“A REASONABLY COMPARABLE EVIL”: EXPANDING INTERSECTIONAL CLAIMS UNDER TITLE VII USING EXISTING PRECEDENT

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INTRODUCTION

Title VII of the Civil Rights Act of 1964 ("Title VII") makes it unlawful to discriminate against an individual in employment “because of such individual’s race, color, religion, sex, or national origin.” The Supreme Court has since clarified that discrimination includes both harassment and stereotyping based on a protected class. Legal scholars have increasingly recognized and explored how intersectional discrimination, in which people are discriminated against on the basis of more than one trait or characteristic, relates to Title VII and other anti-discrimination laws. A key insight of intersectional theory is that this kind of discrimination is not merely additive (discrimination against Black women equals race discrimination plus sex

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2 Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986) (holding that a “hostile environment” sexual harassment claim was viable under Title VII); Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (holding that discrimination based on sex stereotyping violated Title VII).
discrimination), but that “categories may intersect to produce unique forms of disadvantage.”

For example, an employer willing to hire Black men and white women might have a particular prejudice towards Black women with children as “welfare mothers.” This sort of discrimination emerges from social attitudes towards specific combinations of identities. But while it may seem intuitive that intersectional discrimination is prohibited by Title VII, circuit courts are split on how, or even whether, to allow intersectional claims. This is a significant issue, since upwards of twenty percent of all Title VII claims involve allegations of discrimination on multiple bases, amounting to tens of thousands of claims every year. Where such claims are allowed, they are usually subjected to significant doctrinal constraints and are substantially less likely to succeed than single-basis claims. The Supreme Court has yet to weigh in on intersectional discrimination, resulting in a proliferation of different approaches across circuits.

This Article argues that claimants can use the existing Supreme Court precedent of Oncale v. Sundowner Offshore Services, Inc. to contend that intersectional discrimination is a “reasonably comparable evil” to the single-basis discrimination contemplated by Congress in 1964, and therefore falls under the broad and flexible interpretation the Court has applied to Title VII’s “because of” language.

Part I introduces the background and current state of the law on intersectional discrimination under Title VII. It surveys the development of the foundational case law around intersectional discrimination and reviews the current approaches to intersectional claims.

Part II examines the problems created by those approaches. This Part considers a conceptual framework for understanding how the legal process disadvantages intersectional claimants, reviews the existing empirical work on intersectional discrimination, and surveys the inadequacies of the predominant “sex-plus” framework.

5 See discussion infra Part I.
6 See discussion infra Section II.A.
7 Id.
Part III proposes that claimants and courts can rely on the existing Supreme Court precedent of *Oncale* to allow a broader understanding of intersectional claims under Title VII, which in turn will allow claimants to overcome some of the key inadequacies in the current doctrine. In addition, this Article argues that the relatively broad textual construction of *Oncale* requires courts to allow at least some kind of intersectional claim.

I. **Title VII and Intersectionality: A Complicated Relationship**

Courts have confronted claims of discrimination based on more than one protected characteristic since Title VII became law, though with mixed results. This Part surveys the legislative history and administrative framework of Title VII, analyzes the canonical cases involving intersectional discrimination, and explores how courts have grappled (or not) with this complex issue since the passage of the Civil Rights Act. While courts were initially skeptical of intersectional claims, most circuits now allow them in at least some form, though the predominant “sex-plus” doctrine is less than ideal for intersectional plaintiffs.9

A. **Title VII Background**

What became the Civil Rights Act of 1964 was initially proposed by President John F. Kennedy in a speech broadcast to the American people on June 11, 1963, the same day Governor George Wallace prevented two Black students from registering for class at the University of Alabama.10 After Kennedy’s assassination, President Lyndon B. Johnson made the bill’s passage a chief priority and signed it into law on July 2, 1964.

The Civil Rights Act of 1964 established the Equal Employment Opportunity Commission (“EEOC”) to administer the statute. Title VII gives employees who are discriminated against based on a protected category a federal cause of action. The core of the statute makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation,

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9 See infra Section II.A.
10 John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963). Kennedy subsequently federalized the Alabama National Guard to enforce the desegregation order. *Id.*
terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”

All Title VII employment discrimination actions begin with a charge filed with the EEOC. The EEOC investigates these charges to determine if a violation has occurred. If it finds a charge has merit, the EEOC will attempt to administratively settle the charge or mediate a solution between the employer and employee. If that is unsuccessful, the charging party may request a “right to sue” letter from the EEOC, which gives permission to file a Title VII action in federal or state court. The EEOC has the power to bring lawsuits itself, but only does so in a small percentage of cases.

Under the Title VII framework established in *McDonnell Douglas Corp. v. Green*, the claimant carries the initial burden of showing a prima facie case of discrimination by establishing that: (1) they are a member of a protected class; (2) they were qualified for the job; (3) they were subject to an adverse employment action; and (4) that a similarly situated employee outside of the protected class received better treatment. The burden then shifts to the employer to present a legitimate, non-discriminatory reason for the adverse action. If the employer is able to do so, the burden shifts back to the claimant to show by direct or indirect evidence that the provided non-discriminatory reason is pretextual.

The EEOC has explicitly considered Title VII to encompass intersectional claims since 2000 and considers “the issue of dual or intersectional discrimination [] an important part of [their] Title VII enforcement work.” However, this guidance has so far had a limited effect.

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13 See *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM’N [Nov. 14, 2019, 3:51 PM], https://www.eeoc.gov/filing-lawsuit [https://perma.cc/7ULR-HDMK] (“The EEOC has discretion which charges to litigate if conciliation efforts are unsuccessful, and ultimately litigates a small percentage of all charges filed.”).
15 See *Davis v. Team Electric Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008) (applying the modern understanding of the *McDonnell Douglas* framework).
16 *Id.*
17 *Id.*
on the behavior of courts. Some district courts have cited the EEOC guidance in allowing claims of intersectional discrimination. But while the Supreme Court held in *Chevron USA, Inc. v. Natural Resources Defense Council* that administrative agencies can receive significant deference for their interpretations of the statutes they administer in some circumstances, it has clarified that this kind of EEOC compliance guidance is not due that kind of deference. Federal agencies can receive the less deferential *Skidmore* deference on a case-by-case basis, but courts have regularly declined to apply *Skidmore* to the EEOC.

**B. "Intersectional Anti-Canon"**

The first major case involving intersectional discrimination under Title VII was *DeGraffenreid v. General Motors*. The plaintiffs, Black women employed by GM, sued under a theory of a “combination of racial and sex-based discrimination,” alleging that GM’s “last hired-first fired” policy harmed Black women particularly. The Eighth Circuit refused to recognize Black women as a “special class to be protected from discrimination,” upholding the district court decision that the plaintiffs could not “combine remedies” to create a “super-remedy” which would give them relief “beyond what the drafters of the relevant statutes intended.” The Eighth Circuit, while noting it did “not subscribe entirely to the district court’s reasoning,” upheld the ruling.

