ARTICLE

There Are No Outsiders Here

Rethinking Intersectionality as Hegemonic Discourse in the Age of #MeToo

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On September 27, 2018, Dr. Christine Blasey Ford testified before the Senate Judiciary Committee about then Supreme Court Nominee Judge Brett Kavanaugh's alleged assault of her 36 years earlier. Rifts soon occurred along partisan and gender lines, with those supporting Judge Kavanaugh on one side of the divide and those supporting Dr. Blasey Ford as a woman and sexual assault survivor on the other. #MeToo had finally come to Capitol Hill. Amidst protests by women's organizations at the Capitol and on social media, Senate Majority Leader Mitch McConnell called for a cloture vote, a vote to end the delay of the proceedings occasioned by a limited FBI investigation, on Judge Kavanaugh's nomination and advance Judge Kavanaugh's candidacy to the High Court for an official vote. Many tweeted their frustrations on Twitter and posted about it on Facebook, but none so famous as Bette Midler. In her angst over the possibility of Judge Kavanaugh's confirmation, Midler tweeted, "'Women, are the n-word of the world.' Raped, beaten, enslaved, married off, worked like dumb animals; denied education and inheritance; enduring the pain and danger of childbirth and life IN SILENCE for THOUSANDS of years[.] They are the most disrespected creatures on earth."[1] Twitter erupted with objections from Black women, among them Franchesca Ramsey of

* Professor of Law, Mercer University Walter F. George School of Law. The author thanks God, who makes all things possible; her husband, Mark A. Chubb, for his enduring love and support; and Associate Provost for Research Gary Simson, for reading and commenting on this article and for his generous research support while Dean of Mercer Law School. The article is dedicated to the women of color who inaugurated the annual Writing As Resistance Workshop, generously sponsored by the University of Denver Sturm College of Law with additional support from Nova Southeastern University Shepard Broad College of Law. We are and will remain #bustinoutbetterthaneverybody.

1 Bette Midler (@BetteMidler), TWITTER (Oct. 4, 2018, 4:50 PM), tweet deleted by author. You can see the tweet in Zeba Bley, *Bette Midler Is the Clueless White Lady of the World*, HUFFPOST (Oct. 5, 2018, 12:29 PM ET), https://huffpost.com/entry/bette-midler-women-n-word-world-tweet_n_5bb6d9d0e4b01470d050121e.

YouTube fame for her 2012 video "Sh[*]t White Girls Say . . . to Black Girls."[2] Ramsey wrote in her response to Midler's tweet, "no. black women exist. this is some white feminist bullsh[*]t & it's disappointing af. you don't get to co-opt a slur created to denigrate black bodies as if we don't still deal with the consequences of that word. f[*]cking sh[*]t @BetteMidler."[3] Midler responded to the backlash by tweeting, "I gather I have offended many by my last tweet. "'Women are the . . . etc' is a quote from Yoko Ono from 1972, which I never forgot. It rang true then, and it rings true today, whether you like it or not. This is not about race, this is about the status of women; THEIR HISTORY."[4] The pressure continued, forcing Midler to delete the controversial tweets and to post a third and final tweet:

> The too brief investigation of the allegations against Kavanaugh infuriated me. Angrily I tweeted w/o thinking my choice of words would be enraging to black women who doubly suffer, both by being women and by being black. I am an ally and stand with you; always have. And I apologize.[5]

Many chided Midler for her choice of words, both in calling herself an ally and in blaming blackness itself for Black women's suffering, rather than racism.[6] Activist, politician, and former law professor Nekima Levy-Pounds summed up the dissenting tweets best when she tweeted, "Dear White Women, Please never say ['women are the n-word of the world']. This is deeply offensive and minimizes the significance of the weight, scope, depth, breadth, and long lasting impacts of the institution of slavery on African Americans."[7]

As the country grappled with Dr. Blasey Ford's testimony, still others attempted to place it in the context of Anita Hill's testimony before that same Committee in 1991—before some of the same members—

2 *See, e.g.*, Franchesca Ramsey (a.k.a. chescaleigh), *Shit White Girls Say . . . to Black Girls*, YOUTUBE (Jan. 4, 2012), https://youtu.be/ylPUzxpIBe0 (over 12 million views). *See generally* Franchesca Ramsey, WELL THAT ESCALATED QUICKLY: MEMOIRS AND MISTAKES OF AN ACCIDENTAL ACTIVIST (2018).

3 Franchesca Ramsey (@chescaleigh), TWITTER (Oct. 4, 2018, 5:35 PM), https://twitter.com/chescaleigh/status/1048008780372480001.

4 Bette Midler (@BetteMidler), TWITTER (Oct. 4, 2018, 7:23 PM), tweet deleted by author but available via the article by Zeba Bley, *supra* note 1.

5 Bette Midler (@BetteMidler), TWITTER (Oct. 4, 2018, 10:23 PM), https://twitter.com/search?q=Bette%20Midler%20ally&src=typd.

6 *See generally* #BetteMidler, TWITTER, https://twitter.com/hashtag/BetteMidler?src=hash; https://twitter.com/search?q=Bette%20Midler%20ally&src=typd. *See, e.g.*, Rachel McKibbins (@RachelMcKibbins), TWITTER (Oct. 4, 2018, 8:35 PM), https://twitter.com/search?q=Bette%20Midler%20ally&src=typd.

7 Nekima Levy-Pounds (@nlevy), TWITTER (Oct. 5, 2018, 8:39 AM), https://twitter.com/nvlevy/status/ 1048236156599656448.

recounting the alleged sexual misconduct by then Supreme Court Nominee Clarence Thomas.[8] News outlets, drawing parallels between the two, compared Hill's "strength" to Blasey Ford's "vulnerability"[9]—a comparison that quickly drew ire for engaging the damaging trope of "the strong Black woman."[10] Of this comparison, activist, legal scholar, and law professor Kimberlé Crenshaw, credited with coining the phrase "intersectionality," would write in a *New York Times* Opinion Editorial that "[w]e are still ignoring the unique vulnerability of black women. . . . Black women are vulnerable not only because of racial bias against them, but also because of stereotypes – that they expect less nurturing, they are more willing, no one will believe them."[11] She continued,

> We can still redress the shameful legacy of the Hill-Thomas confrontation by placing black women in their rightful place at the center of the fight against sexual predation on and off the job.
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> * * *
>
> Throughout history, black feminist frameworks have been doing the hard work of building the social justice movements that race-only or gender-only frames cannot. Intersectionality, my term for the urgent project of uniting the battles for race and gender justice, is an indispensable way to understand aspects of our history, that, to our peril, remain hidden.
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> * * *
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> The Hill-Thomas conflict has gone down in history as a colossal failure in intersectional organizing. It's not too late, as the Kavanaugh nomination enters its next phase, to write a better history.[12]

8 Michaela Bouchard and Marissa Schwartz Taylor, *Flashback: The Anita Hill Hearings Compared to Today*, N.Y. TIMES, Sept. 27, 2018, https://www.nytimes.com/2018/09/27/us/politics/anita-hill-kavanaugh-hearings.html?smid=fb-nytimes&smtyp=aut&bicmet=1419773522000&bicmp=AD&bicmst=1409232722000&bicmlukp=WT.mc_id.

9 Kay Wicker, *Anita Hill and Christine Blasey Ford are now joined in history*, THINKPROGRESS (Sept. 27, 2018, 4:07 PM), https://thinkprogress.org/anita-hill-christine-blasey-ford-93c09881e525/; Ruth Umoh, *How Christine Blasey Ford's vulnerability shaped her credibility*, CNBC (Sept. 28, 2018, 4:03 PM), https://www.cnbc.com/2018/09/28/ how-christine-blasey-fords-vulnerability-shaped-her-credibility.html; Erin Hanafy, *Christine Blasey Ford's Testimony Showed That Vulnerability is Actually a Superpower*, WELL AND GOOD (Sept. 27, 2018), https://www.wellandgood.com/good-advice/christine-blasey-ford-vulnerability-strength/; Megan Garber, *For Christine Blasey Ford to Be Believable, She Had to Be 'Likable,'* THE ATLANTIC (CULTURE) (Sept. 27, 2018), https://www.theatlantic.com/entertainment/archive/2018/09/christine-blasey-ford-pernicious-demand-be-likable/571555/.

10 Wicker, *supra* note 9 (referencing CNN analyst Joan Biskupic's description of Anita Hill as "strong and stoic"); David Lauter, *Hour 1 Analysis: How Christine Blasey Ford's testimony compares to Anita Hill's in 1991*, LA TIMES (Sept. 27, 2018, 8:57 AM), http://www.latimes.com/politics/la-na-pol-kavanaugh-ford-hearing-hour-1-analysis-how-christine-blasey-1538063779-htmlstory.html#; Karen Attiah, *Christine Ford, Anita Hill and the dangerous myth of the strong black woman*, WASH. POST (Sept. 29, 2018), https://www.washingtonpost.com/blogs/post-partisan/wp/2018/09/29/christine-ford-anita-hill-and-the-dangerous-myth-of-the-strong-black-woman/?utm_term=.e5b6bb458de2.

11 Kimberlé Crenshaw, Opinion, *We Still Haven't Learned From Anita Hill's Testimony*, N.Y. TIMES, Sept. 27, 2018, https://www.nytimes.com/2018/09/27/opinion/anita-hill-clarence-thomas-brett-kavanaugh-christine-ford.html.

12 *Id.*

To be sure, the history of the Hill–Thomas matter is a carefully constructed intersectional tale—a gendered story in Black and White communities of a Black woman against state power and of a race traitor, a tool of state power led astray by white feminism bent on keeping a good Black man down. However, this story obfuscates the larger one, of the role of state power in protecting patriarchy, white supremacy, and capitalism. It too is the tale of a president, George Herbert Walker Bush, who nominated a Black man with no civil rights record and no affinity for marginalized people to take the place of a newly retired and ailing Thurgood Marshall. Clarence Thomas was state power in Blackface, even as Judge Brett Kavanaugh's rictus of rage in his response to Dr. Blasey Ford's testimony has become the face of state power. Yet, twenty-seven years after the Hill–Thomas hearings, it seems that even if we were to write a different history, as Kimberlé Crenshaw urges us to do, how we talk about race, gender, and feminism—whether in person, online, or in scholarly discourse—remains straightjacketed by our notions of whose stories matter more and should take center stage in the telling.

Of feminism and the stories that matter, human rights activist and scholar Angela Davis remarked during her lecture *Feminism and Social Transformation in the Trump Era*,

> [Intersectional feminism] is feminism that recognizes the interconnections between gender violence and racist violence, between intimate violence and institutional violence, between individual violence and structural violence . . . . If we fail to perceive connections, relations, intersections, crossings, junctures, coincidences, overlapping and cross-hatching phenomena, we will be forever imprisoned in a world that appears to be White and male and heterosexual and cis gender and capitalist and U.S. centric or Eurocentric . . . . [We] have to develop habits of perception, habits of analysis that acknowledge the inadequacies of the conceptual tools on which we are compelled to rely.[13]

This article explores intersectionality as an inadequate conceptual tool on which we are compelled to rely. It considers how the shorthand of intersectionality functions as a proxy to describe the relationship between white supremacy, patriarchy, and capitalism in anti-discrimination litigation, activist circles, and across social media. As a proxy it dominates conversations between lawyers, scholars, and activists to dictate how we

13 *Leccion Inaugural 2018 Dra Angela Davis UCR en Inglès*, 13:20–17:16 (Universidad de Costa Rica video Apr. 3, 2019), https://www.youtube.com/watch?v=sNIgsic3k0k.

are able to talk about and conceptualize difference. These dominant conversations, hegemonic discourse, reduce how we see discrimination to overly simplistic categories like male/female and White/Black domination. Our facile perceptions are reflected in our conversations, which reinforce the discrimination that we actively seek to prevent and enshrine our notions of the "outsider."

