

I. THE ANTIDISCRIMINATION FRAMEWORK

A. The Experience of Intersectionality and the Doctrinal Response

One way to approach the problem of intersectionality is to examine how courts frame and interpret the stories of Black women plaintiffs. While I cannot claim to know the circumstances underlying the cases that I will discuss, I nevertheless believe that the way courts interpret claims made by Black women is itself part of Black women's experience and, consequently, a cursory review of cases involving Black female plaintiffs is quite revealing. To illustrate the difficulties inherent in judicial treatment of intersectionality, I will consider three Title VII⁴ cases: *DeGraffenreid v General Motors*,⁵ *Moore v Hughes Helicopter*⁶ and *Payne v Travenol*.⁷

1. *DeGraffenreid v General Motors*.

In *DeGraffenreid*, five Black women brought suit against General Motors, alleging that the employer's seniority system perpetuated the effects of past discrimination against Black women. Evidence adduced at trial revealed that General Motors simply did not hire Black women prior to 1964 and that all of the Black women hired after 1970 lost their jobs in a seniority-based layoff during a subsequent recession. The district court granted summary judgment for the defendant, rejecting the plaintiffs' attempt to bring a suit not on behalf of Blacks or women, but specifically on behalf of Black women. The court stated:

[P]laintiffs have failed to cite any decisions which have stated that Black women are a special class to be protected from discrimination. The Court's own research has failed to disclose such a decision. The plaintiffs are clearly entitled to a remedy if they have been discriminated against. However, they should not be allowed to combine statutory remedies to create a new 'super-remedy' which would give them relief beyond what the drafters of the relevant statutes intended. Thus, this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.⁸

⁴ Civil Rights Act of 1964, 42 USC § 2000e, et seq as amended (1982).

⁵ 413 F Supp 142 (E D Mo 1976).

⁶ 708 F2d 475 (9th Cir 1983).

⁷ 673 F2d 798 (5th Cir 1982).

⁸ *DeGraffenreid*, 413 F Supp at 143.

Although General Motors did not hire Black women prior to 1964, the court noted that "General Motors has hired . . . female employees for a number of years prior to the enactment of the Civil Rights Act of 1964."⁹ Because General Motors did hire women—albeit *white women*—during the period that no Black women were hired, there was, in the court's view, no sex discrimination that the seniority system could conceivably have perpetuated.

After refusing to consider the plaintiffs' sex discrimination claim, the court dismissed the race discrimination complaint and recommended its consolidation with another case alleging race discrimination against the same employer.¹⁰ The plaintiffs responded that such consolidation would defeat the purpose of their suit since theirs was not purely a race claim, but an action brought specifically on behalf of Black women alleging race *and* sex discrimination. The court, however, reasoned:

The legislative history surrounding Title VII does not indicate that the goal of the statute was to create a new classification of 'black women' who would have greater standing than, for example, a black male. The prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box.¹¹

Thus, the court apparently concluded that Congress either did not contemplate that Black women could be discriminated against as "Black women" or did not intend to protect them when such discrimination occurred.¹² The court's refusal in *DeGraffenreid* to

⁹ Id at 144.

¹⁰ Id at 145. In *Mosley v General Motors*, 497 F Supp 583 (E D Mo 1980), plaintiffs, alleging broad-based racial discrimination at General Motors' St. Louis facility, prevailed in a portion of their Title VII claim. The seniority system challenged in *DeGraffenreid*, however, was not considered in *Mosley*.

¹¹ Id at 145.

¹² Interestingly, no case has been discovered in which a court denied a white male's attempt to bring a reverse discrimination claim on similar grounds—that is, that sex and race claims cannot be combined because Congress did not intend to protect compound classes. White males in a typical reverse discrimination case are in no better position than the frustrated plaintiffs in *DeGraffenreid*: If they are required to make their claims separately, white males cannot prove race discrimination because white women are not discriminated against, and they cannot prove sex discrimination because Black males are not discriminated against. Yet it seems that courts do not acknowledge the compound nature of most reverse discrimination cases. That Black women's claims automatically raise the question of compound discrimination and white males' "reverse discrimination" cases do not suggest

acknowledge that Black women encounter combined race and sex discrimination implies that the boundaries of sex and race discrimination doctrine are defined respectively by white women's and Black men's experiences. Under this view, Black women are protected only to the extent that their experiences coincide with those of either of the two groups.¹³ Where their experiences are distinct, Black women can expect little protection as long as approaches, such as that in *DeGraffenreid*, which completely obscure problems of intersectionality prevail.