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19 Kimble v. Wisconsin Dep’t of Workforce Dev., 690 F. Supp. 2d 765, 769–70 (E.D. Wis. 2010) (citing EEOC guidance on allowing an intersectional claim for a Black male plaintiff).
20 *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) ("[C]onsiderable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.").
23 *Young v. United Parcel Serv., Inc*, 135 S. Ct. 1338, 1352 (2015) (finding EEOC guidelines unpersuasive because they were inconsistent with earlier positions and promulgated only after certiorari was granted); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 361 (2013) (finding EEOC guidance "lack[ed] the persuasive force that is a necessary precondition to deference under *Skidmore*.").
24 *DeGraffenreid v. General Motors Assembly Div.*, 413 F. Supp. 142 (E.D. Mo. 1976), aff’d, 558 F.2d 480 (8th Cir. 1977).
25 *Id.* at 142–43.
26 *Id.* at 143.
27 *DeGraffenreid*, 558 F.2d at 484.
DeGraffenreid was the first in what scholars have referred to an “intersectionality anti-canon.” These cases, which include Rogers v. American Airlines, Inc., Moore v. Hughes Helicopters, Inc., Chambers v. Omaha Girls Club, and Payne v. Travenol Laboratories, Inc., involved Black female plaintiffs alleging both race and sex discrimination whose Title VII claims were found to be invalid. The initial wave of intersectionality scholarship was largely in response to the anti-cannon cases. Professor Kimberlé Crenshaw, a pioneering intersectionality scholar, identified these cases as the “doctrinal manifestations of a common political and theoretical approach to discrimination which operates to marginalize Black women” in anti-discrimination litigation and discourse. In this account, the results of these cases exemplify the ways that the legal system and conventional anti-discrimination framework, which focuses on single-basis discrimination, fail and marginalize Black women.

C. Jefferies and “A Class Separate and Distinct”

Shortly after DeGraffenreid, the Fifth Circuit reached a much different result, holding that Black women as a group are entitled to Title VII protections in Jefferies v. Harris County Community Action Association. Jefferies, a Black woman, alleged she was discriminated against based on both race and sex when she was denied a promotion. In contrast to DeGraffenreid, the

30 Moore v. Hughes Helicopters, 708 F.2d 475, 480 (9th Cir. 1983) (affirming a lower court’s holding that the Black female plaintiff inadequately represented white females or Black males in an employment class action).
31 Chambers v. Omaha Girls Club, 629 F. Supp. 925, 942 (D. Neb. 1986), aff’d, 834 F.2d 697 (8th Cir. 1987) (holding that the plaintiff, a Black woman, did not demonstrate Title VII intentional discrimination on the basis of her being a Black woman).
32 Payne v. Travenol Laboratories, 565 F. 2d 895, 896 (5th Cir. 1978) (holding the Black female plaintiffs lacked standing in a Title VII suit).
34 Crenshaw, supra note 33, at 150.
35 Id.
36 Jefferies v. Harris County Cnty. Action Ass’n, 615 F.2d 1025, 1032 (5th Cir. 1980).
37 Id.
Fifth Circuit found “[t]he use of the word ‘or’ evidences Congress’ [sic] intent to prohibit employment discrimination based on any or all of the listed characteristics.”\footnote{Id. at 1032 (emphasis added).} Given the purpose of the Civil Rights Act, the court reasoned:

In the absence of a clear expression by Congress that it did not intend to provide protection against discrimination directed especially toward black women as a class separate and distinct from the class of women and the class of blacks, [the court could not] condone a result which leaves black women without a viable Title VII remedy.\footnote{Id.}

The Jefferies court also interpreted \textit{Phillips v. Martin Marietta Corp.},\footnote{Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).} which was not discussed by the DeGraffenreid court, as requiring Black women to allow claims on the basis of both race and sex.\footnote{Jefferies, 615 F.2d at 1033.} The Phillips court held that different standards of treatment towards female employees with young children could violate Title VII, even if the plaintiffs could not prove “bias against women as such.”\footnote{Phillips, 400 U.S. at 543.} The Jefferies court reasoned that if women with children were a protected subgroup under Title VII, it would be illogical not to provide similar protections to the subgroup of Black women, which involve two categories explicitly protected by the statute: race and sex.\footnote{Jefferies, 615 F.2d at 1034.}

The Fifth Circuit concluded that “recognition of black females as a distinct protected subgroup for purposes of the prima facie case . . . is the only way to identify and remedy discrimination against black females.”\footnote{Id.} An employer could otherwise present evidence that it did not discriminate against Black men or white women to “escape from liability for discrimination against Black females,” even if such discrimination had in fact occurred.\footnote{Id. at 1032.} While the facts of Jefferies involved Black women, it has been interpreted to apply to generally to “subclass” discrimination, or discrimination where only some members of a protected class are being
discriminated against on the basis of that class. The *Jefferies* approach has since been adopted by the Tenth and Eleventh Circuits.

The Supreme Court has yet to directly consider the issue of intersectional discrimination under Title VII, but *Jefferies* was cited approvingly in a footnote by the majority in *Olmstead v. L.C. ex rel. Zimring* to support the proposition that unlawful discrimination need not affect an entire class in order to create a valid Title VII claim.

D. Aggregation of Multiple Basis Claims

Courts have faced the related question of whether a claimant can “aggregate” harassment along different lines (race, sex, religion, etc.) for the purpose of establishing a hostile work environment if no single type of harassment is sufficiently severe or pervasive when considered alone. The primary case for aggregation in a Title VII claim is *Hicks v. Gates Rubber Co.*, in which a Black woman alleged that a combination of race and sex harassment created a hostile work environment. The Tenth Circuit considered the question of “whether incidents of racial harassment which may, by themselves, be insufficient to support a racially hostile work environment claim can be combined with incidents of sexual harassment to prove a pervasive pattern of discriminatory harassment in violation of Title VII.” The *Hicks* court, citing *Jefferies*, answered in the affirmative, holding that “in determining the pervasiveness of the harassment against a plaintiff, a trial court may aggregate evidence of racial hostility with evidence of sexual hostility.” This was an important recognition of the way that different types of prejudice can co-exist and become interwoven.

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46 See Lam v. Univ. of Hawai’i, 40 F.3d 1551, 1562 (9th Cir. 1994) (citing *Jefferies* for the proposition that “[i]ke other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women”).
47 *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) (“We are persuaded that the *Jefferies* ruling is correct.”); Mosley v. Ala. Unified Jud. Sys., 562 F. App’x 862, 866 (11th Cir. 2014) (“This Court has recognized black females as a distinct protected subgroup under Title VII.”).
49 Id. at 599 n.10.
50 *Hicks*, 833 F.2d at 1406.
51 Id.
52 Id. at 1415.
53 Id. at 1416.
The Sixth Circuit, in *Hafford v. Seidner*,\(^{54}\) also concluded “[i]t would not be right to require a judgment against [the plaintiff] if the sum of all of the harassment he experienced was abusive, but . . . with no one category containing enough incidents to amount to ‘pervasive’ harassment.”\(^{55}\) The *Hafford* court also allowed for “the possibility that the racial animus of [the plaintiff’s] co-workers was augmented by their bias against his religion.”\(^{56}\) This approach acknowledges the key intersectional concept that intersectional discrimination is not merely additive (discrimination against Black Muslims equals discrimination against Blacks plus discrimination against Muslims), but can result in distinct and amplified forms of prejudice and harassment.

