Comments

Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims

Rosalio Castro† and Lucia Corral‡

INTRODUCTION

The American labor system has been shaped by historical White\(^1\) male domination that continues to subordinate people of color and women. The authors agree with theorists and scholars who argue that working women of color\(^2\) are more vulnerable to racist and sexist employment practices than either working White women or working men of color.\(^3\) This is true because women of color have traditionally worked in employment positions lacking power, equal pay, or social prestige. For

‡ B.A. 1988 University of California, Los Angeles; J.D., 1993 University of California, Hastings College of the Law. The authors would like to thank Mary Dunlap, our “familias,” La Raza Law students at Hastings and Boalt Hall, and the brave women who have the courage to assert their rights.

1. The descriptions “Black” and “White” will be capitalized because they denote classes of people with distinct cultures and history. By capitalizing these terms the authors intend to show the same respect given to terms which describe nationality, e.g., “Mexican.” While titles such as “African-American” and “White Anglo-Saxon Protestant” may be more appropriate, we have chosen to use White and Black because these are the terms used most often in the case law.

2. We use the term “women of color,” however we recognize that women are not discriminated against solely on the basis of their color.

example, the labor force in Northern California canneries has long been segregated by race (Chicana) and sex (female), and more recently by age (middle-aged). The vulnerability of women of color is particularly true for undocumented immigrant women who must deal with the very real threat of "cross reporting" to the Immigration and Naturalization Service (INS). If women of color want legal redress, they are forced to use a legal construct that does not recognize the bias they face because of the combination of their race and gender.

The same interests that create the labor system are responsible for the legal system which supports it, and these interests are fundamentally propelled by historical White male chauvinism. Evidence of this proposition is the current U.S. legal system itself, which until early this century, did not permit even White women to practice law. Further, not until the 1960s and the implementation of affirmative action programs did people of color attend law school in any significant numbers. It has been twenty-nine years since the passage of the Civil Rights Act of 1964, yet the promise of equal opportunity in employment remains substantially unfulfilled. Even with these struggles to achieve equality, women of color remain marginalized within the women's rights movement and the Civil Rights movement of the 1960s.

The struggles to achieve social equality for women and people of color have repeatedly sacrificed the particular concerns and needs of women of color for the advancement of the larger group. For example, according to Chicano activist Jesus Moya, during the Chicano Movement of the late 1960s and early 1970s Chicano males exhorted Chicana women to wait until racial equality was achieved for the good of the movement before they assert their rights as a doubly or triply oppressed class of women. Indeed, many women were accused of being divisive when they did voice their needs.

Many theorists have grappled with the problem of women of color

5. See Sandra Henriquez Cacavas, Violence Against Undocumented Women, 3 HASTINGS WOMEN'S L.J. 83 (1992) (explaining that while many undocumented Latina survivors would like to report crimes committed against them, they fear that law enforcement officials will "cross report" them to the INS).
8. See DAVIS, supra note 7. See also Rocio de Lourdes Cordova, A Brief Note on the Birth of Latinas, 3 HASTINGS WOMEN'S L.J. 71 (1992); Crenshaw, supra note 7.
10. Id.
who experience employment discrimination and intend to litigate a Title VII claim not because they are people of color or because they are women, but because they are women of color. Legal scholars like Kimberle Crenshaw, Adrienne Dale-Davis, Mari Matsuda, Angela Harris, and Peggy Smith criticize the system of categorization in which the multidimensionality of people and their experiences are lost in a categorical framework. The development of scholarly legal research on the subject of the intersection of race and gender is led by Kimberle Crenshaw.11 Hers is one of the first theoretical models that examines the assumption that Black women's experiences are interchangeable with White women and/or Black men in Title VII applications. Peggy Smith elaborates on the distinctiveness of Black women's experience with a focus on Title VII.12 Her analysis, like Crenshaw's, criticizes Title VII's historical approach to Black women's allegations of discrimination, because it fails to recognize that racism and sexism interact inextricably to harm Black women.13 In essence, it is the categorical framework of Title VII within which women of color must work to base their discrimination claim that Crenshaw and Smith criticize. These categories distort the experience of women of color and lead once again to the marginalization of the particular needs of women of color.