The pages that follow focus on the use of intersectionality as a rhetorical expression for which a coherent communication of oppression remains elusive. It proceeds in four parts. Section I gives background on the origins of our current understanding of the term "intersectionality." Section II explores the process by which intersectionality has become hegemonic discourse. Section III considers the practical limitations of intersectionality, understood as the relationship between race, class, gender, and sexuality, through an exploration of several cases engaging anti-discrimination doctrine. Lastly, Section IV examines how the #MeToo movement exposes the analytic gaps between intersectionality—expressed as the intersection of race, class, gender, and sexuality—and the overarching power structures of white supremacy, patriarchy, and capitalism that control them.

I. *Moore v. Hughes Helicopter, Inc.*[14] and the Legal Origins of Intersectional Rhetoric

Kimberlé Crenshaw's article, *Demarginalizing the Intersection Between Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, is the legal origin for our popular understanding of intersectionality.[15] In her article, Crenshaw examines the case *Moore v. Hughes Helicopter, Inc.* to arrive at the premise that intersecting identities in White persons are considered the norm, while the intersecting identities of women of color converge as something "other" than and "lesser" than the "norm," a "marginalized" identity, resulting in anti-discrimination doctrine that falls short of addressing discrimination.[16] Because Crenshaw's analysis of *Moore* is crucial to the formation of intersectional rhetoric, the case and Crenshaw's reading of it require closer examination.

14 708 F.2d 475 (9th Cir. 1983).

15 Kimberlé Crenshaw, *Demarginalizing the Intersection Between Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

16 *Id.* at 143–46. Crenshaw also examines two other cases in the article: DeGraffenreid v. Gen. Motors, 413 F. Supp. 142 (E.D. Mo. 1976); Payne v. Travenol, 673 F.2d 798 (5th Cir. 1982). *Id.* at 141.

Tommie Moore, an African American woman, sued Hughes Helicopter, Inc. as representative of a class of Black women on allegations that Hughes violated Title VII of the Civil Rights Act of 1964.[17] The class of Black women Moore sought to represent was included in a collective bargaining unit comprised of 1,562 people.[18] Moore cited Hughes' failure to choose African American women for supervisory positions and higher-grade craft positions (Labor Grades 15–20) from 1975–1979 as the basis of Hughes' discriminatory employment practices.[19] She brought the case under a disparate impact theory of employment discrimination, which only required her to prove that Hughes' employment practices had a disparate or "significantly discriminatory" impact on the women as a protected class under Title VII.[20] In the years 1975–1979, Hughes employed a total of 427 men (White and African American) and eight women (White) in higher-grade craft positions.[21] None of the women in the higher-grade craft positions were African American; the eight White women chosen for the positions represented 1.8% of the total number of employees in Labor grades 15–20.[22] In the years 1975–1979, Hughes employed eighty-five men (White and African American) and six women (White and African American) as supervisors over members of Moore's collective bargaining unit.[23] Of the six females, two (2.2%) were African American.[24] Moore argued that the low percentage of African American women in upper level jobs (craft and supervisory) established a *prima facie* case of discrimination given the overall percentage of African American women in her collective bargaining unit.[25]

The United States Court of Appeals for the Ninth Circuit analyzed separately Moore's ability to represent a broad class consisting of all women (both Black and White), and the merits of her employment discrimination claim. In considering Moore's ability to represent the class, the Ninth Circuit found that the lower court was correct in denying Moore's right to represent a class consisting of "all black and/or all female" employees in her collective bargaining unit.[26] The lower court certified the class as "[a]ll black female employees in [Moore's collective bargaining unit] who have been employed by Hughes Helicopters at any time on or after December 3, 1975."[27] In denying Moore the right to represent a class broader than only Black women, the lower court reasoned that in Moore's pleadings, inclusive of her complaint filed before the Equal Employment

17 *Moore*, 708 F.2d at 478.

18 *Id.*

19 *Id.*

20 *Id.* at 481.

21 *Id.* at 478.

22 *Id.*

23 *Id.* at 479.

24 *Id.*

25 *Id.*

26 *Id.* at 480.

27 *Id.*

Opportunity Commission (EEOC), she specifically stated that she had been discriminated against as a Black woman in particular, but not also a woman in general.[28] The lower court also found that Moore could not represent Black males, because she indicated in deposition testimony that Black males were not being discriminated against in promotion to supervisory positions or selection for craft positions.[29]

In upholding the lower court's decision concerning certification, the Ninth Circuit cited to Federal Rule of Civil Procedure 23(a),[30] which states the requirements for class certification, but as interpreted in *General Telephone v. Falcon*, 457 U.S. 147 (1982), to support the proposition that "[m]ere membership in a sexual or racial group does not justify a finding that a plaintiff will adequately represent all members of a particular group."[31] *General Telephone Co.*, a case appealed to the Fifth Circuit Court of Appeals and ultimately the United States Supreme Court, involved the certification of a class pursuant to Federal Rule of Civil Procedure 23(a) comprised of Mexican American employees of General Telephone Company of the Southwest.[32] The Respondent/Appellee, Mariano Falcon, alleged that Southwest limited "employment, transfer, and promotional opportunities" of its Mexican American employees because they were Mexican American.[33] Falcon alleged that he was passed over for promotion, while White employees with less seniority were promoted into the position for which he applied.[34] The class specified in Falcon's complaint was "composed of Mexican-American persons who are employed, or who might be employed, by G[eneral] T[elephone] C[ompany] at its place of business located in Irving, Texas, who have been and who continue to be or might be adversely affected by the practices complained of herein."[35]

In sum, Falcon sought to represent Mexican Americans who were not hired on the basis of race, as well as Mexican Americans who were not

28 *Id.*

29 *Id.*

30 Federal Rule of Civil Procedure 23(a) states, in relevant part,

> Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

31 *Moore*, 708 F.2d at 480.

32 Gen. Tel. Co. v. Falcon, 457 U.S. 147, 150–51 (1982).

33 *Id.* at 150 n.1.

34 *Id.* at 150.

35 *Id.* at 151.

promoted based on race. At the time Falcon filed his complaint, the Fifth Circuit had just ruled in *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969), which allowed those suffering racial discrimination to bring an "'across the board' attack" against an employer who allegedly engaged in racially discriminatory employment practices based on racially discriminatory policies.[36] An "across the board" attack would allow a plaintiff alleging racial discrimination based on one discriminatory practice by an employer to represent a class of persons who alleged racial discrimination based on a different discriminatory employment practice if all members in the class had the same injury.[37] Thus, Falcon sought to represent Mexican Americans employed at General Telephone Southwest who were either denied employment or promotion. The commonality between the two, and hence the alleged basis of the employment discrimination, was the employees' status as Mexican Americans.[38]

While the United States Supreme Court in *General Telephone* ultimately supported the reasoning in allowing "across the board" attacks on discriminatory employment practices, it nevertheless reiterated that the requirements of Federal Rule of Civil Procedure 23(a) must still be met.[39] A group of persons who belong to the same racial group and who allege discriminatory employment practices are definitely a class governed by Rule 23(a).[40] However, whether that class of persons meets the requirements of Rule 23(a) such that they may be certified is another matter entirely.[41] The Court held that a person purporting to represent the class must do so in actuality; otherwise every individual allegation of discriminatory employment practices could serve as the basis for a class action suit.[42] In the Court's words,

> Even though evidence that [Falcon] was passed over for promotion when several less deserving whites were advanced may support the conclusion that respondent was denied the promotion because of his national origin, such evidence would not necessarily justify the additional inferences (1) that this discriminatory treatment is typical of [General Telephone Southwest's] promotion practices; (2) that [General Telephone Southwest's] promotion practices are motivated by a policy of ethnic discrimination that pervades [it], or (3) that this policy of ethnic discrimination is reflected in [General Telephone Southwest's] other employment practices, such as hiring, in the same way it is manifested in the promotion practices.[43]

36 *Id.* at 152.

37 *Id.* at 153.

38 *Id.* at 153–54 (citing generally Payne v. Travenol Labs, Inc., 565 F.2d 895 (5th Cir. 1978)).

39 *Id.* at 157.

40 *Id.*

41 *Id.*

42 *Id.* at 158, 159.

43 *Id.* at 158.

In crafting its holding in *General Telephone*, the United States Supreme Court also looked to its reasoning in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977) handed down just five years prior. *East Texas Motor Freight* involved an employment discrimination suit brought by three Mexican American over-the-road truckers, Jesse Rodriguez, Sadrach Perez, and Modesto Herrera.[44] The three alleged that East Texas Motor Freight's no-transfer policy, a policy that required a driver seeking a transfer to a different job to forfeit seniority built up in their present job, was in part a violation of Title VII of the Civil Rights Act of 1964.[45] Procedurally, the parties never moved for class certification at the trial court level, although the Fifth Circuit Court of Appeals certified what it thought to be the correct class before reversing the District Court's ruling against Rodriguez, Perez, and Herrera.[46] The original complaint in the case brought suit on behalf of all

> East Texas Motor Freight's Mexican-American and Black in-city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas. Additionally that such class should properly be composed of all Mexican-American and Black applicants for line driver positions with East Texas Motor Freight . . . from July 2, 1965 (the effective date of Title VII) to present.[47]

Reviewing the Fifth Circuit Court's decision to certify the class, the United States Supreme Court did not consider whether it was proper for an appellate court to certify a class when it had not been previously certified at the trial court level.[48] Instead, the Court was most concerned about whether the class as certified was properly represented by the three named plaintiffs.[49] The Court found that the plaintiffs were not proper class representatives because they did not qualify for the positions for which they sought transfer and all three stipulated that they had not suffered discrimination at the time they were hired.[50]

It is important to note that in both *General Telephone* and *East Texas Motor Freight* the Court's main concern was that representative members of the class of persons actually represent the injuries and interests of the class.[51] Neither court denied that: (1) a member of a racial or ethnic group could represent a class consisting of members of that same racial or ethnic

44 *East Tex. Motor Freight*, 431 U.S. at 398.

45 *Id.* at 397–99.

46 *Id.* at 398.

47 *Id.* at 399.

48 *Id.* at 403.

49 *Id.*

50 *Id.* at 403–04.

51 *General Tel.*, 457 U.S. at 156 (*citing East Tex. Motor Freight*, 431 U.S. at 403).

group regardless of sex (the Mexican American male in *Falcon* who endeavored to represent a class of Mexican American persons); nor that (2) members of a single racial or ethnic group (the Mexican American males in *East Texas Motor Freight*) could represent a class consisting of members of the group to which the representatives belonged regardless of sex (Mexican American in city drivers and Mexican American applicants for line driver positions), as well as another group considered a racial minority regardless of sex (Black in city drivers and Black applicants for line driver positions). Rather, the respondents in *General Telephone* and *East Texas Motor Freight* ultimately failed as class representatives because they did not meet the adequacy and typicality requirements of 23(a).

When read in the context of the precedent relied upon by the Ninth Circuit Court of Appeals in arriving at its decision, *Moore* is the continuation of these themes. Had Moore been specific in her pleadings and evidentiary offerings that she alleged discrimination on the behalf of all women regardless of race, all persons regardless of sex, or even all Black persons and all women, there is no indication that the Court would have precluded her representation of any of these classes, provided her claims were typical of and adequate for the class.[52] To use the language of the *General Telephone* court, even if Moore could prove that she was not selected to work in a higher grade craft position or that she was passed over for promotion, such proof does not support the inference that: (1) any discriminatory treatment against Black women was typical of Hughes' selection and promotion practices at the time with respect to all women and Black men; (2) that Hughes' selection and promotion practices were motivated by a policy of racial and/or sexual discrimination that pervaded it; and (3) that Hughes' policy of discrimination manifested itself in the same way in job selection and promotion.[53]

Although this line of reasoning may justify the Ninth Circuit's decision to preclude Moore from representing a class larger than Black women, it also reveals essentialist unifiers, words or phrases used to flatten the experiences of a group into one "universal" experience, as the basis for the court's reasoning paradigm. The court's analysis with respect to class representation takes place within the unifier "gender discrimination" or "sex discrimination" expressed and communicated as women as subordinated to men (male/female domination), rather than or in addition to Black women subordinated to White women, or even Black women subordinated to Black women (two black women in Moore's unit did

52 *See infra* note 119.