Similarly, the Second Circuit held in *Cruz v. Coach Stores, Inc.*\(^{57}\) that “the interplay between . . . two forms of harassment” could provide support for the severity or pervasiveness of a hostile working environment claim.\(^{58}\) The plaintiff in that case alleged both race-based and sex-based hostility, and the court noted that a jury might find that “racial harassment exacerbated the effect of . . . sexually threatening behavior and vice versa.”\(^{59}\) Since workplace harassment must reach a certain threshold of severity or pervasiveness to amount to a Title VII violation, this approach makes a remedy more likely for victims of intersectional harassment. Several district courts in other circuits have taken a similar approach.\(^{60}\)

**E. Lam And “The High Water Mark”**

*Lam v. University of Hawai’i*,\(^{61}\) a 1994 case that expressly incorporated intersectional concepts, is frequently considered the “high water mark” of

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55. *Id.* at 515 (emphasis added).
56. *Id.*; see also *Shazor v. Pro. Transit Mgmt., Ltd.*, 744 F.3d 948, 958 (6th Cir. 2014) (“Title VII does not permit plaintiffs to fall between two stools when their claim rests on multiple protected grounds.”).
57. 202 F.3d 560 (2d Cir. 2000).
58. *Id.* at 572.
59. *Id.*
61. 40 F.3d 1551 (9th Cir. 1994).
intersectional jurisprudence under Title VII. Lam, a female Asian-American professor at the University of Hawai‘i, alleged she was subjected to discrimination based on a combination of her sex, race, and national origin. The Ninth Circuit, citing Professor Crenshaw’s then-recent article on intersectionality, held that “the attempt to bisect a person’s identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences” and that under Title VII, it is “necessary to determine whether the employer discriminates on the basis of that combination of factors, not just whether it discriminates against people of the same race or of the same sex.”

Lam’s impact outside of the Ninth Circuit has been muted. The current EEOC guidance quotes Lam for the proposition that intersectional discrimination is covered by Title VII. Some district courts have also cited Lam to allow intersectional claims under Title VII. But while other court of appeals have not openly rejected the Ninth Circuit’s reasoning in Lam, none have subsequently adopted it.

F. An Attempted Solution: The “Sex-Plus” Doctrine

The so-called “sex-plus” doctrine is the most prevalent current approach to intersectional discrimination. “Sex-plus” claims are those where “sex [is] considered in conjunction with a second characteristic.” Most courts that allow “sex-plus” claims trace them back to Phillips, though the Supreme

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62 Minna J. Kotkin, Diversity and Discrimination: A Look at Complex Bias, 50 WM. & MARY L. REV. 1439, 1475 (2009) (“Lam represents the high water mark in this entire saga.”); see Mayeri, supra note 28, at 730 (“The scholarly consensus seems to be that Lam... was the ‘high watermark’ for intersectionality doctrine.”); Yvette N. A. Pappoe, The Shortcomings of Title VII for the Black Female Plaintiff, 22 U. PA. J.L. & SOC. CHANGE 1, 14 (2019) (“Lam... is considered the ‘high water mark’ within the intersectionality and Title VII jurisprudence landscape.”).
63 Lam, 40 F.3d at 1551.
64 Crenshaw, supra note 33.
65 Lam, 40 F.3d at 1562.
66 EEOC Compliance Manual, supra note 18 (quoting Lam, 40 F.3d at 1561–62) (“Likewise, Title VII protects Asian American women from discrimination based on stereotypes and assumptions about them ‘even in the absence of discrimination against Asian American men or White women.’”)
68 Fisher v. Vassar College, 66 F.3d 1420, 1433 (2d Cir. 1995).
The doctrine is best encapsulated by the frequently cited Back v. Hastings On Hudson Union Free School District, in which the Second Circuit clarified that “[t]he term ‘sex plus’ or ‘gender plus’ is simply a heuristic . . . developed in the context of Title VII to affirm that plaintiffs can, under certain circumstances, survive summary judgment even when not all members of a disfavored class are discriminated against.”

Under this approach, intersectional discrimination against Black women is viewed as a subcategory of sex discrimination. This approach has been adopted in the First, Second, Third, Sixth, and DC Circuits.

The “sex-plus” doctrine limits intersectional discrimination claims to those “based on one protected, immutable trait or fundamental right, which are directed against individuals sharing a second protected, immutable characteristic.” This limit derives at least in part from a concern that the Jefferies approach could create “a many-headed Hydra, impossible to contain within Title VII’s prohibition . . . protected subgroups would exist for every possible combination of race, color, sex, national origin and religion.”

Restricting the secondary characteristic to one that is either “immutable” (like race or national origin) or that implicates a “fundamental right” (like marriage) functions to substantially limit “sex-plus” claims. A workplace

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69 Id. (“The Supreme Court [in Phillips] has adopted the proposition that sex considered in conjunction with a second characteristic—‘sex plus’—can delineate a ‘protected group’ and can therefore serve as the basis for a Title VII suit.”).

70 365 F.3d 107, 118 (2d Cir. 2004).

71 Id. at 118.

72 Rosencrans v. Quixote Enters., Inc., 755 F. App’x 139, 142 (3d Cir. 2018) (describing the burden for a “sex-plus” claim); Chadwick v. WellPoint, Inc, 561 F.3d 38, 43 (1st Cir. 2009) (“[T]he simple question posed by sex discrimination suits is whether the employer took an adverse employment action at least in part because of an employee’s sex.”); Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428, 432 (6th Cir. 2004) (“[I]n a ‘sex-plus’ or ‘gender-plus’ case, the protected class need not include all women [but] the plaintiff must still prove that the subclass of women was unfavorably treated as compared to the corresponding subclass of men.”); Barnes v. Costle, 561 F.2d 983, 993 (D.C. Cir. 1977) (“A sex-founded impediment to equal employment opportunity succumbs to Title VII even though less than all employees of the claimant’s gender are affected.”).


74 Judge, 649 F. Supp. at 780.

policy prohibiting braids or dreadlocks would not be considered discriminatory under Title VII even if it created a significant burden that exclusively affected Black employees, because hair style is not an immutable characteristic.

The Eleventh Circuit held just that in *EEOC v. Catastrophe Management Solutions*,\(^76\) in which it upheld a decision allowing an employer to rescind a job offer to a Black woman with dreadlocks who would not cut off her hair.\(^77\) The employer’s only rationale was “they tend to get messy, although I’m not saying yours are, but you know what I’m talking about” and the policy as applied only affected Black employees. However, the court held that since dreadlocks were a “mutable” characteristic, the prohibition did not violate Title VII.\(^78\)

Likewise, since the doctrine allows only a single “plus” characteristic, a Black woman with young children would be restricted to two traits in a Title VII claim ("woman plus Black"; “woman plus children;” or “Black plus children”), because “Black plus woman plus children” exceeds the number of “pluses” allowed.

