race, religion, sex, or national origin).

255. See Best, *supra* note 223, at 1019 (justifying the need for intersectionality in Title VII claims due to the disadvantages faced when trying intersectionality claims).

complicated than single-faceted analysis.<sup>256</sup> Congress should use their law-making power to update and modernize laws that were created when society was less diverse.<sup>257</sup> Data shows an intersectional approach to discrimination law is necessary because society is becoming more diverse.<sup>258</sup> Further, there are plentiful experts to help guide and inform Congress about diversity, intersectionality, and multidimensional discrimination.<sup>259</sup> Modernizing the language of Title VII could be one of the most impactful solutions both parties could support because it is something that effects everyone; everyone is a culmination of a myriad of factors and characteristics that make up who they are, which affects how they are treated by society.<sup>260</sup> There is a negative public opinion in

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256. *Cf. id.* at 1009, 1019 (viewing different claims based on race, sex, religion, etc. as independent claims perpetuate disadvantages for those who face more than one type of discrimination).

257. *Cf.* Saul Loeb, *Trump Opposes Federal LGBTQ Nondiscrimination Bill, Citing 'Poison Pills,'* NBC NEWS (May 14, 2019, 2:25 PM), <https://www.nbcnews.com/feature/nbc-out/trump-opposes-federal-lgbtq-nondiscrimination-bill-citing-poison-pills-n1005551> [<https://perma.cc/W5WC-T3YN>] (referring to how Congress recognized the need to introduce new laws by proposing the Equality Act to help prevent discrimination against the LGBTQ+ community).

258. *Cf.* Livingston, *supra* note 246 (showing how the trend of increasing number of multiracial babies is leading to a more ethnically diverse society); *cf.* Kaestle, *supra* note 246, at 812, 814–17, 823–24 (2019) (explaining the fluidity of sexuality and how sexual orientation development follows multiple progressions creating a vast amount of sexual populations).

259. *See Kimberlé Crenshaw*, AFR. AM. POL'Y F., <https://aapf.org/kimberle-crenshaw> [<https://perma.cc/SMN5-CWHZ>] (referring to Kimberlé Crenshaw, an expert who has conducted workshops on intersectionality and helped other countries draft equality clauses into their constitutions, and showing one example of someone who could assist our government in updating laws to reflect our more diverse communities); *see* Rebecca Clay, *How Do I Become Culturally Competent?*, AM. PSYCH. ASS'N, <https://www.apa.org/gradpsych/2010/09/culturally-competent> [<https://perma.cc/C987-LF98>] (explaining Ali Mattu's approach to becoming more culturally competent through different training and experiences and how psychology programs cover cultural competence).

260. *See* Best, *supra* note 223, at 1017–19 (supporting the importance and need of adding intersectional claims to title VII.); *see also* Ruta K. Stropus, *Understanding Culture and Its Impact on Lawyering*, ILL. INST. FOR CONT. LEGAL EDUC. (July 20, 2018), <https://www.iicle.com/the-cross-cultural-lawyer> [<https://perma.cc/45BM-2ZX5>] (describing cultural competency and how people's cultures change the way lawyers must address their needs).

the role of the judicial branch to create laws.<sup>261</sup> Thus, Congress should do what they were elected to do and modernize Title VII.<sup>262</sup>

### B. *How Can Lawyers Help?*

The American Bar Association explained the Model Rules of Professional Conduct rules on competence includes cultural competency.<sup>263</sup> For attorneys who want to bring intersectional suits, cultural competence is necessary to adequately represent a client.<sup>264</sup> Attorneys can research and educate themselves or participate in Continuing Legal Education (CLE) courses specifically designed to help lawyers become more culturally competent.<sup>265</sup> For example, Illinois offers a CLE class about diversity, inclusion, and culturally competent lawyering that teaches attorneys how cultural differences could impact the representation of their clients.<sup>266</sup> Illinois also offers a CLE class about understanding the “myriad of factors which contribute to one’s culture,” which reflects an intersectional understanding a client has a diverse and multi-faceted identity that must be taken into account for representation.<sup>267</sup> In New York, there is a CLE that takes a more proactive approach by encouraging attorneys to discover and

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261. Cf. David Savage, *Brett Kavanaugh, a Washington Veteran, Is Trump's Second Pick for the Supreme Court*, L.A. TIMES (July 9, 2018, 6:00 AM), <https://www.latimes.com/politics/la-na-pol-brett-kavanaugh-supreme-court-20180709-story.html> [<https://perma.cc/MH77-5FU2>] (“A judge must be independent and must interpret the law, not make the law.”).