2. *Moore v Hughes Helicopter, Inc.*

*Moore v Hughes Helicopters, Inc.*¹⁴ presents a different way in which courts fail to understand or recognize Black women's claims. *Moore* is typical of a number of cases in which courts refused to certify Black females as class representatives in race and sex discrimination actions.¹⁵ In *Moore*, the plaintiff alleged that the employer, Hughes Helicopter, practiced race and sex discrimination in promotions to upper-level craft positions and to supervisory jobs. Moore introduced statistical evidence establishing a significant disparity between men and women, and somewhat less of a disparity between Black and white men in supervisory jobs.¹⁶

that the notion of compoundedness is somehow contingent upon an implicit norm that is not neutral but is white male. Thus, Black women are perceived as a compound class because they are two steps removed from a white male norm, while white males are apparently not perceived to be a compound class because they somehow represent the norm.

¹³ I do not mean to imply that all courts that have grappled with this problem have adopted the *DeGraffenreid* approach. Indeed, other courts have concluded that Black women are protected by Title VII. See, for example, *Jefferies v Harris Community Action Ass'n.*, 615 F2d 1025 (5th Cir 1980). I do mean to suggest that the very fact that the Black women's claims are seen as aberrant suggests that sex discrimination doctrine is centered in the experiences of white women. Even those courts that have held that Black women are protected seem to accept that Black women's claims raise issues that the "standard" sex discrimination claims do not. See Elaine W. Shoben, *Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination*, 55 NYU L Rev 793, 803-04 (1980) (criticizing the *Jefferies* use of a sex-plus analysis to create a subclass of Black women).

¹⁴ 708 F2d 475.

¹⁵ See also *Moore v National Association of Securities Dealers*, 27 EPD (CCH) ¶ 32,238 (D DC 1981); but see *Edmondson v Simon*, 86 FRD 375 (N D Ill 1980) (where the court was unwilling to hold as a matter of law that no Black female could represent without conflict the interests of both Blacks and females).

¹⁶ 708 F2d at 479. Between January 1976 and June 1979, the three years in which Moore claimed that she was passed over for promotion, the percentage of white males occupying first-level supervisory positions ranged from 70.3 to 76.8%; Black males from 8.9 to 10.9%; white women from 1.8 to 3.3%; and Black females from 0 to 2.2%. The overall male/female ratio in the top five labor grades ranged from 100/0% in 1976 to 98/1.8% in 1979. The white/Black ratio was 85/3.3% in 1976 and 79.6/8% in 1979. The overall ratio of men to women in supervisory positions was 98.2 to 1.8% in 1976 to 93.4 to 6.6% in 1979; the Black to white ratio during the same time period was 78.6 to 8.9% and 73.6 to 13.1%.

For promotions to the top five labor grades, the percentages were worse. Between 1976



How is equity defined, treated and institutionalized in your profession?

Exercise Your Equity Organ

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So if you don't make it to the end of this article, here's the cliff note: we will not "program" our way out of inequity. We won't grant our way out, either. But the sooner we demand equity in all of our sectors and spaces--and create a shared roadmap to reaching equity--our combined efforts could transform society towards measured, tangible outcomes.

*We need to get to a point in our society where
we are not rewarded for every effort that aims
to improve people's lives...*

The term equity is used a lot. If I didn't believe in it so much, I would probably be tired of hearing it. It's not so much that equity is an overused term, but often a misused one with an incomplete presentation. It is often used interchangeably with equality or narrowly described as the availability of resources, which would be access. Other times, it is limited to talks on increasing diversity and inclusion. All of which are characteristics of equity. But I offer that equity is a less like a supplement that you take from time to time to stay regular or address a deficiency. No matter the titles or positions I've held over the years, I have learned that equity is both a perspective and a state of being--and an achievable constant. Yes, equity is concerned about access, but it is also concerned about the quality of what's accessible, the frequency of what's accessible, and the intensity of what's accessible. Equity is more like an organ. And just

diagnose, triage, and maintain. And now more than ever, we need to stop glamorizing equity and really demystify it and collectively achieve it.

Workout #1: Formally make "equity" an organizational priority.

Similar to our resistance to keep up with regularly scheduled medical visits, our institutions--from non-profits to local government--are often hesitant to get an annual equity exam. Why? Because we haven't put equity in its rightful perspective. Equity is still the Splenda we sprinkle in our coffee, instead of the coffee itself. And instead of a concrete equity plan, we settle for characteristics of equity, and declare 'mission accomplished' without certainty as to whether our efforts actually significantly addressed a disparity. A way to change this habit is to explicitly make equity a priority *with teeth*. Maybe your org's vision statement should highlight specific equity goals that drive the actions moving forward. Or you require all of your staff to receive training on how to identify--and address--inequities. And if you're a politician, you may just want to legislate equity. Centering equity as a requirement should be expressed, understood, and evaluated.