The Fourth and Seventh Circuits have both expressly declined to decide whether they recognize “sex-plus” claims, instead preferring to resolve recent cases on more narrow grounds.\(^79\) This is significant, because in fiscal year 2019, courts within these circuits were responsible for roughly fourteen percent of the total federal civil caseload.\(^80\) While some district courts within

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\(^76\) 852 F.3d 1018 (11th Cir. 2016).
\(^77\) *Id.* at 1035.
\(^78\) *Id.* at 1032.
\(^79\) Mosby-Grant v. City of Hagerstown, 630 F.3d 326, 337 n.4 (4th Cir. 2010) (explaining that “[b]ecause the issue was not raised by Mosby–Grant, we decline to address whether she would have been able to sustain a ‘hybrid’ sex and race claim under Title VII”); *see* Coffman v. Indianapolis Fire Dep’t, 578 F.3d 559, 563 (7th Cir. 2009) (explaining that “[w]e have not yet decided in this circuit whether we recognize a ‘sex-plus’ theory of discrimination”).
\(^80\) In the twelve months preceding June 30, 2019, 41,538 civil suits were commenced in the district courts in the Fourth and Seventh Circuits, out of 293,520 nationally. *See* Table C-3—U.S. District Courts—Civil Statistical Tables for The Federal Judiciary (United States Courts, June 30, 2019), archived at https://perma.cc/LV88-L2VF.
these circuits have allowed such claims, others have not.\textsuperscript{81} As a result, for a significant number of employees who may be subjected to some kind of intersectional discrimination or harassment, a legal remedy may be uncertain or unavailable.

II. INTERSECTING PROBLEMS: INTERSECTIONAL CLAIMS

The legal doctrine around intersectional discrimination has not evolved in a vacuum, and its application has a substantial impact on how and even whether those experiencing such discrimination in the workplace can seek a Title VII remedy. Today, intersectional claimants are at a significant disadvantage in court, even in jurisdictions that do allow some kind of intersectional claim under Title VII. This is unfortunate, both because the treatment of these claims in court often mirrors or compounds the discrimination experienced in the workplace, and because claims of intersectional discrimination make up a significant portion of the overall Title VII caseload.

This Article examines the current state of intersectional claims in Part II before proposing a solution based on developments elsewhere in Title VII in Part III. Section II.A discusses the mechanisms of intersectional disadvantage and the practical effect of this disadvantage on plaintiffs. Section II.B examines the specific shortcomings of the prevalent “sex-plus” doctrine.

A. The Intersectional Disadvantage

Rachel Kahn Best and her co-authors, who did some of the foundational empirical work on Title VII intersectional claims, propose a conceptual framework that distinguishes between “demographic intersectionality” and “claim intersectionality” in examining how intersectional claimants are disadvantaged in litigation.\textsuperscript{82}

Demographic intersectionality “occur[s] when discrimination . . . targets plaintiffs who occupy the intersection of two or more demographic categories


\textsuperscript{82} Best et al., supra note 4, at 993.
. . . [because] overlapping axes of disadvantage may add up to more than the sum of their parts.” Examples would include stereotypes of “docile” Asian women or “radical” Muslim men. Intersectional claimants not only experience this sort of disadvantage in the workplace, but critically, because “[j]udges, juries, and lawyers are subject to the same institutional stereotypes as are employers,” the same stereotypes that led to the initial discrimination “may also affect court outcomes.”

Claim intersectionality “is present when plaintiffs allege discrimination on the basis of two or more ascriptive characteristics” in a legal claim. Examples would include a plaintiff claiming discrimination based on both race and gender, or on both age and disability. Because anti-discrimination law tends view discrimination as “formal, one-dimensional categories . . . legal doctrine often fails to capture the types of discrimination suffered by intersectional subjects” and create procedural difficulties for plaintiffs who are already less likely to succeed than single-basis claimants. Claim intersectionality is a “mechanism of disadvantage that is particular to civil rights litigation.”

Intersectional claimants encounter and are affected by both types of intersectional disadvantage. In other words, “intersectionality disadvantages plaintiffs both as a source of inequality in litigation and as a mismatch between legal conceptualizations and actual experiences of discrimination.” This is reflected in outcomes: While white female intersectional claimants are significantly more likely to succeed than non-white female intersectional plaintiffs (demographic intersectionality), all intersectional claimants appear to suffer a disadvantage compared to single-basis claimants (claim intersectionality).

The effect is significant. In fiscal year 2018, the EEOC received 76,418 charges of workplace discrimination. The existing empirical work suggests

83 Id. at 994.
84 Id.
85 Id.
86 Id.
87 Id. at 995.
88 Id. at 993.
89 Id. at 1009.
intersectional claims represent a substantial share of the resulting litigation. Examining a randomized sample of 1,014 federal employment civil rights decisions between 1965 and 1999, Best and her co-authors found that eighteen percent of all such cases involved intersectional claims, which were defined as claims alleging discrimination based on more than one protected class. These were less than half as likely to succeed as single-basis claims of discrimination, and the study found “strong evidence for the hypothesis that [employment discrimination] law disadvantages plaintiffs who allege intersectional discrimination.” The authors also found that intersectional claims increased dramatically over that time, from around one hundred annually in the 1970s to more than one thousand annually by the late 1990s, by which point they represented twenty-five percent of all employment discrimination cases.

A more recent survey of the Eighth Circuit revealed similar numbers. Of the 162 employment discrimination cases appealed to the Eighth Circuit between 2008 and 2010, 32.7 percent involved multiple claims. Intersectional claims were substantially less likely to make it past summary judgement, with only 7.5 percent of multiple-basis claims surviving, compared to 30.9 percent of single-basis claims.

If 25 percent of employment discrimination charges involve multiple claims of discrimination, that amounts to tens of thousands of such claims annually, with each claim potentially disadvantaged at every stage of the process. This is a remarkable quantity, especially given the uncertainty and disadvantage in even bringing such claims under the prevalent doctrine. Given the scale of the issue, improvements in outcomes or efficiency would have a significant impact on both claimants and federal courts.

Several factors may be at work in the claim intersectionality disadvantage. One is administrative: The EEOC charge intake form is usually filled out without an attorney present and presents a series of

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91 Best et al., supra note 4, at 1000.
92 Id. at 1011 (finding only thirteen percent of intersectional claimants won at trial, compared to twenty-three percent of single-basis claimants).
93 Id. at 1008.
95 Id.
96 Id.
checkboxes for types of discrimination. Mina Kotkin suggests this “practically invites the filing of multiple claims that may lack a firm foundation” by tempting potential claimants into checking all boxes which fit some identity they possess. The intake form also does not distinguish between multiple claims brought in the alternative (alleging discrimination because of either race or sex) or intersectional claims. Another proposed factor is that intersectional claims are just more likely to be frivolous or fraudulent. Best and her co-authors quote a judge who thought plaintiffs with multiple claims are “throwing spaghetti at the wall to see what sticks,” essentially adding frivolous claims to maximize their chances of recovery. Under either theory, intersectional claims may fail because they lacked merit at the outset.

This belief that multiple claims result from strategic behavior or confusion, rather than the complex intersectional discrimination experienced in the workplace, seems to drive significant judicial skepticism. Justice Samuel Alito, then a judge on the Third Circuit, referred to multiple claims as a “rather common tactic” in Sheridan v. E.I. DuPont de Nemours and Co. A judge in the Northern District of Alabama, citing Judge Alito in Sheridan, issued a special order strongly encouraging plaintiffs “to amend the complaint to eliminate all claims of prohibited employer conduct except one.” One of the plaintiffs, who had not alleged intersectional discrimination in her complaint but had felt compelled to do so at trial, appealed the order. The Eleventh Circuit, calling the case a “morass of claims,” upheld the order with some modifications.