262. Cf. *Our Government: The Legislative Branch*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/the-legislative-branch/> [<https://perma.cc/DK65-HH9B>] (explaining the power of the legislative branch and the legislative process to pass bills, and, since Congress is the only power able to introduce legislation, Congress would have to be the one to amend Title VII).

263. Madaan, *supra* note 250 (“For legal professionals, cultural competency has been defined more specifically as ‘the ability to adapt, work and manage successfully in new and unfamiliar cultural settings.’”).

264. *Id.* (recognizing how an attorney needs to understand the culture of each client to know how to adequately represent them).

265. *But see id.* (“In an increasingly diverse society, attorneys no longer will be able to maintain competence simply by attending CLE courses.”).

266. *Module 8: Diversity & Inclusion: Culturally-Competent Lawyering*, ATT’Y REG. & DISCIP. COMM’N OF THE SUP. CT. OF ILL., <http://iadc.fastcle.com/store/seminar/seminar.php?seminar=104508> [<https://perma.cc/ZQL3-7TD6>].

267. Stropus, *supra* note 260.

acknowledge their own biases and try to eliminate them.<sup>268</sup> Whether a lawyer participates in CLEs about diversity and culture or takes it upon themselves to self-educate, the need for understanding diverse identities is essential in modern-day society.<sup>269</sup> Lawyers must be competent in representing their clients, which includes understanding their own biases, the client's identity, and how society, the law, and the justice system treats and views their client's identity.<sup>270</sup>

Apart from educating themselves, law firms should encourage and create avenues where their attorneys can become culturally competent.<sup>271</sup> In addition, law firms should have diversity efforts in their offices, including decisions in who they hire and which clients they represent.<sup>272</sup> These diversity issues and efforts need to be evaluated through an intersectional lens, meaning a law firm should hire and represent people whose identities intersect.<sup>273</sup> A possible way to get more diverse clients is by advertising their cultural competence and sensitivity after they have made diversity efforts and educated their lawyers accordingly.<sup>274</sup> If a claimant wants to bring a discrimination suit, they would probably feel most comfortable with someone who understands, validates, and takes into account their identity in their

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268. *Diversity, Inclusion and Elimination of Bias Curriculum*, N.Y. STATE BAR ASS'N, <https://www.nysba.org/DiversityCLE/> [<https://perma.cc/4APR-ERQN>].

269. Madaan, *supra* note 250 (acknowledging it is the attorney's responsibility to set "[t]he foundation of cultural competency . . . [by] recognizing the needs and individuality of each client and recognizing that each client brings a unique set of values and beliefs.").

270. *See id.* (encouraging attorneys to become culturally competent to adequately represent an increasingly diverse society and defining implicit bias to be the "unintentional or unaware act of grouping persons or things into categories that can lead to discriminatory behaviors.").

271. *Cf.* Coffey-Urban, *supra* note 223, at 38, 41–42 (highlighting the low number of minority members in the legal profession and the need for lawyers to analyze in an intersectional manner "to fully understand why a lack of diversity is still a problem" in the legal profession).

272. *Id.* at 38, 42 (encouraging the legal profession to understand intersectionality and incorporate efforts that promote a culture of inclusion).

273. *See generally id.* at 38, 44. Some examples of a person with multi-faceted identities that intersect such as Latinx transgender people (race and gender intersection), an old working-class man (economic status and age intersection), or disabled Black woman (disability, race and gender intersection).

274. *See* Debra Pickett, *Three Ways Legal PR Specialists can Support Diverse Attorneys*, THE NAT'L L. REV. (Aug. 13, 2019), <https://www.natlawreview.com/article/three-ways-legal-pr-specialists-can-support-your-firm-s-diverse-attorneys> [<https://perma.cc/JXC8-25LB>] (identifying ways attorneys can publicize their work to bring in more diverse clients and recognizing that diversity in the workplace is no longer a lofty goal, rather a strategic imperative).

representation.<sup>275</sup> Once attorneys and law firms have diversified their efforts, gone through cultural competence training and education, they should bring intersectional suits.<sup>276</sup>

Lawyers should not shy away from bringing intersectional discrimination claims; doing so will create case law and encourage other lawyers to bring similar claims to foster mobility for these claims.<sup>277</sup> If the Legislature does not add “any combination thereof” to Title VII, the Cluster Framework is a useful strategy for lawyers to present to courts on why a multi-burdened individual should be protected according to their multi-faceted identity rather than under a single-axis model.<sup>278</sup>