53 *General Tel.*, 457 U.S. at 158.

receive promotions). In the context of legal reasoning as it occurs in this case, "sex discrimination" became a totality encompassing Moore's relationship to White and Black women in her collective bargaining unit at Hughes. As such, the court required evidence that in some way explained how women in Moore's collective bargaining unit, regardless of race, were subordinated to the men.[54]

Because Moore did not plead that all women (Black and White) in her collective bargaining unit were discriminated against as women (male/female domination), the class of people who she could represent was limited to Black women; they occupied her same category from which White women were excluded. Accordingly, the Ninth Circuit could only assess Moore's adequacy as a representative of Black women in the context of her subordination to Black and White men. In suggesting all of the men (both Black and White) were adequately represented in job selection and promotion, Moore's characterization of her claim reinforced the court's "sex discrimination" paradigm as women (Black and White) subordinated to men (Black and White). As man's subordinate, Moore could not be his representative; as a Black woman her claims were too narrow to represent all women. Had Moore been White and presented the same pleadings and evidence supporting class certification, it is unlikely that the court would have allowed her to represent all women given the same relevant precedent.

In *Demarginalizing the Intersection of Race and Sex*, Kimberlé Crenshaw offers a different reading of *Moore v. Hughes Helicopter, Inc.* Crenshaw's reading takes place within the analytical construct of intersectionality, a construct Crenshaw identified to capture the layers of Black women's identity as Black people and women, race and gender, as opposed to analyzing those experiences in terms of race or gender.[55] The premise of Crenshaw's article is that anti-discrimination doctrine only takes into account the experiences of those privileged within a racial or gender group. In her words, "in race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women."[56] According to Crenshaw, this focus "marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination."[57] Within the context of the article, "sex- or

54 Ernesto Laclau & Chantal Mouffe, Hegemony and Socialist Strategy: Towards a Radical Democratic Politics 117–18 (2d ed. 2001).

55 Crenshaw, *supra* note 15, at 139.

56 *Id.* at 140.

57 *Id.*

class-privileged Blacks" are men; "race- or class-privileged women" are White.[58]

For Crenshaw, the Ninth Circuit's failure to allow Moore to serve as a class representative for all women not only reflected the court's failure to recognize Black women's multiple and intersecting identities, but also the court's centering of White women's experiences in their understanding and analysis of gender discrimination claims.[59] The court's reasoning that Moore could not represent "all women" because she specifically brought her claims against Hughes as a "Black woman" demonstrates, within the intersectionality construct, one of two things: (1) that the discriminatory practices against Black women occupy a limited sphere within discriminatory practices against all women, and therefore cannot be representative; or (2) discrimination against Black women is something different than and stands in opposition to discrimination against women in general.[60] Black women's experiences with both race and gender discrimination become marginalized and hybridized to White women's experiences, which are construed as "normal," "pure," or "standard" discrimination claims without any racial dimensions.[61] As Crenshaw states, "[f]or [White women] there is no need to specify discrimination as *white* females because their race does not contribute to the disadvantage for which they seek redress."[62]

Crenshaw's interpretation of the case, first in a lecture and then communicated in a law review article, takes place in the analytic space of college studies departments (Women's Studies, Black Studies, Queer Studies), where faculty of difference (women, African Americans, LGBTQIA persons) fought for inclusion of their stories and perspectives into college curricula. It also takes place at a time when elite law schools were reluctant to include faculty of color and scholarship about difference into law school curricula. In particular, the relationship between the telling of Black women's herstories, the telling of White women's herstories, and the exclusion of certain of these stories in college and law school curricula were all acute political lightning rods. Crenshaw opens her article with a passing reference to the text *All the Women Are White, All the Blacks are Men, But Some of Us are Brave* [hereinafter *But Some of Us Are Brave*]. *But Some of Us Are Brave*, published in 1982, in many ways is a memorialization of the struggle to include Black women's stories into college

58 *Id.* at 155–56, 160–61.

59 *Id.* at 144–45.

60 *Id.* at 144.

61 *Id.* at 144–45.

62 *Id.*

curricula.[63] The book is divided into seven parts: *Part One - Searching for Sisterhood: Black Feminism*; *Part Two—Roadblocks and Bridges: Confronting Racism*; *Part Three – Dispelling the Myth: Black Women and the Social Sciences*; *Part Four—Creative Survival: Preserving Body, Mind, and Spirit*; *Part 5—"Necessary Bread" Black Women's Literature*; *Part Six—Bibliographies and Bibliographic Essays*; and *Part Seven—Doing the Work: Selected Course Syllabi*.[64] All of the parts are unified under central themes: the marginalization of Black women's stories and perspectives in college curricula; the privileging of White women's stories and perspectives as all women's stories; and Black female academicians' struggle for inclusion in the academy.

The year when *But Some of Us Are Brave* was published marked a significant time period for new law students and legal academics of color. Many future contributors to the scholarship of Critical Race Theory/Critical Race Feminism (CRT/F) were entering elite law schools in the early 1980s and found the legal academy an unwelcoming place for their perspectives and experiences as people of color.[65] The CRT movement happened upon legal academe in much the same way scholars in undergraduate and graduate institutions began to push for "Studies" departments that would teach the work of those whose voices were muted on the periphery of legitimate scholarship and pedagogy.[66] Like its forbearers in the "Studies" movement, CRT began its critique of the law and institutions through the totalizing unifier "race," which excluded from critiques of discrimination the relationships between women of all races and men who were not African American.[67] It is no surprise, then, that by 1989, the year that Crenshaw's *Demarginalizing the Intersection of Race and Sex* was published and the first CRT Conference was held in Madison, Wisconsin, the field was ripe for beginning a discussion about interpreting Black women's experiences in various legal contexts, although not fully realized.[68] The structure for doing so was set by the example in the

63 (Gloria T. Hull et al. eds., 1982). *See also id.* at xv, in which historian and lawyer Mary Berry writes,

> The education of students has long been bereft of adequate attention to the experiences and contributions of Blacks and women to American life. But practically no attention has been given to the distinct experiences of Black women in the education provided by our colleges and universities. This absence of attention is molded and reflected in the materials made available by scholars.

64 *Id.*

65 Angela Harris, *Foreward*, *in* CRITICAL RACE THEORY: AN INTRODUCTION xv–xvii (Richard Delgado & Jean Stefancic eds., 2d ed. 2012).

66 *See, e.g.*, FABIO ROJAS, FROM BLACK POWER TO BLACK STUDIES: HOW A RADICAL SOCIAL MOVEMENT BECAME AN ACADEMIC DISCIPLINE (2007); DAPHNE PATAI & NORETTA KOERTGE, PROFESSING FEMINISM: CAUTIONARY TALES FROM INSIDE THE STRANGE WORLD OF WOMEN'S STUDIES (1994); Marilyn J. Boxer, *For and about Women: The Theory and Practice of Women's Studies in the United States*, 7 SIGNS 661 (1982).

67 CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xxxi (Kimberlé Crenshaw et al. eds., 1995).

68 *See generally* CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing et al. eds., 1997). Wing conceived this reader to answer the silence of women-centered texts in Critical Race Theory scholarship.

"Studies" movement, which created an analytic, discursive field where Black women's stories and perspectives were communicated as occupying marginal spaces, subordinated to White women's stories and perspectives, and subordinated to all men's stories and perspectives. This "marginalization" became the signifier or symbol under which Black women's experiences were described vis-à-vis White women, Black men, and White men; this language became the way of describing Black women's discrimination in a manner that continues to produce actual marginalization and reinforce its symbolic nature.[69]

It is in this context that Crenshaw's reading of *Moore* reveals the rules governing the hegemonic discourse of intersectionality, or the acceptable means of discussing marginalization in academic and activist circles. Within the analytic field of Crenshaw's discourse, the Ninth Circuit's refusal to allow Moore to represent a class of "all women" becomes an articulation of "intersectionality." The only way to speak of such marginalization is to describe the relationships it includes at a fixed period of time. In Moore's case, this is her relationship not to the Black men and White men with whom she occupies space in the collective bargaining unit, but with the White women whose status as "women" and "White" converge to Moore's detriment and exclusion. Thus, under the strictures of this discourse, Moore cannot represent White women because their whiteness is invisible, and they are "all women" while she is not; their experiences are centered while hers are marginalized. It is irrelevant whether, truthfully, Moore's experiences as a Black woman could fully encompass White women's claims. In Crenshaw's construct, Moore, as a member of a "multiply-disadvantaged class," is strategically poised to represent anyone else who shares a disadvantage (femaleness or Blackness).[70]

Communicated in this manner, the concrete reality of Moore's failure to advance in her employment with Hughes is a form of dichotomous subordination (White/Black; male/female domination) even if the cause is not readily discernible from the case itself. The way Moore's experience is discussed as intersectional rhetoric helps to maintain marginalization as a symbol of White and Black female relationships in the employment discrimination arena; those reading Crenshaw's article, for example, find a means to express White and Black female relationships in these terms. Such expression reinforces how members of those groups perceive themselves in actuality. In this discourse, Black women occupy multiple, intersecting identities that are invisible, while White womanhood is

69 See LACLAU & MOUFFE, *supra* note 54, at 117 (discussing how language creates reality).

70 Crenshaw, *supra* note 15, at 145.

subsumed in whiteness and considered "the norm." As the term "intersectionality" has become the shorthand by which scholars and activists discuss multiple, intersecting identities for marginalized people—primarily people of color—it has essentialized marginalization and set up whiteness as a monolithic identity without interrogating the nuanced race, class, gender, and sexualities that comprise it.

Such hegemonic discourse limits how scholars, litigators, and activists can discuss the consequences of difference as they manifest in the law and legal and societal institutions, and how litigators and activists can use the theories that comprise "intersectionality" for social change. To continue this discourse in ways that both define and solidify difference does little to address the nuances of white supremacy, patriarchy, and capitalism as they operate in the descriptors "race," "class," "gender," "sexuality," and "sexual orientation." Rather, it sets up intersectionality as hegemonic discourse.

II. Creating Intersectionality as Hegemonic Discourse

Ernesto Laclau and Chantal Mouffe's *Hegemony & Socialist Strategy: Towards a Radical Democratic Politics* is an effort to reconceptualize theories of hegemony as expressed by Hegel, Marx, Gramsci, and their progeny.[71] Laclau and Mouffe's work not only sheds light on the binary conception of hegemony (us/them; insider/outsider), but also on the formation of hegemonic discourse. Roughly defined, hegemony is predominant influence or domination that is perpetuated and preserved through power relationships between the oppressor and oppressed. In Hegelian, Marxian, and Gramscian theories of hegemony, the source of the predominant influence or domination shifts according to each theorist's explanation of historical and political phenomena. For example, the source of Hegelian hegemony is the State or an entity characterized by rules, customs, and laws designed to advance its people (subjects) toward a freedom it defines.[72] Hegel's freedom is the reconciliation of man's Spirit and mind as embodied in the State.[73] In comparison, Marxian theories of

71 *See generally* LACLAU & MOUFFE, *supra* note 54; *see also,* G.F.W. HEGEL, INTRODUCTION TO THE PHILOSOPHY OF HISTORY 67 (1988); C.L.R. JAMES, NOTES ON THE DIALECTICS: HEGEL, MARX, AND LENIN 41, 43 (1948); Karl Marx, *Contribution to the Critique of Hegel's Philosophy of Right, in* THE MARX-ENGELS READER 21 (Robert C. Tucker ed., 2d ed. 1978); Karl Marx, *Economic and Philosophic Manuscripts of 1844, in* THE MARX-ENGELS READER 84, 92–93 (Robert C. Tucker ed., 2d ed. 1978); Karl Marx, *The German Ideology, in* THE MARX-ENGELS READER 151 (Robert C. Tucker ed., 2d ed. 1978); ANTONIO GRAMSCI, PRISON NOTEBOOKS xvii (1971); MARTIN CLARK, ANTONIO GRAMSCI AND THE REVOLUTION THAT FAILED 2 (1977); JOHN HOFFMAN, THE GRAMSCIAN CHALLENGE: COERCION AND CONSENT IN MARXIST POLITICAL THEORY 53–59 (1984); DANTE GERMINO, ANTONIO GRAMSCI: ARCHITECT OF A NEW POLITICS 256–57 (1990).