Best and her co-authors directly addressed the question of whether the claim intersectionality disparity results from poorer-quality claims. In their analysis of the data, they concluded that intersectional claims were not

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98 Kotkin, supra note 62, at 1460.
99 Id.
100 Best et al., supra note 4, at 1011 (citing Kotkin, supra note 62, at 1442).
101 Sheridan v. E.I. Du Pont de Nemours & Co., 100 F.3d 1061, 1085 (3d Cir. 1996) (Alito, J. concurring in part and dissenting in part) (presenting thirteen appellate court cases where he believed the “tactic” had been used).
103 Id. at 937.
104 Id. at 938.
generally of lower quality. Instead, “intersectional claims are held back by a combination of doctrinal barriers and judicial interpretations.”

Best’s explanation is ultimately the most convincing. While the EEOC charge intake process may encourage more multiple-basis Title VII charges, there is significant winnowing before trial. After intake, a charging party will meet with an EEOC Counselor, the complaint will be investigated and evaluated by EEOC investigators, parties may engage in EEOC mediation, and the charging party will usually retain counsel before filing a complaint. This has an effect: In fiscal year 2018, the EEOC took in 76,418 charges of employment discrimination, but during that same period, less than 12,500 employment discrimination suits were filed in federal district courts. It seems difficult to credit the significant outcome difference to intake paperwork mistakes given the process and likely presence of counsel by the time a suit is filed, especially as the disparity seems to carry through to appeals.

Other scholars have noted skepticism towards Title VII plaintiffs generally based on a perception of “fakers and floodgates:” the belief these claims are more likely to be meritless than other federal suits and create a flood of litigation that creates administrability problems in the federal courts. But neither concern is empirically true. Since 1999, there has been a sharp drop in overall federal employment discrimination claims, and Title VII claimants represent an increasingly small share of overall federal litigation. Similarly, the available social science research indicates that most employees, far from casually invoking Title VII, “are reluctant to believe that they have been discriminated against and are reluctant to complain formally.”

While there is clearly an impression of low-quality multiple claims among judges like Alito, Best’s analysis concludes that these claims are of similar

105 Best et al., supra note 4, at 1012.
106 Id. at 1018.
109 Id. at 237–38.
110 Id. at 240.
quality to single-basis claims by the time they reach court and rejects the argument that quality is the primary driver of the disparate outcomes.

B. “Sex-Plus” Problems

The predominant current doctrine for dealing with intersectional claims is the so-called “sex-plus” framework. The consensus of interdisciplinary scholars is that this framework is inadequate, doing “no more than [acknowledging] the possibility of subclass discrimination” without providing a useful way to address such discrimination.¹¹¹ Indeed, “[c]ourts more often than not treat ‘sex-plus’ discrimination claims as opportunities to further restrict Title VII relief” rather than a way to capture a distinct form of discrimination.¹¹²

“Sex-plus” forces intersectional claimants to prioritize a particular segment of their identity in the claim, with practical implications. Other traits, even those protected by Title VII, are relegated to a secondary status, which can create confusion over how to weigh evidence of harassment. It forces victims of intersectional discrimination to “just pick two” in making their claims.¹¹³ This regularly creates a situation where evidence of discrimination based on two identically protected classes, like race or sex, is treated differently for the purpose of Title VII litigation.¹¹⁴ As such, while “sex-plus” is a somewhat more sophisticated version of articulating identity than the single-basis approach, “[it is] ultimately still a facade for discrimination that is structured around one factor.”¹¹⁵

These problems are well-illustrated by the examples of the Black single mother and the Title VII hair cases. In an early article on intersectionality, Peggie R. Smith used the hypothetical example of discrimination against single Black mothers to illustrate the problems posed by claim intersectionality:

In the past two years, an employer denied promotions to five of the nine Black women who sought them. All five of the Black women who did not

¹¹¹ Kotkin, supra note 62, at 1443 (2009); see also Mayeri, supra note 28, at 729 (arguing the “sex-plus” analysis is “awkward” and “of limited utility”).
¹¹⁴ Id.
¹¹⁵ Id.
receive promotions were “single with children.” The four who did receive promotions also had children but were married. In addition to the four Black women who were married with children, the employer promoted several other employees including four “single with children” white women, two “single with children” Black men, and two “single with children” white men.116

Because “sex-plus” claimants must “pick two,” they are restricted to three possible theories: sex plus race; sex plus single with children; or (in some jurisdictions) race plus single with children.117 But all of those theories give the employer comparators that would cause the intersectional claim to fail: The sex plus race claim fails because married Black women with children were promoted; the sex plus single with children claim fails because the single white women with children were promoted; and the race plus single with children claim fails because the Black men with children were promoted.118 Even though we would expect these claimants to be protected by Title VII, the “sex-plus” doctrine in this scenario “permits employers to discriminate against them by relying upon invidious racial and sexual stereotypes.”119

Similarly, a series of cases upholding certain workplace grooming requirements demonstrate some of the problems with the widely adopted “immutable characteristic” requirement of the “sex-plus” doctrine. In Rogers v. American Airlines, Inc.,120 a Black female plaintiff challenged a workplace prohibition on “corn row” braids, arguing that the hair style “has been and continues to be part of the cultural and historical essence of Black American women.”121 The court dismissed the claim because “the grooming policy applies equally to members of all races” and that hair style was an “easily changed characteristic.”122 EEOC v. Catastrophe Management Solutions123 reached a similar conclusion about dreadlocks, holding that “[s]ince Blacks are not the exclusive wearers of dreadlocks, [testimony that dreadlocks are primarily worn by Blacks] would not support Plaintiff’s claim that a prohibition on dreadlocks discriminates against Blacks” and that Title VII

117 Id.
118 Id. at 47.
119 Id.
121 Id. at 231–32.
122 Id. at 232.
“does not protect against discrimination based on traits, even a trait that has sociocultural racial significance.”

Paulette M. Caldwell gave Rogers as “an exemplar of employment discrimination cases that involve black women’s physical image, negative stereotypes of black womanhood, and the intersection of race and gender.” Caldwell noted that these sorts of “equally applied” grooming restrictions predominantly affect Black women, and that the ostensibly neutral prohibition forces Black women to conform to the “aesthetic standards of the white society” in a way that helps the “perpetuation of social distinctions between . . . blacks and whites.”

These burdens are significant and quantifiable. Angela Onwuachi-Willig attempted to provide concrete numbers for a hypothetical Title VII hair case involving a requirement that hair be straight. “To straighten a black woman’s hair through a relaxer costs approximately $60 to $300 for each full permanent or $40 to $100 dollars for each touch-up in between full relaxers, with either full relaxers or touch-ups occurring every four to eight weeks or sooner.” The time burden is also significant, as relaxed hair can require “two to three hours of work every few days.” The relaxers themselves, which are often caustic substances like lye, can do lasting damage to hair, cause significant pain, or even cause chemical scalp burns requiring medical attention. Onwuachi-Willig quotes a journalist describing the result: “[W]alk into a black salon and the most common thing you’ll see is a woman gripping the armrests of a chair to manage her pain.”

These grooming policies can create a significant workplace burden that disproportionately affects a particular subgroup at the intersection of two protected classes. But under the current approach, Title VII provides no remedy in almost any jurisdiction.