Law professor Adrienne Dale-Davis agrees. She states: "[I]t is important] for people who are progressive in our politics and looking towards liberation to understand the fight. In essence I think it is to identify the categories that are out there and take control of who it is that is assigning meaning to them."14

Other theorists have criticized different aspects of the American legal perspectives that allow for the creation of these ineffective categories. These legal theorists argue for different jurisprudential methods that will consider a plethora of experiences. Mari Matsuda, for example, argues for a multiple consciousness perspective.15 Angela Harris identifies and argues strongly against essentialist perspectives.16 Additionally, Trina Grillo and Stephanie Wildman identify and criticize racial/White supremacist perspectives and essentialist presumptions that underlie our

11. See Crenshaw, supra note 7.
13. Id. at 23.
16. Harris, supra note 7, at 585 (1990) (defining essentialism as the notion that a unitary, "essential" women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience).
legal system. All of these criticisms clearly point to recognizing the intersection of race and gender as a distinct basis of discrimination.

In this article we explore the different ways in which courts have interpreted Title VII claims brought by women of color against the background of the legal framework advocated by the theories described above. In addition, we investigate how practitioners have chosen to pursue these claims. Federal courts currently disagree on the interpretation of Title VII, and while many recognize the intersection of race and gender, others do not. Finally, we recommend a theoretical framework and legislative proposal that would address these inconsistencies and provide women of color with an adequate legal remedy against discrimination based on both race and gender.

**DISCUSSION**

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex or national origin. This framework assumes that all discrimination will fit squarely within one of these categories. Indeed, most Title VII litigation has operated on this basic notion. Serious issues arise, however, when a claimant wishes to combine any of the categories protected under Title VII. The combination pertinent to our discussion is that of race and gender. For example, a Black female who alleges employment discrimination claiming that she was not hired because she is a Black female may lose her case if the employer defends by showing that it has hired Black men and that it has hired White women. Similarly, a Chicana/Latina might allege employment discrimination based on her sex, race and national origin. Her employer could defend by showing it has hired White women and Chicano/Latino males. The problem of leaving women of color without a remedy under Title VII may seem to some to be a far-fetched manipulation of facts. The notion that an individual could be discriminated against for such a precise amalgam of reasons may seem unrealistic. To victims of discrimination, however, especially women of color, such a scenario is a reality of everyday life. Judith Winston, a legal scholar, articulates the problem as follows:

Working women who are members of racial minorities are frequently victimized by discrimination precisely because they are women of color. Thus, for them, racial and sexual discrimination coexist. When employers act on racial stereotypes that render women of color more vulnerable

---

19. The terms "combination of race and gender" and "intersectionality" are used interchangeably.
20. We use the words Chicana/Latina in our discussion to include the experiences of Chicana women as well as Latinas.
to sexual harassment, a combination of race and sex discrimination, or race-based gender discrimination, results.\textsuperscript{21}

The insensitivity to issues that face women of color in employment is exemplified best by Title VII's lack of direction regarding the intersection of race and gender. Attorneys themselves are so constrained by Title VII's rigid categorical framework that they have failed to recognize combination claims based on race and sex. Indeed, some attorneys who practice in this area have never even thought about pursuing a claim in this manner.\textsuperscript{22} Nevertheless, the few cases that have squarely tackled this issue reveal a glimmer of hope that the courts will recognize the combination of protected categories and allow a remedy for victims of such discrimination. Until Congress acts, judicial interpretation provides the only hope for a remedy. The following is a summary of the few cases that have focused on the intersectionality issue.

**Cases Against the Intersectionality Perspective**

The leading case refusing to recognize the rights of women of color under Title VII is *DeGraffenreid v. General Motors.*\textsuperscript{23} This case involved five Black women who brought a Title VII action against their former employer, General Motors (GM), charging that the seniority system of "last-hired first-fired" layoff policy perpetuated the effect of past race and sex discrimination in violation of Title VII.\textsuperscript{24} The class consisted of all Black women who were victims of GM's alleged discrimination.\textsuperscript{25} The district court dismissed the sex discrimination claim on its merits, and it dismissed without prejudice the claim charging racial discrimination.\textsuperscript{26} The district court ruled that a complaint such as this one could state a "cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both."\textsuperscript{27} The district court believed the plaintiffs should "not be allowed to combine statutory remedies to create a new 'super-remedy' which would give them relief beyond what the drafters of the relevant statutes intended."\textsuperscript{28}