Courts can analyze discrimination claims based on a combination of protected classes by using the analysis already available for the protected classes.<sup>279</sup> For classes that are not protected, attorneys can use the Cluster Framework<sup>280</sup> to see why the category alleged as the basis of discrimination should be combined with the protected class alleged.<sup>281</sup> For example, if the transgender community were deemed unincorporated in the protected class of sex or if the Equality Act is not enacted into law,

275. Cf. *A 5 Step Guide to Finding the Right LGBT-Friendly Therapist*, LIGHTHOUSE LGBTQ+ AFFIRMING CARE, <http://blog.lighthouse.lgbt/5-step-guide-finding-lgbtq-therapist/> [https://perma.cc/3FU7-MQ5W] (explaining the usefulness of an individual who understands and knows how to accommodate a LGBTQ person’s unique experiences).

276. See Areheart, *supra* note 254, at 207, 214 (emphasizing the problematic and minimal amount of successful intersectional cases and the need for attorneys to find ways to create genuine intersectional precedent).

277. Cf. *id.* at 229–31 (discussing factors that stall intersectional cases from succeeding such as minimal precedent, the failure of the judge and juries to appreciate the harms of an injury, and the failure of attorney to recognize compound discrimination).

278. See Kate Sablosky Elengold, *Clustered Bias*, 96 N.C. L. REV. 457, 479–80 (2018) (explaining how the Cluster Framework, stemming from intersectionality/post-intersectionality theories, is the center of the modern antidiscrimination doctrine); see also Crenshaw, *supra* note 244, at 145 (confirming many courts analyze discrimination under a single-axis model by analyzing each protected category separately).

279. See, e.g., *Jeffers v. Thompson*, 264 F. Supp. 2d 314, 326 (D. Md. 2003) (affirming anti-discriminatory claims may be premised on a combination of discriminatory factors). *But see* Elengold, *supra* note 278, at 466, 489 (illustrating how courts in anti-discriminatory cases typically utilize an inequitable precedent that evaluates claims based on a single-axis model (single, separate claims and protected classes) rather than a combination of factors).

280. See Elengold, *supra* note 278, at 479–80 (“[The Cluster] framework addresses the critiques of intersectionality theory in a civil rights action, allowing for analogies to, and coalitions with, other subgroups experiencing discrimination.”).

281. See *id.* at 480 (opining that the Cluster Framework can be shown to represent the traditionally protected classes in antidiscrimination law).

they would not be a federally protected class.<sup>282</sup> The transgender community is vulnerable and there is a lack of protection for people of color who are transgender.<sup>283</sup> The Cluster Framework would allow the legal field to restructure a discrimination claim by analyzing together the client's race and being transgender rather than under one protected class of race.<sup>284</sup>

The Cluster Framework addresses and solves the criticisms of intersectionality by using a new framework for “pleading, litigating, and analyzing intersectional claims of discrimination within the anti-discrimination doctrine.”<sup>285</sup> The classic civil rights litigation tactic where the attorney tells a story that reaffirms societally recognized stereotypes in order to invoke a theme of familiarity that resonates with the values, beliefs, and assumptions of how factfinders understand the world and thus appear credible.<sup>286</sup> Dependence on stock stories can reinforce, rather than remedy, structural forces and inequities that perpetuate discrimination.<sup>287</sup>

In the traditional intersectionality Venn diagram, circle A represents a subordinated gender group such as female or female-ness, and circle B represents a subordinated racial group such as Black or Black-ness.<sup>288</sup> The overlap of the circles represents the intersection of the person's

282. See generally *The Equality Act: What Transgender People Need to Know*, NAT'L CTR. FOR TRANSGENDER EQUAL. (June 9, 2019), <https://transequality.org/blog/the-equality-act-what-transgender-people-need-to-know> [<https://perma.cc/QLG7-RBKD>] (emphasizing the Equality Act would prohibit discrimination based on sexual orientation or gender identity and provide expansive protections).

283. *Understanding the Transgender Community*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/understanding-the-transgender-community> [<https://perma.cc/QR4S-9K3Z>].

284. See Elengold, *supra* note 278, at 479–80 (“The cluster framework involves . . . explicitly defining discrimination to include the categorizing, stereotyping, and subjugation of certain subgroups of the protected class, thus accounting for the relationship between individual discrimination and structural inequities; and . . . recogniz[es] the full range of harms that flow from complex discrimination-to the individual, her community, her subgroup and her group.”)