72 HEGEL, *supra* note 71, at 64–65.

73 *Id.* at 67.

hegemony highlight the conflicting nature of the State as it is and the State as it imagines itself.[74] Marxist hegemony creates a State that advances its people toward an ideal that does not capture their existence, dual existences of the material and spiritual, which remain irreconciled.[75] In order to maintain its illusion of the ideal, the State makes definitions and sets limits on the people's actions.[76] At the heart of Marxist hegemony theory is that the definitions and limitations that are set by the State vary in each stage of history and are dependent upon man's relationship to labor and the means of production, the source of predominant influence and domination.[77] Lastly, the Gramscian source of hegemony rests neither in the State, nor in man's relationship to the means of production. It rests in the development and preservation of classes, namely the ruling class and its antithesis, the subaltern or working class.[78] All three theories have as their goal universal man's freedom, universal man's ability to live reconciled in oneself (mind, spirit, and material existence) absent the intervention and interference of a supreme power.[79] However, all three describe different single unifiers (the State, relationship to the means of production, and class preservation) as the source of hegemonic power.

Laclau and Mouffe's work is a departure from embodying hegemony within a single unifier. In the theorists' view, a unifier (e.g. race) is a fictionalized description that attempts to harmonize a series of varied and diverse experiences.[80] In the Laclau/Mouffe paradigm, a unifier falls into the category of an "articulated practice" or "any practice establishing a relation among elements such that the identity [of an element] is modified."[81] Discourse is the discussion of the articulated practice as a unifier or a "structured totality."[82] In turn, these discussions are governed by certain rules that are set by the context, the analytic/discursive field, where such discussions occur.[83] Such discourse is communicated or "dispersed" based on the discursive/analytic spaces that govern it.[84] The analytic space governs the acceptable scope of relationships in an articulated practice.[85]

For Laclau and Mouffe, every object of study within a discursive field is created by the method and means of how it is discussed.[86] There is no

74 Marx, *Contributions to the Critique of Hegel's Philosophy of Right*, *supra* note 71, at 21.

75 Marx, *The Economic and Philosophic Manuscripts of 1844*, *supra* note 71, at 84, 92–93.

76 *Id.*

77 Marx, *The German Ideology*, *supra* note 71, at 151.

78 GRAMSCI, *supra* note 71, at 51–52.

79 HEGEL, *supra* note 71, at 67; Marx, *The Economic and Philosophic Manuscripts of 1844*, *supra* note 71, at 91; JAMES, *supra* note 71, at 41.

80 LACLAU & MOUFFE, *supra* note 54, at 95–96.

81 *Id.* at 105.

82 *Id.*

83 *Id.* at 105, 107, 109.

84 *Id.* at 105.

85 *Id.* at 110.

86 *Id.* at 108.

distinction between language and behavior, or the spiritual, material, and mental.[87] On the contrary, language, behavior, spirit, material and mental all exist on the same plane, each is its own discursive space.[88] Any relationship between them is temporarily fixed by discourse and dispersion in a discursive/analytic field. Any unifier connecting them is a symbol or signifier of a (false) totality.[89] Furthermore, the relationship between the subjects of the unifier (the spiritual and mental for Hegel's "State, for example") is a creation of discourse and dispersion, and the symbol that unifier becomes.[90]

Accordingly, unifiers such as race, class, gender, sexuality, and sexual orientation are essentialist descriptors—totalizing descriptors—of the relationships that comprise them.[91] Discussions of difference and discrimination as they occur in the discursive field of scholarly legal discourse cast unifiers (race, class, gender, sexuality, and/or sexual orientation) or a series of unifiers (race x class x gender x sexuality x sexual orientation) as categories of oppression.[92] In actuality, each unifier is an expression of a series of relationships that is temporarily fixed by discourse and dispersion, and then by the symbolism attached to the unifier as dispersed.[93] Laclau and Mouffe give an example of this phenomenon in their critique of feminist essentialism.[94] They argue that the whole of sexual differences are cast as woman subordinated to man, regardless of the forms these differences take or the relationships they encompass.[95] In construing the relationships between men and women in this manner, each relationship becomes symbolized (falsely) as an expression of the male domination of females.[96] In turn, the symbolism in which the expression takes place produces real forms of subordination in male and female interactions. Ultimately, these

87 *Id.* at 109–10.

88 *Id.*

89 *Id.* at 106.

90 *Id.* at 114–16.

91 *Cf. id.* at 109. The authors argue,

> The objective world is structured in relational sequences which do not necessarily have a finalistic sense and which, in most cases, do not actually require any meaning at all: it is sufficient that certain regularities establish differential positions for us to be able to speak of a discursive formation. Two important conclusions follow from this. The first is that the material character of discourse cannot be unified in the experience or consciousness of a founding subject.

92 *Cf. id.* at 115–16. The authors explain how subject categories are attempts to capture complex relationships. To the extent that a writer or speaker assembles these subject categories as a means to express their underlying relationships, the writer or speaker is essentializing each subject category and fixing the reader/hearer's understanding of it in a particular moment of converging relationships.

93 *Id.* at 116.

94 *Id.* at 117.

95 *Id.* at 117–18.

96 *Id.* at 118.

interactions reinforce and reproduce the symbolism from which they were born.[97]

CRT/F scholars' discussion of White race, class, gender, sexuality, and sexual orientation intersections as the "norm" or as White domination of Black people, and gender as male domination of female is another example of symbolic language that seeks to express complex relationships as temporarily fixed under essentialist unifiers. Such discussions have obfuscated the underlying relationships that comprise the unifiers "race," "class," "gender," "sexuality," and "sexual orientation" and are temporarily fixed under those unifiers.[98] Discussing intersections of race, class, gender, sexuality, and sexual orientation almost exclusively in terms of the dichotomous relationships (male/female domination, White/Black) denies larger patterns of oppression that reinforce discrimination against both women and men and manifest differently across race, class, gender, sexuality, and sexual orientation.

Sociologists Patricia Hill Collins and Deborah King were instrumental in developing foundational theory for interlocking oppressions, which later birthed the discourse on "Black Feminist Thought" or race, class, and gender as a framework for analyzing difference.[99] While the focus of her work is Black women, Collins' foundational tenet of developing theoretical models from multiple interacting oppressions has wide application. Building on the work of feminist scholar bell hooks,[100] namely hooks' assertion that dichotomous thinking is "the central ideological component of all systems of domination in Western society,"[101] Collins situates race, class, and gender analyses within a fluid set of analyses (e.g. race, class, gender, sexuality, region, age,[102] and culture[103]) involving interacting systems of oppression.[104] Collins' work is a departure from what she calls "dichotomous oppositional difference," or the notion that an identity gains meaning only when defined in relation to its opposing counterpart (i.e.

97 *Id.*

98 *Cf. id.* at 117–18, 121 (Note how the authors discuss the role of unifiers in obscuring the relationships they attempt to explain.).

99 *See generally* PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT (2008); Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS 42 (1988); Jennifer C. Nash, *'Home Truths' on Intersectionality*, 23 YALE L.J. & FEMINISM 445 (2011) (historicizing the relationship between intersectionality and Black feminism).

100 BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (1984).

101 Patricia Hill Collins, *Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought* (No. 6), 33 SOC. PROBS. S14, S20 (1986).

102 *Id.* at S16.

103 *Id.* at S21–S24.

104 *Id.* at S20–S21.

male/female, White/Black, etc.).[105] Likewise, in her article *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, King cautions against developing a simplistic framework for analyzing race, class, and gender because "[their significance] is "neither fixed nor absolute but, rather, is dependent on the sociohistorical context and the social phenomenon under consideration."[106] Both King and Collins' work stand in contrast to those totalizing unifiers that form intersectionality as hegemonic discourse.

III. The Limitations of Intersectionality in Practice

Privileging experiences of women of color as subordinated to White women and all men in describing intersectionality obfuscates how white supremacy, patriarchy, and capitalism operate as race, class, gender, sexuality, and sexual orientation, and prevents more dynamic theoretical frameworks for analysis. Several case examples detailing sex and race discrimination in the employment realm illustrate the limits of intersectionality as shorthand in practice: *Phillips v. Martin Marietta Co.,* 400 U.S. 542 (1971), *Earwood v. Continental Southeastern Lines,* 539 F.2d 1349 (4th Cir. 1976), and *Vinson v. The Cheesecake Factory Restaurants, Inc.* (N.D. Ga. 2003) (No. 1:03 CV 2231 (WBH)).[107]

A. *Phillips v. Martin Marietta Co.*

In 1969, Ida Phillips brought a sex discrimination lawsuit against Martin Marietta Co. pursuant to Title VII of the Civil Rights Act of 1964.[108] Phillips alleged in her claim that Martin Marietta's refusal to accept her application for assembly trainee because she was the mother of preschool age children was a violation of Title VII's prohibition on sexual discrimination. The United States District Court for the Middle District of Florida granted Martin Marietta's Motion for Summary Judgment on grounds that Martin Marietta employed men with preschool aged children in the position Ms. Phillips sought, and that 75–80% of the people hired for the position were women.[109] The Court of Appeals for the Fifth Circuit affirmed the District Court's decision and denied a rehearing in a *per curium* decision.[110] In the dissent, Chief Judge John R. Brown and Circuit Court Judges Ainsworth and Simpson considered whether the

105 *Id.*

106 King, *supra* note 99, at 49.

107 All that exists for this case are the initial disclosures and the docketing record.

108 *Phillips*, 400 U.S. at 543.

109 *Id.*

110 Phillips v. Martin Marietta Co., 416 F.2d 1257, 1258 (5th Cir. 1969).

court should have heard argument on whether claimants bringing Title VII lawsuits should be able to allege discrimination based on one of Title VII's protected classes, in this case sex, in addition to another non-protected class, motherhood, as a basis for discrimination.[111] In Judge Brown's words,

> The case is simple. A woman with pre-school age children may not be employed, a man with pre-school children may. The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody – and this includes Judges, Solomonic or life tenured – has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman. It is the fact of the person being a mother – i.e., a woman – not the age of the children, which denies employment opportunity to a woman [sic] which is open to a man.[112]

The Supreme Court of the United States granted Phillips' request for *certiorari*.[113] In its opinion, the Court found that the Fifth Circuit Court of Appeals erred in interpreting Title VII as allowing different hiring policies for men and women with preschool age children on the basis of sex.[114] However, the Court did state that it would be possible for the Fifth Circuit Court of Appeals on remand to uphold Martin Marietta's employment policy if the Company showed that familial obligations interfered more with a woman's job performance than a man's.[115] If so, Martin Marietta's policy would qualify as a "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise," exempting it from Title VII scrutiny.[116] Criticizing the majority opinion, Justice Thurgood Marshall in his concurrence remarked,

> By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing "to hire an individual based on stereotyped characterizations of the sexes." . . . Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity. The exception for a "bona fide occupational qualification" was not intended to swallow the rule.[117]

While *Phillips v. Martin Marietta* is cited as a victory for mothers and is popularly known for the controversial sex-plus analysis in Title VII

111 *Id.*

112 *Id.* at 1259.

113 Phillips v. Martin Marietta Co., 397 U.S. 960 (1970).

114 *Phillips*, 400 U.S. at 544.