The sex discrimination claim was dismissed on its merits because GM had hired White female workers before the effective date of Title

\begin{itemize}
\item \textsuperscript{21} Winston, *supra* note 3, at 412.
\item \textsuperscript{22} The foregoing is based on several interviews of prominent Title VII plaintiff's attorneys in the San Francisco area. Unfortunately we were unable to explore the practical aspects of litigating a combination claim because this approach has not been attempted by the attorneys interviewed. But see Shoben, *Compound Discrimination: the Interaction of Race and Sex in Employment Discrimination*, 55 N.Y.U. L.REv. 793 (1980) (offering a systematic method for statistically determining whether an employer is discriminating on the basis of a combination of characteristics).
\item \textsuperscript{23} 558 F.2d 480 (8th Cir. 1977).
\item \textsuperscript{24} *Id.*
\item \textsuperscript{25} *Id.* at 482.
\item \textsuperscript{26} *Id.*
\item \textsuperscript{27} *Id.*
\item \textsuperscript{28} *Id.* at 483.
\end{itemize}
However, prior to 1970, GM had employed only one Black female.\textsuperscript{30} The result of the district court's reasoning is that Black females cannot maintain a sex-based claim of discrimination if the employer has hired White females. This is an example of the loophole that is created when lawmakers fail to realize the likely implications of essentialist reasoning.\textsuperscript{31}

The fact that this case was upheld by the Eighth Circuit has commentators concerned that women of color will continue to fall through the cracks created by judicial interpretations of Title VII. However, even within the Eighth Circuit the language of the district court's ruling in \textit{DeGraffenreid} was severely questioned. In fact, the Eighth Circuit upheld the district court decision on other very significant grounds. The Eighth Circuit stated, "We do not subscribe entirely to the district court's reasoning in rejecting appellants' claims of race and sex discrimination under Title VII."\textsuperscript{32} The Eighth Circuit upheld the case because the United States Supreme Court had decided \textit{International Brotherhood of Teamsters v. United States} in the interim.\textsuperscript{33} The \textit{Teamsters} case emphasized that § 703(h) of Title VII validates facially neutral seniority systems, even if they perpetuate the impact of race discrimination which occurred before the effective date of Title VII. The main reason for allowing these seniority systems to remain valid is to protect the vested seniority rights of arguably innocent workers. "Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees."\textsuperscript{34} As applied by the Eighth Circuit, GM's seniority system was found to be "neutral in operation."\textsuperscript{35}

Thus, it appears that the district court's often cited language disallowing combination of categories is no longer uncontroversial law. It is clear that the Eighth Circuit relied solely on \textit{Teamsters} for upholding the result. The Eighth Circuit upheld the district court's decision because it found a newly protected seniority system, not because race and sex could not intersect in a Title VII cause of action. While this bit of insight provides little consolation for the plaintiffs in \textit{DeGraffenreid}, it does weaken the force of what to date had been the most explicitly antagonistic language against the combination of liability theories.

In \textit{Robinson v. Adams}, the Ninth Circuit denied a claim of race and sex discrimination to a Black male because the proffered statistics did not

\begin{itemize}
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} \textit{Id.} at 482.
\item \textsuperscript{31} \textit{See} Harris, supra note 7.
\item \textsuperscript{32} \textit{DeGraffenreid}, 558 F.2d at 484.
\item \textsuperscript{33} \textit{International Brotherhood of Teamsters v. United States}, 431 U.S. 324 (1977).
\item \textsuperscript{34} \textit{Id.} at 354.
\item \textsuperscript{35} \textit{DeGraffenreid}, 558 F.2d at 485.
\end{itemize}
show a disparate impact on Blacks as a whole. Judge Harry Pregerson's dissent, however, stated the strongest reasoning in support of allowing the combination of protected categories.

In Robinson, the plaintiff, Kenneth Robinson, had applied for four positions with the County of Orange and the Orange County Superior Court. Orange County denied each application at the initial screening phase, and Robinson filed charges with the Equal Employment Opportunity Commission (EEOC). The statistics showed no disparate impact on Blacks as a whole. Blacks represented 1.2% of Orange County's population, yet “1.7% of the Superior Court work force was Black, and 2.7% of both the 'Professional' and 'Official/Administration' positions in the County of Orange were held by Blacks.” Robinson maintained, however, that Orange County's hiring process had a disparate impact on Black males as a distinct group because Orange County's Court had no Black males in its workforce. After stating that there was no disparate impact on Blacks as a whole, the Ninth Circuit concluded the following:

Obviously, since [B]lacks are not statistically underrepresented in the Orange County Superior Court’s workforce, Robinson cannot plausibly maintain that the court’s hiring practices have a racially discriminatory impact on [B]lacks as a whole. Conceivably, the absence of any [B]lack male employees could result from racial stereotyping or have some other link to racial discrimination. Robinson, however, has presented insufficient evidence to suggest that this is the case here. His showing that [B]lack males are statistically underrepresented cannot, standing alone, show a racially discriminatory impact on [B]lacks as a whole.