285. *Id.* at 479.

286. *Id.* at 465, 469–71 (“[S]cholars have explored the dangers of stock stories in venues like housing discrimination and employment discrimination. For example, the “dirty old man” stock story utilized in sexual harassment in housing cases is problematic because, by excluding race from the story and thus from the judicial analysis, the stock story perpetuates the very stereotypes and structural forces that have operated throughout American history to ignore and permit continued sexual abuse of Black women in the home.”).

287. *Id.* at 469–71.

288. *Id.* at 475–76, 480, 483.

different identities.<sup>289</sup> This diagram is fuel for the critiques of under-inclusivity and over-inclusivity because it attempts to overcome prior criticisms concerning the importance of protecting specific subgroups under antidiscrimination laws.<sup>290</sup> In the Cluster Framework, the circles are not defined by subjugated groups but represent the traditionally protected classes in antidiscrimination law.<sup>291</sup> Instead, the circles are coterminous; circle A now represents sex and circle B represents race.<sup>292</sup> Within the circles are horizontal and vertical lines that represent the continuum of the protected class.<sup>293</sup> In the example of the Black female, circle B, which represents race, has a vertical line that uses the socially constructed definition and view of race based on “phenotype, skin color, and other physiological aspects that often define Black people in the United States.”<sup>294</sup> The line goes from White-ness to Black-ness, and where an individual falls is based on those visual cues of race.<sup>295</sup> Each dot in the coterminous circles represents an individual’s intersectional identity and together creates clusters, which allows for group study, overcoming the critique of over-inclusivity.<sup>296</sup> The Cluster Framework offers insight into structural inequalities suffered by “a cluster and can help explain why certain subgroups should be studied and protected as a group, even if their individual experiences are not identical.”<sup>297</sup> This helps explain why civil rights laws should specifically protect a subgroup—such as Black women—rather than throwing them into the

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289. *Id.* (articulating how the overall construction of the Venn Diagram represents a person’s different identities and their overlap).

290. *See id.* at 483 (“The concept of coterminous circles more explicitly recognizes the inextricable nature of categories or statuses of identity and bias. And pulling the circles back to represent the entire protected class (e.g., sex), rather than limiting the circle to subordinated subgroup of the class (e.g., female), does work toward answering the critiques of intersectionality theory as applied to civil rights jurisprudence.”).

291. *See id.* at 483 (claiming the structure of the cluster graph better demonstrates why subgroups should be studied as entities on their own).

292. *See id.* at 476 (defining the cluster framework as two circles that stack on top of one another, so the identities fully intersect).

293. *Id.* at 480.

294. *Id.* at 480–81 (demonstrating how each line across the circles represents a sliding scale on which each person can be classified depending on their identity).

295. *Id.*

296. *See id.* at 483 (providing the dotted clusters better illustrate the concept that subgroups should be studied as group).

297. *Id.*

broad category of women where they are usually forgotten due to the dominance of White women.<sup>298</sup>

If lawyers bring more intersectional lawsuits, there will be more case law and, as is already shown in case law, there will most likely be a circuit split on how courts handle these cases.<sup>299</sup> This could lead to the Supreme Court clarifying and possibly interpreting discrimination law to mean a claimant could bring a claim based on one or more of the protected class combined rather than separate.<sup>300</sup> This would ultimately make intersectional claims legitimate and integrated into the legal system.<sup>301</sup>

### C. Law Schools

Law schools are in the best position to implement intersectionality into the legal profession because *they* are creating the next generation of lawyers.<sup>302</sup> Law schools can include cultural competency into their curriculum and create attorneys who are competent to bring intersectional suits by introducing certain lessons and assignments into their programs.<sup>303</sup> Further, ABA Standard 302(d) encourages law schools to

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298. *See id.* at 489 (illustrating how grouping Black women’s legal issues with those of White women can stifle the unique issues relevant only to Black women under this organizational structure).

299. *Cf. Areheart, supra* note 254, at 222 (“[There is] general confusion in courts regarding how to evaluate the components of an intersectional claim.”); *cf. Elengold, supra* note 277, at 497 (“[I]f plaintiffs seek damages commensurate with the full extent of their injuries, the law can develop with a respect for the disproportionate burden that certain subgroups have carried historically and today.”)

300. *Cf. Areheart, supra* note 254, at 214 (“The closest the U.S. Supreme Court has come to addressing the intersectional dilemma is its approving citation to *Jefferies v. Harris County Community Action Ass’n*. Unfortunately, the reference was made in passing and lacked any analysis.”).