115 *Id.*

116 *Id.*

117 *Id.* at 545.

claims,[118] this case is full of unexplored contours. Although Ida Phillips was a White woman, the NAACP Legal Defense Fund (LDF) served as her legal team.[119] Reporting on the case in 1971, Jet Magazine, a magazine wholly devoted to dispensing news to African Americans about African Americans, described Ms. Phillips as having "seven pre-school age children."[120] Phillips' occupancy in the workplace as a mother of seven young children suggests that she had assumed the role as either the primary breadwinner or a breadwinner in her family, and that she needed to work to support her family. This is precisely the reason why the LDF took the case; its rationale was that Martin Marietta's reasoning in the case, if adopted by the court, could prove detrimental if applied to similarly situated African American women.[121] Historians have noted the prevalence of Black female-headed homes to argue that feminist agendas pushing the right to enter the workplace were primarily concerned with White women.[122] Implicit in this telling of social history is the assumption that the majority of White women occupied positions of stay-at-home-wife and mother, who had little to no responsibility in financially supporting their families.[123] Ms. Phillips was the negation of this assumption; she occupied a space so far beyond acceptable White womanhood that she became a Black woman by proxy in the legal proceedings.[124] Placing Ms. Phillips in this historical context reveals that her race (White), class (economically poor or working class), gender (woman), and sexuality/sexual orientation (presumably cis heterosexual) converged to her detriment; it made her motherhood something less than fully protected. However, "race," "class," "gender," "sexuality," and "sexual orientation" as totalizing categories of analysis expressing Black subordinated to White and female to male are far too narrow to adequately describe her case and place sex-plus cases in a dynamic discursive field.

The United States' *amicus curiae* brief in *Phillips* gives further insight into how advocates for Ms. Phillips' position struggled to fit her reality into the categories available under Title VII. Based on the "Introduction

118 *See, e.g.,* Jeffries v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1033 (5th Cir. 1980); Judge v. Marsh, 649 F. Supp. 770, 780 (D.D.C. 1986); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987).

119 SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 51 (2011).

120 JET MAG., Feb. 18, 1971, at 23.

121 MAYERI, *supra* note 119, at 53.

122 *See, e.g.*, JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT (2d ed. 2009).

123 *See, e.g.,* Joanne Meyerowitz, *Beyond the Feminine Mystique: A Reassessment of Postwar Mass Culture, 1946–1958, in* NOT JUNE CLEAVER: WOMEN AND GENDER IN POSTWAR AMERICA, 1945–1960 229–62 (Joanne Meyerowitz ed., 1994).

124 *Cf.* MAYERI, *supra* note 119, at 51–53. A discussion of how Ms. Phillips' attorneys chose to represent her, especially their references to Black mothers in legal arguments, is discussed *infra* note 128.

and Summary of the Argument" in its brief, the United States' concern was that denying women with pre-school age children the opportunity to work would cause a greater welfare burden on the state.[125] It cited to statistics from the U.S. Department of Labor that showed as of March 1968 "fourteen percent (4.1 million) of all women in the labor markets were mothers with children under six years of age. [And] of this number, 33 percent were either heads of their households or had husbands whose incomes were below $5,000 in 1967."[126] The U.S. cited additional statistics to show that "[a]mong all non-white mothers with children under six years of age, a larger percentage worked (45 percent) than did white mothers with such children (27 percent)."[127] Despite the statistics available to it on the impact the Fifth Circuit Court of Appeals decision if upheld could have on all working mothers, the United States gave cursory attention to this line of reasoning before turning to address Martin Marietta's claims of BFOQ. Significantly, the United States emphasized the disproportionate impact the decision could have on African American mothers.[128] While from a litigation standpoint, arguing race discrimination under Title VII seems persuasive given the shakiness of Phillips' sex discrimination claim, this strategy did not strike at the decaying heart of the court's interpretation of motherhood, especially as it pertained to Ms. Phillips as a working-class White mother. Ultimately, it was a strategy designed to defend the gains of the feminist movement and a nascent Title VII, but not to advance to the battlefield of gender equity.

By framing the argument in terms of the group that would be disproportionately burdened (African American mothers), instead of focusing on the group burdened by the current litigation (all working women with pre-school age children; White women in particular), the United States reinforced dichotomous thinking by pitting race against sex. In its words,

> The decision below directly affects a substantial number of women in the labor market, many of whom are the sole or principal income-producing member of households with children and thus are among those in our society least able to afford restrictions upon their employment opportunities. The burden falls heaviest among Negroes and other non-whites.[129]

This limited argument failed to address that Ida Phillips was being punished through eclipsed employment opportunities as a working White mother of pre-school age children, not merely by stereotypes about the

125 *Brief for the United States as Amicus Curiae* at 4–5, Phillips v. Martin Marietta, 397 U.S. 960 (1970) (No. 1058).

126 *Id.* at 5 n.2.

127 *Id.* at 6 n.3.

128 *Id.* at 5–6.

129 *Id.*

societal role of women, but by a patriarchal, capitalist structure that subordinates and erases women's reproductive and care-taking labors as they support male capitalist enterprise in the marketplace and have a value on their own.[130]

Women of all races are affected by this phenomena, but historically White women's labor at home (reproduction, childcare, housekeeping) has been tied to the capitalist economy through the White men it supports and enables to engage in it outside of the home, and the legitimate White children that continue this legacy.[131] In contrast, Black women's reproductive labor directly supported the capitalist enterprise of slavery, while their care-taking labor on the plantation (in the household or in the fields) reinforced and solidified the class position of wealthy Whites (the plantocracy).[132] Black women's care for White children during slavery and throughout the Jim Crow era took them away from their children and households, and again funneled the economic benefits of their labor primarily into the White households they served.[133] When viewed through this lens, Ms. Phillips' presence in the workplace, like all working mothers, simultaneously made visible and monetized the cost of childcare. However, its significance for White women was different than for Black women. For White women, it separated the caretaking role from one's sex, which was a direct challenge to so-called "acceptable" racialized gender roles for White women that could form the basis for Martin Marietta's BFOQ claim. The basis for the stereotype of what working mothers of small children were fit to do was tied to White women's work.

B. *Earwood v. Continental Southeastern Lines*

Ronald Earwood brought suit against Continental Southeastern Lines, Inc. for refusing to allow him to work without receiving a haircut. He alleged that Continental's enforcement of its rules for hair length discriminated against him on the basis of sex in violation of Title VII.[134] The United States District Court for the Western District of North Carolina ruled in Earwood's favor, awarded him back pay, and ordered Continental to cease enforcement of the policy.[135] Earwood was employed as a bus driver at Continental, who at the time employed only males as bus drivers.[136] Under its grooming policies, Continental required its bus drivers to "report for work cleanly shaved with a trim haircut, a clean shirt,

130 *See* Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 3–4, 5–6, 16–17 (1993).

131 *Id*. at 8–9, 10–11.

132 *Id*. at 7–8, 12–13.

133 *Id*. at 19–21.

134 Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976).

135 *Id.* at 1350.

shoes polished, and a clean, neat uniform."[137] The hair length requirement also provided that, "1. Sideburns will not be worn lower than the ear lobe. 2. The hair will not at any time hang over the shirt collar. 3. Hair will not be worn over the ears. 4. Moustaches will be neatly trimmed, straight and no handle bars. 5. Beards are not permitted."[138] These particular standards only applied to bus drivers; employees in Continental's other divisions were allowed to have longer hair than drivers, but were still required to "be neat and clean and groomed in a manner commensurate with their jobs."[139] According to the Fourth Circuit, "The district court described Earwood's hair as 'modishly full' . . . It was combed over his ears and was thick upon his neck, but not so long as to fall about his shoulders."[140] Citing *Phillips v. Martin Marietta*, Earwood argued that Continental's grooming regulation deprived him of an employment opportunity because it reinforced a "sex stereotype."[141] The Fourth Circuit distinguished *Phillips*, reasoning that sex-plus cases involved discrimination based on sex and another immutable characteristic like sex (e.g. motherhood).[142] In the court's view hair was not an immutable sex characteristic; it could be changed on a whim.[143] On the basis of this reasoning, and the precedent set by the Fifth, Eighth, Ninth, and D.C. Circuit Courts of Appeals, the Fourth Circuit reversed the lower court's ruling.[144] The sole dissenter to the opinion, Circuit Judge Winter, reasoned that because hair length was only an issue for men, Continental's policy discriminated on the basis of sex.[145]

Of import here is the district court's use of the words "modishly full" to describe Earwood's hair. 1976, the year the Fourth Circuit opinion was filed, marked an era just shy of the negative associations with hair length and political associations.[146] The anti-war movement surrounding the conflict in Vietnam, which ended with the departure of the last United States military helicopter from Saigon,[147] was a challenge to all things conservative and of the status quo. America looked with derision on its "hippie," inhabitants, primarily middle class Whites,[148] who espoused free love, and encouraged life outside of suburbia and the confines of 9-to-5.[149] Long hair was the style preferred by male "hippies," a "mod" or faddish style, and had no place in the conservative workplace.[150] "Hippie" is a

136 *Id.*

137 *Id.*

138 *Id.* at 1350 n.2.

139 *Id.* at 1350.

140 *Id.*

141 *Id.* at 1351.

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.* at 1352.

146 Barry Miles, Hippie 10 (2005).

147 *Id.*

148 *Id.* at 9–16; Lewis Yablonsky, The Hippie Trip: A Firsthand Account of the Beliefs and Behaviors of Hippies in America By a Noted Sociologist 103 (1968).

distinctly White male and female identity, in contrast to the "Black Power" association with the Afro in the same era, or long natural "radical" hair for Black people.[151] All court and newspaper accounts of the case suggest that Earwood was White.[152] It would be an inaccurate description of Earwood's case to cast it simply in terms of "hair preference," as indeed the Fourth Circuit Court of Appeals did. The convergence of Earwood's race (White), gender (man), class (economically middle class),[153] and sexuality/sexual orientation (arguably cis heterosexual)[154] were the basis for his discrimination. However, in a framework that casts White males as solely the oppressor of persons of color and all women, such an analysis is not possible.

At its core, Earwood's case is about how White male hippie identity posed a challenge to patriarchy. As historian Sara M. Evans argues in her article, *Sons, Daughters, and Patriarchy: Gender and the 1968 Generation*, the children of middle-class and elite parents lived in overt, visible opposition to the values held dear by their parents' generation.[155] She writes,

> These wholesale attacks on authority and hierarchy, however, had different political implications for men and women. Young men were visible leaders, the public figures who actively rejected both the power of their father's generation and the culturally sanctioned trappings of successfully achieved masculinity. They attacked the rigidity of school rules, militarism, and the

149 YABLONSKY, *supra* note 148, at 106–07; JOHN BASSETT MCCLEARY, THE HIPPIE DICTIONARY: A CULTURAL ENCYCLOPEDIA (AND PHRASEICON) OF THE 1960S AND 1970S 50, 166, 323 (2004); JON WIENER, COME TOGETHER: JOHN LENNON IN HIS TIME 40 (1991).

150 MILES, *supra* note 146, at 9–16.

151 *See* PAMELA FERRELL, LET'S TALK HAIR: EVERY BLACK WOMAN'S PERSONAL CONSULTATION FOR HEALTHY GROWING HAIR 18–19 (1996).