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124 Id. at 1144.
126 Id. at 392, 393.
128 Id. at 1115.
129 Id. at 1116–17.
III. LOOKING AT \textit{Hively}: The \textit{Oncale} Solution for Intersectional Claims

Since the passage of Title VII, judges and claimants have lacked authoritative guidance on how to treat intersectional claims in the absence of action by Congress or the Supreme Court. Section III argues that a line of Title VII sex discrimination cases could provide that guidance. Section III.A proposes that the Supreme Court’s approach to interpreting Title VII in \textit{Oncale} could be applied to intersectional discrimination. Section III.B explores the development of \textit{Oncale} and its daughter cases, especially \textit{Hively}. Section III.C shows how the \textit{Oncale} reasoning can be used to solve some of the problems of intersectional claims discussed in Parts I and II.

A. The “Reasonably Comparable Evils” Approach

Even as the scholarship has advanced, “judicial opinions containing thoughtful analysis of intersectional claims remain few and far between.”\textsuperscript{131} Intersectional claims simply lack direct Supreme Court precedent. However, parallel developments in Title VII law around sexual orientation discrimination can be adapted to intersectional claims. In particular, the “reasonably comparable evil” logic of \textit{Oncale}, recently relied on to expand Title VII protections to sexual orientation and gender identity, provides a compelling argument that Title VII allows or even requires courts to allow broad \textit{Lam}-style intersectional claims.

Scholars have noted the inadequacy of Title VII doctrine in dealing with intersectional claims for decades.\textsuperscript{132} But despite this “these scholars . . . have offered little in the way of guidance for the resolution of the everyday employment discrimination action that is a concrete manifestation of postmodern legal theory.”\textsuperscript{133} The solutions offered generally fall into three categories: (1) amending the language of Title VII; (2) expanded or clarified guidance from the EEOC; and (3) the Supreme Court resolving the issue by

\textsuperscript{131} Mayeri, supra note 28, at 730.

\textsuperscript{132} Crenshaw, supra note 33, at 150 (arguing that the “common political and theoretical approach to discrimination . . . operates to marginalize Black women.”); see also Kathryn Abrams, \textit{Title VII and the Complex Female Subject}, 92 Mich. L. Rev. 2479, 2526 (1992) (discussing the conceptual failures of Title VII in dealing with “complex” or intersectional subjects).

\textsuperscript{133} Kotkin, supra note 62, 1443 (2009).
adopting a framework along the lines of Lam. These approaches have failed to help plaintiffs, whose options are essentially “wait for Congress or the Supreme Court to act” or “cite Lam and hope for the best.”

This Article argues that courts and commentators have overlooked important and useful developments elsewhere in Title VII jurisprudence that offer a way forward. First, even as the intersectional protections under Title VII have stagnated, courts have significantly broadened the understanding of the “because of . . . sex” provision of Title VII to extend workplace protections to LGBTQ+ employees. Courts could take an analogous approach to intersectional discrimination, understanding allegations of intersectional discrimination involving at least one protected category to fall under the “because of” language in Title VII. Second, the limitations commonly placed on intersectional claims (like the “immutable characteristic” requirement) derive from arguments about congressional intent the Supreme Court has rejected in the Oncale line of cases.

B. Oncale and the Evolution of Title VII

The Supreme Court has substantially expanded the understanding of sex discrimination under Title VII in a way that could be applied to intersectional discrimination. This approach is best exemplified by Oncale. The plaintiff, a male oil worker, brought a complaint against his employer for workplace sexual harassment by male co-workers. Both the district court and the Fifth Circuit held that, as a man, he had no Title VII cause of action for harassment by male co-workers. The Supreme Court reversed unanimously, holding same-sex harassment did fall under Title VII:

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135 Oncale, 523 U.S. at 77.

136 Id.
We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. . . . Male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discriminat[ion] . . . because of . . . sex” . . . Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.\textsuperscript{137}

The Supreme Court took a similarly expansive view of the “because of . . . sex” language in \textit{Price Waterhouse v. Hopkins}.\textsuperscript{138} The plaintiff alleged she had been unlawfully passed over for a promotion because of “sex stereotyping.”\textsuperscript{139} A partner at her firm described her as “macho” and recommended she act more feminine to improve her chances for partnership.\textsuperscript{140} The Court clarified that Title VII does not require an employment decision be based entirely on gender, but rather that if “gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving . . . that it would have made the same decision even if it had not taken the plaintiff’s gender into account.”\textsuperscript{141} As with \textit{Oncale}, \textit{Price Waterhouse} indicates that the “because of” language in Title VII can and should be read broadly to protect employees against discrimination, even if the particular form of discrimination was not initially contemplated by the law, so long as the discrimination is reasonably comparable to what the law was intended to remedy.

A more recent line of cases has cited \textit{Oncale} in expanding Title VII protections to discrimination based on sexual orientation or gender identity. The first was \textit{Hively v. Ivy Tech Community College of Indiana}.\textsuperscript{142} The Seventh Circuit considered whether the plaintiff, a gay woman, could file a claim against her employer for sexual orientation discrimination under Title VII.\textsuperscript{143}

\begin{footnotes}
\item[137] \textit{Id.} at 79–80, 82.
\item[138] 490 U.S. 228 (1989).
\item[139] \textit{Id.} at 235.
\item[140] \textit{Id.}
\item[141] \textit{Id.} at 258 (emphasis added).
\item[142] 853 F.3d 339, 341 (7th Cir. 2017).
\item[143] \textit{Id.}
\end{footnotes}
Relying on previous circuit precedent, the district court dismissed the claim and was upheld on appeal. The full circuit finally reversed en banc, recognizing that employment discrimination based on sexual orientation provided a claim under the “because of . . . sex” language of Title VII. The Seventh Circuit understood the question as one of “pure . . . statutory interpretation,” but rejected Ivy Tech’s argument that congressional intent regarding Title VII should be determinative. The *Hively* court’s “interpretive task [was] guided instead by the Supreme Court’s approach in the closely related case of *Oncale.*” Under that approach, discrimination based on sexual orientation, like same-sex harassment, was a type of sex discrimination under Title VII even if “these interpretations may also have surprised some who served in the 88th Congress.”

The Second Circuit followed the next year in *Zarda v. Altitude Express, Inc.* Applying “[the *Oncale*] reasoning to the question at hand,” the Second Circuit held that “because sexual orientation discrimination is a function of sex, and is comparable to sexual harassment, gender stereotyping, and other evils long recognized as violating Title VII, the statute must prohibit it.” Soon after, the Sixth Circuit expanded Title VII protection to discrimination against trans employees in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* Citing *Oncale, Price Waterhouse, Hively,* and *Zarda,* the Sixth Circuit held that “[d]iscrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII.” *Zarda* and *R.G. Harris* were granted certiorari and consolidated with *Bostock v. Clayton County Board of Commissioners,* an Eleventh Circuit case upholding circuit precedent that “specifically rejected
the argument that the Supreme Court precedent in Oncale . . . supported a cause of action for sexual orientation discrimination under Title VII.”