301. *Cf. Elengold, supra* note 278, at 497 (“[S]hifting to a cluster framework can do some work toward overcoming the barriers that have existed for civil rights plaintiffs asserting intersectional bias.”).

302. *See Bonny L. Tavares, Changing the Construct: Promoting Cross-Cultural Conversations in the Law School Classroom*, 67 J. LEGAL EDUC. 211–12 (2017) (“Promoting cross-cultural awareness should be an important aspect of professionalism training’ in legal education. Cross-cultural awareness is essential to our students as they prepare to practice in an increasingly diverse domestic and international legal marketplace with competence and confidence.”).

303. *See id.* at 214–16 (“[F]aculty should help students avoid becoming the next lawyer or judge to be sanctioned for culturally offensive behavior. More broadly, early and repeated faculty attention to cross-cultural issues can improve the learning environment for all students while they are still in law school.”).

include a curriculum which augments a lawyer's ability to competently represent clients and extend cultural competency in their teachings.<sup>304</sup>

For lawyers to bring intersectional claims, they must have cultural competence<sup>305</sup> to understand the complex identities of their clients and use it in their representation strategies.<sup>306</sup> "Cultural competence is based on the premise of respect for individuals and the cultural differences and the implementation of a trust-promoting method of inquiry, advice, and counsel."<sup>307</sup> Law schools can play an integral role in fostering culturally competent lawyers by integrating cultural competence into their curriculums.<sup>308</sup> The first thing a law school that wants to participate in implementing intersectionality needs to do is to look at their admissions to see if the institution is accepting a diverse student body.<sup>309</sup> A diverse student body exposes students and faculty to different cultures which can create familiarity, tolerance, and understanding of people from different backgrounds.<sup>310</sup> To use St. Mary's University School of Law as an example, this law school is in San Antonio, Texas, where 64% of the city

304. AM. BAR. ASS'N, MANAGING DIRECTOR'S GUIDANCE MEMO: STANDARDS 301, 302, 314, AND 315 1-2 (2015), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2015\\_learning\\_outcomes\\_guidance.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_learning_outcomes_guidance.pdf) [<https://perma.cc/2N6R-Z639>].

305. Cf. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 66 (1st ed. 2007) (emphasizing the need for law schools to have the capacity to identify and respond appropriately to issues of culture and communication and "to create settings in which bias and stereotype are less likely to govern and to seek to eliminate bias.").

306. See Cynthia M. Ward & Nelson P. Miller, *The Role of Law Schools in Shaping Cultural Competent Lawyers*, 89 MICH. BAR J. 16, 16 (2010) ("With an increasingly diverse potential client base, lawyers cannot ignore cultural competence. Lawyers must provide competent legal services. Competent service depends on understanding the clients whom lawyers serve.").

307. *Id.* at 17.

308. See *id.* at 18 ("Education in cultural competence involves more than admitting law students of different ethnicities and culture. Law schools must also provide increasing opportunities for diversity education and cultural-competence training through their curricula and co- and extracurricular offerings."); see also Tavares, *supra* note 302, at 216 ("Addressing issues of bias throughout the curriculum supports a law school's diversity policy by 'freeing the voices of students with diverse perspectives,' and enriching the classroom discussion by including 'the perspectives of female students, students of color,' LGBTQIA students, religious minorities, students with disabilities, students of various national origins, and others.").

309. Ward & Miller, *supra* note 306, at 17.

310. See *id.* at 20 ("Law schools 'can enhance their students' abilities to deal sensitively and effectively with diverse [individuals and] groups . . . by serving as a model for promoting diversity in law practice and the community . . .").

is Latino,<sup>311</sup> and the student body is among the top ten law schools in regard to our percentage of Hispanic students in the country.<sup>312</sup> The faculty is majority White and male.<sup>313</sup> With a diverse student body, St. Mary's is in a good position to introduce a curriculum that fosters cultural competence, which in turn will encourage alumni lawyers to bring intersectional claims.<sup>314</sup> One way to integrate teaching cultural competence is for professors to have conversations about the legal issues from various cultural perspectives based on classroom demographics.<sup>315</sup> For example, in a criminal law class, the professor could ask men for their input about sexual assault laws to hear a different perspective from a group that is far less likely to be a sexual assault victim.<sup>316</sup> Such a tactic would encourage different perspectives to be heard, challenged, and possibly find some common ground.<sup>317</sup> This can be done by encouraging student input and conversations about the case's fairness, the

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311. *Quick Facts: San Antonio, Texas*, U.S. CENSUS BUREAU (2018), <https://www.census.gov/quickfacts/sanantoniocitytexas> [https://perma.cc/W94X-KBQL] (detailing the demographic makeup of San Antonio, TX, which in addition to its 64% Latino population, is 25% White and 7% Black).