Workout #2: Check your equity temperature.

A whole lot of things can cause your body to run a fever. And if left unattended, that fever can cause other complications throughout the body. Much like a fever, inequity is a symptom of unhealthy systems and environments, often left ignored, under-attended, or misdiagnosed for substantial periods of times. Over time, these ailments can lead to generational decay. But what do you do if you have the sniffles and it's unclear whether it's because of a cold or allergies? Or put another way, when we pour books into libraries, are we addressing access, when the problem may be illiteracy? To accurately understand the needs of communities, practitioners must first know what the complete health of that community is. Whether it's a report highlighting the disparities, a clearinghouse with a full list of services available (and which ones are missing), or a survey from residents about their needs and satisfaction with community providers, data-informed tools at least provide a snapshot, and ultimately help strengthen strategies to address the equity organ.

Workout #3: Align equity partners to reach multiple strategies.

Even the most altruistic among us can't do it all, and most of us work in spaces where we are designated only a piece of equity to focus on. But the beauty of the prior two workouts is that, if done collaboratively, equity can be achieved through collective action. We don't like to talk about it as much, but reaching equity can, in itself, be a competition--which ultimately does not strengthen the organ. Organizations are often spending time proving that their theory of action is stronger than another org's theory (largely due to the need to compete for grant and foundation dollars), instead of combining efforts to reach shared mutual goals quicker and with greater quality and accuracy. Furthermore, aligning with other partners who provide different services to

disparities in a much more rapid format and expediting healing and healing to the overall community.

We need to get to a point in our society where we are not rewarded for every effort that aims to improve people's lives but instead normalize equity in our business plans, strategies, and outcomes. And all that takes practice and a little tweaking. So push what you can, and push beyond that! Whatever your contribution is, we are depending on you to build your strongest, boldest equity muscle so that together, we can reach a healthier society.



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The people #MeToo leaves behind



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By [Bernice Yeung](https://www.revealnews.org/author/bernice-yeung/) (<https://www.revealnews.org/author/bernice-yeung/>) / November 27, 2017

Another day, another startling story about sexual harassment, or worse. The reality is that every day, about [50 people](https://www.bjs.gov/index.cfm?ty=pbdetail&iid=2377) (<https://www.bjs.gov/index.cfm?ty=pbdetail&iid=2377>) experience extreme sexual harassment when they are sexually assaulted or raped on the job.

It's a problem that affects people in all types of work, extending beyond film, media and politics to the women who clean hotel rooms (<https://www.revealnews.org/blog/why-cleaning-a-hotel-room-makes-you-a-target-for-sexual-harassment/>), tidy office buildings at night or pick vegetables.

At the heart of any sexual harassment accusation is the abuse of power. Hollywood mogul Harvey Weinstein had movie roles to offer. Reporter Glenn Thrush of The New York Times could help young journalists get in front of a top editor. Congressman John Conyers could open doors to a high-powered political career.

I've been reporting on these kinds power dynamics since 2012 with one critical difference: The women I've talked to are immigrant women from the working class. They face the same kind of power imbalance as the women coming forward today, except the exploitation plays out differently.

Their bosses aren't famous but they still have real influence on the people who work for them. These supervisors can hire and fire, mete out extra hours or take them away. For women living paycheck to paycheck, that's a significant kind of power to wield.

Supervisors overseeing immigrant workers also know that there are specific ways to coerce and silence the women they oversee – women who might not be authorized to be in the country, who don't speak English and who are purposely set up to work in isolation.

That sets up a dynamic in which women have been raped in the fields and sexually assaulted in the high-rises they clean, a phenomenon I sought to expose alongside my colleagues at the Investigative Reporting Program at University of California Berkeley, KQED-FM, PBS' FRONTLINE and Univision. My forthcoming book, "In a Day's Work: The Fight to End Sexual Violence Against America's Most Vulnerable Workers" (The New Press, 2018), draws from and expands on this work to look at how this issue plays out among domestic workers. In all of these industries, the dynamics that make women vulnerable to attack also make it difficult to speak up or file a complaint.