152 *See Bus Driver Says He'll Keep Hair*, STAR-NEWS (Wilmington, N.C.), Oct. 6, 1972, http://news.google.com/newspapers?nid=1454&dat=19721005&id=6mg0AAAAIBAJ&sjid=yAkEAAAAIBAJ&pg=1912,1247082; *Bus Company Fires Driver for Wearing Lengthy Hair*, STAR-NEWS, Oct. 7, 1972, http://news.google.com/newspapers? nid=1454&dat=19721007&id=7Gg0AAAAIBAJ&sjid=yAkEAAAAIBAJ&pg=6012,1579744; *Hair Rules Upheld*, TUSCALOOSA NEWS, Sept. 5, 1976, http://news.google.com/newspapers?nid=1817&dat= 19760905&id= 2BgfAAAAIBAJ&sjid= 8J0EAAAAIBAJ&pg=4060,1450521. The newspaper articles appear to mention someone's race when they are not White. *See, e.g.*, *Indian Leader to Jail*, TUSCALOOSA NEWS, Sept. 5, 1976, http://news.google.com/ newspapers?nid=1817&dat=19760905&id=2BgfAAAAIBAJ&sjid=8J0EAAAAIBAJ&pg=4060,1450521. This article is listed above the Earwood article *Hair Rules Upheld*. It is the only mention of a racial designation in any headline on the entire page. Also, how the courts describe Earwood's hair suggests that it is straight, not the kinky hair necessary to create an Afro. Kinky hair grows up and out; straight hair grows down. Finally, because of the politicization of the Afro, it is unlikely that it would go unmentioned in court and media coverage of the Earwood case if he was indeed Black.

153 Earwood was $20,000 in debt from his son's medical bills. He was suspended from his job without pay for failure to cut his hair. Having the choice to keep his hair over receiving payment from his job suggests that Earwood was not poor. *Bus Driver Says He'll Keep Hair*, *supra* note 152.

154 Earwood's son is mentioned in *id.* While having children is not determinant of a person's sexual status, the non-mainstream nature of gay adoption in 1972 suggests that Earwood was heterosexual.

155 114 AM. HIST. REV. 331, 334 (2009).

> meaninglessness of affluent consumption, arguing instead for authenticity, spontaneity, and freedom from tradition.
>
> * * *
>
> A critical subtext of the revolt of young male students was that it contested the constructions of masculinity of their fathers' generation. Their choices of gender-bending self-presentation—long hair, rejection of "suits," draft resistance, and anti-war activism—only heightened the threat.[156]

Mr. Earwood's hair was a symbol of this identity, even if he did not personally ascribe to the ideals attached to it. As a bus driver, he was the public face of the company, his body ("cleanly shaved with a trim haircut, clean shirt, shoes polished, and clean, neat uniform")[157] a representation of the company's adherence to hierarchy and elite and middle-class values wrapped in White cis heterosexual masculinity. His deviation from this standard was a threat. Moreover, the rules governing his presentation furthered Continental Southeastern Lines as a capitalist enterprise, a brand that operated out of a bus station that refused to sell beer at its café due to the large numbers of WWII soldiers who frequented that station during the war.[158] So concerned with its image, its parent company Queen City Trailways accepted the early retirement of one of the owner's sons, Jack Love, after he was accused of selling buses for which he received no payment.[159] The case began in 1959, the year Mr. Love retired, and dragged on until its resolution by settlement in 1964.[160] The Love family continued to run the company until 1975,[161] three years after Ronald Earwood began his employment discrimination claim.[162]

The image of the hippie in opposition to patriarchal gender norms persists in American jurisprudence. In his dissent in *Obergefell v. Hodges*, Justice Antonin Scalia suggested that hippie values were in conflict with intimacy as expressed within the confines of marriage. Responding to the majority's assertion that "'[t]he nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality,'"[163] Scalia opined "(Really? Who ever

156 *Id*. at 335.

157 *Earwood*, 539 F.2d at 1350.

158 Walter R. Turner, *Coming Home: The North Carolina Bus Companies that Became Part of Trailways and Greyhound*, 90 N.C. HIST. REV. 355, 371 (2013). Carolina Scenic Stages became Continental Southeastern Lines upon its acquisition by the Transcontinental Bus System in 1966. *Id*. at 376, 376 n.52. Prior to that time, it operated as a subsidiary of Queen City Trailways. *Id*.

159 *Id*. at 375 n.48

160 *Id*.

161 Turner, *supra* note 158, at 377.

162 *Earwood*, 539 F.2d at 1350.

thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie."[164] Scalia's statement reveals that just under the surface, white supremacy, patriarchy, and capitalism function to shape White male identity and experience even as their influence appears to be invisible. Practitioners who reject such invisibility can work to capture the complexity of White masculinities as they reinforce discrimination and fall prey to it.

C. *Vinson v. The Cheesecake Factory Restaurants, Inc.*

In 2003, Bryan Vinson, an African American male, brought a racial discrimination suit[165] pursuant to Title VII against the Cheesecake Factory in the United States District Court for the Northern District of Georgia (Atlanta).[166] Although no published opinion exists for the case,[167] Vinson's initial disclosures provide information on the basis for his claim.[168] The case involved the grooming standards at Cheesecake Factory, where Vinson was employed as a server.[169] Vinson wore his hair cornrowed, a hairstyle where hair is tightly braided flat to the scalp in various patterns.[170] According to Vinson's description, "[c]ornrows, like other traditional African-American hairstyles, are an expression of African-American culture and have developed great cultural significance. Cornrows and variations thereof have been appropriated as a cultural symbol of the African American race and are often worn to affirm African-American's African heritage."[171]

Vinson's direct supervisor was Louis Sandor.[172] Vinson alleged that Sandor commented inappropriately and negatively about his cornrows, as well as about traditional African American hairstyles worn by other African American employees at Cheesecake Factory.[173] According to

163 Obergefell v. Hodges, 135 S. Ct. 2584, 2630 (2015).

164 *Id.*

165 Plaintiff's Responses to Initial Disclosures 1-2, Vinson v. Cheesecake Factory Rests., Inc., (N.D. Ga. 2003) (No. 1:03 CV 2231 (WBH)). Vinson also alleged "negligent supervision/retention and intentional infliction of emotional distress." *Id.*

166 *Id.*

167 Docket, Vinson v. Cheesecake Factory Rests., Inc., (N.D. Ga. 2003) (No. 1:03CV02231 (WBH)). The docket ends with a reference to a "Joint Preliminary Report and Discovery Schedule (to Judge) (ALS) (Entry Date 09/03/03)."

168 Plaintiff's Responses to Initial Disclosures and Plaintiff's First Supplement to Plaintiff's Responses to Initial Disclosures, Vinson v. Cheesecake Factory Rests., Inc., (N.D. Ga. 2003) (No. 1:03 CV 2231 (WBH)).

169 Plaintiff's Responses to Initial Disclosures 1, Vinson v. Cheesecake Factory Rests., Inc., (N.D. Ga. 2003) (No. 1:03 CV 2231 (WBH)).

170 *Id.*

171 *Id.*

172 *Id.*

Vinson's disclosures, Sandor's negative views about his cornrows, "labeled 'extreme' and in a 'pattern,'" were the cause for his termination.[174] He argued that Cheesecake Factory's application of its grooming standard was neither reasonable nor even handed for African American employees, because it did not allow hairstyles predominantly worn by African Americans.[175] By targeting these hairstyles specifically, the grooming policy had a disparate impact on African Americans.[176]

While legal challenges to traditional African and African American hairstyles in the workplace have garnered much litigation[177] and scholarly attention,[178] much of the discussion has centered on Black women's right to wear these hairstyles and not Black men. Cornrows as worn by Black men have been a hotbed of public debate. When Black males wear them, they are associated with gang behavior, crime, violence, and the like.[179] In 2006, the Dean of Hampton University Business School, Sid Credle, came under media scrutiny for lauding the Business School's grooming policy,

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.*

177 *See, e.g.*, Hollins v. Atl. Co., 188 F.3d 652 (6th Cir. 1999) (suit brought by African American female employee alleging that company grooming policy which, in practice, required her supervisor to pre-approve "ethnic" or other "eye-catching" hairstyles was discriminatory in violation of Title VII); Eatman v. UPS, 194 F. Supp. 2d 256 (S.D.N.Y. 2002) (suit brought by African American male alleging that a work policy requiring drivers with "unconventional" hairstyles to cover their hair with a hat was discriminatory in violation of Title VII); Halton v. Great Clips, Inc., 94 F. Supp. 2d 856 (N.D. Ohio 2000) (suit brought pursuant to Title VII by African Americans who were refused hair services for African American textured hair types at Great Clips locations); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981) (Title VII suit brought by African American female against American Airlines fired because of her braided and cornrowed hairstyle).

178 *See, e.g.*, Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010); D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got To Do With It?*, 79 U. COLO. L. REV. 1355 (2008); Constance Dionne Russell, *Styling Civil Rights: The Effect of § 1981 and the Public Accommodations Act on Black Women's Access to White Stylists and Salons*, 24 HARV. BLACKLETTER L.J. 189 (2008); Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL'Y 407 (2007); Deborah Pergament, *It's Not Just Hair: Historical and Cultural Considerations for an Emerging Technology*, 75 CHI.-KENT L. REV. 41 (1999); Devin D. Collier, Note, *Don't Get it Twisted: Why Employer Hairstyle Prohibitions Are Racially Discriminatory*, 9 HASTINGS RACE & POVERTY L.J. 33 (2012); Monica C. Bell, Comment, *The Braiding Cases, Cultural Deference, and the Inadequate Protection of Black Women Consumers*, 19 YALE J.L. & FEMINISM 125 (2007); Michelle L. Turner, *The Braided Uproar: A Defense of My Sister's Hair and a Contemporary Indictment of* Rogers v. American Airlines, 7 CARDOZO WOMEN'S L.J. 115 (2001).

179 *See School's Ban on Boy's Cornrows is 'Indirect Racial Discrimination,'* THE GUARDIAN (June 17, 2011, 7:01 PM BST), http://www.guardian.co.uk/uk/2011/jun/17/school-ban-cornrows-indirect-discrimination. In this article about a boy of African descent banned from school in Kenton, Harrow North London for wearing cornrows, the headteacher of the school stated, "Our uniform and haircut policy for students other than sixth formers is a critical part of our strategy for maintaining excellent behavior, for keeping gang mentality out of the school and for ensuring that students do not adopt attire or haircuts that may encourage this mentality." The High Court subsequently found that there was race discrimination, but no sex discrimination. Ben Power, *Ban on Cornrows Race, but Not Sex, Discrimination,* SPRINGHOUSE SOLICITORS EMPLOYMENT LAW UPDATE (June 17, 2011), https://www.springhouselaw.com/updates/ban-on-cornrows-race-but-not-sex-discrimination/; Fenceroy v. Morehouse Parrish Sch. Bd., No. Civ.A. 05-0480, 2006 WL 39255 (W.D. La. Jan. 6, 2006) (suit brought by parents on behalf of their minor son who was expelled from school for wearing braids); ENCYCLOPEDIA OF THE AFRICAN DIASPOR: ORIGINS, EXPERIENCES, AND CULTURE, VOLUME 2 493–94 (Carole Boyce Davis ed. 2008).

also known as the "hair code,"[180] which was implemented in 2000 as a policy for the five-year MBA students.[181] The "hair code," which Credle stated was "more for [Black] male students,"[182] prohibits cornrows and other "extreme" and non-conservative hairstyles.[183] A syllabus for the Leadership Application Program at the Business School stated that "[b]raids, dreadlocks and other unusual styles [were] not acceptable."[184] Students violating the "hair code" were asked to leave class or sit in the back of the room.[185] In some instances, they were also prevented from attending seminars, received a course credit deduction for non-attendance, and were asked to complete additional class work to account for the lost credit.[186] Of these practices Credle commented,

> I want the best for them [our Business School students]. Our job as educators is to teach our students at the highest levels . . . If a student looks unkempt or sloppy, it can leave a negative impression . . . cornrows could set you back. The first thing they (interviewers) see is your appearance.[187]

As Vinson wore them, his cornrows became an expression of a particular Black masculine identity associated with poverty, danger, and criminality. This image would not be conducive to the Cheesecake Factory's reputation as an "upscale casual dining" franchise.[188] Moreover, Dean Credle's comments highlight the intragroup controversy surrounding cornrows. As one Hampton student remarked, "[the hair code] is more than a rule, it is a way of making African Americans assimilate to the mainstream standards of 'what is professional and what is not.'"[189]

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180 *See* Latasha Willis, *Hampton Business School Sticks by Requirement for "Conservative Hairstyles,"* JACKSON FREE PRESS, July 11 2006, http://www.jacksonfreepress.com/news/2006/jul/11/article-hampton-business-school-sticks-by/; *Hairy Debate Grips School*, THE NEWS & OBSERVER (RALEIGH, N.C.), May 14, 2006, http://thirdcity.org/articles/Hair.pdf; *Dreadlocks Don't Make the Cut*, MAYNARD INST. FOR JOURNALISM EDUC. (June 23, 2006), http://mije.org/richardprince/dreadlocks-dont-make-cut.