312. *Law School Enrollment by Race & Ethnicity (2018)*, ENJURIS, <https://www.enjuris.com/students/law-school-race-2018.html> [https://perma.cc/D5TD-UAA7] (commending St. Mary's University School of Law for becoming one of the top 10 law schools with the highest enrolment of minorities—49.39%); *St. Mary's University National Comparison: Overview of Facts*, PUB. LEGAL (2019), <https://www.ilrg.com/rankings/law/view/97> [https://perma.cc/5DAY-S8RW]; James Aldridge, *St. Mary's Law School Ranks First in Texas in Diversity*, SAN ANTONIO BUS. J. (Mar. 10, 2015, 12:33 PM), <https://www.bizjournals.com/sanantonio/news/2015/03/10/st-mary-s-law-school-ranks-first-in-texas-in.html> [https://perma.cc/9QYX-3MNF] (“U.S. News & World Report has ranked St. Mary's University as the most diverse law school program in Texas.”).

313. PUB. LEGAL *supra* note 312 (reporting the St. Mary's School of Law faculty is 64% male, 36% female, and 24.6% minority).

314. *See id.* (noting a 5.1% increase in female enrollment at St. Mary's School of Law since 2017 as well as an overall increase in student enrollment over the same period).

315. Tavares, *supra* note 302, at 226–27 (2017) (creating a classroom environment with the capability of entertaining a wide range of perspectives requires trust, planning, and a professor to facilitate the discussion through the role of a neutral moderator).

316. *See* Michele C. Black et al., *National Sexual Violence Resource Center 2010 Summary Report*, NAT'L. CTR. FOR INJURY PREVENTION AND CONTROL 1 (2010), [https://www.cdc.gov/ViolencePrevention/pdf/NISVS\\_Report2010-a.pdf](https://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf) [https://perma.cc/SGA6-3RRM] (reporting one in five women will be raped at some point in their life while one in seventy-one men will be, which indicates that men overall are less likely to be victim of a sexual assault).

317. *Cf.* Tavares, *supra* note 302, at 228 (recommending professors do their best to provide students with as many perspectives on groups as possible instead of aiming to solely on a black and white dichotomy).

evidence, and the law itself.<sup>318</sup> To challenge students to be critical of the law, the students will gain critical thinking skills and understand the law on a deeper level.<sup>319</sup> Discussing the law and hearing different perspectives about the law and cases will help foster tolerance of different people, understanding of different cultures and perspectives, which can help cultural competency efforts.<sup>320</sup>

Being a culturally sensible lawyer “requires an understanding that we all have multifaceted cultural backgrounds, experiences, and biases that affect how we perceive and analyze legal problems and how we interact with clients and colleagues.”<sup>321</sup> Law school courses have their set curriculums tailored to meet ABA requirements, so it may be smarter and more efficient to have a class directly dedicated to teaching cultural competency and implicit biases.<sup>322</sup> If there were a class dedicated to teaching cultural competency and implicit biases, it would challenge students to identify and understand their own biases.<sup>323</sup> This class could

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318. Cf. Alexander C. Gavis & Mark E. Young, *A Need for Lawyers with Empathy*, THE NAT'L. L. J., <https://www.law.com/corpcounsel/2018/08/07/a-need-for-lawyers-with-empathy/> [<https://perma.cc/4JXE-RBPY>] (encouraging how the development of a lawyer's empathy begins during their law school years and includes incorporating strategies to learn about their client's "history" to build better client relationships and provide robust and collaborative legal representation).

319. See Tavares, *supra* note 302, at 214–15 (“Probing what cultural assumptions underlie an opinion or an individual argument fosters critical thinking characteristic of good legal analysis.” Students will have a broader and deeper understanding of case law . . .”).

320. Cf. Gavis & Young, *supra* note 318 (asserting both the public and private sectors value a lawyer with empathy skills because they have the potential to revolutionize the profession).

321. Tavares, *supra* note 302, at 214 (urging for students to be trained in cross-cultural analysis because they will become writers and advocates by fostering deep analytical skills, case reading, and the ability to identify cultural bias).