Robinson’s evidence, however, was not designed to show a disparate impact on Blacks as a whole; it was designed to show a disparate impact on Black males as a class. The Ninth Circuit failed to recognize this point completely and offered that Robinson might have a claim if he could “identify” the specific employment practice that “caused” such a disparate impact. One can only conclude that the court was confused by the complexities of Title VII litigation or that a claimant must first establish race discrimination as a whole before being allowed to show discrimination based on race and sex combined.

Judge Harry Pregerson dissented arguing that the Ninth Circuit had failed to see that Robinson had a claim as an “individual.” Pregerson's
dissent will be discussed later; suffice it to say, Pregerson's view is the most persuasive in support of cases that combine protected categories under Title VII. Though we agree that judicial and legislative attention should be brought to bear on this issue, we are also of the opinion that there is sufficient precedent and strong reasoning on which to build an argument for combining race and sex as a distinctly protected category.

CASES IN SUPPORT OF COMBINATION THEORY

Fortunately, cases such as Robinson are in the minority, as the majority of cases recognize a Title VII claim based on a combination of the prohibited categories. The leading case supporting combination theory is the Fifth Circuit case of Jefferies v. Harris Cnty. Community Assn. This case recognized Black females as a distinctly protected subgroup.

The plaintiff in Jefferies alleged that she had been denied promotional opportunities because she was a Black woman. The essence of Jefferies' argument was that an employer should not be able to avoid liability for discrimination against Black females by showing that it does not discriminate against Blacks and that it does not discriminate against females. The Fifth Circuit agreed. The Fifth Circuit argued that the use of the word "or" in the proscriptive language of Title VII indicates Congress' intent to prohibit employment discrimination based on any or all of the protected categories (race, color, religion, sex or national origin).

Also indicative of Congress' intent, said the Fifth Circuit, is the fact that the House of Representatives refused to adopt an amendment which would have added the word "solely" to modify the word "sex."

The Fifth Circuit also employed an analysis based upon "sex plus" theory to lend support to its conclusion. Ordinarily a plaintiff creates a prima facie case of disparate treatment discrimination by proving that she was a member of a class protected by Title VII, she applied for an available position with an employer, she was qualified for the position, and she was rejected under circumstances that raise an inference of discrimination. Once a plaintiff establishes a prima facie case, she creates a presumption of discrimination which the employer may rebut by introducing evidence of a legitimate, nondiscriminatory reason for its actions. The plaintiff must then overcome the employer's evidence of that alleged legitimate reason by proving that the employer's asserted reason was a mere pretext for discrimination.

43. 615 F.2d 1025 (5th Cir. 1980), but see n.7 at 1034.
44. Id. at 1029.
45. Id. at 1032.
46. Id.
47. Id. (citing 110 CONG. REC. 2728 (1964)).
48. Id. at 1030 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed.2d 668 (1973)).
A "sex plus" case is one where the employer adds an ostensibly neutral characteristic to discrimination based on an unlawful factor. For example, an employer that discriminates against males may fire a man and explain that the termination was for wearing long hair. However, that same employer has no difficulty hiring women with long hair. Therefore, long hair (the neutral factor) was not the real reason for the termination; the real reason was the sex (protected category) of the individual, plus the long hair. These "plus" defenses have been found to violate discrimination laws because the "plus" factor was proven to be a pretext for unlawful discrimination, much the same way that proffered "legitimate business reasons" have been found to be pretextual.

After reviewing the line of cases that have developed the theory of "sex-plus" discrimination, the Fifth Circuit continues:

It is clear from the foregoing cases that an employer may not single out Black women for discriminatory treatment . . . . An employer may not apply different standards of treatment to women with young children, to married women, or to women who are single and pregnant. It is beyond belief that, while an employer may not discriminate against these subclasses of women, he [sic] could be allowed to discriminate against Black females as a class. This would be a particularly illogical result, since the "plus" factor in the former categories are ostensibly "neutral" factors, while race itself is prohibited as a criterion for employment.50

The Fifth Circuit's conclusion was sensitive to the multiple factors that make up the many experiences of women of color, and recognized Black females as a distinctly protected group.