181 Willis, *supra* note 180.

182 *Hairy Debate Grips School, supra* note 180. Hampton is an Historically Black College and University. Its Mission Statement states in part: "A historically black institution, Hampton University is committed to multiculturalism." *Mission*, HAMPTON UNIV., http://www.hamptonu.edu/about/mission.cfm.

183 *Hairy Debate Grips School, supra* note 180.

184 Willis, *supra* note 180.

185 *Id.*

186 *Id.*

187 *Id.*

188 *About the Cheesecake Factory*, CHEESECAKE FACTORY, https://investors.thecheesecakefactory.com/home/default.aspx (stating that "[t]he Cheesecake Factory Incorporated created the upscale, casual-dining segment in 1978 with the introduction of our namesake concept").

189 Willis, *supra* note 180.

In this context, Bryan Vinson's desire to present his body in a particular way at his workplace is a challenge to white supremacy, patriarchy, and capitalism, as they restrict presentation of the Black masculine body to what is marketable and accessible. Vinson's wearing his hair in cornrows invoked the image of criminality inconsistent with the Cheesecake Factory brand. Masculinities theorist Frank Rudy Cooper has described Black masculinities as bipolar with the "Bad Black Man" and the "Good Black Man" at each pole.[190] The Bad Black Man is criminal and outcast, while the Good Black Man has the option of assimilating into dominant (White) society through adopting White patriarchal norms.[191] Cooper argues,

> Many whites expect the Good Black Man to assimilate as the price for his inclusion into the mainstream. Consequently, they feel no guilt when the non-assimilating Bad Black Man is consigned to the lower-classes or jail. Bipolar representation of black masculinity thus protects the status quo of exclusion of most black men into the lower-classes and jail and the inclusion of only a token few assimilationists into the white mainstream.[192]

When the Cheesecake Factory fired Vinson for not adhering to its grooming policy, it left him facing unemployment and possible consignment to the lower classes. Its framing of the issue as one of "proper grooming" rendered Vinson's cornrows a "choice," rather than an acceptable grooming method for his hair texture and an expression of cultural pride. However, Vinson's choice was about whether he would assimilate into a white supremacist, patriarchal, capitalist marketplace, by making his bodily representation saleable to Cheesecake Factory patrons—a head unadorned by cornrows sitting on the shoulders of a "Good Black Man"[193]—and therefore employable. He literally paid a price, his wages and other employment benefits, for keeping his cornrows and his cultural representation of himself intact. This cost illustrates the pernicious nature of workplace rules that target how employees can present their bodies for work.

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190 Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 857–58, 876–78 (2006).

191 *Id*. at 857–59.

192 *Id*. at 858–59.

193 *See id*. at 881–82. Cooper argues,

> We can say, then, that many whites carry around an image of a 'paradigmatic black man' against whom they measure other blacks. That Good Black Man is 'passive, nonassertive, and nonaggressive. He has made a virtue of identification with the aggressor, and he has adopted an ingratiating and compliant manner. The image of the Good Black Man thus requires that he assimilate into white culture by downplaying his race. In a sense, he must become a Good White Man.

Id.

In sum, these cases demonstrate the limits of intersectionality as shorthand for what are actually a host of feminist-centered strategies designed to expose, weaken, and eventually eradicate white supremacy, patriarchy, and capitalism. Practitioners employing the term "intersectionality' should fully engage it as a viable analytical framework to communicate how discrimination has manifested against their client, rather than use it as a catchall for combinations of claims or a descriptor for the multiple categories implicated in a Title VII claim. Doing so requires the advocate to understand the historical, sociological, and legal underpinnings of intersectionality; the intellectual rigor required to create documents of persuasion that communicate its tenets; and the advocacy skills necessary to convince courts of law and public opinion of its importance in anti-discrimination jurisprudence and social activism.

IV. Intersectional Feminism and the Activism of #MeToo

In early 2017, five days after the presidential inauguration, USA Today ran a story titled "What is intersectional feminism? A look at the term you may be hearing a lot."[194] In an illustration of the term, the article's author wrote, "A white woman is penalized by her gender but has the advantage of race. A black woman is disadvantaged by her gender *and* her race. A Latina lesbian experiences discrimination because of her ethnicity, her gender and her sexual orientation."[195] The article went on to explain how calls for intersectional feminism came out of the Women's March on Washington as a criticism of how women of color were excluded in the planning process for the March.[196] Similarly, Denison University posted an article written by a current student on its Women's & Gender Studies webpage.[197] In her description the author, a White woman, opines that

> "white feminism" ignores intersectionality and neglects to recognize the discriminations experienced by women who are not white. It's important to note that not all feminists who are white practice "white feminism." "White feminism" depicts the way white women face gender inequality as the way all women experience gender inequality, which just isn't correct.[198]

194 Alia E. Dastagir, *What is Intersectional feminism? A look at the term you may be hearing a lot*, USA TODAY, Jan. 25, 2017, https://www.usatoday.com/story/news/2017/01/19/feminism-intersectionality-racism-sexism-class/96633750/.

195 *Id.*

196 *Id.*

197 Taylor Hawk, *Intersectional Feminism: What It Is and Why We need it For a Truly Gender Equal World*, DENISON (July 26, 2016), https://denison.edu/academics/womens-gender-studies/feature/67969.

198 *Id.*

These dialogues, descriptions, and definitions underscore why using the term "intersectionality" as a rhetorical shorthand to express interlocking identities when discussing claims of discrimination and marginalization demonstrates that each unifier—"race," "class," "gender," "sexuality," and "sexual orientation"—is treated as a modifier for others depending on the impetus for the discrimination claim. The legacy of such usage is an expression of various aspects of identity as amplifiers. For Black women, womanness is amplified by Blackness. For white women, Whiteness is amplified by womanness. The danger present in this shorthand is that it obscures the power at play behind the scenes. It obscures how white supremacy, patriarchy, and capitalism are expressed through the possible combinations of race, class, gender, sexuality, and sexual orientation. We live in three dimensions simultaneously and our various identities are simultaneously shaping each other, the varied results of which are present in any given context.

As this foray into explaining intersectional feminism demonstrates, the legacy of intersectionality as shorthand is present in both descriptions, where for White women Whiteness is amplified by womanness, and for Latinas where gender and sexuality are amplified by race and ethnicity. The language of intersectionality becomes a proxy for the exclusion of women of color, and sets up whiteness as a fixed, static, and neutral set of insider relationships inaccessible by outsiders. This language is also polarizing, as evidenced by several tweets highlighted in the USA Today article, which read, "If you don't know the difference between white feminism vs. intersectional feminism then you're probably a white feminist,"[199] and "Wishlist for the bookish diversity discussion in 2017: - Stop comparing marginalizations; - Intersectionality; - LISTEN TO WOC [women of color]."[200] But compare we must if intersectionality would also take into account the intersecting identities of men of color, White women, White men, and the nuances of their marginalization as well. To do otherwise contributes to these groups' colonization of marginalized people's experiences to describe their own. Armed solely with language that casts them as insiders, even as they are having outsider experiences,

199 Mami Nature (@maminature), TWITTER (Jan. 16, 2017, 7:30 PM), https://twitter.com/MamiNature_/status/821197993110081536.

200 Marines (@mynameismarines), TWITTER (Jan. 17, 2017, 1:23 PM), https://twitter.com/mynameismarines/status/821468059881930752.

201 *See, e.g.*, Veronica Wells, *You Better Not: White Women Suggest Kneeling for Nat'l Anthem to Protest Kavanaugh's Confirmation,* MADAMNOIRE (Oct. 8, 2018), https://madamenoire.com/1043270/white-women-suggest-kneeling-for-national-anthem/; Keka Araujo, *White Feminists Attempt to Co-opt 'Take a Knee' Movement,* DIVERSITYINC (Oct. 10, 2018), https://www.diversityinc.com/Haters/white-feminists-coopt-take-knee.

these groups plant their flags on the bloody battlefield of intersectional feminism (read as intersectional oppression), colonizing women of color's experiences as their own.[201]

Purveyors of #MeToo litter the same field like fallen Themyscirian warriors on the frontlines of feminism. Headlines like "The #MeToo Movement Looks Different For Women of Color. Here Are 10 Stories"[202] or "Black women are waiting for their #MeToo moment"[203] speak to the exclusion of women of color from discussions of sexual harassment and assault, rather than taking a hard look at how white supremacy, patriarchy, and capitalism converge to silence the women and men who would dare declare #MeToo.[204] Actor Alyssa Milano made the hashtag popular on October 15, 2017, using it as a way for survivors of sexual harassment and assault to find community in each other and to bring their stories to the forefront.[205] Milano's tweet came ten days after the New Yorker published actor Ashley Judd's allegations of sexual harassment by producer Harvey Weinstein.[206] Judd's allegations were followed by accounts made by countless, additional women, most of them White, who reported that Weinstein harassed them, raped them, and/or blacklisted them.[207] Among the cacophony and cross talk of the accusers, Lupita Nyong'o and Salma Hayek raised their voices to the roar of outrage.[208] Journalists, tweeters, bloggers, and public intellectuals were quick to point out that Nyong'o and Hayek's stories received less attention in the media because they are

202 Jessica Prois & Carolina Moreno, *The #MeToo Movement Looks Different For Women of Color. Here Are Ten Stories*, HUFFPOST (Jan. 2, 2018, 9:20 AM), https://www.huffpost.com/entry/women-of-color-me-too_us_5a442d73e4b0b0e5a7a4992c.

203 Renée Graham, Opinion, *Black Women are waiting for their #MeToo moment*, BOSTON GLOBE (May 15, 2018, 3:21 PM), https://www.bostonglobe.com/opinion/2018/05/15/black-women-are-waiting-for-their-metoo-moment/BuZ8QJXP09k6ZNKIDgdTBJ/story.html.

204 *But see* Lolita Buckner Inniss, *The Absent Racial #MeToo and Rekindling Intersectional Identity,* A'INT I A FEMINIST LEGAL SCHOLAR TOO? (Sept. 23, 2018), http://innissfls.blogspot.com (Inniss' analysis begins to unpack #MeToo and its relationship to patriarchy and White supremacy, but only scratches the surface.).

205 Alyssa Milano (@Alyssa Milano), TWITTER (Oct. 15, 2017, 4:21 PM), https://twitter.com/Alyssa_Milano/status/919659438700670976?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E919659438700670976&ref_url=https%3A%2F%2Fmashable.com%2F2017%2F10%2F15%2Fme-too-alyssa-milano-twitter-harassment%2F.

206 Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, THE N.Y. TIMES, Oct. 5, 2017, https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html.

207 *See, e.g.*, Emma Dibdin, *A Full List of Harvey Weinstein's Accusers and Their Allegations: Actresses Ashley Judd, Gwyneth Paltrow, Angelina Jolie, Lea Seydoux, and Cara Delevigne are among the women who have come forward*, ELLE (Dec. 13, 2017), https://www.elle.com/culture/a12838402/a-full-list-of-harvey-weinsteins-accusers-and-their-allegations/.

208 *See, e.g.*, Lupita Nyong'o, Opinion, *Lupita Nyong'o: Speaking Out About Harvey Weinstein*, N.Y. TIMES, Oct. 19, 2017, https://www.nytimes.com/2017/10/19/opinion/lupita-nyongo-harvey-weinstein.html; Salma Hayek, Opinion, *Harvey Weinstein is My Monster Too*, N.Y. TIMES, Dec. 17, 2017, https://www.nytimes.com/interactive/2017/12/13/opinion/contributors/salma-hayek-harvey-weinstein.html.