322. See *id.* at 216 (“Pursuant to ABA Standard 302(d), encouraging cultural competency across the curriculum provides a means for law schools to help students develop the ‘professional skills needed for competent and ethical participation as a member of the legal profession.’”); see also *ABA Standards and Rules of Procedure for Approval of Law Schools 2020–2021*, A.B.A. [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf) [<https://perma.cc/WVD7-AYTP>] (detailing the ABA requirements and objectives for legal education programs).

323. See Tavares, *supra* note 302, at 216 (“Improving student’s cultural competency through classroom discussion helps them to connect issues of diversity with the day-to-day practice of law. Cross-cultural discussion helps to raise students’ awareness, equips them with the ability to recognize potential pitfalls created by cultural insensitivity, and helps them to avoid embarrassing mistakes, which in turn protects and elevates the reputation of the legal profession.”); cf. STUCKEY ET AL., *supra* note 305, at 22 (“It is important for law schools to help students develop their capacity to deal sensitively and effectively with clients and colleagues from a range of social,

go even further by addressing why certain classes are protected while others are not and how the larger system institutionally oppresses people.<sup>324</sup> The class could be imbedded in the second or third-year law school curriculum as students start to work in firms, complete pro bono hours, and begin to study for the Multistate Professional Responsibility Examination (MPRE).<sup>325</sup>

If law schools neglect or refuse to implement cultural competency lessons into their curriculum, the student body should create interactive seminars.<sup>326</sup> During the University of Pennsylvania Carey Law School's Public Interest Week, a combination of student organizations hosted a panel discussion about the evolution of intersectional approaches to advocacy, how public interest lawyers can work around the law's limitations for intersectional claims, and strategies for how law schools can incorporate an intersectional approach.<sup>327</sup> An addition to this seminar, or a separate seminar, could be a brainstorming session on how to bring intersectionality into the norm of the legal systems and what law students who want to go into policy can do.<sup>328</sup> Interactive seminars and

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economic, and ethnic backgrounds.”). *See generally* Ward & Miller, *supra* note 306, at 16–17 (assessing the growing significance of educating students in law school on cultural competence and how it correlates to the legal profession and practice of law).

324. *Cf.* Tavares, *supra* note 302, at 215 (“[E]ffective representation of a client from a different culture should include being wise to the prejudices and biases of others [or institutions and the law] that may affect how a client has been or will likely be treated.”). This example is a whole class in itself, and most likely would need to be a jurisprudence course. The class expands into philosophies, such as race theory, gender theory, institutional racism, etc.

325. *See* STUCKEY ET AL., *supra* note 305, at 208, 209 (emphasizing law students should develop life-long learning skills, self-reflection, and other skills related to cultural competency during their second and third-years of legal education).

326. *See* Ward & Miller, *supra* note 306, at 18 (favoring the idea of clinical programs as another area to incorporate cultural-competence training). *See generally* *PI Week—Intersectionality and the Law*, PENN L. (Oct. 23, 2019), [https://www.law.upenn.edu/newsevents/calendar.php#!event\\_id/60852/view/event](https://www.law.upenn.edu/newsevents/calendar.php#!event_id/60852/view/event) [<https://perma.cc/7ZSQ-YMKW>] (showcasing seminars during Pennsylvania Law's Public Interest week and showing that law schools can incorporate seminars on intersectional approaches to discrimination).

327. *PI WEEK—Intersectionality and the Law*, *supra* note 326.

328. *See id.* (addressing how law schools, law students, and lawyers can incorporate intersectionality approaches into the profession and the impact of this commitment to understanding the overlapping and interdependent aspects of disadvantage and discrimination for individuals—“including how public interest lawyers can work around current limitations of the law to advocate for clients experiencing intersectional discrimination.”).

events are a great start for law schools to begin integrating cultural competence and intersectionality in teaching.<sup>329</sup>

#### CONCLUSION

Our world is becoming more accepting and understanding of different kinds of people, and the law needs to catch up and be a leader in embracing the complexities of individuals in our society.<sup>330</sup> Laws are supposed to protect all persons, and, to achieve that purpose, the law must reflect the complexities and uniqueness of each person in our society.<sup>331</sup> Also, the law must be flexible enough to protect the unique situations that arise among a diverse population.<sup>332</sup> Intersectionality recognizes multifaceted people and understands their unique place in society can cause multidimensional discrimination.<sup>333</sup> Discrimination law, as it exists

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329. See Ward & Miller, *supra* note 306, at 18 (“The law school curriculum provides far-reaching opportunities for intentional cultural-competence training for students. With traditional legal education lasting three years, law schools can integrate cultural-competence training into students’ professional development.”); see also, e.g., *PI WEEK – Intersectionality and the Law*, *supra* note 326. (providing additional solutions for law schools to utilize in their own curriculum and academic environment to address intersectionality).