Recognition of Black females as a distinct protected subgroup for purposes of the prima facie case and proof of pretext is the only way to identify and remedy discrimination directed toward Black females. Therefore, we hold that when a Title VII plaintiff alleges that an employer discriminates against Black females, the fact that Black males and White females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding that the employer did not discriminate against the Black female plaintiff.51

Other Circuit courts have followed the Jefferies ruling. The Tenth Circuit followed Jefferies in the case of Hicks v. Gates Rubber Co.52 This case involved a Black woman who was employed by the defendant as a security guard. Hicks was the only Black woman and one of only two Black guards.53 Hicks attempted to show that her work environment was permeated with racial and sexual hostility.54 Although the Circuit

50. Jefferies, 615 F.2d at 1034.
51. Id.
52. 833 F.2d 1406 (10th Cir. 1987).
53. Id. at 1408-1409.
54. Id. at 1409. (This shows that combination of factors is no longer limited to disparate impact cases).
The court upheld the district court's rejection of the racial harassment claim, it remanded the case with directions that the trial court "may aggregate evidence of racial hostility with evidence of sexual hostility. . . . We conclude that such aggregation is permissible." In essence, the Circuit Court allowed a combination of factors within the hostile work environment context. More explicitly, the court said, "We are persuaded that the Jefferies [sic] ruling is correct."

The Fourth Circuit has employed similar reasoning. In Lewis v. Bloomsburg Mills Inc. the court analyzed a claim that alleged, inter alia, that Black women had been denied employment opportunities with the defendant because of their race and sex combined. Specifically, the plaintiff argued that the defendant denied Black women hiring opportunities equal "to those accorded [W]hite female applicants." The Fourth Circuit accepted the district court's implicit identification of Black women as a protected subgroup and its conclusion that "plaintiffs have established a prima facie case under Title VII disparate impact theory."

The district courts have not flatly rejected combination claims but have dealt with them in different ways. Although these courts have recognized the intersection of race and sex as a proper cause of action under Title VII, no uniform analytical construct has been developed. At present, trial courts are left with little guidance as to how to proceed with these cases. Some courts have proceeded by implicitly accepting the cause of action, i.e., they adjudicate a combination claim without explicitly justifying the legal authority to do so, or using the "sex-plus" model. While "sex-plus" is a helpful development in the law, the authors agree with Peggie Smith in that it is dangerous to rely on this concept because it relegates one protected category to the level of a "plus" factor, to be seen only as a pretext for discrimination which is ultimately based on

55. Id. at 1412.
56. Id. at 1416.
57. Id.
59. Id. at 562.
60. Id. at 568 n. 14.
61. See, e.g., Judge v. Marsh, 649 F. Supp. 770 (D.D.C. 1986) (employment actions directed against Black females as a group may violate Title VII, where both factors allegedly involved in such discrimination, race and sex, are separately accorded Title VII protection); Graham v. Bendix, 585 F. Supp. 1036 (N.D. Ind. 1984) (under Title VII, the plaintiff as a Black woman is protected against discrimination on the double grounds of race and sex, and an employer who singles out Black females for less favorable treatment does not defeat plaintiff's case by showing that White females or Black females are not so unfavorably treated); Chambers v. Omaha Girls Club, 629 F. Supp. 925 (D. Neb. 1986) (Title VII forbids discrimination directed especially toward Black women as separate and distinct class from class of women and class of Blacks); Long v. AT&T Information Systems Inc., 733 F. Supp. 188 (S.D.N.Y. 1990) (when plaintiff alleges discrimination based not on the basis of either race or sex standing alone, but on a combination of the two, the court confines its inquiry accordingly).
only one factor. This is dangerous because it tends to weaken the force of our proposition that discrimination should be viewed as based on each or any combination of the protected categories.

**PROPOSED THEORY OF LIABILITY**

We propose a theory of liability that focuses particular attention on discrimination suffered by individuals. This approach has strong underpinnings within Title VII case law. This approach is more flexible and responsive because it recognizes the multifarious effects of discrimination and the many ways in which an individual may experience discrimination. Our proposed theory is based on the fact that Title VII protects "individuals." This is not a new concept in itself, but has yet to be used explicitly to uphold a combination claim. Judge Harry Pregerson of the Ninth Circuit is to be credited with having attempted to transfer this concept into the area of intersectionality/combination law under Title VII. Though we arrived at this concept independently, we were encouraged to discover that its use had been advocated by such a distinguished judge.