Writing for the Bostock majority, Justice Neil Gorsuch emphatically confirmed the vitality of Hively’s broad textually approach to Title VII:

We agree that homosexuality and transgender status are distinct concepts from sex. But, as we’ve seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Nor is there any such thing as a “canon of donut holes,” in which Congress’s failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII. Sexual harassment is conceptually distinct from sex discrimination, but it can fall within Title VII’s sweep. Same with motherhood discrimination. . . . As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.

Bostock also addressed arguments regarding Title VII and congressional intent. “Certainly nothing in the meager legislative history of this provision suggests it was meant to be read narrowly. Whatever [the reasons for including the broad language], many, maybe most, applications of Title VII’s sex provision were “unanticipated” at the time of the law’s adoption.” The Court noted that, while some lower courts initially resisted innovations like sexual harassment or pregnancy discrimination, “[o]ver time [] the breadth of the statutory language proved too difficult to deny.”

To date, the scholarly discussion of how Oncale should be applied to Title VII has focused almost exclusively on extending protections to gender and sexual minorities. This trend began almost immediately and continues
to the current day.\textsuperscript{161} \textit{Oncale} was decided as a sex discrimination case, and its application has generally been restricted to that category of discrimination. This Article argues that this is an oversight. Nothing in the text of Title VII distinguishes between discrimination based on sex and discrimination based on race, color, religion, or national origin, and nothing prevents \textit{Oncale} from being applied broadly.

\textbf{C. The Oncale Approach to Intersectional Discrimination}

Discrimination against Black women is at least as “reasonably comparable” to the kind of sex discrimination originally contemplated by Congress as the same-sex harassment in \textit{Oncale} or the discrimination in \textit{Bostock}, and it is less of a leap than extending the protections to sexual orientation discrimination or sexual harassment. This Article argues that Supreme Court precedent therefore allows, and perhaps even requires, courts to permit fairly broad intersectional claims involving any of the protected categories under Title VII. Allowing such claims would help intersectional claimants with valid claims who are disadvantaged by current Title VII doctrine.

Neither legislative action nor a definitive Supreme Court holding is likely forthcoming and waiting will not be helpful to the tens of thousands of plaintiffs who experience this discrimination each year. EEOC guidelines have occasionally convinced district courts to allow intersectional claims, but they are not binding and have not led to much progress on the issue. And in the decades since \textit{Lam} other circuits have not moved in that direction.

One oft-mentioned fix is the addition of the phrase “or any combination thereof” to the text of Title VII.\textsuperscript{162} The legal scholars suggesting this do not generally believe this change is \textit{necessary} to allow intersectional claims, but this proposed solution does speak to a perceived problem: It is unclear to some judges if the text of the statute bears a reading that would allow these claims. But the principle of \textit{Oncale} can offer the same sort of clarification that a Title VII amendment would, if less directly. \textit{Oncale}, \textit{Price Waterhouse}, and \textit{Bostock} stand for the proposition that “because of \ldots sex” should be interpreted very

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\textsuperscript{162} See Pappoe & Areheart, supra note 134.
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broadly towards the underlying purpose of Title VII—combating workplace discrimination—sweeping up “reasonably comparable evils” in addition to the sort most directly contemplated by the 88th Congress. Discrimination based on a combination of multiple characteristics protected by the statute is certainly comparable to discrimination based on a single protected characteristic.

The *Oncale* approach could provide intersectional claimants with several benefits. First, claimants could argue that courts should allow single hybrid claims of discrimination under Title VII. Similar to the claim aggregation in *Hicks* and *Hafford*, a hybrid claim would “consider how the evidence of one type of discrimination, such as age bias, supports an inference that another type of discrimination, such as sex bias exists.” While Congress may not have specifically contemplated such claims in 1964, *Oncale* tells us this does not matter if the type of discrimination is reasonably comparable and the claim falls under the broad “because of” language. Hybrid harassment based on a combination of race and sex, for example, is certainly reasonably comparable to discrimination based on either characteristic by itself.

Second, arguments for prohibiting or constraining intersectional claims have generally relied on congressional intent in a way that goes against *Oncale*. *DeGraffenreid* hinged on the belief that plaintiffs “should not be allowed to combine statutory remedies to create a new ‘super-remedy’ which would give them relief beyond what the drafters of the relevant statutes intended.” *Willingham v. Macon Telephone Publishing Co*, a precursor to *Rogers* that relied on by the latter case, held that a grooming policy that treated man and women differently did not violate Title VII because “Congress sought only to give all persons equal access to the job market, not to limit an employer’s right to exercise his informed judgment as to how best to run his shop.” *Oncale* tells us that this inquiry into congressional intent is neither determinative nor required in interpreting the scope of Title VII, and provides a powerful counterargument against these results. As *Oncale* states, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws

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163 Oncale, 523 U.S. at 79.
166 507 F.2d 1084 (5th Cir. 1975).
167 Id. at 1092.
rather than the principal concerns of our legislators by which we are
governed.”

_**Willingham** originated the “immutable characteristic” requirement which
has since become characteristic of the “sex-plus” approach. The court
arrived at its “narrow construction” in light of “the Congressional purpose”
of Title VII. “Congress in all probability did not intend for its proscription
of sexual discrimination to have significant and sweeping implications. We
should not therefore extend the coverage of the Act to situations of
questionable application without some stronger congressional mandate.”

But _**Oncale**, _ **Price Waterhouse**, and _**Bostock** confirm this is precisely the wrong
way to approach Title VII. **Price Waterhouse** also provides an implicit rejection
of the “immutable characteristic” requirement. Hopkins was discriminated
against based on her “macho” behavior, a mutable characteristic, but she
still had a Title VII claim. Discrimination based on gendered behavior
expectations was ultimately still “because of . . . sex.”

Similarly, the **Rogers** court, in holding that the grooming policy there did
not violate Title VII, understood the statute to be focusing a “laser of
prohibition” at “specific impermissible bases of discrimination.” But
**Oncale**, **Price Waterhouse**, and **Bostock** tell us that Title VII is not a narrow laser,
but rather a broad remedy against discriminatory workplace practices. That
a particular policy harming Black women may not have been contemplated
by Congress does not mean the plaintiff in **Rogers** should be denied a remedy
any more than the plaintiff in **Oncale** should have been.

Additionally, even if the “reasonably comparable evil” logic of **Oncale** does
not tell us how we must interpret Title VII, it serves to conclusively dismiss
the most common objections to allowing broad intersectional claims. That
Congress may not have intended the law to protect the subclass of “single
Black mothers” is not a valid objection to allowing that protection, provided
it is both a reasonable interpretation of the “because of” language of the
statute and a “reasonably comparable evil” to what was intended.

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169 _**Willingham**, 507 F.2d at 1091.
170 _Id. at 1090.
173 _**Oncale**, 523 U.S. at 79.
In light of *Oncale* and *Bostock*, courts should reject the narrow reading of Title VII that has led courts to deny claims in cases like *Willingham*, *Rogers*, and *Catastrophe Management*. *Oncale* clarified that the text of Title VII is controlling. Since there was “no justification in the statutory language” for a rule excluding same-sex harassment from the law, and since the broad understanding of the “because of” language plausibly encompassed such behavior, it fell under Title VII regardless of legislative intent. The “immutable characteristic” rule was based on an early understanding of legislative intent, which *Oncale* tells us is not controlling. Intersectional claims based on mutable characteristics should not be disallowed because of that perceived intent. A claim like *Catastrophe Management* would still need to meet the other statutory requirements and the *McDonnell Douglas* framework, of course. But, absent this artificial constraint, it would have a meaningful chance of success, and could result in meaningful changes to discriminatory workplace policies.