330. Cf. Eric Levenson, *All the Ways the Trump Administration Has Rolled Back Protections for Transgender People*, CNN (Oct. 22, 2018, 5:27 PM), <https://www.cnn.com/2018/10/22/politics/transgender-trump-protection-rollback-trnd/index.html> [<https://perma.cc/6RHW-ZU4M>] (showing how policy, and the directives and proposals taken by the Trump administration oppressively discriminate LGBTQ+ members and leave them less protected); cf., e.g., German Lopez, *FBI: Reported Hate Crimes Increased by 17 Percent in 2017*, VOX (Nov. 13, 2018, 1:10 PM), <https://www.vox.com/policy-and-politics/2018/11/13/18091646/fbi-hate-crimes-2017> [<https://perma.cc/D5U9-KBPU>] (“[Donald Trump has] been repeatedly criticized, from his campaign to his presidential statements and tweets, of stoking racist sentiment, particularly against immigrants and refugees. . . . [H]ate crime experts . . . said there has likely been an uptick [in hate crime] due to Trump’s rhetoric . . .”).

331. See generally NAT’L CTR. FOR TRANSGENDER EQUAL., *supra* note 282 (“The Equality Act prohibits discrimination based on an individual’s sexual orientation or gender identity in employment, housing, credit, education, jury service, federally-funded programs (including health care), and businesses that serve the public. It will also prohibit discrimination against women and girls in public accommodations for the first time in federal law.”).

332. Cf. John A. Powell, *The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity*, 81 MINN. L. REV. 1481, 1511 (1997) (Thus, in terms of the law, rules that prohibit racial and gender discrimination by addressing them as discrete phenomena do not adequately extend protection to a person marked by both subordinate gender and racial status.”); cf. e.g., Areheart, *supra* note 254, at 202 (“[T]here is a legitimate need to push for additional statutory protection, particularly in the area of sexual orientation.”).

333. See Jane Coaston, *The Intersectionality Wars*, VOX (May 28, 2019, 9:09 AM), <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination> [<https://perma.cc/DQ9B-672S>] (“On the right, intersectionality is seen as

today, does not recognize the multi-faceted identity.<sup>334</sup> Law schools, lawyers, the legislature, and the legal system as a whole can play their own integrals roles in normalizing intersectionality in the law.<sup>335</sup> All people are made up of a series of factors defining who they are.<sup>336</sup> We would all benefit from the adoption of intersectionality in the law, especially those of us whose complex identity is a target of multi-axis discrimination.<sup>337</sup> The time has come for the law to be updated to do what it is supposed to do—protect us individually and collectively.

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‘the new caste system’ placing nonwhite, non-heterosexual people on top. To many conservatives, intersectionality means ‘because you’re a minority, you get special standards, special treatment in the eyes of some.’ It ‘promotes solipsism at the personal level and division at the social level.’ . . . Intersectionality is thus ‘really dangerous’ or a ‘conspiracy theory of victimization.’”)

334. See Crenshaw, *supra* note 244, at 151 (“Because the scope of antidiscrimination law is so limited, sex and race discrimination have come to be defined in terms of experiences of those who are privileged *but for* their racial or sexual characteristics. . . . Notions of what constitutes race and sex discrimination are as a result, narrowly tailored to embrace only a small set of circumstances . . .”).

335. See Aubrey Coffey-Urban, *Intersectionality, Diversity and the Legal Profession*, ARIZ. ATT’Y, Apr. 2017, at 38, 40, 42 (“Intersectionality comes from the legal profession. It was named by a legal scholar and evolved out of various movements embedded in our professions, taken on by individuals in our profession, and brought to the public by those individuals. . . . Understanding intersectionality and carrying that understanding and perspective into your everyday life can have a huge impact on how you see the world and how you see others.”).

336. *Id.* at 38, 40 (opining the necessity to better understand the multiplexities of an individual’s identity and “recognize that the experiences of people with various identities will not be the same in all social contexts.”).

337. See Coaston, *supra* note 333 (“Intersectionality operates as both the observance and analysis of power imbalances, and the tool by which those power imbalances could be eliminated altogether. And the observance of power imbalances, as is so frequently true, is far less controversial than the tool that could eliminate them.”).