The basic notion of an "individual" approach is that a discriminatee's injury is not lessened by the fact that an employer treats other members of the plaintiff's larger class more favorably. For example, the fact that an employer has a large White female workforce does not alleviate the harm to the women of color who have been discriminated against by the same employer. We believe that a theory of liability which allows plaintiffs to combine race and sex under Title VII is best suited to address the problems faced by women of color in discrimination cases.

The language of Title VII and several United States Supreme Court decisions lend ample support to this proposition. Section 703 (a)(1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 (a)(1) reads as follows:

> It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Obviously, this section focuses attention on the situations of individuals. This is clear from reading the plain language of the statute. The

---

62. See Smith, supra note 12, at 45.
63. This theory is not to be understood as a "super remedy." We are not proposing that new damages/remedies be added. In fact, we are pleased with the damages now provided for by Title VII, Pub. L. No. 102-166, 105 Stat. 1071 (1990), 42 U.S.C. § 2000e, et seq.
64. See Robinson v. Adams, 847 F.2d at 1320-1321 (Pregerson, J., dissenting).
word "individual" appears three times in this section, and its repeated use is intended to project an unmistakable focus on individuals.

The first case to highlight Title VII's protection for individuals was City of Los Angeles Department of Water and Power, et. al. v. Manhart.65 In this case, the Department of Water and Power required its female employees to make larger contributions to the pension fund than male employees. The department argued that because women as a class live longer than men and would thus receive a greater amount of money in retirement, women should contribute larger amounts to the pension fund.66

The Supreme Court determined that this requirement violated § 703(a)(1) of Title VII of the Civil Rights Act of 1964.67 The Supreme Court stated, "[t]he statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national origin class."68 Further,

[e]ven if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.69

The department's policy illegally discriminated against women because it operated on the assumption that all women would live longer than all men. There was no assurance, however, that any individual woman working for the department would actually fit the generalization and live longer than all the men.70 The critical issue, then, was that the department's policy failed to view women as individuals who may or may not live longer than the men.

The view that Title VII's focus on the individual is not lessened despite the fact that an employer treats other members of the individual's class more favorably is derived from Connecticut v. Teal.71 In this case, an employer violated Title VII because it required, as an absolute condition for promotion, that plaintiffs pass a written test that Blacks failed in disproportionate numbers.72 The overall result of the test was that Black applicants passed at a rate of 54.17%, while White applicants passed at a rate of 79.54%.73 The plaintiffs failed the test and were not considered for promotions. The employer sought to escape liability by relying on

66. Id.
67. Id. at 711.
68. Id. at 708.
69. Id. at 709.
70. Id. at 708.
72. Id. at 444.
73. Id. at 443.
the results of the promotion process as a whole. The employer pointed to statistics which indicated that of the forty-eight identified Black candidates who participated in the selection process, 22.9% were promoted and that of the 259 identified White candidates, 13.5% were promoted.\textsuperscript{74} The Court held that this "bottom-line" result, more favorable to Blacks than to Whites, did not preclude the plaintiffs from establishing a \textit{prima facie} case, nor did it immunize the employer from liability.\textsuperscript{75} The Court reasoned that the argument that disparate impact should be measured only at the "bottom line" ignores the fact that Title VII guarantees these individual petitioners the opportunity to compete equally with White workers.\textsuperscript{76} The Court also stated that § 703(a)(2) of Title VII prohibits practices that would deprive or tend to deprive "any individual of employment opportunities."\textsuperscript{77} In addition, "[t]he principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee."\textsuperscript{78} Most importantly, the court observed that Title VII does not permit the victim of a facially discriminatory policy to be told that he or she has not been wronged because other persons of his or her race or sex were hired.\textsuperscript{79} Thus, a well balanced workforce cannot immunize an employer from Title VII liability.\textsuperscript{80} In \textit{Teal}, the fact that other Blacks were actually promoted did nothing to lessen the discriminatory impact of the test as it was felt by the individual plaintiffs who were ineligible for promotion.