Judicial skepticism of intersectional claims has been posited as a mechanism for their lower success rate. Basing the validity of such claims in Supreme Court precedent may help overcome that skepticism in two ways. First, it would provide a strong normative justification for allowing such claims. Courts should conclude that Title VII covers intersectional discrimination not because academics say so, but through the same method of interpreting of Title VII the Supreme Court has used for decades. *Oncale* tells us that “because of” is read broadly to protect employees, not narrowly to prevent remedies against discrimination. As a result, it seems implausible to read it in a way that would give less protection to those discriminated against “because of” more than one protected category.

Second, having an authoritative precedent for permitting *Lam*-style intersectional claims might allow more intersectional claimants to become single claimants, through the hybrid claims discussed above, rather than multiple claimants, which would have the practical effect of reducing the judicial “spaghetti skepticism” Best and Kotkin identified.

Some might argue allowing more “pluses” or loosening the immutability requirement will create a flood of complaints and federal intrusion into the

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174 Id.
175 Best et al., *supra* note 4, at 1018 (finding evidence in their analysis for the proposition that “judicial skepticism about intersectional claims may make intersectional plaintiffs less likely to win their cases”).
workplace. But, as discussed in Section II.A, there is simply no evidence that the “floodgates and fakers” concerns have any empirical basis. Allowing cleaner intersectional claims would not create more problems than allowing claims for workplace harassment or stereotyping did. If this change allows for more successful suits, we would expect companies to revise policies rather than engage in expensive litigation. Importantly, similar arguments about scope and administrability were addressed in Oncale itself. “Respondents . . . contend that recognizing liability for same-sex harassment will transform Title VII into a general civility code for the American workplace. But that risk is no greater for same-sex than for opposite-sex harassment and is adequately met by careful attention to the requirements of the statute.”

Title VII’s statutory requirements provide adequate protection against false or frivolous claims. The additional burdens imposed by current intersectionality doctrine are unnecessary, and there is no evidence removing them will create significant additional costs for courts and employers.

We can see how this would work by applying the “comparative method” test used in Hively and Zarda to Smith’s hypothetical Black single mother. The majority described this as a “tried-and-true . . . method in which we attempt to isolate the significance of the plaintiff’s sex to the employer’s decision” by examining whether, if “holding all other things constant and changing only her sex, the plaintiff would have been treated the same way.”

Hively’s complaint alleged that “if she had been a man married to a woman . . . and everything else had stayed the same, [her employer] would not have refused to promote her and would not have fired her.” Using the comparative method, the Seventh Circuit held that Hively’s claim was “paradigmatic sex discrimination” under Title VII and sufficient to survive the motion to dismiss.

Zarda applied an analogous test to reach a similar result for its plaintiff, a gay man alleging he had been fired because of his sexual orientation, and therefore “because of . . . sex:”

To determine whether a trait operates as a proxy for sex, we ask whether the employee would have been treated differently “but for” his or her sex. In the context of sexual orientation, a woman who is subject to an adverse employment action because she is attracted to women would have been

176 Oncale, 523 U.S. at 80.
178 Id.
179 Id.
treated differently if she had been a man who was attracted to women. We can therefore conclude that . . . sexual orientation discrimination is a subset of sex discrimination.\footnote{180 Zarda v. Altitude Express, Inc., 883 F.3d 100, 119 (2d Cir. 2018).}

Applying this method to intersectional discrimination, it is clear such discrimination falls under Title VII’s “because of” language when it involves protected classes. The “welfare mother” stereotype relies on a combination of identities: Black, female, single mother. If a Black man or white woman with children would not be subjected to the same treatment as the claimant, the discrimination is “because of” sex or race. Under a pure sex discrimination theory, a situation where a Black man would be treated differently than a Black woman is “a subset of sex discrimination,” just as the treatment in \textit{Zarda}.\footnote{181 Id.} In that situation, the intersectional discrimination would fall under Title VII.

This sex discrimination analysis applies equally to race discrimination.\footnote{182 See \textit{Price Waterhouse v. Hopkins}, 490 U.S. 228, 244 (1989) (explaining “[t]he principles we announce, apply with equal force to discrimination based on race, religion, or national origin”).} If a single Black woman with children suffers an adverse employment action where a single white woman with children would not, that treatment would be a subset of race discrimination under the comparative method used in \textit{Hively}. While this may not have been what Congress intended, \textit{Oncale} and \textit{Price Waterhouse} both tell us that (1) that intent is not determinative under Title VII, and (2) the “because of” language can and should be read broadly to apply to “reasonably comparable evils.” Under this approach, Smith’s Black single mother should have a valid claim.

Using the broader reasoning of \textit{Oncale} could also overcome some of the barriers in the “sex-plus” doctrine. The objection that there are one too many “pluses” for the Black single mother is not supported by the statute and is rooted in approaches to congressional intent that have been rejected by the Supreme Court. Relying on \textit{Oncale}, the plaintiffs in Smith’s hypothetical of the single Black mothers would no longer need to “pick two,” but would instead be allowed to present their experience of discrimination in its full context. This would both provide legal recognition for their particular experiences and overcome an important procedural hurdle. Absent the artificial, textual restrictions of the current doctrine, the hypothetical comparators would no longer be sufficient to defeat the plaintiffs’ claims.
To the extent we understand many types of intersectional discrimination to be the result of pernicious stereotypes attached to categories protected by Title VII, the Court’s acceptance of the sex stereotyping theory in *Price Waterhouse* indicates those stereotypes should also be actionable. Why would Title VII prohibit sex stereotyping of “macho” women but allow the combination of race and sex stereotyping behind discrimination against “Black welfare mothers?”

**CONCLUSION**

This Article argues that courts can and should allow a broader approach to intersectional discrimination under Title VII by using existing Supreme Court precedent. Subsequent to foundational cases like *DeGraffenreid*, the Supreme Court has clarified that “because of” should be construed broadly to encompass sexual harassment, same-sex discrimination, and sex stereotyping. But intersectional jurisprudence has remained stagnant, even as some courts have followed this logic to its natural conclusion by expanding Title VII protections to LGBTQ+ Americans.

Using the approach to Title VII interpretation pioneered by *Oncale*, expanded by *Hively* and *Zarda*, and confirmed by *Bostock* provides a simple and compelling rationale for allowing broad intersectional claims like that in *Lam*. This would provide an important tool to the tens of thousands of people bringing claims of intersectional discrimination and harassment each year, who the current system disadvantages at every stage. In the absence of a clear expression by Congress that Title VII does not protect intersectional claimants, we should not condone a result that leaves them “without a viable Title VII remedy.”

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183 Jefferies v. Harris Cnty. Cmty. Action Ass’n, 615 F.2d 1025, 1032 (5th Cir. 1980) (explaining that “[i]n the absence of a clear expression by Congress that it did not intend to provide protection against discrimination directed especially toward black women as a class separate and distinct from the class of women and the class of blacks, we cannot condone a result which leaves black women without a viable Title VII remedy”).