In this moment when all eyes are on sexual harassment among women with a certain level of privilege, here's a few key things I've learned about why this issue has historically been so hard to bring to light among low-wage immigrant workers:

- **Financial worries trap immigrant women in their jobs when they are sexually abused by their bosses.** Single mothers or women supporting families in their home countries told us that they feel tethered to their jobs. That's especially true for women not authorized to work in the U.S., because they worry that it will be difficult to find a new job.
- **Immigrant workers don't always know sexual harassment is against the law.** The women we talked to knew that what was happening to them was wrong, but some didn't initially know that they had a right to make a complaint. Making things even murkier, many workers in agriculture and janitorial work are employed by labor contractors, and they were confused about where they should report a problem.
- **Isolation is a powerful weapon for abusive supervisors in low-wage work.** Farmworkers said their bosses tried to rape them in their trucks after taking them to remote fields. Janitors on the night shift said bosses preyed on them in the bathrooms or in supply closets where they knew there weren't security cameras. Companies have tried to eliminate this risk by having women work in pairs or forbidding supervisors from driving their workers.

Our reporting also found that low-wage immigrant workers have pushed back on sexual violence, despite the formidable barriers to confronting it. They've [filed lawsuits \(https://www.npr.org/templates/story/story.php?storyId=5597646\)](https://www.npr.org/templates/story/story.php?storyId=5597646), [marched in rallies \(https://www.revealnews.org/blog/how-janitors-banded-together-to-fight-rape-on-the-night-shift/\)](https://www.revealnews.org/blog/how-janitors-banded-together-to-fight-rape-on-the-night-shift/) and given legislative testimony to denounce on-the-job sexual violence.

But even as a space has been cleared for more people to come forward, traps and barriers remain for the women I have been writing about. Immigration authorities are making more arrests, and police officials say fear of deportation has led to a drop in sexual assault reports.

We're at the cusp of a cultural inflection point that could lead to improvements for working women. But it won't be true progress if some of us, held back by poverty-level wages and immigration status, aren't able to step forward to say #MeToo.

Here's how to dig deeper into our previous investigations into sexual assault among farmworkers and night-shift janitors:

RAPE IN THE FIELDS

- [Read \(https://www.revealnews.org/article/female-workers-face-rape-harassment-in-us-agriculture-industry/\)](https://www.revealnews.org/article/female-workers-face-rape-harassment-in-us-agriculture-industry/)
- [Listen \(https://www.npr.org/2013/11/05/243219199/silenced-by-status-farm-workers-face-rape-sexual-abuse\)](https://www.npr.org/2013/11/05/243219199/silenced-by-status-farm-workers-face-rape-sexual-abuse)
- [Watch \(https://www.pbs.org/wgbh/frontline/film/rape-in-the-fields/\)](https://www.pbs.org/wgbh/frontline/film/rape-in-the-fields/)

RAPE ON THE NIGHT SHIFT

- [Read \(https://www.revealnews.org/article/under-cover-of-darkness-female-janitors-face-rape-and-assault/\)](https://www.revealnews.org/article/under-cover-of-darkness-female-janitors-face-rape-and-assault/)
- [Listen \(https://www.revealnews.org/episodes/hell-of-a-job/#segment-rape-on-the-night-shift\)](https://www.revealnews.org/episodes/hell-of-a-job/#segment-rape-on-the-night-shift)
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There have also been many powerful stories that have taken a hard look at violence against women at work over the years. Here are some of the best pre-Weinstein long-form stories that you should also check out:

[In Secretive Marijuana Industry, Whispers of Abuse and Trafficking \(https://www.revealnews.org/article/in-secretive-marijuana-industry-whispers-of-abuse-and-trafficking/\)](https://www.revealnews.org/article/in-secretive-marijuana-industry-whispers-of-abuse-and-trafficking/) (Reveal)

For decades, the ancient forests here have provided cover for the nation's largest marijuana-growing industry, shielding pot farmers from convention, outsiders and law enforcement.

But the forests also hide secrets, among them young women with stories of sexual abuse and exploitation.

[Juanita Broadrick Wants to Be Believed \(https://www.buzzfeed.com/katiejmbaker/juanita-broadrick-wants-to-be-believed?utm_term=.scLGdXRwz#.anR7b8zq2\)](https://www.buzzfeed.com/katiejmbaker/juanita-broadrick-wants-to-be-believed?utm_term=.scLGdXRwz#.anR7b8zq2) (BuzzFeed)

Broadrick claims Bill Clinton raped her in 1978, when he was Arkansas' attorney general, during what she thought would be a morning business meeting.

[Out Here, No One Can Hear You Scream \(http://highline.huffingtonpost.com/articles/en/park-rangers/\)](http://highline.huffingtonpost.com/articles/en/park-rangers/) (Huffington Post Highline)

In 2014, in California, female employees of the U.S. Forest Service filed a class-action lawsuit – the fourth in 35 years – over what they described as an egregious, long-standing culture of sexual harassment, disparity in hiring and promotion, and retaliation against those who complained.

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