It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force.\textsuperscript{81} 

\section*{Conclusion}

Current interpretations of Title VII have failed to develop an analytical framework which is responsive to the needs of persons who do not fit neatly into the statute's protected categories. Our review of the case

\textsuperscript{74} Id. at 444.  
\textsuperscript{75} Id. at 456.  
\textsuperscript{76} Id. at 451.  
\textsuperscript{77} Id. at 453.  
\textsuperscript{78} Id. at 453-454, (citing §§ 703 (a)(1), (b), (c), 704 (a), 78 Stat. 255-257, as amended, 42 U.S.C. §§ 2000e-2(a)(1), (b), (c), 2000e-3(a); 110 CONG. REC. 7213 (1964)) (interpretive memorandum of Sens. Clark and Case) ("discrimination is prohibited as to any individual"); id. [sic], at 8921 (remarks of Sen. Williams) ("Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job.").  
\textsuperscript{79} Id. at 455.  
\textsuperscript{80} Id. at 454, (quoting Furnco Construction Corp. v. Waters, 438 U.S. 567, 579 (1978)).  
\textsuperscript{81} Id. at 454, (quoting Furnco Construction Corp. v. Waters, 438 U.S. 567, 579 (1978), citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 412-413 (1975)).
law points out that both Black women and Black men, as individuals, have often fallen through the cracks left in the categorical framework of Title VII. More surprising is the complete lack of cases in which Chicana/Latina women or Chicano/Latino men have litigated the issue. This is a reflection of the relative vulnerability that different non-privileged groups experience. That is to say, the more vulnerable a group of people are, the less access they will have to the legal system.

A solution that permits plaintiffs to combine the protected categories is of particular importance to the Chicano/Latino community. Discrimination against a Chicana/Latina or Chicano/Latino is likely to involve a combination of race, color, sex, and national origin. For this reason the Chicano/Latino community has a strong interest in insuring that Title VII becomes responsive to the many dimensions of the Chicano/Latino experience, particularly that of the Chicana/Latina.

We propose that the phrase "or any combination thereof" be added to the end of Sec. 703 (a)(l) of the Civil Rights Act of 1964 to provide a legal construct in employment discrimination law which is responsive to the needs of individuals, especially working women of color. This would give clear Congressional direction to courts to allow women of color to put forth discrimination claims as women of color. This change would bring an end to the division among the Circuit Courts, and remedy Congress' earlier oversight in drafting § 703(a)(l).

In the meantime, the judiciary should continue to allow women of color to base discrimination claims on a combination of categories. We strongly urge that such claims be analyzed within the "individual" framework established under Manhart, Teal & Furnco. That is to say, women of color should be able to show that their employer discriminated against them as individuals of a certain sex and of a certain color, combined. Under this approach, better treatment for White females will be irrelevant, as would better treatment for males of color. This is so because the focus is on the individual and not the larger groups or categories to which the individual belongs. To disallow combinations of protected categories as a viable cause of action under Title VII would be to ignore a person's individuality and Title VII's clear emphasis on protection for individuals. Title VII should not require individuals to truncate their identity in order to pursue a Title VII action.

Our proposal does not seek to eliminate disparate impact causes of action. Black and Chicano/Latino plaintiffs may still maintain a Title VII

83. See Cacavas, supra note 5.
85. A disparate impact cause of action is one where a claimant can demonstrate that a certain ostensibly neutral practice of the employer is unintentionally causing a discriminatory result upon a class of people, e.g., a test that fails Blacks disproportionately. Griggs v. Duke Power Co., 401 U.S.
VII action based solely on race or national origin. Our proposal seeks to address the intersectionality concern of the aforementioned legal scholars by conceptualizing a categorical framework which allows individuals to bring a Title VII claim based on her total experience as a woman of color.

Our approach may seem impractical and ideal to some legal advocates at the present time in light of the conservative composition of the Supreme Court. However, we also know that our concept can be used as a tool on two fronts: First, as an argument in the courtroom, and second, as part of a legal discussion that can influence debate in Congress so that this ideal can be realized through legislation. We hope this work will increase awareness among attorneys and scholars that Title VII remains unresponsive to the individual needs and issues facing women of color, as women of color. Awareness is the first step towards effecting change, a change that is long overdue.

424 (1971). In a disparate impact case the individual seeks relief by showing with statistics how the practice affects the class; it does not require the same attention to the individual that we urge in our proposal. Our proposal seeks only to define classes with more particularity, for example, to recognize Black women as a class or Chicanas/Latinas as a class, based on the particularities of these subclasses of women as a whole.