209 *See, e.g.*, Errin Haines Whack, *Why few women of color in wave of accusers? 'Stakes Higher,'* NWI TIMES (Ind.), Nov. 20, 2017, https://www.nwitimes.com/entertainment/why-few-women-of-color-in-wave-of-accusers-stakes/article_8c94544b-9ed8-5c8f-8627-0e90826ad828.html; Isha Aran, *Harvery Weinstein is Saving His Nastiest Smear Attempts for Women of*

women of color,[209] and that Alyssa Milano's #MeToo hashtag originated in 2007 with a Black woman, activist Tarana Burke.[210] Although the media did indeed pay less attention to Nyong'o and Hayek's claims and Weinstein directly denied their allegations in a way he had not done for prior allegations brought by White women, the waning attention and denials were more a function of white supremacy, patriarchy, and capitalism as expressed in Weinstein's wealthy, racialized masculinity, than in White women as beneficiaries of the same.

Tensions over inclusion in discussions of sexual harassment and assault also served to marginalize, if not outright oust, White men and men of color from the #MeToo movement. For example, when actor Corey Feldman attempted to bring attention to what he described as a Hollywood pedophile ring, which he asserts operated to prey on child actors like himself and fellow child actor and friend Corey Haim, his claims were met with incredulity by the press and his peers.[211] His 2013 memoir, *Coreyography*, gives accounts of childhood sexual abuse by industry heavyweights, abuse that Feldman insists led to his ongoing struggles with substance abuse and Haim's fatal overdose.[212] Feldman's allegations received renewed and serious consideration as Weinstein's accusers continued to come forward.[213] Although somewhat vindicated by the #MeToo movement, Feldman has been accused of lying and of paranoia.[214] As a White male, Feldman cannot occupy a place of vulnerability when compared to any woman alleging claims of sexual assault. Despite his marginalized and unprotected status as a child star—a status that set him up as prey for Hollywood powerbrokers that had the power to end or prolong his career—White male Hollywood insiders are construed

Color, SPLINTER NEWS (Dec. 14, 2017, 12:43 PM), https://splinternews.com/harvey-weinstein-is-saving-his-nastiest-smear-attempts-1821293136; Shannon Carlin, *Salma Hayek Says Harvey Weinstein Specifically Discredits Women of Color*, REFINERY29 (May 14, 2018, 11:30 AM), https://www.refinery29.com/2018/05/199077/salma-hayek-harvey-weinstein-discredited-women-of-color.

210 *See, e.g.*, Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES, Oct. 20, 2017, https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html.

211 Jason Duaine Hahn & Christina Dugan, *Corey Feldman 'Shattered' Over Lack of Support from Peers in Wake of Abuse Claims*, PEOPLE.COM (Dec. 27, 2017), https://people.com/tv/corey-feldman-lack-support-abuse-claims-tale-two-coreys/; Christabel Duahm, *Corey Feldman calls out Hollywood for not supporting his sexual abuse claims*, ATLANTA J. CONST., Dec. 29, 2017, https://www.ajc.com/entertainment/celebrity-news/corey-feldman-calls-out-hollywood-for-not-supporting-his-sexual-abuse-claims/wpNucr1WFC6sOeHX5DQmIN/.

212 COREY FELDMAN, COREYOGRAPHY: A MEMOIR (2013).

213 Yohana Desta, *Corey Feldman on Abuse Allegations: "It's All Connected to a Bigger, Darker Power,"* VANITY FAIR (Nov. 10, 2017, 8:00 AM), https://www.vanityfair.com/hollywood/2017/11/corey-feldman-movie-campaign-interview.

214 Christie D'Zurilla, *Corey Feldman 'not playing around' about naming Hollywood pedophiles – if his movie gets funded*, L.A. TIMES, Oct. 30, 2017, http://www.latimes.com/entertainment/la-et-entertainment-news-updates-corey-feldman-hollywood-pedophiles-1509372721-htmlstory.html.

as those who wield privilege and power, not those who are silenced within its stranglehold.

Former football star, actor, and comedian Terry Crews suffered a similar fate in reporting his status as a sexual assault survivor. When Crews shared his story via Twitter of sexual assault by a White male executive during a work party, reactions ranged from sympathetic to skeptical.[215] In his account, Crews revealed his conflicted feelings of anger and voicelessness during the assault and in the days following. Right after the assault, Crews remembers his desire to fight the executive, but decided physical violence to be an ill-considered path.[216] In his words, "'240 lbs. Black Man stomps out Hollywood Honcho' would be the headline the next day. Only I probably wouldn't have been able to read it because I WOULD HAVE BEEN IN JAIL. So [my wife and I] left."[217] Crews would later testify before Congress in support of the Sexual Survivor's Bill of Rights, an act in furtherance of his advocacy against toxic masculinity and for survivors of sexual assault.[218] He received criticism from other men, who would cast his Black masculinity (construed as justified anger and aggression as a response to sexual assault) as antithetical to his status as an abuse survivor (silenced by trauma, shame, and fear).[219] Yet, the movement that gave him the courage to speak out about his own experiences possessed no effective language to navigate warring conceptions of Crews' black masculinities. Thus, it could hold no space for him simultaneously as an ally and a survivor.

Elsewhere, the #MeToo camp was fighting a different battle over the intersectional ownership rights to #MeToo. Arguments that Tarana Burke's status as the originator of #MeToo was overshadowed by Alyssa Milano's use of the hashtag and the overwhelming support Milano received was boiled down to the obvious differences between the two—Milano is a White woman; Burke is a Black woman.[220] Prior to Milano's October 15, 2017 tweet using the hashtag #MeToo, she called for women to boycott Twitter in support of Rose McGowan and her allegations that

215 Yohana Desta, *In the Wake of Weinstein News, Terry Crews Shares His Own Sexual –Assault Story*, VANITY FAIR (Oct. 10, 2017, 6:23 PM), https://www.vanityfair.com/hollywood/2017/10/terry-crews-harvey-weinstein.

216 Lucia Graves, *Terry Crews Details His Sexual Assault in Powerful Testimony to the Senate*, VULTURE (June 26, 2018), http://www.vulture.com/2018/06/terry-crews-details-sexual-assault-in-testimony-to-senate.html.

217 Desta, *supra* note 215.

218 Graves, *supra* note 216.

219 Hannah Giorgis, *Terry Crews and the Discomfort of Masculine Anxiety,* THE ATLANTIC (June 29, 2018), https://www.theatlantic.com/entertainment/archive/2018/06/terry-crews-and-the-discomfort-of-masculine-anxiety/564047/.

220 Garcia, *supra* note 210.

221 *Id.*

Harvey Weinstein raped her.[221] McGowan had been locked out of her Twitter account for a short time as she sought to bring attention to sexual harassment and assault in Hollywood.[222] On October 12, 2017, Milano tweeted, "Tomorrow (Friday the 13th) will be the first day in over 10 years that I won't tweet. Join me. #WomenBoycottTwitter."[223] Black Twitter, among them April Reign, architect of the hashtag "#OscarsSoWhite," was quick to respond.[224] Reign commented, "White women have not been as supportive as they could have been of women of color when they experience targeted abuse and harassment . . . . If there is support of Rose McGowan, which is great, you need to be consistent across the board. All women stand with all women."[225] Perhaps best tweeted by Kimberly Bryant @6Gems: "Intersectionality = when you really want to support #WomenBoycottTwitter but you're conflicted [because] Black women never get the same support. [frowny face Emoji]."[226]

Implicit in these comments is the reality of women of color being erased in narratives of sexual assault.[227] However, expressing this erasure as evidence of the need for intersectionality underscores how intersectionality as shorthand obfuscates the interplay of white supremacy, patriarchy, and capitalism. White women's stories about sexual harassment and assault receive greater media attention because race (white) and gender (woman) expressed as descriptions of white supremacy, patriarchy, and capitalism are elevated and idealized in the marketplace as the most valuable articulation of femaleness above all other incarnations. This does not mean that White women are not also victims and survivors of sexual harassment and assault or that they always receive redress for the crimes against them. Weinstein's many accusers demonstrate the contrary, as does the confirmation of Justice Brett Kavanaugh to the Supreme Court of the United States. Nor does it mean that White women have prevented women of color from doing the work to end sexual assault and harassment among women of color, hindered their stories from being heard, or otherwise thwarted women of color's attempts to make the crimes against them public. Beginning with Rosa Parks' ardent

222 *Id.*

223 *Id.*

224 *Id.*

225 *Id.*

226 *Id.*

227 *See, e.g.*, Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241 (1991); Danielle L. McGuire, At the Dark End of the Street: Black Women, Rape, and Resistance – A New History of the Civil Rights Movement from Rosa Parks to the Rise of Black Power (2010).

228 *See* McGuire, *supra* note 227.

advocacy of Recy Taylor[228] and continuing with Tarana Burke's organization, Just Be Inc. Girls for Gender Equity, the absence of a hashtag did not mean that the activism was absent or ineffective. Tarana Burke's comments about Milano's use of #MeToo are instructive in this regard: "Initially I panicked . . . . I felt a sense of dread, because something that was part of my life's work was going to be co-opted and taken from me and used for a purpose that I hadn't originally intended."[229] Burke's angst over Milano's tweet speaks to the issue of exclusion and visibility, another function of white supremacy, patriarchy, and capitalism—one that Milano attempted to rectify by giving well-publicized attribution to Burke for #MeToo and by ensuring that she was included publicly in discussions about the shape of the #MeToo movement going forward.[230] If recognition, allies, and support are needed, describing the absence of them as a call for intersectionality is a perilous strategy that accomplishes the opposite. The 2016 Presidential election is illustrative of this point. Scholars and activists alike remain conflicted as to why over 50% of United States White women voted for a man for president who had been accused of sexual harassment and assault,[231] and who glories in making misogynistic comments about women. Perhaps the failure of intersectionality as shorthand to make the multiple, intersecting identities of White women explicit prevented them from seeing themselves as outsiders too.

V. Conclusion

As the work of Critical Race Theory/Critical Race Feminism scholars, litigators, activists, and social media influencers demonstrate, new analytical models for anti-discrimination must move beyond intersectional rhetoric to capture how white supremacy, patriarchy, and capitalism operate to marginalize people of all races, classes, genders, sexualities, and sexual orientations. By continuing the hegemonic discourse of intersectionality, those with the power to shape our national conversations in legal arenas and across social media platforms march in lockstep to a theory that does not realize the promise of theorists Patricia Hill Collins and Deborah K. King—a transformative model for addressing patterns of domination in historical, cultural, political, and social context. Scholarly legal discourse communities and practical legal discourse communities are separate but linked; acceptable and viable theories in one inform what are

229 Garcia, *supra* note 210.

230 *Id.*

231 *Exit Polls – Election 2016*, CNN (Nov. 23, 2016, 11:58 AM), https://www.cnn.com/election/2016/results/exit-polls/national/president.

viable and acceptable methods and analytical processes in the other. Likewise, these communities impact how conversations about multiple interlocking oppressions are carried out across social media platforms and in activist circles. For these reasons, CRT/F scholarship must reformulate what the law posits itself to be, where it gains power, and by what means it exercises authority. In its next stage of development, it must endeavor to mold critical lawyering, activist, and influencer practices to reimagine and destroy "dichotomous oppositional difference," especially as it perpetuates the hegemonic discourse of the "outsider." Failure to do so will leave us divided and fighting each other over the scraps that white supremacy, patriarchy, and capitalism throw at our respective communities, rather than uniting to fight these sources of predominant influence and domination that leave us all wanting. We can choose to remain suspended in the pain of invisibility and disregard or attempt to move beyond it. Ultimately it is our collective responsibility to change the conversation from one that reinforces hierarchies to one that creates equity and inclusion, for this is the hope and the promise of #MeToo.